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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTOR LUQUE, Plaintiff-Appellant, v. ANTONY J. BLINKEN, Secretary of State of the United States of America, Defendant-Appellee.	No. 21-16012 D.C. No. 4:19-cv-00330-JGZ-LAB MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Jennifer G. Zipps, District Judge, Presiding

Submitted December 7, 2022**
Phoenix, Arizona

Before: WARDLAW and BUMATAY, Circuit Judges, and ZOUHARY,*** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

Victor Luque appeals the district court's denial of his request to be declared a United States citizen. Luque claimed U.S. citizenship under 8 U.S.C. § 1409(c), which allows a person born outside the United States to acquire citizenship if he can show that he was born out of wedlock to a U.S. citizen mother, and that "at the time of such person's birth . . . the mother had previously been physically present in the United States . . . for a continuous period of one year." 8 U.S.C. § 1409(c). After a bench trial, the district court concluded that Luque failed to establish his mother's continuous presence in the United States for the requisite period prior to his birth. We affirm.

1. Luque first argues that the district court erred by determining that the word "continuous" requires uninterrupted physical presence in the United States. We review questions of statutory interpretation de novo. *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1151 (9th Cir. 2019). The district court's reading of the statute is consistent with the text's plain meaning, and precedent. The statute requires that "the mother had previously been *physically present* in the United States . . . *for a continuous period of one year*." 8 U.S.C. § 1409(c) (emphasis added). The plain meaning here is unambiguous: the mother must have been continuously physically present. To read the statute as allowing interruptions during the one-year period renders the word "continuous" meaningless.

The Supreme Court interpreted nearly identical language the same way in *INS*

v. Phinpathya, 464 U.S. 183 (1984), where the Court found the requirement that a non-citizen be "physically present in the United States for a continuous period of not less than seven years" required uninterrupted physical presence with no exceptions for brief absences. *Id.* at 189. The Court explained that if Congress had intended a different outcome, it could have used different language. *Id.* at 189–92.

2. Luque next argues that the district court erred by (1) failing to exclude his mother's deposition testimony, and (2) excluding his mother's "family lore" testimony. We review evidentiary rulings for abuse of discretion and reverse only if a ruling is "both erroneous and prejudicial." *Wagner v. County of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013). Neither ruling was an abuse of discretion.

Luque contends that his mother's deposition testimony should have been excluded because she was not competent at the time of the testimony. Federal Rule of Evidence 601 provides that "[e]very person is competent to be a witness unless these rules provide otherwise." Fed. R. Evid. 601. The advisory committee notes to Rule 601 state that "[n]o mental or moral qualifications for testifying as a witness are specified." Typically, issues of inconsistency and memory problems evident in otherwise admissible testimony inform the factfinder's assessment of the witness's reliability and weight of testimony. *See City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014); *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) ("Shaky but admissible evidence is to be attacked by cross examination,

contrary evidence, and attention to the burden of proof, not exclusion."). The district court did not abuse its discretion in considering the deposition and trial testimonies of Luque's mother.

Luque also argues that the district court erred in excluding as hearsay out-of-court statements about where his mother was told she lived for the first few years of her life. The district court excluded this testimony as not within the hearsay exceptions identified in Federal Rules of Evidence 803(19) or 804(b)(4). These exceptions apply to statements concerning "birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history." Fed. R. Evid. 803(19); *see also id*. 804(b)(4). Where Luque's mother lived for a few years does not fit within any of these categories. The district court did not abuse its discretion in excluding these hearsay statements.

3. Luque also raises for the first time on appeal that his citizenship claim should not have been considered under 8 U.S.C. § 1409(c) after *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017). Because *Morales-Santana* found 8 U.S.C. § 1409(c) unconstitutional, Luque argues that his claim for citizenship should have been considered under a different citizenship section, 8 U.S.C. § 1401(a)(7). Luque also urges that that the remedy applied in *Morales-Santana*—application of 8 U.S.C. § 1401(a)(7)'s current five-year residency requirement—should apply to "all people

seeking citizenship after [the case] was filed" regardless of the applicants' date of birth. Luque waived these arguments because he did not raise them before the district court. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Although the Supreme Court decided *Morales-Santana* before Luque even applied for a passport, Luque argued his case only under 8 U.S.C. § 1409(c). Indeed, Luque expressly argued in the district court that *Morales-Santana*'s holding was "inapplicable to the present case." During the bench trial, Luque again acknowledged *Morales-Santana* but said that 8 U.S.C. § 1409(c) was still the operable statute.

Nor does Luque's argument fall under any exceptions to the waiver doctrine. *See Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007) (allowing exceptions for (1) exceptional circumstances; (2) a change in the law; or (3) pure questions of law when the opposing party will suffer no prejudice). Luque cites to no exceptional circumstances and *Morales-Santana* was decided before his trial. And although which citizenship statute applies is a legal question, its resolution is fact-specific and so the government would be prejudiced by allowing Luque to argue it now because the record is insufficiently developed.

AFFIRMED.