

ORIGINAL

1 PETITION
2 DAVID C. AMESBURY, ESQ.
3 Amesbury & Schutt
4 Nevada Bar No. 3889
5 703 South Eighth Street
6 Las Vegas, Nevada 89101
7 Work: (702) 870-1444
8 Fax: (702) 870-1467
9 Attorneys for Petitioner,
10 Wilsonis Ayala-Villanueva

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CLERK'S OFFICE, CLERK'S COURT
DISTRICT OF NEVADA

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

11 WILSONIS AYALA-VILLANUEVA

12 CV-S-05-1321-JCM-GWF

13 Petitioner,

14 v.

15 ALBERTO GONZALES, Attorney General,)
16 MICHAEL CHERTOFF, Secretary, Department)
17 of Homeland Security; ASA HUTCHINSON,)
18 Under Secretary, Department of Homeland)
19 Security; MICHAEL GARCIA, Director,) Civil Action No.
20 Bureau of Immigration and Customs)
21 Enforcement; JOHN SALTER, Chief Counsel)
22 Bureau of Immigration and Customs)
23 Enforcement; WAYNE PRICE, Trial)
24 Attorney, Bureau of Immigration and)
25 Customs Enforcement; FRANK GALVAN,)
26 Supervisory Detention and Deportation)
27 Officer; GLORIA KEE, Field Office)
28 Director Bureau of Immigration and)
Customs Enforcement)
Respondents,)
)

PETITION FOR WRIT OF HABEAS CORPUS
AND COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF ORDERING THE RELEASE
FROM CUSTODY OF THE PETITIONER

1 This case is related to case number CS-S-03-0856-KJD-RJJ,
2 dismissed by Honorable Kent Dawson, by order dated May 18, 2005,
3 which dismissal was without prejudice. Exhibit A

4 Petitioner, Wilsonis Ayala-Villanueva, by and through his
5 undersigned counsel, hereby respectfully petitions this Court
6 for the issuance of a writ of habeas corpus to remedy his
7 continued unlawful detention, and to direct his release from
8 custody by the respondents because he is a citizen of the United
9 States and the Bureau of Immigration and Customs Enforcements
10 has no legal authority whatsoever to detain him.

13

14 **CUSTODY**

15 Petitioner is in the physical custody of the Department of
16 Homeland Security in North Las Vegas Detention Center.

18

19 **JURISDICTION AND VENUE**

20 This action arises under the Constitution of the United
21 States, the Immigration and Nationality Act ("INA"), 8 U.S.C.
22 Section 1101 et seq., and the Administrative Procedure Act
23 ("APA"), 5 U.S.C. Section 701 et. seq. This Court has
24 jurisdiction under 28 U.S.C. Section 2241(c)(1) & (3), article 1
25 Section 9, cl. 2 of the United States Constitution ("Suspension
26 Clause"), and 28 U.S.C. Section 1331, as Petitioner is presently
27 in custody under color of the authority of the United States,
28

1 and such custody is in violation of the Constitution, laws and
2 treaties of the United States. This Court may grant relief
3 pursuant to 28 U.S.C. Section 2241, the Administration Procedure
4 Act, the Declaratory Judgment Act, 28 U.S. c. Section 2201 et.
5 seq. and the All Writs Act, 28 U.S.C. Section 1651.
6

7 Venue lies in the United States District for the District
8 of Nevada, the judicial district in which Petitioner is
9 detained.
10

11 **PARTIES**
12

13 The Petitioner is a native of El Salvador. He was admitted
14 to the United States for lawful permanent residence on Oct 23,
15 1982. He became a derivative citizen of the United State by
16 operation of law, 8 U.S.C. 1432 upon the Naturalization of his
17 mother on February 19, 1987 in the United States District Court
18 for the Eastern District of Virginia. Her naturalization
19 Certificate Number is 12334471.
20

21 The Respondent, Alberto Gonzales, is the Attorney General
22 of the United States. Respondent, Michael Chertoff, is the
23 Secretary of the Department of Homeland Security. The
24 Respondent, Michael Garcia, is the Director of the Bureau of
25 Immigration and Customs Enforcement. The Respondent, Wayne
26 Price, is the Trial Attorney, who represented the Respondents in
27 the proceedings in the Immigration Court. The Respondent, John
28

1 Salter, is the Chief Counsel of the Bureau of Immigration and
2 Customs Enforcement. The Respondent, Frank Galvan, is the
3 Supervisory Detention and Deportation Officer of the Las Vegas
4 Office. The Respondent, Gloria Kee, is the Field Office Director
5 of the Bureau of Immigration and Customs Enforcement.

7

8 **ISSUES**

9 The Immigration and Naturalization Service, the predecessor
10 to the Department of Homeland Security, initiated removal
11 proceedings. The case was tried before Immigration Judge, Irene
12 Weiss who terminated removal proceedings finding the Petitioner
13 is a United States citizen by derivation. Petitioner was then
14 released. The respondents appealed to the Board of Immigration
15 Appeals (BIA) which vacated the Immigration Court's decision and
16 remanded the case for further proceedings. In its order the BIA
17 found that the Immigration Court failed to give adequate notice
18 to the parties concerning the court's hearing on citizenship and
19 thus did not provide respondents an adequate opportunity to
20 present evidence. The petitioner was again taken in custody in
21 March 2005. The Honorable Kent Dawson, in an order dated May 18,
22 2005, dismissed the pending Habeas petition because facts
23 presented made it appear that the petitioner was in the custody
24 of Nevada authorities. He is, in fact, in the custody of
25 Federal Authorities now. The case, on remand was retried before

1 Immigration Judge Irene Weiss over a period of time and by
2 decision dated October 18, 2005, Judge Weiss again determined
3 that the Petitioner is a derivative United States citizen and
4 ordered the proceedings terminated.
5

6 Despite the termination of proceeding and the nonexistence
7 of any pending charges which would confer jurisdiction upon the
8 respondents, Petitioner continues in custody, and the
9 Respondents fail and refuse to release him. A copy of Judge
10 Weiss' decision is attached hereto as Exhibit B.
11

12

13 **LEGAL BACKGROUND**

14 Petitioner is in custody pursuant to INA Section 236(c), 8
15 U.S.C. Section 1226(c), which mandates the detention of those
16 aliens convicted of aggravated felonies BUT the Petitioner is
17 Not an alien. He is a United State citizen and the Respondents
18 have no legal right to detain him.

20 Petitioner was born on July 28, 1973 in El Salvador. He
21 was born out of wedlock, the son of Maria Dolores Villanueva.
22 His birth certificate is attached as Exhibit C. Petitioner's
23 mother was naturalized on February 19, 1987 in the United States
24 District Court for the Eastern District of Virginia. Her
25 naturalization Certificate is attached to as Exhibit D.

27 8 U.S.C. 1432, which was the law on the date of the
28 naturalization of Petitioner's mother, provided for the

1 automatic acquisition of United State citizenship by a child
2 born outside the United States of alien parents upon the
3 naturalization of the parent having legal custody of the child
4 if the child was born out of wedlock and if the paternity of the
5 child has not been established by legitimation, providing the
6 naturalization takes place while the child is not married and
7 under the age of 18. It is quite clear that Petitioner was
8 unmarried and that he was about 12 when his mother was
9 naturalized.

10
11 The petitioner never knew the true identity of his father
12 until these proceedings were commenced. He was, until then,
13 unaware that he was born out of wedlock.

14
15
16 **CLAIM FOR RELIEF**
17

18 Wilsonis Ayala-Villanueva, the Petitioner, respectfully
19 prays for an Order directing his release from custody.

20 Petitioner further prays for the grant of a Writ of Habeas
21 Corpus.

22 Petitioner further prays for declaration that his
23 incarceration under Section236(c) of the Immigration and
24 Nationality Act violates the Fifth Amendment of the United State
25 Constitution.

1 Petitioner further prays for an award of reasonable costs
2 and attorney's fees and the grant of any and other further
3 relief which this Honorable Court may deem just and proper.
4

5 DATED this 18 day of November, 2005.
6

7
8 Respectfully Submitted by,
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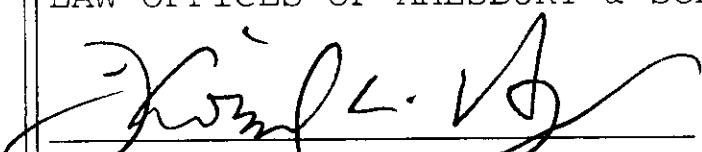
10 LAW OFFICES OF AMESBURY & SCHUTT
11 
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EXHIBIT “A”

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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

10 WILSONIS AYALA-VILLANUEVA,
11 Petitioner,
12 v.
13 TOM RIDGE, *et al.*,
14 Respondents.

Case No. CV-S-03-0856-KJD (RJJ)

ORDER

15
16 In July 2003, Petitioner filed the instant § 2241 habeas petition seeking to terminate removal
17 proceedings. Respondents charged Petitioner with removal pursuant to § 237(a)(2)(A)(iii) of the
18 Immigration and Nationality Act (“INA”) alleging that his state court conviction for possession of
19 stolen property was an aggravating felony as defined in § 101(a)(43)(g) of the INA. At the time
20 Petitioner filed his § 2241 petition, the immigration court had yet to rule on Respondents’ removal
21 request. In both his § 2241 petition and his removal proceedings, Petitioner alleged citizenship by
22 derivation. In an order dated December 5, 2003, the immigration court terminated the removal
23 proceedings finding that Petitioner was a United States citizen by derivation. After Respondents
24 appealed, the Bureau of Immigration Appeals (“BIA”) vacated the immigration court’s decision and
25 remanded the case for further proceedings. In its order, the BIA found that the immigration court
26 failed to give adequate notice to the parties concerning the court’s hearing on citizenship and thus did

1 not provide Respondents an adequate opportunity to present evidence. After the BIA had issued its
2 order, Petitioner was arrested by Hawaii authorities on suspicion of drug possession. Petitioner was
3 extradited to Nevada and is currently in Nevada state custody awaiting a parole revocation hearing.
4 Based on these circumstances, the immigration judge administratively closed Petitioner's removal
5 proceedings until his release from state custody.

6 After reviewing the filings in this case, the Court finds that it lacks jurisdiction over
7 Petitioner's § 2241 petition. Initially, the Petitioner is not "in custody" for § 2241 purposes. See 28
8 U.S.C. § 2241(c)(3). First, Petitioner satisfies the "in custody" requirement if he is in the actual
9 physical custody of the Respondents. Here, however, Petitioner is in the actual physical custody of the
10 State of Nevada. Second, even if Petitioner is not in the actual physical custody of the
11 Respondents, he may still be "in custody" for § 2241 purposes if he is subject to a final order of
12 removal. See Nakaranurack v. United States, 68 F.3d 290, 293 (9th Cir. 1995). Petitioner, however,
13 does not allege a final order of removal. In fact, the Board of Immigration Appeals vacated the
14 decision finding that Petitioner had acquired derivative citizenship and remanded Petitioner's case to
15 the immigration court for further proceedings. On remand, Petitioner's removal case has been
16 administratively closed.

17 Second, to the extent Petitioner challenges a removal order by claiming that he is a United
18 States Citizen, his exclusive remedy is review by the Ninth Circuit Court of Appeals. See Taniguchi
19 v. Schultz, 303 F.3d 950, 955 (9th Cir. 2002), see also 8 U.S.C. § 1252(b). If a circuit court finds
20 that genuine issues of material fact exist concerning a petitioner's nationality or citizenship claim, it
21 may then transfer the case to the district court to resolve such factual issues. See Martinez-Piedras v.
22 INS, 354 F. Supp. 2d 1149, 1154 n.4 (S.D. Cal. 2005). This case is not one that the circuit court has
23 transferred for resolution of factual issues concerning citizenship. Rather, Petitioner initially filed
24 the instant § 2241 petition in this Court.

25 ///

26 ///

1 Because the Court lacks jurisdiction over Petitioner's § 2241 petition, IT IS HEREBY
2 ORDERED that the instant case is **DISMISSED WITHOUT PREJUDICE**.

3 DATED this 10th day of May 2005.

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6 
7 Kent J. Dawson
8 United States District Judge
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EXHIBIT “B”

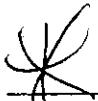
UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LAS VEGAS, NEVADA

LEON ROSEN, ESQUIRE
AMESBURY & SCHUTT
703 SOUTH EIGHTH STREET
LAS VEGAS NV 89101-7006

Date: Oct 18, 2005

File A37-300-465

In the Matter of:
AYALA-VILLANUEVA, WILSONIS

 Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before 11/17/05. The appeal must be accompanied by proof of paid fee (\$110.00).

Enclosed is a copy of the oral decision.

Enclosed is a transcript of the testimony of record.

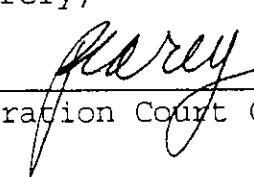
You are granted until _____ to submit a brief to this office in support of your appeal.

Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,


Immigration Court Clerk

UL

CC: WAYNE H. PRICE, ESQUIRE
3373 PEPPER LANE
LAS VEGAS, NV 89120

PC

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
3365 Pepper Lane, Suite 200
Las Vegas, NV 89120

IN THE MATTER OF:)	In Removal Proceedings
)	
)	
AYALA-VILLANUEVA, Wilsonis)	
)	File No.: A37-300-465
)	
<u>Respondent</u>)	Date: October 18, 2005

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act.

Section 237(a)(1)(A) of the Immigration and Nationality Act (Act), as amended, in that at the time of entry or adjustment of status, you were within one or more of the classes of aliens inadmissible by the law existing at such time, to wit: alien immigrants who are not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by the Act, or who are not in possession of a valid unexpired passport, or other suitable travel document, or identity and nationality document if such document is required by regulations issued by the Attorney General pursuant to Section 212(a)(7)(A)(i)(1).

Section 237(a)(1)(A) of the Immigration and Nationality Act (Act), as amended, in that at the time of entry or adjustment of status, you were within one or more of the classes of aliens inadmissible by the law existing at such time, to wit: aliens who seek to procure, or have sought to procure, or who have procured a visa, other documentation, or admission into the United States, or other benefit provided under the Act, by fraud or by willfully misrepresenting a material fact, under Section 101(a)(43)(B) of the Act.

APPLICATION: Termination of Proceedings.

On Behalf of Respondent:

Leon Rosen, Esq.
Amesbury & Schutt

On Behalf of Government:

Wayne Price, Assistant Chief Counsel
Immigration and Customs Enforcement

703 South Eighth Street
Las Vegas, Nevada 89101

Department of Homeland Security
3373 Pepper Lane
Las Vegas, Nevada 89120

ORDER OF THE IMMIGRATION COURT

I. Procedural History

The respondent is a native of El Salvador, who was admitted into the United States at or near Buffalo, New York, on October 23, 1982, as a lawful permanent resident. On May 7, 2002, the respondent was convicted in the Eighth Judicial District Court for the State of Nevada, for the offense of Possession of Stolen Property, in violation of Nevada Revised Statute § 205.275. The respondent was sentenced to a term of imprisonment of twelve to forty-eight months. *See Exhibit 2.* He served nine months and was released. Based on the foregoing, on March 6, 2003, the Bureau of Immigration and Customs Enforcement (ICE)¹, a component of the Department of Homeland Security, issued a Notice to Appear (NTA), personally serving the respondent on March 7, 2003, charging him with removal pursuant to § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, he was convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act. *See Exhibit 1.*

On July 21, 2003, the respondent filed with the United States District Court, District of Nevada, a Petition for Writ of Habeas Corpus and a Complaint for Declaratory and Injunctive Relief Declaring Petitioner a United States Citizen and Ordering His Release from Custody (Case No: CV-S-03-0856-KJD-RJJ). *See Exhibit 4.* However, the Petition has now been dismissed without prejudice.

On July 25, 2003, the respondent's Application for Certificate of Citizenship (Form N-600) was denied. The Government attached an explanation for the denial. It stated that under § 312(a) of the Act, both of the respondent's parents must naturalize in order for him to qualify for derivative citizenship. It indicated that only his mother had naturalized. The attached statement also explained that the record indicated that the respondent was *not* born out of wedlock and that his father was not a naturalized United States citizen. Furthermore, it stated that the record indicated that the respondent's mother and father were married at the time of his mother's naturalization. *Although not marked as an Exhibit, the denial letter*

¹ The functions of the Immigration and Naturalization Service were formally transferred on March 1, 2003, to the newly established Department of Homeland Security, pursuant to the Homeland Security Act of 2002. Pub. L. 107-296, tit. IV, subts. D, E, F, 116 Stat. 2135, 2192 (Nov. 25, 2002). These functions are presently organized under the Bureau of Immigration and Customs Enforcement (ICE). For the sake of clarity, the acronym "ICE" will be used herein to refer both to the Bureau of Immigration and Customs Enforcement in its present form as well as the former Immigration and Naturalization Service.

is in and part of the Record of Proceedings. ICE did *not* submit any supporting documentation to the Immigration Court to support this denial or the statements represented in the Government's explanation (emphasis added).

The Immigration Court issued a written decision on December 5, 2003 rejecting the decision of the Department of Homeland Security and concluding that respondent has attained derivative citizenship when his mother naturalized in 1987.

On December 24, 2003, ICE filed an appeal with the Board of Immigration Appeals ("BIA"). ICE argued that it did not have notice or an opportunity to present documentary or testimonial evidence at the October 17, 2003 hearing. The BIA agreed and on December 30, 2004, remanded this case back to this Court so that, after proper notice, the parties would have the opportunity to present documentary evidence and witness testimony on the citizenship issue. *See Exhibit 3*

There were several hearings not only to take the testimony of Jose Humberto Ayala, but also to allow ICE to obtain additional documentation.

II. Statement of the Case

At all times following the remand to this Court, the respondent was represented by attorney Leon Rosen. The respondent's counsel represented to the immigration Court, that it should make a determination with respect to the respondent's claim to United States citizenship.

The following information was submitted to the Court at the October 17, 2003 hearing and was included in the hearings following the remand from the BIA. The respondent was born out-of-wedlock in El Salvador on July 28, 1973. He was admitted to the United States as a lawful permanent resident on October 23, 1982. While the respondent was not born in the United States, he contends that he is a citizen of the United States. The respondent states that he became a derivative citizen of the United States through his mother when she naturalized on February 19, 1987, in the United States District Court for the Eastern District of Virginia. *See Exhibit 8; and 8 U.S.C. §1432.* The respondent was 13 years old when his mother naturalized. The respondent's mother is Maria Dolores Villanueva.

The following documents have been marked as Exhibits: respondent's NTA (Exhibit 1); Additional Charges of Inadmissibility issued on August 25, 2005 (Exhibit 1A); Judgment of Conviction (Exhibit 2); Decision of the Board of Immigration Appeals (Exhibit 3); Petition for Writ of Habeas Corpus (Exhibit 4); *Peterson v. Gonzales*, 126 Fed. Appx. 866 (2005)(Exhibit 5); *Solis v. Gonzales*, 401 F.3d 1090 (2005)(Exhibit 6); Request for Production of Documents filed by ICE (Exhibit 7); Application for Derivative Citizenship (N-600)(Exhibit 8); Birth Certificate submitted with N-600 for respondent (Exhibit 9); Translation of Birth Certificate (Exhibit 10); Birth Certificate submitted with I-485 application for respondent (Exhibit 11); Birth Certificate submitted with the Immigration Court for respondent (Exhibit 12); Translation of Birth Certificate from Municipal City Hall of La Villa de Concepcion (Exhibit 13); Request for Overseas Investigation (Exhibit 14); Visa Application of Jose Humberto Ayala (Exhibit 15);

Correspondence between respondent's sister and the Mayor's Office in Conception Batres in El Salvador (Exhibit 16); Birth Certificate Submitted with I-485 for respondent and service of documents by ICE(Exhibit 17); *Woody v. INS*, 385 U.S. 276 (1966)(Exhibit 18).

III. Legal Authority

No affirmative steps were taken to naturalize the respondent, therefore, he has citizenship, if at all, only derivatively through his mother. The respondent has admitted to being born in El Salvador; therefore, the respondent has the burden of establishing a claim to United States citizenship through naturalization or citizenship through derivation. *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969). As the respondent was born abroad to alien parents, derivative citizenship in this case is governed by § 321(a) of the Act, 8 U.S.C. §1432(a), now repealed.² In relevant part §321(a) of the Act provides:

A child born outside of the United States of alien parents...becomes a citizen of the United States upon fulfillment of the following conditions:

- (1) The naturalization of both parents; or
- (2) The naturalization of the surviving parent if one of the parents is deceased; or
- (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or *the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation*; and if
- (4) Such naturalization takes place while such child is under the age of eighteen years; and
- (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

8 U.S.C. § 1432(a) (emphasis added).

In a deportation (now removal) proceeding, ICE bears the ultimate burden of establishing all facts supporting deportability by clear, unequivocal, and convincing evidence. *Murphy v. INS*, 54 F.3d 605, 609-610 (9th Cir. 1995). However, evidence of a foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent or deportee to prove citizenship. *Id.* If the deportee can

²The Child Citizenship Act of 2000 (CCA) repealed § 321 of the Act and amended §320 of the Act. If the CCA applied retroactively, it appears that the respondent would have attained citizenship when his mother naturalized in 1987 when the respondent was 13 years old. But the Ninth Circuit has held that "CCA granted automatic citizenship only to those children who were under the age of 18, and who met the other criteria, on February 27, 2001." *Hughes v. Ashcroft*, 255 F.3d 752, 760 (9th Cir. 2001). The respondent was 27 years old on February 27, 2001; therefore the CCA has no application here, and the respondent must rely upon the now repealed § 321 of the Act.

produce substantial credible evidence in support of his or her citizenship claim, thereby rebutting the presumption, ICE's burden of proving deportability by clear and convincing evidence again comes into play. *Id.*, *see also* *Woodby v. INS*, 385 U.S. 276, 277, 286, 87 S.Ct. 483, 484, 488 (1966).

IV. Evidence Presented

A. Testimony of Mr. Jeffrey Lee Adam

Mr. Jeffrey Lee Adam from the United States Citizenship and Immigration Service (USCIS), testified for the government. He stated that he has worked for USCIS for 13 years and that he is a District Adjudications Officer, specializing in derivative citizenship cases. Mr. Adam testified that if a case was complicated, it would be assigned to him. He stated that after reviewing respondent's file, as well as the files of his mother and father, he concluded respondent was an alien with no claim to U.S. citizenship. Mr. Adam was shown Exhibit 9 which he stated was not an actual birth certificate, but was actually a paternity declaration. He also explained the process used in El Salvador to register births, which he had become familiar with after working for USCIS. According to Mr. Adam, the father must go to the local registrar and tell them of the birth. The registrar then notarizes the birth and inputs the information into the book of births. Mr. Adam testified that he does not believe Exhibit 9, the paternity declaration, is accurate because it shows the father to be Jose Tiburcio Ayala Gaitan and the middle name is incorrect. He explained that it was his opinion that Jose Humberto Ayala is respondent's biological father. Mr. Adam opined that the reason for the confusion is that Jose Humberto Ayala's father is Jose Tiburcio Ayala Gaitan, and that is why there is a discrepancy on the two birth certificates. He explained that the way he arrived at his decision was based on the card that people in El Salvador must carry around. Mr. Adam stated that this card contains a person's name, along with the names of their parents. It also contains a unique identifying number, known as the cedula number. Mr. Adam noted how all the birth certificates presented contained the same cedula number which is 519653.

On cross examination, when asked about the discrepancy in the age and occupations listed for the father, Mr. Adam testified that he just took that as a mistake because all the birth certificates have the same date of registration. He also testified that after discovering the discrepancy, he did not communicate this with anyone in the registrars office in El Salvador. Mr. Adam also stated that he knows how the births are recorded in El Salvador and these are the types of mistakes that are made. When asked what he relied on when denying respondent's N-600 application, Mr. Adam stated that he relied on a preponderance of the evidence and his experience. Mr. Adam also said that nothing on the application troubled him and that it appeared to be clear cut and that is why he made the decision that he did.

B. Testimony of Ms. Cynthia Chavez

Ms. Cynthia Chavez, respondent's sister, testified that she was born in Washington, D.C. on May 2, 1976. She stated that she and respondent share the same mother. Ms. Chavez stated that she knew that in order to demonstrate that respondent was born out of wedlock, she would need a copy of respondent's birth certificate. In order to obtain this, Ms. Chavez testified that she submitted a request

under the Freedom of Information Act to the INS. She also stated that she contacted the Salvadoran consulate in Los Angeles to try and obtain her brother's birth certificate. Ms. Chavez testified that she paid a courier \$50 to go and obtain a copy of respondent's birth certificate. She stated that she translated the birth certificate she received from the courier. *See Exhibit 9.*

Ms. Chavez testified that it was not until she translated the birth certificate that she noticed respondent's father's name was listed as Jose Tiburcio Ayala Gaitan. According to Ms. Chavez, this was the first time that she realized that her and her brother may have different fathers. Ms. Chavez said that she called the consulate again in order to confirm the birth. She stated that she spoke with Ricardo Ceravia (phonetic), head of the Family Registry in El Salvador and told him what she needed and to send her whatever information they had. She testified that she got the response the day before this hearing and translated the document herself because of the short amount of time.³ Ms. Chavez also testified that she has a letter from the Salvadoran authorities which states that the birth certificate with Jose Humberto Ayala listed as the father is not a valid birth certificate. *See Exhibit 16.*

Ms. Chavez also stated that she did in fact fill out respondent's N-600 with the information she believed to be correct. It wasn't until later, Ms. Chavez stated, that she learned the information regarding respondent's father was inaccurate.

Ms. Chavez stated that on July 23, 2003, she contacted the birth registry in El Salvador by fax in order to obtain a birth certificate. *See Exhibit 16.* The registrar wrote back stating that the certificate requested, which is the same one that ICE asserts is valid, does not exist in their books and is not a correct birth certificate. The registrar also stated that they searched all of the books of birth for 1973, the year of respondent's birth, as well as years 1974 and 1975 and were not able to locate it. Ms. Chavez also testified that in order to register as the father of the child born, the father must go in person to register the child's birth. She also testified that there was no way that Jose Tiburcio Ayala Gaitan could be her father (the man that the mother married) because, according to the birth certificate, he was a 21-year old student while her father stopped attending school at age 11. She also stated that the reason respondent did not submit to a DNA test was because the family does not want to know.

On cross examination, Ms. Chavez testified that she has attended all the hearings. She also stated that her brother never filed an amended N-600. She testified that she is aware of the other birth certificates in existence with regards to respondent. Ms. Chavez said that she is aware that her parents became legal permanent residents after her birth and that respondent immigrated as a legal permanent resident after his mother petitioned for him. Ms. Chavez testified that when they were all growing up, all the children thought they had the same mother and father.

Ms. Chavez also stated that she received a response to her request under the Freedom of Information Act. She testified that she did not see the birth certificate in the file when she first went through

³The document referred to here is in evidence as Exhibit 12.

it because it was different than the one she was sent. Ms. Chavez also said that the birth certificate filed with USCIS is not a real birth certificate.

Ms. Chavez said that she has not told any of her brothers that respondent may have a different father. She also said, when asked if she knew her paternal grandfather, that she did and his name was Jose Tiburcio Gaitan Chavez. She admitted that this was similar to the name listed as respondent's father but pointed out the discrepancy in age and occupation. ICE also inquired whether or not her father would be willing to take a DNA test. Ms. Chavez stated that she does not want to put her father or her family through a DNA test.

On redirect, Ms. Chavez stated that her mom is religious and attends church. When asked if she had talked to her mother about the two different fathers listed on the birth certificates, Ms. Chavez said that she cannot talk to her mother about sexual affairs.

V. Analysis

On remand, this Court once again finds that it is undisputed that the respondent meets the conditions set forth in subsections (4) and (5) of §321(a) of the Act. The respondent was 13 years old when his mother naturalized. It is also clear that the respondent was a lawful permanent resident, who resided with his mother when she naturalized. Analysis of subsections (1), (2), or (3) is what will ultimately determine whether the respondent has derived United States citizenship from his mother. Subsections (1) and (2) do not apply here because only one of the respondent's parents has naturalized, and no evidence in the record suggests that the respondent's father is deceased. Thus, the respondent can only claim derivative citizenship if he satisfies the requirements of § 321(a)(3) of the Act. Specifically, the part of subsection (3) that applies is that which requires "the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation."

In this case, it is clear from the record that the respondent's natural mother became a naturalized United States citizen on February 19, 1987. It is also clear from the birth certificate that was obtained from local authorities in El Salvador that the respondent *was* born out of wedlock. In addition, the record is clear that the respondent's mother married Jose H. Ayala in Washington, D.C. on July 28, 1976, and they are still married to this day. It appears from the record of proceeding, that the respondent had assumed up until recently that his mother's husband, Jose H. Ayala, was in fact his natural father and that they had been married when he was born. What is in dispute, however, is the actual biological father of the respondent. There are four separate birth certificates admitted into evidence. See Attachment #1. The Court has examined each of them closely. It appears that Exhibits 9 and 12 are in fact the same birth certificate, the difference being the date on which each was transcribed from the book of births. These aforementioned Exhibits indicate that Jose Tiburcio Ayala Gaitan, a 21 year old student from Estanzuelas is the father of record. However, Exhibits 11 & 17 and 13 & 16 indicate that respondent's father is Jose Humberto Ayala Gaitan, a 26-year old farmer from Estanzuelas. There is also a discrepancy in the place of birth listed in the various birth certificates. Exhibits 9 and 12 show the place of birth as being San Pedro Hospital in the city while Exhibits 11&17 and 13&16 state that the place of birth is Concepcion Batres in

the San Antonio Section.

In order for the respondent to obtain derivative citizenship under 8 U.S.C. §1432, the respondent has to show that he was *never* legitimated by his natural father (emphasis added). Therefore, the remaining issue before the court is a question of legitimization. Pursuant to §101(b)(1)(C) of the Act, a child is legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimization takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimization. Potential legitimizing acts include analysis of the laws of the country or state of the child or father's domicile or residence; a subsequent marriage of the child's natural parents; judicial decree; formal recognition of paternity, or an open/notorious acknowledgment of paternity.

In this case, there is conflicting evidence and two separate claims as to the biological father of the respondent. If the man that respondent believed to be his father, Jose H. Ayala, is not his biological father, respondent is not legitimized and would be eligible for derivative citizenship under the Act, from his mother. Respondent claims that his biological father is Jose Tiburcio Ayala Gaitan, which he did not learn until these proceedings began. ICE claims that respondent's natural father is Jose Humberto Ayala. There is nothing in the record of proceeding to indicate the respondent's natural father, Jose Tiburcio Ayala Gaitan, ever legitimated the respondent. In addition, the respondent was not legitimized by the marriage of his mother to Jose H. Ayala, because there is doubt as to whether or not he is the respondent's biological father. A requirement of the legitimizing parent is that he is in fact the respondent's natural father. *Matter of Bueno*, 21 I&N Dec. 1029 (BIA 1997). Paternity may be established by primary evidence (i.e. birth certificate) or secondary evidence (historical documents, e.g. medical or school records, or blood tests). *Id.* In this case, the primary evidence includes numerous birth certificates indicating two different names as respondent's father. Therefore, it is impossible to answer the question of legitimization of the respondent due to the fact that ICE has not proved that Jose H. Ayala is in fact respondent's biological father.

Furthermore, the burden of proof is on the government to establish the facts supporting deportability (now removal) by clear, unequivocal, and convincing evidence. *Woodby v. INS*, 385 U.S.276 (1966). As previously stated, if the deportee can produce substantial credible evidence in support of his or her citizenship claim, thereby rebutting the presumption, ICE's burden of proving deportability by clear and convincing evidence again comes into play. *Id.* This Court cannot conclusively state that any one of the birth certificates produced is fraudulent. By the same token, this Court cannot conclusively state that any one of the birth certificates is valid. Respondent has produced substantial credible evidence that Jose Humberto Ayala is not his biological father, thereby shifting the burden back to the ICE to prove deportability by clear and convincing evidence.

It is undisputed that Maria Dolores Villanueva is respondent's mother. The birth certificate submitted by ICE showing respondent's father to be Jose Humberto Ayala Gaitan, a 26 year old farmer, indicates that it was recorded in the Municipal City Hall in Concepcion, Batres. ICE stated that due to a fire, all the records were destroyed and therefore this birth certificate can no longer be obtained from El Salvador. However, respondent's sister, who had obtained the birth certificates identifying Jose Tiburcio

Ayala Gaitan as respondent's father, also contacted the Municipal Mayor of Concepcion Batres and received a letter stating that the birth certificate submitted by ICE does not exist and that certificate 386 belongs to a Rene Armando Perdomo in the Book of Births for 1973.

Therefore, the Court finds that ICE has not produced clear, unequivocal, and convincing evidence that Jose Humberto Ayala is respondent's father thereby preventing respondent from claiming derivative citizenship through his mother.

On August 25, 2005, Additional Charges of Inadmissibility/Deportability was filed alleging that since respondent's mother filed for him and submitted a birth certificate which identified Jose Humberto Ayala Gaitan as his father, that respondent is removable pursuant to §237(a)(1)(A) of the Act, as amended, in that at the time of entry or adjustment of status, he was within one or more of the classes of aliens inadmissible by the law existing at such time, to wit: aliens who seek to procure, or have sought to procure, or who have procured a visa, other documentation, or admission into the United States, or other benefit provided under the Act, by fraud or by willfully misrepresenting a material fact, under § 212(a)(6)(C)(i) of the Act.

The respondent entered the United States as an immigrant when he was nine years old, based upon a petition filed on his behalf by his mother. No one disputes that Maria Dolores Villanueva is the mother of the respondent and that the mother-son relationship exists. It was immaterial who was identified as the father of the respondent when she filed for him. At the time respondent entered in 1982, Maria Dolores Villanueva had married Jose Humberto Ayala in the United States on July 28, 1976 (respondent was born in 1973) and his sister Cynthia, who testified in his behalf, was born in the United States on May 2, 1976. She testified that all the children were brought up believing that they had the same mother and father.

At no time was there a request made to have the mother come in and testify. Each party has chosen to rely primarily on the birth certificates they have presented. There were several hearings in order to enable the Court to hear testimony from Jose Humberto Ayala, and to enable ICE to have someone from their agency in El Salvador go in person to try and clarify the contradictions in the birth certificates. The testimony of Jose Humberto Ayala did not clarify the issue. He was never asked if he had registered respondent's birth. As previously stated, ICE could not obtain another copy of the birth certificate it submitted (part of Exhibits 11, 13, 16 and 17), alleging that a fire had destroyed those records in El Salvador. Yet, respondent's sister did obtain a written response indicating that someone else was listed in folio 349, certificate 386, specified in the Book of Births for 1973 and that there was no record of the respondent being listed anywhere in that Book of Births or the Book of Births for 1974 or 1975 in Concepcion Batres (see Exhibit 16). The birth certificate submitted on behalf of respondent from the Alcaldia Municipal de Usulutan (part of Exhibits 9 and 12) does exist and that document identifies Jose Tiburcio Ayala Gaitan, a *21 year old student*, as the father of respondent. At the time of respondent's birth, Jose Humberto Ayala, would have been 26 years old and worked in the fields, having only gone to school until he was 11 years old.

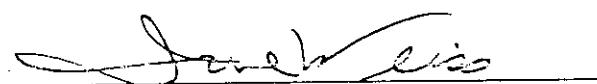
Since the only record of birth that does exist today in El Salvador is the one submitted on behalf

of respondent and that document identifies Jose Tiburcio Ayala Gaitan, a 21 year old student as the father of respondent, the Court finds that respondent is entitled to derivative citizenship through his mother. (See Attachment # 1).

Accordingly, the following Order is being entered:

ORDER

IT IS HEREBY ORDERED that the proceedings herein be and the same are **TERMINATED**.



Irene Weiss
United States Immigration Judge

CERTIFICATE OF SERVICE

SERVICE BY: Mail (M) Personal Service (P)
TO: DHS Alien Alien's Attorney
DATE: 16/18/05 **BY:** Court Staff

Exhibit #	description	Date certificate was transcribed from book of births	Page # in book of births	Birth #	Time/Date of Birth	Place of birth	Father of child	Mother of Child
9	Birth certificate submitted with N-600 for Willsonis Villanueva Ayala	June 11, 2003 Originally recorded in book of births on August 8, 1973	349	686	20 th hour of the 28 th day of the last month. (7-28-1973)	Usulutan San Pedro Hospital in this city	Jose Tiburcio Ayala Gaitan (21 year old, student from Estanzuelas, ID # 519653)	Maria Dolores Villanueva of Estanzuelas
12	Birth certificate submitted with in immigration court Willsonis Villanueva Ayala	June 3, 2005 Originally recorded on August 8, 1973	349	686	20 th hour of the 28 th day of the last month. (7-28-1973)	Usulutan San Pedro Hospital in this city	Jose Tiburcio Ayala Gaitan (21 year old, student from Estanzuelas, ID # 519653)	Maria Dolores Villanueva of Estanzuelas
11&17	Birth certificate submitted with I-485 app. Willsonis Ayala Villanueva	March 10, 1977 Originally recorded on August 8, 1973	349	386	20 th hour of the 28 th day of the last month. (7-28-1973)	San Antonio section ("Canton") Conception Batres	Jose Humberto Ayala Gaitan, 26 year old Farmer from estanzuelas ID # 519653	Maria Dolores Villanueva of Estanzuelas
13 &16 *	Birth certificate submitted Willsonis Ayala Villanueva	April 20, 1978 Originally recorded on August 8, 1973	349	386	20 th hour of the 28 th day of the last month. (7-28-1973)	San Antonio section ("Canton") Conception Batres	Jose Humberto Ayala Gaitan, 26 year old Farmer from estanzuelas ID # 519653	Maria Dolores Villanueva of Estanzuelas

Attachment #1

*Respondent's sister sent a copy of this birth certificate (relied on by ICE) to the Mayor's Office in Concepcion Batres to verify its existence. She received their response that this birth certificate does not exist in their Book of Births. ICE alleges the records were destroyed in a fire, however, that does not appear to be correct.

EXHIBIT “C”

PARTIDA NUMERO seiscientos ochenta y seis. - WILLSONES VILLANUEVA AYALA,
varón, nació a la 8 veinte horas del día Veintiocho de
meses próximo pasado, en el Hospital San Pedro de esta ciudad,
naciendo hijo de Maria Dolores Villanueva, originaria de Estan-
guelas, de oficios domésticos, de nacionalidad salvadoreña
del domicilio de esta ciudad - . Dijo estos datos José Tiburcio Ayala Gaitán,
Estudiante, de veintiún años de edad, originario de Estanzuelas,
del domicilio de esta ciudad y de nacionalidad salvadoreña,
quien manifiesta ser padre de 1 recién nacido, exhibió su Cédula de Identidad Personal Número Cinco-
uno-nueve mil seiscientos cincuenta y tres, expedida por la Autoridad Municipal de
esta ciudad y firma en tal concepto
* ; el lofrasrito Jefe del Registro Civil

JEFE DEL REGISTRO CIVIL
Samuel Navas y García. -


INFORMANTE
José Tiburcio Ayala Gaitán.

José Tiburcio Ayala Gaitán.-

(Seal)

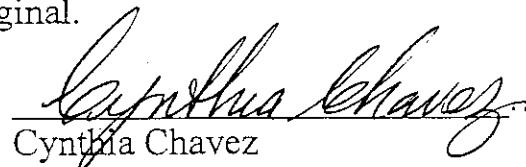
Number six hundred eightysix.- Willsonis Villanueva Ayala, Boy, born at the twentieth hour on the day of the 28th of last month en the Hospital San Pedro of this city, being son of Maria Dolores Villanueva, originally of Estanzuelas, housewife, nationality Salvadorian, domicile in this city. This data was given by Jose Tiburcio Ayala Gaitan, Student of Twenty one years of age, originally of Estanzuelas, domicile in this city and nationality Salvadorian, who attests being the father of the 1 recent birth, showed his Cedula of Identity Five-one-nine one thousand six hundred fifty three, issued by the municipal authority of this city and signs; The head of civil registry gives faith of knowing the father informant. Usulutan, Eight of August of nineteen seventy three.

(signature)
Head of Registry
Samuel Navas Y Garcia

(signature)
Informant
Jose Tiburcio Ayala Gaitan

TRANSLATION:

I Cynthia Chavez am knowledgeable in both the English and Spanish Languages and certify this to be a true and correct translation of the original.


Cynthia Chavez

EL INFRASCrito JEFE DEL REGISTRO DEL
ESTADO FAMILIAR DE ESTA CIUDAD, CERTIFICA
QUE LA PARCELA ORIGINAL, DE LA PRESENTE
NOTOCOPIA SE ENCUENTRA EN EL LIBRO
2 FOLIO _____ AÑO
1973 Y SE EXPIDE PARA EFECTOS
LEGALES, ALCALDIA MUNICIPAL USULUTAN
11 DE junio DEL AÑO 2003

Firma _____
Jefe del Registro del Estado Familiar
RICARDO ALFONSO SARAVIA.



ISDEM
ES N° 515342



Alcaldía Municipal de

ORIGINAL - Para el Contribuyente

ALCALDIAS MUNICIPALES DE EL SALVADOR

RECIBO DE INGRESO

SERIE "B"

ES N° 15336

~~ELLISON VILLANUEVA~~

(Nombre del Contribuyente)

ENTREGO EN ESTA OFICINA LA CANTIDAD DE:

DOS DOLARES CON DIEZ CTVS.

Por	2.10	CARGO EN CAJA, RUBROS O CUENTAS AFECTADAS		
		CONCEPTO O MANDAMIENTO DE INGRESO	Fondo Municipal	Especif. Mpls.
		CERTIF. QUE EXPIDE EL REG. ESTADO DE FAMILIA	1.65	Especif. Fiscales
		SERVICIOS	0.11	
		ADMINISTRATIVOS		
		H. USULUTAN		0.04
		S. S. E. PATRONALES	0.10	
		RECIBO EN CAJA MUNICIPAL USULUTAN 2000		
			0.10	0.04

Receipt of money
paid to
Obtain Bush cert.

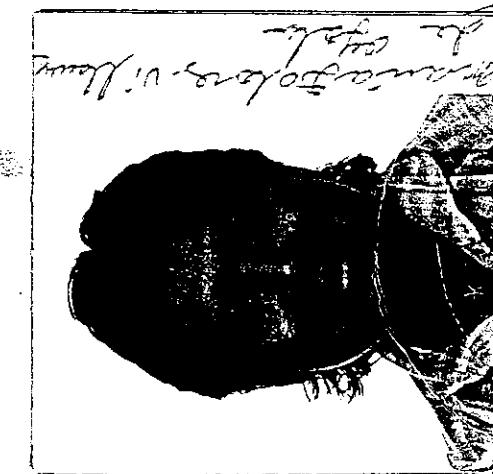
EXHIBIT “D”

No. 12334471

Petition No. 34538

•ORIGINAL•

Personal description of holder as of date of naturalization: Date of birth May 3, 1954 Sex Female
 complexion Medium color of eyes Brown color of hair Black height 5 feet 2 inches
weight 135 pounds visible distinguishing marks Mole on left side of face
 Marital status Married Country of naturalization El Salvador
 I certify that the description above given is true and that the photograph affixed hereto is a likeness of me.



Maria Dolores Villanueva de ayala
 (Complete and true signature of holder)

UNITED STATES OF AMERICA }
 EASTERN DISTRICT OF VIRGINIA } S.S.
As it is known that she is a foreigner United States District County
held pursuant to law Eastern District of Virginia Alexandria, Virginia
 on February 19, 1987 *the Court having found that*
she is residing at 1805 S. Nelson Street, Arlington, Va.
intends to reside permanently in the United States *and is required by the*
Naturalization Laws of the United States *to furnish other respects complied with*
the applicable provisions of such naturalization laws, and was entitled to be
admitted as a citizen of the United States on account that such person *and she was*
admitted as a citizen of the United States of America.
In testimony whereof the seal of the court is hereto affixed this 19th
day of February Eighty-seven

DORIS R. CASEY

Court of the U. S. District Court
 By Edward S. Coffey Deputy Clerk.

IT IS PUNISHABLE BY U. S. LAW TO COPY,
 PRINT OR PHOTOGRAPH THIS CERTIFICATE.