

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA,)	CRIMINAL ACTION NO.
)	
Plaintiff,)	3:03-CR-144-M
)	
v.)	[FILED UNDER SEAL]
)	
XXX XXXX,)	
)	
Defendant.)	
<hr/>)	

EX PARTE MOTION FOR AUTHORIZATION TO RETAIN EXPERT

Defendant, XXX XXXX, pursuant to 18 U.S.C. § 3006A(e)(1), hereby moves this Court for authorization to obtain expert assistance from Paul Zoltan, an immigration lawyer. In support of this motion, Mr. XXXX sets forth the following facts and argument.

1. Mr. XXXX is charged with illegal reentry after deportation in violation of 8 U.S.C. § 1326(a) and (b)(2), and 6 U.S.C. §§ 202 and 557.
2. In order to establish illegal reentry as charged above, the first element the government must establish is that the defendant was an alien at the time alleged in the indictment. *See* Fifth Circuit’s pattern jury instructions. Of course, the government must prove this element to the jury (and the Court) beyond a reasonable doubt.
3. Mr. XXXX’s defense to the offense is that he is a citizen, or alternatively, that reasonable doubt exists with respect to his alienage.

4. Mr. XXXX has raised this issue in a motion to dismiss that is currently pending. Counsel believes this issue is better raised at trial. It is better to raise this issue at trial because the legal question of Mr. XXXX's status, as an element of the crime, becomes a question of fact to be resolved by the jury or the court. More importantly, if raised at trial, any determination of the issue adverse to the government by the Court or the jury may not be appealed.
5. In order to raise this issue in a trial proceeding counsel will need to put into evidence the expert testimony of an immigration law expert in order to explain, how, by operation of law, Mr. XXXX is, in fact a U.S. citizen, or alternatively, how his status is not clear.
6. Counsel, realizes this is a rather extraordinary and unusual claim to make in an illegal reentry case. After all, Mr. XXXX has been deported and the Immigration and Naturalization Service believes that he is an alien.¹ This motion, therefore, will briefly explain the legal theory on which Mr. XXXX, relies.
7. Mr. XXXX was born in Nuevo Laredo, in the state of Tamaulipas, in the country of Mexico in 1957. His father was Mexican. His mother, born in 1937, was also born in Mexico.

¹ The government has filed a motion in limine requesting that Mr. XXXX be precluded from collaterally attacking the legality of the defendant's removal hearing. Mr. XXXX does intend to attack the legality of the prior deportation. The immigration court deported based on the evidence and law that it had before it. Mr. XXXX's defense is that the government cannot prove one of its elements of the offense, namely, his alienage, beyond a reasonable doubt. Because this is an element of the crime he has a constitutional right to raise this issue at trial.

Her father, however, was born in Texas, and consequently was a U.S. citizen. Because he was a U.S. citizen, XXXX's mother was also born a U.S. Citizen. *See* R.S. 1993, as amended in 1934, 48 Stat. 797, formerly 8 U.S.C.A § 6 (“All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be a the time of their birth citizens thereof, are declared citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”)² Although XXXX's mother was born a citizen, she did not transmit that citizenship to him at his birth because she had not lived in the United States, prior to his birth. The law in effect at the time of XXXX's birth provided, the his mother must have been physically present in the United States prior to the child's birth for a period of ten years, at least five of which were after the age of fourteen. 8 U.S.C. § 1401(g) (prior version).³ In 1966, after her husband, XXXX's father had died, his mother, at the age of 29, mother filed Form N-600, a request for an “Application for Certificate of Citizenship,” based on her father's U.S. citizenship. Based on her application, the I.N.S. granted her a certificate, but, remarkably, they did so in error. XXXX's mother, was not, in

² The citizenship of a child who acquires citizenship through a parent, is determined by the law in effect at the time the child was born.

³ XXXX's maternal grandfather, according to I.N.S. documentation, lived in the United States from 1919 until 1936, so XXXX's mother, unlike he, qualified for citizenship at birth. The current version of the statute now requires physical presence in the United States prior to the child's birth for only five years, at least two of which were after the age of fourteen.

fact, entitled to certificate of citizenship. Section 1993 of the Immigration and Nationality Act of June 27, 1952 (8 U.S.C. § 1431) (repealed in 1978) provided:

Any person who is a national and a citizen of the United States at birth under paragraph (7) of subsection (a), (i.e., born outside of the United States, of a U.S. citizen and one alien parent, and the U.S. citizen parent had resided in the United States for the requisite time period), shall lose his [or her] nationality and citizenship unless he [or she] shall come to the United States prior to attaining of twenty-three years and shall immediately following any such coming be continuously present in the United States for at least five years: provided that such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

XXXX's mother, therefore, who admits in her Form N-600 application that she had never resided in the United States, did not, therefore, fulfill the "retention requirement," and should not have been granted a certificate of citizenship pursuant to 8 U.S.C. § 1401(g). At first glance, this conclusion appears to weaken XXXXX citizenship claim. But closer examination reveals otherwise.

8 U.S.C. § 1435(d) provided that a person who loses their citizenship because they do not meet the retention requirement quoted above, "from and after taking the oath of allegiance required by section 1448 of this title be a citizen . . . without filing an application for naturalization." When XXXX's mother filed her application for a certificate of citizenship, she, in fact, took the oath of allegiance required by section 1448. Therefore, by operation of law, she became a

naturalized citizen. In other words, although she was born a citizen, she lost her citizenship because she failed to reside in the United States for five years between the age of fourteen and twenty-eight. She regained her citizenship, by a process of automatic naturalization, when she took her oath of loyalty.

How she became a citizen⁴ makes all the difference in the world to Mr. XXXX. 8 U.S.C. § 1432(c) provided, in relevant part:

A child born outside of the United States . . . of an alien parent and a citizen parent, *who subsequently lost citizenship*, . . . becomes a citizen upon the fulfillment of the following conditions:

(3) The Naturalization of the parent having legal custody of the child when there has been a legal separation of the parents . . . ; and if

(4) Such Naturalization takes place while such child is under age of eighteen years; and

(5) . . . the [child of the] parent naturalized under clause (3) . . . begins to reside permanently in the U.S. under eighteen years of age.

Mr. XXXXX fulfills all of the above conditions. He was a child born outside of the United States of a citizen parent who subsequently lost citizenship; who was separated from his father due to his father's death; who was naturalized when she took the oath of loyalty before Mr. XXXX was eighteen years

⁴ “Particularly between 1934 and 1986, the statutes have prescribed different conditions and various contingencies [for the determination of citizenship], and have frequently changed these conditions. The variances have been substantial, and have produced complexity and confusion which can hardly be justified.” § 93.01[5][b], *Immigration Law and Procedure, Revised Edition*, Gordon, Mailman, Yale-Loehr.

old; and thereafter, he began to live in the United States as a permanent resident. Mr. XXXX, therefore, by operation of law, is a U.S. Citizen.

8. After having researched this issue, (with the assistance of Mr. XXXX), counsel consulted with a respected local immigration lawyer, Paul Zoltan. Mr. Zoltan informed counsel that his preliminary assessment was that the foregoing theory is legally sound. Counsel therefore requests permission to retain Mr. Zoltan as an expert witness.
9. Mr. Zoltan has been practicing exclusively immigration law for eleven years. He received his B.A. from Wesleyan University in 1987, and his J.D. from the University of Minnesota Law School in 1992. Between college and law school, Mr. Zoltan spent a year teaching in Auncion, Paraguay. Since 1992, he has practiced immigration law in Dallas, Texas. Until 1997, he served as Legal Services for the non-profit agency Proyecto Adelante. Since that time he has been in private practice. His practice focuses on the plight of refugees and the victims of human trafficking and domestic violence. For the past two years he has served as the Coordinator of the Dallas Section of the American Immigration Lawyers Association. In May 2002, he received a formal "Special Recognition" from Mayor Laura Miller and Dallas City Council "for generously and kindly assist[ing] the poorest of the poor to participate as full citizens in our democratic society."

10. In this case Mr. Zoltan has generously agreed to give his expert assistance at the reasonable rate of \$150.00 per hour.⁵ Although, in court time, and trial preparation time are difficult to predict in advance, Counsel anticipates that Mr. Zoltan will not need to expend more than twenty hours on this case.

WHEREFORE, XXX XXXX, respectfully requests that this Court authorize undersigned counsel to retain the service of Paul Zoltan in connection with the above referenced case at \$150 per hour to a maximum of \$5000.

Respectfully submitted,

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Attorney for Defendant
XXX XXXX

⁵ The Court should bear in mind that assisting criminals, or, as in this case, people with extensive criminal backgrounds, although important and necessary, is not as intrinsically rewarding as representing victims of domestic violence and human trafficking. Nevertheless, the rate the Court pays attorney appointed pursuant to the Criminal Justice Act is usually well under the rate paid to experts for those same defendants.

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EX PARTE ORDER [NOT TO BE SERVED ON PLAINTIFF]

Upon consideration of Defendant's *Ex Parte* Motion for Authorization to Retain Expert, said Motion is this ____ day of _____, 2003 GRANTED.

ORDERED Defendant is authorized to obtain the expert services of Paul Zoltan in connection with the above referenced case at a rate of \$150 per hour to a maximum of \$5000.

BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE