IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SAZAR DENT, also known as Cesar Augusto Jimenez-Mendez, an individual, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	Case No. 2:10-cv-02673-TMB

ORDER

This case was transferred from the Ninth Circuit under 8 U.S.C. § 1252(b)(5)(B) "'for a new hearing on [Sazar Dent's] nationality claim and a decision on that claim as if an action had been brought' for declaratory relief under 28 U.S.C § 2201."[1] This action is to determine Sazar Dent's (Petitioner's) nationality. The government (Respondent) has moved both for summary judgment on Petitioner's nationality claim and to dismiss all other claims. Petitioner opposes Respondent's motion. Petitioner has requested oral argument, but the Court finds that it is not necessary to resolve the matter.[2] For the reasons stated below, Respondent's motion for summary judgment is **GRANTED** and the motion to dismiss as to all other claims is **GRANTED**.

[1] *Dent v. Holder*, 627 F.3d 365, 376 (9th Cir. 2010).

[2] LRCiv 7.2(f).

I. BACKGROUND

Petitioner was born in 1967 in Honduras.[3] On February 21, 1981, he was admitted to the United States as a lawful permanent resident based on his pending adoption by Roma Dent, a native born U.S. citizen who legally adopted him on September 1, 1981.[4] On December 21, 1981, Roma Dent signed an application to petition for naturalization on Petitioner's behalf.[5] The Immigration and Naturalization Service (INS) marked the application received on January 18, 1982.[6]

On July 20, 1983, the INS issued a request that Roma Dent appear for an interview on her petition on August 4, 1983.[7] A handwritten note on Roma Dent's application reads "ABSENT 8/4/83."[8] However, a March 30, 2010, Administrative Appeals Office (AAO) decision states that Roma Dent did send a letter to the INS asking that the August 4, 1983 interview be postponed because Petitioner was out of the country in Honduras.[9] On February 24, 1984, The INS issued a second request that Roma Dent appear for an interview on March 13, 1984.[10] The

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[3] The exact date of his birth is recorded differently on various forms, but it is undisputed that he was born in 1967 in Honduras. Dkt. 119.

[4] Dkt. 119-1 ¶¶ 1, 4.

[5] *Id.* at ¶ 6.

[6] *Id.*

[7] Dkt. 119-1, Ex. 10.

[8] Dkt. 119-1, Ex. 6.

[9] Dkt. 141 ¶ 3, Dkt. 144-2 ¶ 3.

[10] Dkt. 119-1 ¶ 10.

application contains another handwritten note that reads "ABSENT 3/13/84."[11] The INS scheduled another interview for February 25, 1986, but Petitioner's file contains a note that reads "ABSENT 2/25/86."[12] However, both Petitioner's own testimony and the March 30, 2010 AAO decision state that he did attend that interview.[13]

On February 26, 1986, Petitioner Dent filed his own adult petition for naturalization with the INS.[14] As part of this application, Petitioner took an oath before a naturalization examiner that "[i]t is my intention in good faith to become a citizen of the United State and take without qualification the oath of renunciation and allegiance prescribed by the Immigration and Nationality Act."[15] Petitioner also signed the oath on his petition requesting that he "be admitted to the United States of America."[16] Petitioner states that he believes he became a United States citizen at that time, but does not recall the naturalization examiner telling him that he became a citizen or indicating what would happen after their meeting.[17] Petitioner also states that he never appeared before a U.S. District Court Judge to take a naturalization oath nor did he ever receive a certificate of naturalization.[18]

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[11] *Id.* at ¶ 11.

[12] Dkt. 119-1¶ 14; Dkt. 141 ¶ 7.

[13] *Id.*

[14] Dkt. 119-1 ¶ 17, Ex. 16.

[15] Dkt. 119-1 ¶ 17.

[16] *Id.*

[17] Dkt. 119-1, Ex. 14 at 44, 48.

[18] Dkt. 119-1, Ex. 14 at 36, lines 16-21.

