THE LEGAL ADVISER

DEPARTMENT OF STATE

WASHINGTON

December 10, 2003

Sir:

I am writing with reference to the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*. On 28 November 2003, Mexico requested leave to submit additional documents to the court pursuant to Article 56 of the Rules of Court[1]. On 2 December, 2003, the United States informed the Court that it did not object to the production of the additional documents[2]. It also notified the Court that it intended to exercise its right to comment upon these documents and to submit documents in support of its comments[3]. On 2 December 2003, Mexico supplemented its submission of 28 November to include one additional document[4]. On 5 December 2003, the United States informed the Court that it did not object to the production of the additional document, and reminded the Court of its intention to submit comments on Mexico's additional documents on 10 December 2003[5].

Mr. Philippe Couvreur,
Registrar,
International Court of Justice,
The Hague.

---

[1] Letter from Ambassador Santiago Oñate Laborde, Agent of Mexico, to Philippe Couvreur, Registrar, International Court of Justice, dated 26 November 2003, which was filed with the Court on 28 November 2003 (hereinafter "26 November letter").

[2] Letter from William H. Taft, IV, Agent of the United States of America, to Philippe Couvreur, Registrar, International Court of Justice, dated 2 December 2003.

[3] *Id.*

[4] Letter from Ambassador Santiago Oñate Laborde, Agent of Mexico, to Philippe Couvreur, Registrar, International Court of Justice, dated 2 December 2003 (No. PBA-03070).

[5] Letter from William H. Taft, IV, Agent of the United States of America, to Philippe Couvreur, Registrar, International Court of Justice, dated 5 December 2003.

Accordingly, pursuant to Article 56, paragraph 3, of the Rules of Court, the United States respectfully submits the following comments on the additional documents submitted by Mexico.

The United States fully agrees with Mexico that the factual record for the 52 cases currently put at issue by Mexico in this litigation is enormous[6]. The United States also concurs with Mexico's assessment that if both parties were to submit all relevant documentation to the Court, "[t]he magnitude of this submission would have placed an enormous burden on the Members of the Court…"[7].

This is one of the primary reasons why the United States believes that, as this Court said in *LaGrand*, it is for "the United States of America, by means of its own choosing... [to] allow the review and reconsideration of the conviction and sentence" in those cases where review and reconsideration is warranted under *LaGrand*.[8]

Nevertheless, should this Court decide to undertake the inquiry, the magnitude and complexity of the factual records of the 52 cases for which Mexico currently seeks relief, cannot excuse Mexico from the obligation of a petitioning party to prove its case with respect to each of these 52 cases before the Court can consider the remedies that Mexico seeks. This it has not done, and cannot do for the reasons explained in the Counter-Memorial. Indeed, Mexico's latest submission withdraws its request for relief in two of the original 54 cases raised by Mexico in its Application[9].

---

[6] 26 November letter at 2.

[7] *Id.*

[8] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001* at para. 128(7).

[9] #28 Enrique Zambrano and #50 Pedro Hernández Alberto. 26 November letter at n. 11, n. 14. On 14 October 2003, approximately two weeks before the Counter-Memorial was due, Mexico sought to amend its submission to include two additional cases: Victor Miranda Guerrero and Tonatihu Aguilar Saucedo. Letter from Ambassador Santiago Oñate Laborde, Agent of Mexico, to Philippe Couvreur, Registrar, International Court of Justice, dated 14 October 2003 (No. PBA-02650). On 2 November 2003, the United States objected "to Mexico's attempt to amend its submission to include these two cases at this late date". Letter from William H. Taft, IV, Agent of the United States of America,

The additional documentation submitted by Mexico suffers from the same problems as the supporting materials annexed to Mexico's Memorial. Namely, it is incomplete, misleading, and incorrect. Moreover, these additional documents do not, as Mexico contends, "eliminate any possible doubt about the basic facts of the case before this Court"[10]. In some cases, the documents add further uncertainty to the record before the Court. For example, the birth certificates reveal at least one additional case in which the defendant may have acquired United States citizenship through birth abroad to a United States citizen parent[11].

Mexico concedes in its latest submission that the United States is not obligated under the Vienna Convention to provide consular information and consular notification to United States nationals. On this basis, it has properly withdrawn its request for relief in the case of Enrique Zambrano (#28)[12]. It has still failed, however, to provide the key information that would be necessary to show an absence of United States citizenship in many of the remaining cases, such as key information about the

---

to Philippe Couvreur, Registrar, International Court of Justice, dated 2 November 2003.

[10] 26 November letter at 3.

[11] Although we understand that an authentic Mexican birth certificate may establish Mexican nationality at birth, many of the birth certificates presented contain illegible entries or unexplained omissions. In addition, the birth certificate of #41 Ruben Ramirez Cardenas provides information that increases the possibility that he may be a United States citizen. On his birth certificate, his mother's nationality is listed as "Norteamerica," i.e. United States. A child born to a United States citizen mother abroad at the time of Ramirez Cardenas's birth, if the parents were married, automatically became a United States citizen at birth if, by that time, the mother had been physically present in the United States for ten years, five of which were after the mother's fourteenth birthday. If the parents were not married, the child acquired United States citizenship if the United States citizen mother was physically present in the United States for a continuous period of one year prior to the birth. Thus, to rule out the possibility that Ramirez Cardenas is a United States citizen as a result of his mother's apparent United States citizenship, Mexico must produce information about the mother's periods of presence in the United States and her marital status at the time of his birth. The United States does not have this information.

[12] 26 November letter at n. 11.

individual's parents. The information needed was clearly enumerated in the Declarations submitted with the Counter-Memorial[13], and is far more readily available to Mexico than the United States, since it is primarily in the possession of the individuals and families to whom these cases relate. Instead, Mexico has presented other, less useful evidence[14], as well as a Declaration that contains significant errors as to the operation and administration of United States citizenship law[15]. The declaration of Edward A. Betancourt

[13] Counter-Memorial, Vol. II, Annex 18, Declaration of Edward A Betancourt Concerning United States Citizenship Law at paras. 4, 7, and 9. Mexico wrongly states in its recent submission that it is the United States, not Mexico, that possesses the necessary information to determine United States citizenship because it maintains "A" files for naturalized citizens. 26 November letter at 5. This assertion ignores several relevant facts set forth in the three citizenship-related declarations appended to the Counter-Memorial. First, "A" or "Alien" files are intended to catalog certain aliens, not United States citizens. Because children who acquire United States citizenship through birth abroad to a United States parent are United States citizens (not aliens) at birth, see 8 U.S.C. 1401(g), they should not have "A" files. Second, in the case of a child who has been naturalized by operation of law because of the naturalization of a parent, the child's "A" file would not necessarily contain a record of the child's naturalization because the child became a United States citizen automatically, by operation of law. Thus, the child's "A" file may continue to indicate that the child is an alien, despite the fact that the child has become a United States citizen. To resolve an individual's citizenship status, in cases where derivative naturalization is a possibility, it may be necessary to locate the parents' files, which in the absence of the parents' names, dates, and places of birth is extremely difficult and could be impossible. This basic identifying information should be readily available to Mexico.

[14] The "Additional Nationality Documents" submitted by Mexico are documents created by United States state or local officials, defense counsel, or Mexican government officials, none of whom could be expected to be experts in United States citizenship law, which is a federal matter. If statements indicating Mexican nationality appearing on such documents could be considered "proof" of nationality, several of the individuals at issue in this case would be "proven" United States citizens, since similar documents listed United States nationality in several cases. *See, e.g.*, Counter-Memorial at 7.10 n. 336. Although these documents may indicate what an individual has reported, or, alternatively, what the drafter perceived, they are not determinative.

[15] The affidavit submitted by Adjunct Professor Karen Ellington reflects significant misunderstandings of United States citizenship law and its application to the individual cases presented. It also overestimates the ability of the United States to adjudicate citizenship cases without the cooperation of the individual concerned. As stated in Mr. Betancourt's second declaration, submitted herewith, the United States usually depends on the individual to provide the requisite information.

appended to this submission responds in detail to that Declaration and explains, *inter alia*, that because the nationality laws of the United States are extremely complex, especially with regard to derivative nationality, it is not uncommon for a person not to know that he or she is a United States citizen.

Mexico submits additional declarations from, or on behalf of, forty-one of the individuals whose cases Mexico has brought before this Court, in an effort to prove the Article 36 breaches it alleges. In general, these self-serving declarations add little to the conclusory statements already made in the Declaration of Ambassador Rodríquez Hernández[16], and in some cases they are inaccurate or misleading. For example, the Declaration of Conrad Petermann[17], which is made on behalf of Ramón Bojórquez Salcido (#22), asserts that "[h]e never learned that he had the right to request the assistance of the Consulate of Mexico". Ambassador Hernández' Declaration in Mexico's Memorial states, however, that Bojórquez Salcido requested assistance from the Mexican consulate five months after arriving in the United States[18]. In addition, the Petermann Declaration makes no mention of the fact that Bojórquez Salcido was deported to the United States at his own request, based upon Bojórquez Salcido's sworn statement before a Mexican court that he had renounced his Mexican nationality and had become a United States citizen[19].

Another example of inconsistencies between Mexico's Memorial and its recent submission is found in the declaration of Luis Alberto Maciel Hernández, which states

---

It is simply untrue that, as Mexico claims, all the necessary information is in United States' hands, and it is clear that the necessary information is far more readily available to Mexico.

[16] All but five of these declarations were made after the United States submitted its Counter-Memorial, and they generally consist of a rote statement regarding nationality, a general claim that they were not provided consular information following their arrest, and an assertion that had they been provided consular information they would have immediately requested consular notification and assistance.

[17] 26 November letter, Annex 70, Appendix 20.

[18] Memorial, Annex 7, Exhibit A at para. 117.

[19] Declaration of Ramón Salcido Bojórquez, *reprinted in*, Counter-Memorial, Volume II, Annex 2 at A151.

"I was not able, either *before or after the trial*, to receive the Consulate's help because I did not know I had that right"[20]. This directly contradicts Mexico's assertion that it has been "rendering assistance, both legal and otherwise", including attending Hernández' sentencing hearing, since learning of his case on 28 April 1998[21]. Other declarations raise similar discrepancies with regard to the provision of consular assistance[22].

Mexico asserts that with these additional declarations it has proven breaches of Article 36 in these cases. It has not. In addition, Mexico asserts that it need not prove breaches in the remaining cases because prosecutors have stipulated, or courts in the United States have found, that the competent authorities failed to provide consular information without delay[23]. The United States notes that

---

[20] 26 November letter, Annex 70, Appendix 12 (emphasis added).

[21] Memorial, Annex 7, Appendix A at para. 69.

[22] The recently submitted February 1994 affidavit of Cesar Robert Fierro states "I first learned of my right to contact the consulate from Hernan Ruiz, who visited me a few weeks ago and told me about this right. Before that, I had never heard of the Vienna Convention on Consular Relations". 26 November letter, Annex 70, Appendix 26 (this affidavit was previously submitted as part of Annex 33 of the Memorial, page A680). This appears to be at odds with the assertion in Ambassador Hernández' declaration that Mexico learned of Fierro Reyna's detention "after his sentence was imposed", (which the United States has determined was no later than 1991), and has since been providing him "extensive and ongoing consular assistance". Memorial, Annex 7, Appendix A at para. 172. Similarly, the recently submitted affidavit of Mario Flores Urbán states "[m]y first contact with the Mexican Consulate's Office was on or about September 1988 when I received a Deportation summons from the Immigration and Naturalization Service". 26 November letter, Annex 70, Appendix 36. This contradicts the earlier assertion in Ambassador Hernández' declaration that Mexico learned of Flores Urbán's case in August 1985 and "began rendering assistance, both legal and otherwise". Memorial, Annex 7, Appendix A, para. 297.

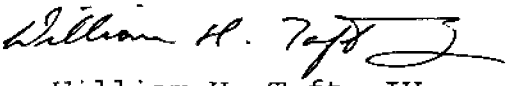
[23] Mexico asserts that "in ten cases, U.S. courts have found that the United States violated Article 36(1)(b)". 26 November letter at 6. This statement is misleading, and in one case incorrect. In three of these cases (Sánchez Ramírez (#23), Ignacio Gómez (#33), and Ramiro Ibarra (#35)), the court merely found that the parties did not dispute that consular information was not provided to the defendant. In the case of Leal Garcia (#36), the court noted that the interrogating officer had testified that he had not provided consular information, but found that suppression of Leal Garcia's statement was not appropriate since he was not in custody when he provided the

state prosecutors may choose not to dispute such allegations if they believe that the defendant's claim is without merit, for example, in cases where the defendant is unable to show that he was harmed by the failure to provide consular information, even assuming that it occurred.

Even if this Court should find that these stipulations and findings provide an adequate basis for finding that Article 36(1)(b) was violated, Mexico must still prove that the United States violated Article 36(2) and that the remedies it seeks are available from this Court, and if so, are appropriate, and warranted. This it has not done and cannot do.

Mexico retains its burden of proof in establishing that each and every individual for whom a failure of consular information and notification is alleged, was, in fact, subject to the VCCR's provisions, and that the United States breached its obligations under Article 36 with respect to each of these individuals. The latest Mexican submission is not sufficient for Mexico to achieve that goal.

Accept, Sir, the assurance of my highest consideration.



William H. Taft, IV
Agent of the United States
of America

---

statements. *Ex Parte Leal*, No. 94-CR-4696-W1 (186th Dist. Tex., Oct. 20, 1999), at 62 (reprinted in Mexican Memorial, Annex 51, A1133).

SECOND DECLARATION OF EDWARD A. BETANCOURT
CONCERNING UNITED STATES CITIZENSHIP LAW

1. I am Edward A. Betancourt, Director of the Office of Policy Review and Interagency Liaison within the Overseas Citizens Services Directorate of the Bureau of Consular Affairs of the United States Department of State. In connection with the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, I have previously submitted the Declaration that is Annex 18 to the United States Counter-Memorial. I am also familiar with the Declaration of Peter W. Mason Concerning the Fifty Four Cases, which is Annex 2 to the United States Counter-Memorial, and other relevant information within the possession of the United States regarding certain cases discussed in that Declaration.

2. I have been employed in the United States Department of State for 29 years and have performed functions relating to citizenship law throughout that period. During that time, I have assisted in citizenship adjudications of thousands of individuals, including both persons born abroad to a United States citizen parent and persons who were naturalized automatically upon the naturalization of a parent or parents. As a lawyer handling citizenship issues for the United States Government, I have acquired particular insights into the operation of United States citizenship laws and the information on which the United States Government relies to resolve citizenship questions. Most immigration attorneys in private practice or academia would not have acquired these insights, or the breadth of experience to understand fully the operation of the laws concerning citizenship acquisition, especially with respect to derivative naturalization and citizenship acquisition through a United States citizen parent. In fact, when speaking to groups of such attorneys, I often begin by setting forth the differences between immigration law, with which they are more familiar, and citizenship law, with which they are generally less familiar.

3. I have reviewed the Declaration of Karen F. Ellingson, Attorney at Law, annexed to Mexico's letter of November 26, 2003[1]. Ms. Ellingson claims to have taught, lectured, and trained others in the area of immigration law, to be a member of certain immigration law-related organizations, and to be a practicing immigration lawyer. She asserts that her current practice is "devoted to immigration issues" and brings her into contact "with the procedures followed by United States authorities in a wide variety of naturalization and citizenship proceedings"[2]. Based on this description of Ms. Ellingson's background, and the approach she has taken in her Declaration, I consider it highly unlikely that Ms. Ellingson has spent a significant amount of time working on

[1] Declaration of Karen F. Ellingson, Annex 69 to Letter from Ambassador Santiago Oñate Laborde to Philippe Couvreur, Register, International Court of Justice, dated 26 Nov. 2003 ("Ellingson Declaration").

[2] Ellingson Declaration, paras. 1 - 2.

issues concerning the acquisition of citizenship through birth to a United States citizen parent abroad. I would also expect that her experience with derivative naturalization (as opposed to naturalization on her client's own application) is limited. Ms. Ellingson's Declaration reflects a fundamental misunderstanding of United States citizenship law and the citizenship adjudication process. Although the Declaration contains several legal errors, misapplications of the law, and false assumptions about the adjudication process, I will highlight only a few.

4. First, Ms. Ellingson contends that, in the case of a child born abroad to only one United States citizen parent, the child does not acquire citizenship until an application for a certificate of citizenship (Form N-600) is filed on the child's behalf[3] with the Department of Homeland Security (or, previously, the Immigration and Naturalization Service (INS)). This is untrue. Where the United States parent has satisfied the applicable transmission requirements, the child acquires United States citizenship at the moment of birth. *See, e.g.,* 8 U.S.C. § 1401 ("The following shall be nationals and citizens of the United States at birth: . . . . "). There is no requirement to seek documentation of that citizenship. It is therefore fundamentally wrong to say that an N-600 application should be readily available to immigration authorities to establish citizenship, and consequently wrong to say that "[t]he absence of such an application virtually excludes any possibility of citizenship acquired by this means; that is, by a child born abroad to one citizen parent"[4]. In fact, in the majority of cases, an N-600 is not filed for children who acquire United States citizenship by birth abroad to a United States citizen parent. Instead, a Consular Report of Birth Abroad of a Citizen of the United States of America or a United States passport, both Department of State documents, may be sought. In many cases, however, no documentation is sought at all. Yet in every case, the individual is a United States citizen, regardless of whether the United States Government has any record of the child[5]. Because our laws do not require that United States citizens be documented as such, there likely are millions of United States citizens for whom the United States Government has no record of citizenship.

5. Moreover, it is my professional experience that it is not uncommon for persons to be unaware of whether they or their children are United States citizens. This is particularly true among persons born in Mexico and Canada. Often persons in Canada

---

[3] Ellingson Declaration, para. 11.

[4] *Id.*

[5] As noted in my first declaration, there is no comprehensive register maintained by the United States Government that lists the names of all United States citizens, and United States citizens do not carry a national identity card. Instead, a record is created when proof of citizenship is sought (for example, if a passport application is filed or a certificate of citizenship is sought). United States citizens commonly do not apply for passports until they are preparing to travel outside the United States to an area where a passport is required. United States law has not generally required United States citizens to carry a passport to travel between the United States and adjacent countries such as Mexico and Canada. *See* 22 C.F.R. § 53.2.

and Mexico who are unaware of their United States citizen status are children of United States citizens, but the United States citizen parent has concealed that fact or the possibility that his or her child is a United States citizen because of concerns related to prohibitions on dual nationality (I understand that Mexico prohibited dual nationality until a constitutional amendment in 1998) or prohibitions on foreign ownership of property (also historically present in Mexico). A United States citizen parent may also choose to withhold information about possible United States citizen claims from his or her child for fear that the child may elect to move to the United States, thereby abandoning the parent. It is my professional opinion that there are many United States citizens who are unaware of their United States citizenship.

6. In many cases, the fact that a person is a United States citizen is not adjudicated until the person applies for a visa on the assumption that he or she is not a United States citizen. Because a visa may not be issued to a United States national, a consular officer, if presented with a visa application from an applicant with indicators of United States nationality, is expected to investigate the individual's citizenship even if the applicant has not claimed to be a United States citizen. In fact, with respect to immigrant visa applications, no final action may be taken on the visa until the citizenship issue is resolved.

Acquisition of United States Citizenship At Birth by Persons Born Outside the United States to One United States Citizen Parent

7. Second, Ms. Ellingson incorrectly analyzes the citizenship indicators in the two cases she discusses in depth – Carlos Avena Guillen and Hector Juan Ayala – both of whom appear to have been born outside the United States to a United States citizen parent, a fact that is a strong indicator of United States citizenship[6].

Carlos Avena Guillen

8. In the Avena Guillen case, Ms. Ellingson begins by asserting that "[a]ccording to records maintained by the United States, Mr. Avena has never applied for citizenship. This fact alone is powerful – perhaps conclusive – proof that Mr. Avena is not a United States citizen."[7] This statement reflects a basic misunderstanding of the law. If Mr. Avena acquired United States citizenship through his United States citizen father, no application for citizenship should exist in United States records. Children who acquire citizenship through birth abroad to a United States citizen parent would not "apply" for United States citizenship – they are United States citizens already. As United States

[6] I cannot undertake a final adjudication of U.S. citizenship, or of the individual elements of a citizenship claim, with respect to either Mr. Avena or Mr. Ayala in this context. Before such an adjudication could be made, I would need to review original or certified copies of relevant documents, as well as, in some cases, to collect statements or other information from the individual, family members, or others with relevant information.

[7] Ellingson Declaration, para. 12.

citizens, they may or may not apply for documentation of their citizenship, but, as explained above, documentation is not necessary to their status.

9. Ms. Ellingson also misunderstands the citizenship law applicable to Mr. Avena's case. Assuming that Mr. Avena was, as Ms. Ellingson asserts, born out of wedlock[8], there are three issues that would control citizenship transmission: paternity, legitimation, and the father's periods of physical presence in the United States prior to Mr. Avena's birth. With respect to the first, Ms. Ellingson notes what she characterized as the "strict paternity requirements" that pertain to a child born abroad and out of wedlock to a United States citizen father. It is true that the individual must provide "clear and convincing" evidence of paternity in such cases, but this standard is not difficult to meet in cases where, as in the case of Mr. Avena, there does not appear to have been any question as to paternity. It appears that Mr. Avena's parents remained together at the time of the birth and for some time thereafter (four more children were apparently born to the couple) and the United States citizen father is listed on the birth certificate (which, in fact, states that they were "casados" or "married")[9]. Information such as this would normally be sufficient to establish paternity. No blood tests are required, and the standard is not proof beyond a reasonable doubt.

10. Citizenship would also depend on legitimation, a subject that Ms. Ellingson fails to address. Legitimation would not normally be a difficult hurdle where, as in this case, the parents married when Mr. Avena was fourteen[10] and it appears that the father held Mr. Avena out as his own child. Thus, the information available about Mr. Avena also suggests that the requirement of legitimation has been met for purposes of allowing Mr. Avena's father to transmit United States citizenship to his son.

11. The final question to be addressed is whether Mr. Avena's father met the applicable United States physical presence requirements for transmittal of citizenship to his son. What is needed is information detailing the periods of time that the father was present in the United States prior to Mr. Avena's birth. This type of information is not normally available to the United States but instead is usually provided to the United States by the individual in question. Nothing in Ms. Ellingson's Declaration or in the other material submitted by Mexico on November 26, 2003, provides this information with respect to Mr. Avena's father.

---

[8] There is some question as to whether the out-of-wedlock analysis that Ms. Ellingson applies is the proper analysis. She indicates that counsel for Mexico have confirmed that Mr. Avena was born out of wedlock through his parents' marriage certificate. However, the Mexican birth certificate included in Mexico's submission for Mr. Avena indicates "casados" or "married" as his parents' civil status.

[9] *See generally* Declaration of Saul Achoy, attached as Exhibit 1 to Ellingson Declaration, paras. 13-18, 22-24.

[10] I have seen a copy of a California Record of Marriage indicating that Mr. Avena's parents were married on February 3, 1975. A prior, Mexican, marriage record could exist, but I am not aware of the existence of such.

Hector Juan Ayala

12. In the case of Hector Ayala, Ms. Ellingson's analysis also raises questions. The first question to be resolved in this case is whether Mr. Ayala's parents were married at the time of his birth on June 24, 1952. If Mr. Ayala was born in wedlock, Ms. Ellingson is correct that his mother would need to have resided for ten years in the United States prior to his birth in order to convey United States citizenship. However, if Mr. Ayala was born out of wedlock, pursuant to the Section 205 of the Nationality Act of 1940, in effect at the time of his birth, Mr. Ayala's mother need only have resided in the United States at some point prior to his birth. Information available to the United States suggests that, in fact, Mr. Ayala should be considered to have been born out of wedlock, but that, in any event, his mother likely met the ten-year residence requirement for children born in wedlock.

13. There is a significant possibility that Mr. Ayala should be considered to have been born out of wedlock, a possibility which Ms. Ellingson ignores. Although, as in the case of Mr. Avena, the birth certificate lists the parents as "casados" or "married", court transcripts from Mr. Ayala's case, attached as Exhibit 1 to this Declaration, suggest that Mr. Ayala's mother was legally married to someone other than Mr. Ayala's father at the time of Mr. Ayala's birth, although she had separated from her husband and had established a new household in a different city with Mr. Ayala's father. *See* Exhibit 1, p. 18184 (noting that Mr. Ayala's mother was first "married" to Raul Saenz, then moved and "entered a partnership" with Mr. Ayala's father). Under these circumstances, the "out of wedlock" rules would be applied, and Mr. Ayala's mother need only have resided in the United States at some point prior to his birth in order to convey United States citizenship. Based on the information I have reviewed, it seems evident that Mr. Ayala's mother would have satisfied this standard. *See, e.g.,* Exhibit 1, p. 18187 (noting that Mr. Ayala's mother "was the child of migrant farm workers, and spent a lot of her time" in the Oxnard, California area); Ayala Birth Certificate, Exhibit 1 to Appendix 2 of Declaration of Peter W. Mason Concerning the Fifty Four Cases, United States Counter-Memorial, at Annex 2 (listing the domicile of Mr. Ayala's parents as Otay, California).

