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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 Alfredo Carrillo-Lozano,

10 Petitioner,

11 vs.

12 Eric H. Holder, Jr., Attorney General,

13 Respondent.

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No. CV-09-1948-PHX-NVW

**ORDER**

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On August 18, 2009, the Court of Appeals for the Ninth Circuit directed this Court to make a *de novo* determination of Petitioner’s claim of United States citizenship pursuant to 8 U.S.C. § 1252(b)(5)(B), which instructs the district court to decide the matter as if it were an action for declaratory judgment under 28 U.S.C. § 2201. On April 27, 2010, the Court conducted a bench trial at which both Petitioner and Respondent submitted documentary and testimonial evidence relevant to the status of Petitioner’s United States citizenship.<sup>1</sup> This order contains contingent findings of fact and describes the remaining course to be taken before conclusions of law may be drawn.

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<sup>1</sup>Some of the documents admitted into evidence are copies of original birth and death certificates and, as such, are appropriately referred to “certificates” in this order. Other documents, however, are recent certifications of the contents of original birth, death, and marriage records located in the civil registry of the State of Zacatecas in Mexico. Those documents are referred to as “certifications” rather than “certificates”.

1 **I. Legal Standards**

2 It is undisputed that Petitioner’s mother is a United States citizen and that  
3 Petitioner was born in Mexico on February 25, 1953. In determining the citizenship of a  
4 claimant born abroad when one parent is a United States citizen, courts look to the  
5 statutes in effect at the time of the claimant’s birth. *Chau v. INS*, 247 F.3d 1026, 1028 n.3  
6 (9th Cir. 2001). The sole statute Petitioner relies upon in asserting United States  
7 citizenship is INA § 309(c), 8 U.S.C. § 1409,<sup>2</sup> which provided at the time of his birth:

8 [A] person . . . born outside the United States and out of wedlock shall be held  
9 to have acquired at birth the nationality status of his mother, if the mother had  
10 the nationality of the United States at the time of such person’s birth, and if the  
11 mother had previously been physically present in the United States or one of  
12 its outlying possessions for a continuous period of one year.

13 Petitioner therefore bears the burden of proving by a preponderance of the evidence that  
14 (1) he was born out of wedlock and (2) his mother had been physically present in the  
15 United States or one of its possessions for a continuous period of one year prior to his  
16 birth. *See Martinez-Madera v. Holder*, 559 F.3d 937, 940 (9th Cir. 2009) (because  
17 foreign birth gives rise to a rebuttable presumption of alienage, a claimant born abroad  
18 bears the burden of proving his United States citizenship).

19 **II. Findings of Fact**

20 **A. Petitioner’s Mother**

21 Petitioner’s mother was Patricia Lozano, born to Agustin Lozano and Ma.  
22 Guadalupe Gallegos. It is undisputed and evident from her birth certificate that Patricia  
23 was born in Kansas on June 22, 1927. Although there is no admissible documentary  
24 evidence of the length of time she remained in the United States after her birth, Petitioner

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25 <sup>2</sup>Until the Final Pretrial Conference in this case, both Respondent and the Court were  
26 under the impression that Petitioner was also asserting a claim of United States citizenship  
27 under INA § 301(a)(7), 8 U.S.C. § 1401(a)(7). However, at the Conference, Petitioner  
28 denied making, and therefore waived, any claim thereunder. His explicit waiver of any such  
claim was repeated several times in the proceedings.

1 testified that his mother's younger siblings were born in the United States and that she  
2 attended elementary school in Kansas through at least the third grade. Based on that  
3 evidence and the inherent likelihood that a person born in the United States remained in  
4 the United States for at least one year if younger siblings were also born in the United  
5 States, the Court finds that it is more likely than not that Patricia Lozano was physically  
6 present in the United States for a continuous period of at least one year prior to  
7 Petitioner's birth in 1953.