On June 14, 1986, Petitioner sent a letter to the INS updating his mailing address.[19] Petitioner then moved twice more without updating his address with the INS.[20] On November 10, 1988, the INS sent a notice to Petitioner at the address he supplied on June 14, 1986, which was his most current address, stating that they were recommending his petition for naturalization be denied for failure to prosecute because he failed to appear at four hearings scheduled for June 25, 1986, December 17, 1986, June 17, 1987, and December 17, 1987.[21] Petitioner says he never received the notice that the INS was recommending his petition be denied, which was why he did not appear for the final hearing on his application scheduled before the United States District Court for the Western District of Arkansas on March 23, 1989.[22] Because he failed to appear, the court denied Petitioner's petition for naturalization based on his failure to prosecute.[23]

On December 11, 2003, Petitioner was convicted of possession of narcotics and third degree escape in the Superior Court of Arizona County.[24] On April 26, 2005, the Department of Homeland Security (DHS) charged petitioner with removability under 8 U.S.C. § 1227(a)(2)(B)(i) based on his violation of a law relating to a controlled substance.[25] Petitioner claimed derivative citizenship based on his adopted mother, Roma Dent's citizenship during

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[19] Dkt. 119-1 ¶ 19.

[20] *Id.* at ¶¶ 20-21.

[21] *Id.* at ¶ 22.

[22] *Id.*

[23] *Id.* at ¶ 23.

[24] *Id.* at ¶ 24.

[25] *Id.* at ¶ 25.

removal proceedings.[26] Petitioner was ordered removed on August 18, 2005 by the Board of Immigration Appeals (BIA).[27] The BIA reissued its decision on September 21, 2005 due to an "error in administrative processing" of the earlier decision, but petitioner did not receive a copy of the reissued decision because he had already been removed from the United States on September 12, 2005.[28]

On May 19, 2008, after a traffic stop in which he provided a false Social Security number and admitted to police that he did not have an operator's license, Petitioner was charged with illegal reentry after deportation in violation of 8 U.S.C. § 1326.[29] Although those charges were later dismissed,[30] the Department of Homeland Security placed an immigration detainer on Petitioner and asked that an adjudications officer with the United States Citizenship and Immigration Services (USCIS) determine whether Petitioner had any applications for citizenship pending.[31]

When USCIS Senior Adjudications Officer Joanne Szczotka reviewed Petitioner's Alien File (A-File), she saw that the application filed by Roma Dent was deemed "non-filed."[32]

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[26] *Id.* at ¶ 26.

[27] Dkt. 119-1, Ex. 26.

[28] Dkt. 119-1 ¶ 28.

[29] *Id.* at ¶ 29.

[30] *Id.* at ¶ 30.

[31] *Id.* at ¶ 32.

[32] *Id.* at ¶ 33. Petitioner objects to Officer Szczotka's explanations of the meaning of notations in Petitioner's A-File on the grounds that they lack foundation, are speculation, and that her training does not permit her to make legal interpretations of these notations. However, Szczotka's explanations are properly admissible to explain the meaning of terms and their use based on her training and experience. *See United States v. Crawford*, 239 F.3d 1086, 1090-91

Officer Szczotka explained that "non-filed" means that the application was denied because Petitioner and his mother, who filed the application, failed to appear in court.[33] Officer Szczotka stated that she then marked the application "denied," thereby reaffirming the nonfiled decision.[34] She also testified that based on her experience, the "ABSENT" notations in Petitioner's file indicated that Petitioner and Roma Dent had failed to appear for their scheduled interviews.[35] Officer Szczotka also reviewed Petitioner's own petition for naturalization and verified that it was denied by the court.[36] Later, on November 10, 2008, she drafted a decision on Roma Dent's application denying the application and sent it to Petitioner.[37]

Petitioner appealed the November 10, 2008 decision to the AAO on December 17, 2008.[38] The AAO dismissed the appeal on March 9, 2009.[39] Petitioner moved for the AAO to reopen his case on April 7, 2009, but the AAO again denied his motion because they determined that Petitioner "was over 18 at the time he was interviewed and [Roma Dent's application] was

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(9th Cir. 2001) (lay witness could testify based on his experience with University policies, on how University used the term "affiliated organization"). *See also United States v. Loyola-Domingues*, 125 F.3d 1315 (9th Cir. 1997) (A-file documents fell under public records exception to hearsay rule and were properly admitted when INS Special Agent explained their significance to the jury).