14. It is also my professional opinion that the ten-year residence requirement that would pertain if Mr. Ayala were born in wedlock was, in any event, likely met in this case. Mr. Ayala's birth certificate indicates (1) his mother was an American citizen; (2) his mother's domicile, at the time of the birth, was in the United States; (3) her parents (grandparents of Mr. Ayala) also resided in the United States at that time; and (4) she was 32 years old when Mr. Ayala was born. This single document – indicating her own United States citizenship and United States domicile, that of her parents, and a relatively high maternal age – is strong evidence that she met the 10-year residence requirement necessary to satisfy transmission requirements and thus that Mr. Ayala is a United States citizen. In addition to this, Exhibit 1 to this Declaration suggests she spent significant time in the United States. Exhibit 1, p. 18187. Also, it appears that the Saenz family (Mr. Ayala's mother's first union, from which four children resulted) lived in Los Angeles, California. *See* Exhibit 1, p. 18184, 18191. Moreover, I am aware of no evidence that Mr. Ayala or his mother lived in Mexico for significant periods of time. *See, e.g.,* Exhibit 2, p. 12917 (testimony of Ayala's older brother confirming that Ayala family lived in

Tijuana on three occasions, but for fairly short periods of time). Thus, although I do not consider there to be enough information available to make a definitive determination of United States citizenship in this case, all available evidence that I have reviewed points toward Mr. Ayala being a United States citizen.

Acquisition of United States Citizenship Derivatively Through Naturalization of a Parent or Parents

15. Ms. Ellingson's statements on acquisition through naturalization are also misleading. For example, Ms. Ellingson asserts that the entire process for naturalization would take, at minimum, five years plus the time necessary to apply for citizenship, have the application successfully adjudicated, and complete the swearing in ceremony. In fact, the time period required is shorter in some cases (for example, three years for persons married to United States citizens). Moreover, insofar as the United States raised particular citizenship concerns about cases among the 54 originally at issue in this litigation, many of these individuals arrived with their parents as infants or small children. In these cases, the arrival was well more than five years and, in many cases, well more than a decade, before the person's 18th birthday, by which time naturalization would have had to occur. Moreover, in immigrant families, children will not infrequently come to join a parent who has already been in the United States for some time. In these cases, a child could arrive in the United States only shortly before the parent's naturalization and still acquire citizenship at the time the parent naturalized.

16. Lastly, and as a general matter, Ms. Ellingson fails to appreciate the difficulties faced in determining whether derivative naturalization has occurred without the participation and cooperation of the individual concerned. It would indeed take extensive time and effort, and may well be impossible, to backtrack through immigration records in order to reach a definitive conclusion as to whether a derivative naturalization has occurred without the assistance of the individual in question[11]. Although Ms. Ellingson states that, in her experience, immigration authorities in the United States generally experience little difficulty in accessing personal information from alien resident files,[12] the contents of an individual's "A" file can not be relied on to provide the necessary information about whether that person benefited from derivative naturalization. Instead, the key information will be in the "A" files of the individual's parents, who may or may not be identified in the individual's "A" file. In short, the most effective way to determine whether these individuals are United States citizens would have been for Mexico to have provided the information noted in my original declaration, principally information concerning the individuals' parents[13]. This Mexico has failed to do.

---

[11] *See* Declaration of Dominick Gentile, Annex 19 to United States Counter-Memorial.

[12] Ellingson Declaration, para. 9.

[13] In my previous affidavit, I set forth the types of information that would be required in order to make a determination of citizenship. *See* Declaration of Edward A. Betancourt, Annex 18 to United States Counter-Memorial, paras. 4, 7 and 9.

I solemnly declare upon my honor and conscience on this 10 th day of December, 2003, that the facts stated herein are true to the best of my knowledge and belief, and that any opinions stated herein are in accordance with my sincere belief.

Edward A. Betancourt

Edward A. Betancourt