8 **B. Petitioner's Father**

9 Petitioner's father was Macario Carrillo Garcia, born to J. Guadalupe Carrillo and  
10 Juana Garcia. The evidence is in conflict with respect to his birth date. On the one hand,  
11 the certification of his birth record indicates that he was born on March 4, 1933. The  
12 certification of his death record, which indicates that he was 32 years old as of September  
13 23, 1965, is consistent therewith. On the other hand, the certifications of the birth records  
14 of Petitioner and his siblings, which indicate Macario Carrillo Garcia's age at the time of  
15 the births, reflect a variety of conflicting ages, none of which are consistent with Macario  
16 Carrillo Garcia's birth and death certifications. Because the certification of Macario  
17 Carrillo Garcia's birth record is very likely the most accurate and therefore reliable  
18 evidence of his birth date, the Court is persuaded on balance that Macario Carrillo Garcia  
19 was born on March 4, 1933.

20 **C. Whether Petitioner's Parents Were Married at the Time of his Birth**

21 **1. Findings Based on Admitted Evidence**

22 The admitted evidence is in conflict with respect to whether Petitioner's parents  
23 were married at the time of his birth in 1953. The most probative evidence is a November  
24 9, 2009 certification of a marriage record indicating that Petitioner's parents were married  
25 in Zacatecas, Mexico, on July 5, 1948. Although the document incorrectly certifies that  
26 both Macario Carrillo Garcia and Patricia Lozano were 18 years old at the time, the other  
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1 particulars, including their names, their nationalities, and the names of their parents, are  
2 entirely accurate. There is no evidence that Petitioner's parents were ever divorced.

3 Petitioner argues, however, that the marriage was invalid from its inception  
4 because Macario Carrillo Garcia was only 15 years old on July 5, 1948, and had failed to  
5 obtain parental consent prior to marrying Petitioner's mother. Pursuant to Zacatecas  
6 Domestic Relations Law in effect at the time, the minimum age for marriage was 16 years  
7 for males and 14 years for females. *Ley de Relaciones Familiares*, Chapter II, Article 18  
8 (1964). In addition, individuals under the age of 21 were required to obtain parental  
9 consent to marry. *Id.*, Chapter II, Article 19. Failure to meet those requirements,  
10 however, rendered the marriage merely voidable for a limited period of time. *Id.*, Chapter  
11 VII, Articles 108, 109, 123. Minority ceased to be a cause for nullifying the marriage  
12 once children were born or once the minor had reached the age of 21 years and neither  
13 spouse had previously sought to void the marriage. *Id.*, Chapter VII, Article 18. Lack of  
14 parental consent, on the other hand, was a basis for voiding the marriage only for 30 days  
15 after the parents became aware of the marriage. *Id.*, Chapter VII, Article 109.

16 Here Petitioner's oldest sibling and his parents' first child, Juan Antonio Carrillo,  
17 was born on June 24, 1949. Therefore, the marriage could be voided on the basis of  
18 Macario Carrillo Garcia's minority only until that date. There is simply no evidence that  
19 it ever was. There is similarly no evidence that Macario Carrillo Garcia's parents ever  
20 took steps to nullify the marriage on grounds of lack of parental consent. If anything, the  
21 available evidence suggests that the marriage continued well after July 5, 1948, or at the  
22 very least that Petitioner's parents believably held themselves out as married at least up to  
23 the time Petitioner was born. By way of example, the certification of Juan Antonio  
24 Carrillo's birth record refers to him as the legitimate son of Macario Carrillo and his wife  
25 Patricia Lozano. Similarly, the certification of the birth record of Maria Socorro Carrillo  
26 Garcia, Petitioner's older sister, indicates that she was born in 1951 and refers to her as  
27 the legitimate daughter and second child of Macario Carrillo and his wife Patricia

1 Lozano, “married by civil and church ceremonies.” Finally, the certification of  
2 Petitioner’s own birth record refers to him as the legitimate son and third child of Macario  
3 Carrillo and his wife Patricia Lozano. Therefore, the marriage was not invalid due to  
4 minority or lack of consent.

5 Petitioner maintains in the alternative that whatever marriage his parents may have  
6 entered into was legally invalid because his father was already married to another woman.  
7 According to Zacatecas Domestic Relations Law in effect at the time, the existence of a  
8 prior marriage rendered any subsequent marriage voidable. *Ley de Relaciones*  
9 *Familiares*, Chapter VII, Article 117 (1964). The same is not true, however, of the  
10 reverse. A subsequent bigamous marriage could not invalidate a previously existing  
11 marriage. *See id.*

12 Here the only evidence Petitioner offers in support of his contention that Macario  
13 Carrillo Lozano was already married to another woman when he married Patricia Lozano  
14 is the certification of the birth record of Petitioner’s half-brother, J. Victor Carrillo, and  
15 the certification of Macario Carrillo Garcia’s death record. The birth certification  
16 indicates that J. Victor Carrillo was born on July 10, 1952, as the legitimate first child of  
17 Macario Carrillo and his wife Tomasa Rodarte. The death certification names Tomasa  
18 Rodarte as Macario Carrillo Garcia’s spouse as of his September 23, 1965 death. While  
19 this is some evidence that Macario Carrillo Garcia was married to Tomasa Rodarte and  
20 not Patricia Lozano the year before Petitioner was born in 1953, the Court is not so  
21 persuaded.

22 For one, while there is direct evidence that Macario Carrillo Garcia and Patricia  
23 Lozano were married in 1948, there is no direct evidence of a marriage solemnization  
24 between Macario Carrillo Garcia and Tomasa Rodarte. Furthermore, there is no evidence  
25 that Petitioner’s parents were ever divorced. Most importantly, while J. Victor Carrillo’s  
26 birth certification suggests Macario Carrillo Garcia held himself out as married to Tomasa  
27 Rodarte before the time of Petitioner’s birth in 1953, it does not prove that they were

1 married before Macario Carrillo Garcia's marriage to Patricia Lozano. If there were two  
2 purported marriages, there is simply no direct evidence indicating which marriage was  
3 first in time.

4 Therefore, the Court is left to draw the most persuasive inferences from existing  
5 evidence. The fact that Macario Carrillo Garcia was a mere 15 years old when he married  
6 Patricia Lozano in 1948 makes it less than likely that he was already married to another  
7 woman at that time. The additional fact that he fathered his first child with Patricia  
8 Lozano approximately three years before he fathered his first child with Tomasa Rodarte  
9 substantiates that conclusion. The Court therefore finds on balance that Macario Carrillo  
10 Garcia's marriage to Patricia Lozano predated any assumed, purported, or actual marriage  
11 to Tomasa Rodarte. As such, his marriage to Patricia Lozano could not have been  
12 invalidated solely by any subsequent marriage to Tomasa Rodarte.

13 Petitioner nevertheless maintains that his parents were never married. In support,  
14 he offers his own testimony and an affidavit from his deceased brother, Juan Antonio  
15 Carrillo, that their mother told them as children and after she returned to the United States  
16 that she had never married their father. It is a close question whether to believe their  
17 mother told them that. In her circumstances, it is plausible that she would tell her  
18 children that, even though it was not true. But other factors cut against the believability  
19 of Petitioner's assertion. Petitioner's credibility suffers in light of his demeanor at trial  
20 and his strong interest in proving he was born out of wedlock. His brother had a similar  
21 interest in aiding Petitioner's cause. The Court assesses the cross-currents of persuasion  
22 as in equipoise on whether Petitioner's mother told him his parents had never married.  
23 Therefore, Petitioner has not carried his burden of persuasion on this particular fact, and  
24 the Court finds that Petitioner's mother did not tell Petitioner his parents had never  
25 married.

26 Second, even if Patricia Lozano told her children that she had never married their  
27 father, a number of interests other than the truth likely motivated her statements. For her  
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1 children's own welfare she likely wished to diminish their attachment to a father who had  
2 abandoned them all and whom Petitioner had never seen. She also likely hoped for a new  
3 married life in her native land, which she found in a marriage to Francisco Orozco  
4 Alcaraz in 1961 when Petitioner was 8 years old. By holding herself out as never married  
5 to the children's father, she avoided a social or legal cloud over her hopes and her later  
6 married life. Third, and most importantly, any such statements by Petitioner's mother are  
7 persuasively contradicted by the several official documents that establish the existence of  
8 a marriage between Petitioner's parents.

## 9 **2. Unresolved Evidentiary and Legal Issues**

10 Notwithstanding the above findings, the Court does not yet reach a conclusion as  
11 to whether Petitioner is a United States citizen under INA § 309(c), 8 U.S.C. § 1409  
12 (1950). To counter Respondent's proof at trial of Petitioner's parents' marriage,  
13 Petitioner offered into evidence proposed Exhibit 4B, a document that purports to be a  
14 handwritten account of his parents' marriage ceremony signed by his mother but possibly  
15 not his father. Petitioner maintains that because his father did not sign the document, his  
16 parents' purported marriage is void. Upon inquiry by the Court, counsel for Respondent  
17 acknowledged that Petitioner's unauthenticated and possibly incomplete proposed exhibit  
18 was obtained by Immigration and Customs Enforcement attachees based in Monterrey,  
19 Mexico. Respondent delivered it to Petitioner, who offered it into evidence. Because the  
20 document lacked attestation and final certification, it was tentatively excluded pursuant to  
21 Fed. R. Civ. P. 44(a)(2) and Fed. R. Evid. 901(a).

22 The Court indicated, however, that it may reconsider its ruling at a later time. In  
23 addition, because the congruency between the handwritten document and the November  
24 9, 2009 certification of Petitioner's parents' marriage record suggests that the certification  
25 may have been derived in whole or in part from the handwritten document, the Court  
26 inquired into the possibility of establishing a foundation for and obtaining a complete  
27 copy of the handwritten document. Respondent indicated that such a task would be  
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1 extremely time-consuming and burdensome. Respondent also argued that pursuant to  
2 *Codigo Civil para el E.L. y S. De Zacatecas*, Title VI, Chapter I, Article 46 (1964), the  
3 handwritten document cannot be considered evidence of Petitioner's parents' marital  
4 status because the November 9, 2009 marriage certification is conclusive evidence of  
5 Petitioner's parents' marital status. Article 46, translated into English, states that a  
6 person's marital status is only proven by the registry's respective records and that no  
7 other document is admissible to prove marital status. At this time, however, it is unclear  
8 whether the provision applies to *certifications* of records in the registry, such as the  
9 November 9, 2009 certification of Petitioner's parents' marriage record, in addition to the  
10 original records themselves. There is also uncertainty as to whether the handwritten  
11 document is a copy of the original record from which the certification was derived.

12 To avoid unnecessary expense and delay, the Court issued an order on May 3,  
13 2010, directing Respondent to submit additional briefing on the legal significance of what  
14 Petitioner's excluded Exhibit 4B purports to show. If the possible absence of Macario  
15 Carrillo Garcia's signature on the document has no material bearing on the validity of his  
16 marriage to Patricia Lozano, there is no need to ascertain its origin or obtain a complete  
17 copy. However, Respondent subsequently moved for a substantial extension of time in  
18 which to submit the additional briefing, explaining that the Law Library of Congress  
19 would be unable to render assistance within the time provided by the order and that the  
20 Department of State would be asked for assistance. (Doc. # 156.)

21 The legal significance of Petitioner's proposed Exhibit 4B turns on seemingly  
22 straightforward but as-of-yet unknown principles of Mexican law, and more specifically,  
23 Zacatecas law. Therefore, the Court concludes in the interest of economy that it should  
24 appoint an independent expert pursuant to Fed. R. Evid. 706(a) to render a written  
25 opinion on the legal significance of proposed Exhibit 4B under principles of Zacatecas  
26 law in 1948. The Court has conferred with and obtained the consent of Lic. Nicolas Jesus  
27 Olea Osuna to serve as a court-appointed expert. Mr. Olea is a Mexican attorney of the  
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1 highest skill, reputation, and ethical standards, long known to this Court. His curriculum  
2 vitae is attached to this order. Mr. Olea will be called upon to give a written opinion on  
3 the following questions:

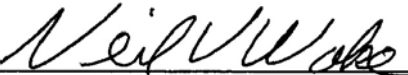
- 4 (1) Assuming without deciding that Exhibit 4B is a copy of the original record  
5 of Petitioner's parents' marriage solemnization on July 5, 1948, and  
6 assuming Petitioner's father did not sign the original record, did the absence  
7 of his signature invalidate the marriage under Zacatecas law?
- 8 (2) If so, is the November 9, 2009 certification of Petitioner's parents' marriage  
9 record conclusive evidence of the content of the original record, so as to  
10 preclude consideration of direct evidence of the original record to prove that  
11 Petitioner's father did not sign the original record?