[33] Dkt. 119-1 ¶ 33.

[34] *Id.*

[35] *Id.* at ¶ 15.

[36] *Id.* at ¶ 34.

[37] *Id.* at ¶ 35.

[38] *Id.* at ¶ 36.

[39] *Id.*

adjudicated" and that his own petition "was denied in 1989 after [he] failed to appear for four hearings scheduled in 1986 and 1987."[40]

Also in 2009, the DHS filed a Notification of Alien's Removal before the BIA.[41] In accordance with the BIA's policy of reissuing decisions where an administrative error would prevent a party from filing a timely appeal, the BIA then reissued the September 21, 2005 decision that Petitioner had not received because he was already removed from the country at the time it was issued.[42] Petitioner then appealed the Board's reissued decision to the Ninth Circuit, which found that Petitioner should have been furnished with his A-file during adjudication of the case, that there was a genuine issue of material fact as to Petitioner's nationality, and transferred the case to the district court for a hearing on his nationality claim.[43]

II. LEGAL STANDARD

Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party,[44] "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[45] In assessing whether there is a genuine dispute as to any material fact, materiality depends on "which facts are critical and which are irrelevant" under the substantive law governing a claim.[46] A "genuine" dispute is

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[40] Dkt. 119-1 ¶ 37, Ex. 37.

[41] Dkt. 119-1 ¶ 38.

[42] *Id*. at ¶ 40.

[43] *Dent* at 370, 374, 376.

[44] *Hooper v. County of San Diego*, 629 F.3d 1127, 1129 (9th Cir. 2011) (citation omitted).

[45] Fed. R. Civ. P. 56(a).

[46] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

one where there is enough evidence for a reasonable jury to "return a verdict for the non-moving party."[47] The court must accordingly determine whether there is sufficient evidence supporting the alleged factual dispute to require the trier of fact "to resolve the parties' differing versions of the truth at trial."[48]

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the same evidence were to be uncontroverted at trial."[49] Where the nonmoving party bears the burden of proof at trial, the moving party may satisfy its burden "by showing . . . that there is an absence of evidence to support the nonmoving party's case."[50] The non-moving party must then "respond . . . by setting out specific facts showing a genuine issue for trial."[51] Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial."[52] Where a party fails to make such a showing, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[53]

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[47] *Id.*

[48] *T.W. Elec. Serv., Inc., v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citations omitted).

[49] *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citation omitted).

[50] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 325 (1986).

[51] *Id.* at 324.

[52] *Id.* at 322-23.

[53] *Id.*

III. DISCUSSION

1. Motion for Summary Judgment

The Government's motion for summary judgment contends that Dent cannot prove his nationality from either his mother's petition for naturalization or his own adult petition for naturalization. This case is before the Court for a decision as if an action had been brought for declaratory relief.[54] "[A] petitioner in a declaratory judgment action in the district court to determine citizenship [bears] the initial burden of proving citizenship by a preponderance of the evidence."[55] Citizenship must be "determined under the law in effect at the time the critical events giving rise to eligibility occurred."[56]

Thus, Petitioner's claim must be analyzed under the law in effect at the time he was adopted, which gave rise to his claim for naturalization. The pertinent portions of the statute in effect at the time provide that an adopted child under the age of eighteen years may be naturalized on the application of a citizen parent; after the age of eighteen they must be naturalized on their own application.[57] After filing an application, the petitioner was subject to a preliminary examination by an employee designated by the Attorney General, who then made a non-binding recommendation to grant or deny the petition to the court.[58] The final step in the naturalization process was for the court to make the final determination on the petition for naturalization and for the "person who has petitioned for naturalization . . . in order to be and

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[54] *Dent* at 376.

[55] *Sanchez-Martinez v. I.N.S.*, 714 F.2d 72, 74 (9th Cir. 1983).

[56] *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005).

[57] 8 U.S.C. §§ 1433(a), 1445(b) (1980).

[58] 8 U.S.C. § 1446(b)(d) (1980).

before being admitted to citizenship, take in open court an oath" of citizenship and allegiance to the United States.[59] The Court must comply strictly with the authorizing statute, which says that a person may be naturalized only "in the manner and under the conditions prescribed . . . and not otherwise."[60] If "a person does not qualify for citizenship . . . the district court has no discretion to ignore the defect and grant citizenship."[61]

A. *Roma Dent's 1982 Application*

In order to naturalize as an adopted child, Petitioner was required to submit an application, report to the INS for a preliminary examination, and appear in court for a final determination and oath of citizenship.[62] Roma Dent's application was properly filed with the INS before Petitioner turned eighteen. The next step in the naturalization process was for Roma Dent and Petitioner to then appear for a preliminary examination. The INS scheduled two interviews for Roma Dent and Petitioner before Petitioner's eighteenth birthday. Petitioner does not claim that he attended either of those interviews. Additionally, Officer Szczotka explained that the "ABSENT 8/4/83" and "ABSENT 3/13/84" notations in Petitioner's A-file indicate that he and Roma Dent did not appear for those required interviews.[63]

Petitioner's appearance for a preliminary examination before his eighteenth birthday was required in order for him to naturalize under Roma Dent's application. When he failed to meet that requirement, he was unable to naturalize as an adopted child under Roma Dent's application.

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[59] 8 U.S.C. § 1448(a) (1980).

[60] *I.N.S. v. Pangilinan*, 486 U.S. 875, 884 (1988).

[61] *Id.* (quoting *Fedorenko v. United States*, 449 U.S. 490, 517 (1981)).

[62] 8 U.S.C. § 1433-1448 (1980).

[63] Dkt. 119-1 ¶ 15, Ex. 15 at 91.

Thus, Roma Dent's application was deemed "nonfiled" and "over 18 2/26/86."[64] Officer Szczotka explained that the "nonfiled" and "over 18 2/26/86" notations on Roma Dent's application mean that Petitioner failed to appear and that the application was denied as nonfiled as or February 26, 1986.[65] Officer Szczotka herself also denied Roma Dent's application again on November 10, 2008.

It is unclear precisely why Officer Szczotka denied Roma Dent's application again in 2008. But the 2008 denial of Roma Dent's application does not change the fact that Petitioner never naturalized under Roma Dent's application, which was already denied on February 26, 1986. He failed to meet the statutory requirements to naturalize by failing to appear for a preliminary examination on the application and failing to appear in Court before he was eighteen years old.

Petitioner argues that delays by the INS "made it impossible for [him] to successfully naturalize based on the childhood application."[66] But even when the evidence is viewed in the light most favorable to him, it is still clear that he did not meet the requirement for naturalization under Roma Dent's application. Because the court must comply strictly with the terms of the authorizing statute and Petitioner cannot show an element essential to his claim, summary judgment as to his failure to naturalize based on Roma Dent's application must be granted.

B. ***Petitioner's 1986 Application for Naturalization***

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[64] Dkt. 119-1 ¶ 16, Ex. 15 at 83.

[65] *Id.*

[66] Dkt. 140 at 14.

After appearing for an interview on February 25, 1986, Petitioner filed his own adult application to file petition for naturalization with the INS on February 26, 1986.[67] In order to successfully naturalize based on his application, Petitioner was required to submit to a preliminary examination and appear in Court for a final determination of citizenship based on his application and to take an oath.[68]

As part of his February 1986 application, Petitioner swore an oath before a Naturalization Examiner as to the details in his application and his intention to become a citizen of the United States.[69] Petitioner believed that he became a United States citizen when he took that oath.[70] However, Petitioner cannot recall anything the Naturalization Examiner may have told him that led him to believe this.[71]

On March 29, 1989, the United States District Court for the Western District of Arkansas denied Petitioner's application for failure to prosecute.[72] Notice that the INS was recommending that denial of his application was sent to Petitioner's most recent address and was based on his failure to appear for four separate final hearings on his application.[73] Petitioner was no longer living at that address and states that he did not have notice of these hearings.[74] He argues that he

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[67] Dkt. 119-1 ¶ 17.

