In re Moises NAVAS-ACOSTA, Respondent

File A37 766 153 - San Diego

Decided April 29, 2003

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) United States nationality cannot be acquired by taking an oath of allegiance pursuant to an application for naturalization, because birth and naturalization are the only means of acquiring United States nationality under the Immigration and Nationality Act.

(2) The respondent, who was born abroad and did not acquire United States nationality at birth, by naturalization, or by congressional action, failed to establish such nationality by declaring his allegiance to the United States in connection with an application for naturalization.

FOR RESPONDENT: David Landry, Esquire, San Diego, California

FOR THE IMMIGRATION AND NATURALIZATION SERVICE: Todd Keller, Assistant District Counsel

BEFORE: Board Panel: HOLMES, Acting Vice Chairman; FILPPU, and MOSCATO, Board Members.

FILPPU, Board Member:

The Immigration and Naturalization Service ("the Service," now the Department of Homeland Security, DHS) has filed a timely appeal from an Immigration Judge's decision dated December 9, 2002, terminating removal proceedings after finding that the Service had not established by clear and convincing evidence that the respondent is an alien. The Service's appeal will be sustained, and the record will be remanded for further proceedings.

Section 101(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3) (2000), defines the term "alien" as "any person not a citizen or national of the United States." Only aliens are subject to removal. *See* section 240(a)(1) of the Act, 8 U.S.C. § 1229a(a)(1) (2000). The respondent contends that he qualifies as a national of the United States, as defined in section 101(a)(22)(B) of the Act, as a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

More specifically, the respondent contends that he submitted an application for naturalization in 1994 and was examined by the Service on January 12, 1996, in connection with his application. At that time, the record indicates

that he signed a statement declaring his allegiance to the United States. The naturalization application was denied by the Service on August 22, 1996. The respondent, citing *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001), contends that by applying for naturalization and taking an oath of allegiance, he has attained the status of a "national" of the United States, as that term is defined in section 101(a)(22)(B) of the Act, thereby excluding him from the definition of an "alien." We disagree.

We first note that the decision in *Hughes v. Ashcroft*, *supra*, does not conclusively hold that an alien who applies for citizenship and takes an oath of allegiance attains the status of a United States national. In that case, the petitioner had not applied for citizenship, and the court found that he was not a national, because to qualify for that status, a "person must, *at a minimum*, demonstrate (1) birth in a United States territory or (2) an application for United States citizenship." *Id.* at 757 (emphasis added). Because the petitioner in that case had not applied for citizenship, the court did not need to determine whether, by filing an application for citizenship and taking an oath, an alien could attain nationality. While the court implied that an alien could attain nationality by those means, a more recent decision of the United States Court of Appeals for the Ninth Circuit expressed its doubts concerning that implication. *See United States v. United States District Court (In re United States)*, 316 F.3d 1071, 1073 (9th Cir. 2003) ("We doubt that one could become a national by merely taking such an oath . . . .")

Historically, the term "national" of the United States has referred to a noncitizen inhabitant of United States territories, and the courts have suggested that a person attains that status primarily through birth. *See Hughes v. Ashcroft*, *supra*, at 756; *United States v. Sotelo*, 109 F.3d 1446, 1448 (9th Cir. 1997); *Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1994); *Oliver v. United States Dep't of Justice, INS*, 517 F.2d 426 (2d Cir. 1975). Chapter 1 of Title III of the Act describes persons who become nationals and citizens of the United States at birth. Sections 301-309 of the Act, 8 U.S.C. §§ 1401-1409 (2000). This chapter includes section 308, which specifically describes the categories of persons who, at birth, become noncitizen nationals of the United States. Chapter 2, entitled Nationality Through Naturalization, provides a statutory framework for obtaining nationality through naturalization. Sections 310-347 of the Act, 8 U.S.C. § 1421-1458 (2000). The Act provides no other means for a person to become a national of the United States. If Congress had intended nationality to attach at some point before the naturalization process is complete, we believe it would have said so.

In *Matter of Tuitasi*, 15 I&N Dec. 102, 103 (BIA 1974), we held that the *acquisition* of nationality for a noncitizen national is governed by section 308 of the Act, rather than by the definitional provision at section 101(a)(22). As we understand the statute, whether one "owes permanent allegiance to the United States," is not simply a matter of individual choice. Section

101(a)(22)(B) of the Act. Instead, it reflects a legal relationship between an individual and a sovereign. Such allegiance can, for example, arise or be eliminated through the United States' acquisition or relinquishment of territory under terms declared by Congress. *See Rabang v. Boyd*, 353 U.S. 427 (1957). When the legal relationship exists, the sovereign, in turn, acquires responsibilities in relation to the national.

Citizenship is one form of nationality. But whether nationality arises through full citizenship or otherwise, its acquisition requires compliance with the conditions set by Congress. *See INS v. Pangilinan*, 486 U.S. 875 (1988) (explaining that courts cannot grant citizenship in the absence of compliance with the conditions established by Congress).

The respondent can point to no provision that would confer nationality upon him. He did not acquire nationality at birth under section 308 of the Act; he did not acquire it through the terms of a territorial transfer; and he did not acquire it through naturalization after birth. The definitional provision the respondent relies on does not set forth the terms and conditions for *acquisition* of nationality.

Other statutory provisions supply further evidence of Congress' intended means of acquiring nationality. Section 318 of the Act provides for the primacy of removal proceedings over a naturalization application, making it clear that an alien who has filed a naturalization application does not thereby become a national, but remains an alien who may be subject to removal. Moreover, section 349 of the Act, 8 U.S.C. § 1481 (2000), strongly suggests that birth and naturalization are the only permissible means of acquiring United States nationality under the Act. That section sets forth grounds on which a "person who is a national of the United States *whether by birth or naturalization*, shall lose his nationality." Section 349(a) of the Act (emphasis added). If a person could acquire nationality through any means other than birth or naturalization, we believe Congress would have included it in this provision.

After considering the historical meaning of the term "national" and the statutory framework of the Act, we find that nationality under the Act may be acquired only through birth or naturalization. The respondent was born in El Salvador, so there is a rebuttable presumption of his alienage. *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001). He does not fall into any of the categories of persons who acquire nationality through birth under Chapter 1 of Title III of the Act, and he is not a naturalized citizen. He also does not claim nationality by virtue of any separate legislation, outside the provisions of the Act, allowing for the acquisition of nationality on either an individual or collective basis. His alienage has therefore been established.

Accordingly, the Service's appeal will be sustained.

ORDER: The appeal of the Immigration and Naturalization Service is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.