12 In addition to providing a written opinion on the above issues in English, Mr. Olea will be  
13 asked to include copies of the applicable provisions of Zacatecas law, together with  
14 English translations thereof, in an appendix to the opinion. Mr. Olea's fees will be  
15 assessed against Respondent pursuant to Fed. R. Evid. 706(b), as Petitioner lacks the  
16 resources to pay his share of the fees.

17 If the Court concludes, after consideration of the opinion of Mr. Olea, that the  
18 assumed absence of Macario Carrillo Garcia's signature on proposed Exhibit 4B would  
19 void his marriage to Patricia Lozano, the Court will consider requiring Respondent to  
20 explore the provenance of the document and obtain a complete copy thereof to determine  
21 whether or not it includes Macario Carrillo Garcia's signature.

22 IT IS THEREFORE ORDERED that Lic. Nicolas Jesus Olea Osuna is appointed  
23 pursuant to Rule 706(a), Federal Rules of Evidence, to render a written opinion as  
24 provided in this order.

25 Dated: June 8, 2010.

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27 \_\_\_\_\_  
28 Neil V. Wake  
United States District Judge

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2 **NICOLÁS JESÚS OLEA OSUNA**

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3 (52) 644 4151311

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5 **EDUCATION**

6 **1971-1977** **University of Sonora**, Hermosillo, Sonora, México.  
Licenciate in Legal Sciences (J.D. Equivalent).  
7 Thesis: "Testamentary Trust".

8 **PROFESSIONAL EXPERIENCE**

9 **1987-Present** **Olea Osuna Abogados, S.C.**, Obregón, Sonora.  
10 Focused on corporate law, banking and foreign investment  
regulations, administrative law, commercial law, agrarian law, civil  
11 law, in-bond industry, real estate law and complex litigation in such  
areas. Worked with foreign nationals and Mexican subsidiaries of  
12 foreign entities

13 **1980-1987** **Empresas Matco, S.A. de C.V.**, Obregón, Sonora.  
Worked as head of legal and credit and collections departments.

14 **1978-1981** **Unibanco, S.A.**, Obregón, Sonora.  
15 Head of legal and trust departments.

16 **1977-1979** **Prosecutors Office**, Nogales, Sonora.  
Worked as the City Attorney.

17 **1976-1978** **Third Criminal Court**, Hermosillo, Sonora.  
18 Law clerk in charge legal proceedings and drafting judicial  
resolutions.

19 **1975-1977** **Third Civil Court**, Hermosillo, Sonora.  
20 Law clerk in charge of Notifications Department.

21 **ASSOCIATIONS**

22 **2009-Present** **La Salle Northwestern University, A.C.** Member of the Board of  
23 Directors.

24 **2008-Present** **Monterrey Institute of Technology (ITESM) in Ciudad Obregon's**  
**Campus.** Member of the Board of Directors.

25 **2007-Present** **Megacable, S.A.B. de C.V.** Member of the Board of Directors,  
26 Chairman of Corporate Governance Committee and member of the  
Audit Committee.

27 Megacable is the largest cable provider in the country and the third  
28 largest telecommunications company in Latin America.

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**1998-Present**

**Red Cross Mexico in Ciudad Obregon.** Member of the Board of Directors.

**1987-Present**

**Empresas Matco, S.A. de C.V., Inmobiliaria Matco, S.A. de C.V.** Commissioner supervising the administration of both companies. Empresas Matco is a Caterpillar dealer in 4 states of northwestern Mexico.

**1994-1998**

**Cajeme City Council.** President of Public Security Committee.

**1994-1997**

**Sister Cities Committee Obregon-Tucson.** President.

**LANGUAGES**

Spanish (native speaker), English (fluent).