[68] 8 U.S.C. § 1445-1448 (1980).

[69] Dkt. 119-1 ¶ 18.

[70] *Id.*

[71] Dkt. 119-1, Ex. 14 at 45, lines 15-17; Ex. 14 at 48, lines 6-20.

[72] Dkt. 119-1 ¶ 23.

[73] *Id.*

[74] Dkt. 140 at 16.

"did not keep his address updated with the former INS past 1986" because "he believed the former INS naturalized him."[75] However, Petitioner offers no proof and has no recollection of the INS ever telling him he was naturalized when he took that oath and submitted his petition. Petitioner's own mistaken belief that he was a citizen does not excuse him from complying with the statutorily proscribed procedures for naturalization. Neither does Petitioner's mistake permit the Court to now grant him citizenship if there is anything less than compliance with all statutory requirements for naturalization.[76] Because Petitioner did not successfully prosecute his application, which was subsequently denied by the court, he cannot prove that he naturalized based on his application. Because there is no genuine issue of material fact as to Petitioner's failure to naturalize under his application for naturalization, summary judgment must be granted as to Petitioner's nationality.

2. Motion to Dismiss as to All Other Claims

Respondent moves not only for summary judgment as to Petitioner's nationality, but also to dismiss all other claims under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). After the Ninth Circuit found that that there was a genuine issue of material fact as to Petitioner's nationality, the proceeding was transferred to the United States District Court for the Court of Arizona under 8 U.S.C. § 1252(b)(5)(B) "for a new hearing on [Petitioner's] nationality claim and a decision on that claim as if action had been brought for declaratory relief under 28 U.S.C. 2201."[77]

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[75] *Id.*

[76] *I.N.S. v. Pangilinan* at 884.

[77] *Dent* at 376.

Thus, the case was transferred to the Court as if on "limited remand" for the express purpose of resolving the factual issues surrounding Petitioner's nationality.[78] Although the Ninth Circuit wondered if the government had authority to delay an application for naturalization, their statements in dicta did not expressly direct this Court to consider due process claims.[79] Rather, the concern about whether "the government lacks authority to sit on an application to naturalize a fourteen year old until after he is eighteen and has aged out or to sit on an application for naturalization" was expressed immediately following their statement that they did not know if the notations in Petitioner's application "amount to denial of naturalization petitions."[80] Officer Szczotka's testimony explains what the notations on Petitioner's application mean. Her testimony, together with the U.S. District Court of Arkansas's 1989 denial of Petitioner's application for naturalization, makes clear that there was no delay in the naturalization process. Thus, any potential issues of delay that went to Petitioner's nationality claim have been resolved by analyzing Petitioner's nationality claim.

Petitioner argues that dismissal is inappropriate because Respondent has not produced Petitioner's full A-file.[81] Respondent responds that it has produced Petitioner's A-file and does not have in its possession any of the individual documents that Petitioner requests.[82] In light of the fact that the Respondent has produced all the relevant documents it has in its possession,

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[78] *Demirchyan V. Holder*, 641 F.3d 1141, 1143 (9th Cir. 2011) ("For the present purpose, we see no meaningful distinction between transfer under 8 U.S.C. § 1252(b)(5)(B) and limited remand.").

[79] *Id*. at 376

[80] *Dent* at 376-77.

[81] Dkt. 140 at 17.

[82] Dkt. 144 at 9.

dismissal as to any document production claims is appropriate. Accordingly, Respondent's motion to dismiss as to all other claims is granted.

IV. CONCLUSION

For the foregoing reasons, Respondent's motion for summary judgment as to Petitioner's nationality claims is **GRANTED** and motion for dismissal as to all other claims at Docket 119 is **GRANTED**.

Dated at Anchorage, Alaska, this 30th day of September, 2013.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE