File: (b) (6) Date: DEC - 8 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jennifer Oltarsh, Esquire

ON BEHALF OF DHS: Stan Weber
Senior Attorney

APPLICATION: Reopening

This case was last before the Board on September 16, 2008, when we dismissed the respondent's appeal regarding his claim of derivative United States citizenship from his mother. We concluded that the Board's "authority to grant nunc pro tunc relief is limited and does not extend to derivative United States citizenship claims." Further, we concluded that, even if we had such authority, we would not find it applicable under the facts and circumstances presented in this case.

On October 16, 2009, the Department of Homeland Security filed what it captions as a "Limited Motion to Reopen." The Government asks that the Board "accept into the record additional evidence that will be dispositive to the Board's consideration of the respondent's derivative United States citizenship claim on certification." Proffered with the motion is a copy of an application for naturalization that was filed by the respondent's mother after the respondent had turned 18 years of age.

The respondent has filed an opposition to the DHS motion. He argues that the evidence has not been shown to be previously unavailable, that it is not dispositive because the evidence does not reflect that it is the "one and only" application for naturalization filed by his mother, and in any event that the evidence would not change the Board's decision in this case in which relief "has already been denied."

The DHS's motion will be denied. Reopening of these proceedings on the basis requested by the DHS would require a remand to the Immigration Judge for further fact finding regarding the proffered evidence. *See* 8 C.F.R. § 1003.1(d)(3)(iv). As noted by the respondent, the Board has dismissed the detained respondent's appeal on the existing record. Under such circumstances, we are not persuaded that reopening these proceedings is warranted.

We address one final matter. In reviewing the record again in conjunction with this motion, we have noted an error in our September 16, 2008, decision. We indicated therein that the "[United States Court of Appeals for the] (b) (6) *as had the Immigration Judge*, found that the respondent was 16 years of age when [his] mother applied for naturalization." (Emphasis added.)

However, while the (b) (6) did state in its (b) (6) decision that the respondent's mother "applied for citizenship in November 1982, when (b) (6) was 16," our re-reading of the record does not reflect that the Immigration Judge ever made such a finding of fact.

The Immigration Judge noted the respondent's argument in this regard, and concluded that the respondent had not derived citizenship through parentage, but he did not make a finding that the respondent's mother had filed an application for naturalization when (b) (6) was 16 years of age. *See* I.J. at 3-4, 9. At one point during the hearing, the Immigration Judge did state that "I'll accept it as being the case if . . . it's going to make you happy." Tr. at 41. But, in context, it seems clear the Immigration Judge meant that he would accept the truth of the claim for the sake of argument because of his view that the date the application was granted was dispositive. This hearing ended with respondent's then counsel agreeing to submit an affidavit from the respondent's mother regarding the timing of her application for naturalization, but such an affidavit was never introduced into evidence. *See* Tr. at 21-28, 37-59, 63, 138-9. While we note this error on our part in our prior decision, it would not otherwise change the substance or disposition of that September 16, 2008, decision.

Accordingly, the following order will be entered.

ORDER: The DHS motion to reopen is denied.

FOR THE BOARD

File: (b) (6) Date: SEP 16 2008

In re: (b) (6)

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Jennifer Oltarsh, Esquire

APPLICATION: Termination of proceedings

This case was last before us on August 2, 2006, when we dismissed the respondent's appeal as untimely filed. In an order dated (b) (6) the United States Court of Appeals for the (b) (6) remanded the case to the Board so that we could consider his claim that he had derived United States citizenship from his mother.[1] We therefore accept the issue of the respondent's derivative United States citizenship claim on certification. *See* 8 C.F.R. § 1003.1(c).

The (b) (6) as had the Immigration Judge, found that the respondent was 16 years of age when he mother applied for naturalization, in the legal custody of his mother, born out-of-wedlock and not legitimated by his father, and over 18 years of age when his mother became a naturalized citizen on November 27, 1984. Thus, the sole issue before us is whether the respondent should be considered to have derived his United States citizenship nunc pro tunc and whether the government's actions in not adjudicating the respondent's mother's application in a more timely fashion resulted in the respondent reaching the age of 18 years before his mother became a naturalized United States citizen.

Our authority to grant relief nunc pro tunc is limited and does not extend to derivative United States citizenship claims. We therefore have no jurisdiction to find that the respondent derived United States citizenship nunc pro tunc.

Even if we had such authority, we would not find it applicable here. The respondent informed the Immigration Judge that his mother applied for naturalization when he was 16 years of age.[2] *See* I.J. at 9; Tr. at 56. No copy of the mother's naturalization application (Form N-600) was submitted into evidence; however, the respondent indicated on his application for a certificate of citizenship that his mother applied for citizenship in 1983. *See* Exh. 11. *See generally*, I.J. at 3 (referencing information in the respondent's naturalization application). Since the respondent turned 18 on February 10, 1983, the respondent's mother's naturalization application was pending at most

[1] The (b) (6) did not overturn the Board's finding that the respondent's appeal was untimely.

[2] The respondent was born on (b) (6) *See* I.J. at 3.

for 13 months at the time he aged-out of eligibility for derivative citizenship based on his mother's naturalization. The respondent has presented no evidence that this delay was untoward, or that his mother took any action to request expedite consideration in light of the respondent's age. Moreover, the respondent did not explain either before the Immigration Judge or on appeal before the Board how this timing of events could be attributed to the government's failure to act properly or reasonably when adjudicating his mother's naturalization application. [3] He has therefore failed to establish that the government engaged in affirmative misconduct which would give rise to an equitable estoppel claim so as to warrant a finding that he should be found to have derived his United States citizenship nunc pro tunc.

Accordingly, the following order shall be entered:

ORDER: The respondent's appeal is dismissed regarding his claim of derivative United States citizenship.

FOR THE BOARD

[3] The only reference on appeal to the respondent's derivative United States citizenship claim is found in the recitation of facts in the first full paragraph on page 2 of his appellate brief. The respondent made no legal arguments regarding his citizenship claim on appeal.