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## North v. Rooney

United States District Court for the District of New Jersey

June 18, 2003, Decided ; June 18, 2003, Filed

CIVIL. NO. 03-1811 (JBS)

### Reporter

2003 U.S. Dist. LEXIS 11299 \*; 2003 WL 21432590

ROBERT NORTH, Plaintiff, v. KEVIN ROONEY, et al.,  
Defendants.

**Disposition:** [\*1] Plaintiff's motion for entry of default and default judgment against defendants was denied; plaintiff's motion for temporary restraining order was granted.

### Core Terms

citizenship, removal proceedings, temporary restraining order, custody, detainer, entry of default, certificate, district court, declaration, motions, preliminary injunction, default judgment, Immigration, defendants', prison, plaintiff's claim, irreparable harm, incarcerated, injunctive, terminated, deportation, proceedings, enjoining, merits

### Case Summary

#### Procedural Posture

Plaintiff individual moved for an order to show cause, a temporary restraining order, and a preliminary injunction enjoining defendants, the Commissioner of the Immigration and Naturalization Service (INS), and the INS from taking him, upon his release from federal criminal custody, into Bureau of Citizenship and Immigration Services custody. The individual moved for default judgment in the underlying action.

#### Overview

The individual serving a term of imprisonment with respect to a federal conviction for possession of cocaine with intent to distribute and a parole violation. The individual alleged that he should be granted a certificate of citizenship because he was born in the Republic of Panama to a Panamanian citizen, and a United States citizen, his natural father. Later he was adopted by a U.S. soldier. The court denied the individual's application for entry of default and default judgment against the INS and its commissioner. The INS and commissioner argued that the individual did not establish that he and his putative father shared a blood relationship. The court found that the individual demonstrated a likelihood of success on the merits of his citizenship claim. The individual alleged substantial proof of his United States citizenship, dating from the 1950s onward, which was belied only by the absence of his birth certificate. In 1989, removal proceedings were terminated on the ground that the individual was a United States citizen. The court also found that the individual demonstrated imminent and irreparable harm absent issuance of a temporary restraining order.

#### Outcome

The individual's motion for default judgment was denied, and his motion for a temporary restraining order was granted.

### LexisNexis® Headnotes

and treaties of the United States.

Immigration Law > Naturalization > Administrative Proceedings > General Overview

### [HN1](#) **Naturalization, Administrative Proceedings**

See [8 U.S.C.S. § 1452\(a\)](#).

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Immigration Law > Judicial Proceedings > Judicial Review > Claims of US Citizenship

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Immigration Law > Judicial Proceedings > Judicial Review > General Overview

### [HN2](#) **Subject Matter Jurisdiction, Jurisdiction Over Actions**

See [8 U.S.C.S. 1503\(a\)](#).

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Immigration Law > Judicial Proceedings > Judicial Review > General Overview

### [HN3](#) **Jurisdiction, Jurisdictional Sources**

See [28 U.S.C.S. § 2201](#).

Criminal Law & Procedure > Habeas Corpus > Jurisdiction

Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview

### [HN4](#) **Habeas Corpus, Jurisdiction**

[28 U.S.C.S. § 2241](#) provides jurisdiction for a district court's review of claims for habeas relief where the applicant is confined pursuant to the laws, Constitution

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

### [HN5](#) **Default & Default Judgments, Default Judgments**

Under [Fed. R. Civ. P. 55\(e\)](#), a default judgment shall not be entered against the United States or an officer or agency thereof, unless the applicant establishes a right to such relief by evidence satisfactory to the court. Courts have consistently held that [Rule 55](#) precludes entry of default judgment against the government simply based on a failure to file an answer or responsive pleading within the time prescribed by the court rules.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

### [HNG](#) **Injunctions, Preliminary & Temporary Injunctions**

To secure the extraordinary relief of a temporary restraining order or preliminary injunction, plaintiff must demonstrate that: (1) he is likely to succeed on the merits; (2) denial will result in irreparable harm to him; (3) granting the injunction will not result in irreparable harm to the defendants; and (4) granting the injunction is in the public interest. A plaintiff must establish that all four factors favor preliminary relief.

**Counsel:** ROBERT NORTH, Washington, D.C., for Plaintiff.

Josie North, Plaintiff, Pro se, Tucson, Arizona.

Louis J. Bizzarri, Assistant United States Attorney,  
CHRISTOPHER J. CHRISTIE, United States Attorney,  
Camden, New Jersey, for Defendants.

**Judges:** JEROME B. SIMANDLE, United States District Judge.

**Opinion by:** JEROME B. SIMANDLE

## Opinion

### **SIMANDLE, District Judge:**

Presently before the Court are the emergent applications of plaintiff, Robert North, for an order to show cause, temporary restraining order, and preliminary injunction enjoining the defendants, Kevin Rooney, Acting Commissioner of the Immigration and Naturalization Service, and the Immigration and Naturalization Service (INS) from taking him, upon his June 17, 2003 release from federal criminal custody, into Bureau of Citizenship and Immigration Services (BCIS) custody pursuant to a detainer lodged by INS on February 9, 1999. Also before the Court are plaintiff's motions [\*2] for entry of default and for default judgment in the underlying action pending before the Court in which plaintiff seeks a declaration of United States citizenship. Defendants filed their responsive pleadings to these pending motions on June 12, 2003 and the Court heard oral argument on June 17, 2003. Plaintiff, currently confined at F.C.I. Fairton, appeared at the hearing *pro se*.

Having considered the arguments and papers submitted by both parties, and for the following reasons, this Court will grant plaintiff's motion for a temporary restraining order and will deny plaintiff's motion for entry of default

and for a default judgment. Plaintiff will be released from federal custody on June 17, 2003 to serve the term of his supervised release upon his 1999 criminal conviction pending this Court's hearing on plaintiff's motion for a preliminary injunction on August 1, 2003.<sup>1</sup>

[\*3] The following findings of fact and conclusions of law are made pursuant to [Fed. R. Civ. P. 65](#).

### I. BACKGROUND

#### A. Procedural History

Plaintiff filed his Complaint on March 11, 2002 in the United States District Court for the District of Columbia seeking a declaration of United States citizenship pursuant to [8 U.S.C. § 1503\(a\)](#) and [28 U.S.C. § 2201](#), seeking judicial review of the defendants' denial of his application for citizenship under [8 U.S.C. § 1452\(a\)](#). At the time, plaintiff was incarcerated at F.C.I. Fairton, in Fairton, New Jersey, serving a term of imprisonment with respect to a 1999 federal conviction from the Eastern District of Virginia for possession of cocaine with intent to distribute and a parole violation. The federal defendants in the District of Columbia made a motion to dismiss the case for improper venue or to transfer the matter to the district in which plaintiff resides. The Honorable Emmet G. Sullivan, United States District Judge for the District of Columbia, denied defendants' motion to dismiss, and granted defendant's motion to transfer. On December 6, 2002, Judge Sullivan [\*4] ordered the case transferred to the United States District Court for the District of New Jersey. The case was electronically transferred on April 21, 2003.

On May 6, 2003, plaintiff filed the present motions for preliminary injunction, for entry of default, and for entry of judgment by default. The federal defendants filed an affidavit with the Court on June 6, 2003 seeking an extension of time to respond to plaintiff's motion. AUSA Louis J. Bizzarri attested that the United States Attorney's Office for the District of Columbia never advised his office that the matter had been transferred to the District of New Jersey, that he did not receive the case file until May 27, 2003, and that the file which he did receive did not include physical copies of documents that were electronically filed in the District of Columbia. He also stated that he did not receive this Court's June 3, 2003 letter requesting the defendants to state their

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<sup>1</sup> Plaintiff has pending motions for summary judgment, transferred from the United States District Court for the District of Columbia, which the Court will also hear on August 1, 2003.

position on plaintiff's motions by June 6, 2003 until June 5, 2003. On June 6, 2003, this Court granted defendants' request for an extension and allowed defendants until June 12, 2003 to file responsive pleadings or opposition to plaintiff's pending motions. [\*5] On June 12, 2003, defendants filed their opposition to plaintiff's motions for preliminary injunctive relief and for entry of default and default judgment.

Meanwhile, on June 11, 2003, plaintiff filed the present motion for a temporary restraining order, again seeking an order enjoining defendants from taking him into BCIS custody upon his release from prison on June 17, 2003. The Court scheduled an emergent hearing on the motion for a temporary restraining order to be held on June 17, 2003, the date when plaintiff was scheduled to be released from prison and delivered to BCIS custody pursuant to an INS detainer. Plaintiff appeared at the hearing *pro se*.

#### B. Factual History

Plaintiff seeks judicial review of the INS's denial of his application for a certificate of citizenship pursuant to [8 U.S.C. § 1503\(a\)](#). Plaintiff alleges that he should be granted a certificate of citizenship because he was born on July 10, 1952 in the Republic of Panama to a Panamanian citizen, his mother, and a United States citizen, his natural father, Vearon Allen Widner who was employed by the United States Government. Before 1950, plaintiff's father had resided in the [\*6] State of Alabama until 28 years of age. (Complaint, PP 3-5).

Plaintiff says that he lived with his mother and father in Panama until 1957 when his parents separated. Then he went to live with his father in Havana, Cuba until July 28, 1958. By that time, his mother had met a United States Army Sergeant Thomas George North, who helped his mother obtain custody of plaintiff and his older brother, Bernardo Widner. Sgt. North and plaintiff's mother married on October 27, 1960 and on October 31, 1960, Sgt. North adopted plaintiff and his brother. In the legal proceedings to effect the adoption, plaintiff's natural father formally acknowledged his paternity and then gave his consent to the adoption of his two sons by Sgt. North. (Compl., PP 6-8).

Plaintiff says he first arrived in the United States at Port Charleston, South Carolina on July 28, 1962, at ten years of age. He entered the country "with an immigrant visa on two occasions due to the expediency of the military travel of his parents." (See May 21, 2001 Office of Administrative Appeals ("AAO"), INS, at Exhibit 5, pg. 2 to defendants' opposition). Plaintiff lived with his

mother and adoptive father in Tucson, Arizona until October 18, 1964, when [\*7] he returned to Panama. On September 9, 1966, he returned to the United States where he lived for more than seven continuous years between the ages of thirteen and twenty-one. (Compl., P 9).

On November 6, 1984, plaintiff was convicted in the United States District Court for the District of Maryland on charges of cocaine distribution, possession with the intent to distribute and aiding and abetting, in violation of [18 U.S.C. § 2](#) and [21 U.S.C. § 841\(a\)\(1\)](#). (See Judgment of Conviction, Ex. 1 to defendants' opposition). He was sentenced to twelve years in prison and three years on special parole. On July 11, 1989, while incarcerated, INS presented plaintiff with a notice of hearing to determine his deportability. In the proceeding, plaintiff asserted that he was a United States citizen and should not be deported. On November 27, 1989, the Supervisory Attorney General filed a motion to dismiss the deportation proceedings, stating that plaintiff had apparently acquired United States citizenship. The Immigration Judge granted the motion and the deportation proceedings were terminated. (Compl., PP 10-12).

In 1998, plaintiff was convicted on [\*8] federal charges of cocaine possession with intent to distribute and running from parole in the United States District Court for the Eastern District of Virginia. He was sentenced on January 8, 1999 to 65 months in prison and five year supervised release. In 1999, INS instituted removal proceedings against plaintiff because of this federal drug conviction and lodged a detainer against him on February 9, 1999. The Immigration Judge ("IJ") administratively terminated the removal proceeding on November 1, 2000, (Def. Ex. 2), but the detainer remains lodged against plaintiff.

While incarcerated, on May 5, 2000, plaintiff filed an application for a Certificate of Citizenship, Form -600. The Acting District Director in Philadelphia denied the application under the [Immigration of Nationality Act of 1952](#). Plaintiff appealed the decision, arguing that the Act does not apply to him because he was born before the Act became effective on December 24, 1952. The AAO affirmed the decision of the Acting District Director on May 21, 2001. (Compl., P 12).<sup>2</sup>

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<sup>2</sup>The federal defendants assert that the 1999 removal proceedings were administratively terminated by agreement of the parties on November 1, 2000 because of the application

[\*9] Plaintiff has been serving his term of imprisonment for the 1998 conviction at F.C.I. Fairton and is scheduled for release on June 17, 2003 to serve the five-year term of supervised release. However, the February 9, 1999 INS detainer remains lodged with the United States Bureau of Prisons ("BOP"), meaning that upon his release from the BOP on June 17, 2003, plaintiff, absent the present temporary restraining order, would be immediately placed into BCIS custody. Plaintiff claims that this denies him the right to a Certificate of Citizenship that he is entitled to under [8 U.S.C. § 1452\(a\)](#)<sup>3</sup> and the [Nationality Act of 1940](#). (Compl., P 16).

## [\*10] II. DISCUSSION

### A. Subject Matter Jurisdiction

This Court finds that it likely has subject matter jurisdiction under [8 U.S.C. § 1503\(a\)](#) and [28 U.S.C. § 1331](#). [HN2](#)<sup>[↑]</sup> [Section 1503\(a\)](#) provides:

(a) Proceedings for declaration of United States nationality

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such a right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such a person may institute an

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for a certificate of citizenship under [8 U.S.C. § 1452\(a\)](#) that plaintiff filed on May 3, 2000. (Order of Immigration Judge dated November 1, 2000, Def. Ex. 2.)

<sup>3</sup> [8 U.S.C. § 1452\(a\)](#) [HN1](#)<sup>[↑]</sup> provides in relevant part as follows:

A person who ... is a citizen of the United States by virtue of the provisions of subsection (c), (d), (e), (g), or (i) of section 201 of the Nationality Act of 1940, as amended (54 Stat. 1138), ... or under the provisions of section 203 or 205 of the Nationality Act of 1940 (54 Stat. 1139), ... may apply to the Attorney General for a certificate of citizenship. Upon proof to the satisfaction of the Attorney General that the applicant is a citizen, and that the applicant's alleged citizenship was derived as claimed, or acquired, as the case may be, and upon taking and subscribing before a member of the Service within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, such individual shall be furnished by the Attorney General with a certificate of citizenship, but only if such individual is at the time within the United States.

action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States

(1) arose by reason of, or in connection with any removal

(2) is in issue in any such removal proceeding.

An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be [\*11] filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases in such cases is conferred upon those courts.

[HN3](#)<sup>[↑]</sup> Title [28 of the United States Code, Section 2201](#) reads:

(a) In a case of actual controversy within its jurisdiction, ..., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Here, plaintiff alleges that his application for a certificate of citizenship was administratively denied by the INS in May 2001 and that he later brought this action for a declaratory judgment as to his citizenship status in the district court in which he was incarcerated at the time. Under these facts, the Court likely has subject matter jurisdiction over this matter pursuant to [§ 1503\(a\)](#). Venue is proper in the District of New Jersey because of plaintiff's residency at F.C.I. Fairton at the [\*12] time of filing the Complaint through today.

Defendant, however, argues that plaintiff's current action for citizenship arose out of, or in connection with, the 1999 removal proceedings which were administratively terminated on November 1, 2000. Alternatively, defendants argue that plaintiff's citizenship status continues to be an issue in a removal proceeding.<sup>4</sup>

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<sup>4</sup> At the hearing on June 17, 2003, the government withdrew this latter argument, conceding it is highly unlikely that the Immigration Judge in the removal hearing would revisit the

Either way, defendant argues that plaintiff is precluded from seeking judicial review of the INS denial of citizenship under [section 1503\(a\)\(1\)](#) and [\(2\)](#).

The Court preliminarily finds that the exceptions to filing a declaratory action pursuant to [section 1503\(a\)](#) are satisfied. Plaintiff's present civil action under [section 1503\(a\)](#) was initiated on March 11, 2002, after removal proceedings had [\*13] been administratively terminated, and in accordance with the Order of November 1, 2000 which stated that the removal case was "administratively closed and ... considered no longer pending." With no removal proceedings presently ongoing at this time, this action seeking judicial review by declaratory judgment does not likely "arise out of, or in connection with" a removal proceeding.<sup>5</sup> [\*14] Moreover, the issue of plaintiff's citizenship actually arose well before the commencement of the 1999 removal proceedings as demonstrated by plaintiff's argument that his citizenship status was fully litigated and determined in his favor by an Immigration Judge ruling in 1989, when the Supervisory Attorney General acknowledged plaintiff's acquisition of citizenship, as discussed above. If true, the removal proceedings initiated by the INS in 1999 would have been barred by the 1989 determination of citizenship. Accordingly, it appears that the Court has jurisdiction to review plaintiff's claim for citizenship under [8 U.S.C. § 1503\(a\)](#).<sup>6</sup>

#### B. Application for Entry of Default Judgment

issue of citizenship which had been decided adversely by the AAO on May 21, 2001.

<sup>5</sup> The Court also finds the circumstances in [Said v. Eddy, 87 F. Supp.2d 937 \(D. Alaska 2000\)](#), relied upon by defendants in their opposition brief, to be factually distinguishable. Most importantly, the plaintiff there filed her action for judicial review under [section 1503\(a\)](#) during the pendency, and as part of, her removal proceedings. The court also noted that the Immigration Judge never made a finding there that the plaintiff was not a United States citizen. "Without such a finding, there is no final administrative denial of the right or privilege of U.S. citizenship. And without that denial, there is no basis for a declaratory action under [subsection 1503\(a\)](#)." [Said, 87 F. Supp.2d at 940](#).

<sup>6</sup> The Court notes that had plaintiff been under BCIS custody, his application for a temporary restraining order would have been governed under [28 U.S.C. § 2241](#), [HN4](#) [↑] which provides jurisdiction for the district court's review of claims for habeas relief where the applicant is confined pursuant to the laws, Constitution and treaties of the United States. The parties agree that [section 2241](#) does not govern this action.

Pursuant to [Fed. R. Civ. P. 55\(e\)](#), this Court will deny plaintiff's application for entry of default and default judgment against defendants. [HN5](#) [↑] Under [Rule 55\(e\)](#), a default judgment shall not be entered against the United States or an officer or agency thereof, unless the applicant establishes a right to such relief by evidence satisfactory to the court. Courts have consistently held that [Rule 55](#) precludes entry of default judgment against the government simply based on a failure to file an answer or responsive pleading within the time prescribed by the court rules. See, e.g. [Gordon v. Duran, 895 F.2d 610, 612 \(9th Cir. 1990\)](#); [\*15] [Aziz v. Leferve, 830 F.2d 184, 187 \(11th Cir. 1987\)](#); [Bermudez v. Reid, 733 F.2d 18, 21 \(2d Cir. 1984\)](#); [Mason v. Lister, 562 F.2d 343 \(5th Cir. 1977\)](#); [United States v. Zulli, 418 F. Supp. 252, 253 \(E.D. Pa. 1975\)](#).

In this case, plaintiff has not established a clear right to such relief by evidence satisfactory to the Court. Moreover, the Court finds that the defendants have demonstrated good cause for their delay in responding to plaintiff's complaint and motions. As explained *supra*, counsel for defendants, AUSA Louis J. Bizzarri, submitted an affidavit attesting that his office was not informed of the transfer of this case to this district court until very recently and was not aware of any filing deadlines in this case until receipt of this Court's letter on June 5, 2003. Since then, he has filed, on behalf of the defendants, an Answer to plaintiff's Complaint and responsive pleadings to plaintiff's motions which raise good faith arguments in opposition to plaintiff's claim of citizenship. This Court finds that the United States Attorney's Office for the District of New Jersey reacted in a quick and professional [\*16] manner upon learning of the pendency of this action and these motions. This Court will hear their opposition to plaintiff's claim of citizenship and will thus deny plaintiff's motion for entry of default and default judgment. The defendants' Answer filed June 12, 2003 will be deemed timely.

#### C. Application for Temporary Restraining Order

[HN6](#) [↑] To secure the extraordinary relief of a temporary restraining order or preliminary injunction, plaintiff must demonstrate that:

- (1) [he] is likely to succeed on the merits;
- (2) denial will result in irreparable harm to [him];
- (3) granting the injunction will not result in irreparable harm to the defendants; and

(4) granting the injunction is in the public interest.

Maldonado v. Houstoun, 157 F.3d 179, 184 (3d Cir. 1998), cert. denied, 526 U.S. 1130, 143 L. Ed. 2d 1007, 119 S. Ct. 1802 (1999)(considering preliminary injunction); see also Ballas v. Tedesco, 41 F. Supp.2d 531, 537 (D.N.J. 1999) (considering temporary restraining order). A plaintiff must establish that all four factors favor preliminary relief. ACLU v. Black Horse Pike Reg'l Bd of Educ., 84 F.3d 1471, 1477 n.2 (3d Cir. 1996) [\*17] (en banc); Opticians Ass'n of America v. Independent Opticians of America, 920 F.2d 187 (3d Cir. 1990).

#### 1. Likelihood of success on the merits

Defendants argue that plaintiff has not demonstrated the likelihood of success on the merits because he has not shown that the denial of citizenship by INS violated the law or had no basis in fact. Specifically, defendants argue that plaintiff did not establish by a preponderance of the evidence, as required by 8 C.F.R. § 341.2, that he and his putative father share a blood relationship. Because plaintiff was not born in the United States, defendants assert that he does not have a constitutional right to citizenship by birth, meaning that his claim of citizenship is subject to "strict compliance with the ... 'terms and conditions specified by Congress.'" INS v. Pangilinan, 486 U.S. 875, 884, 100 L. Ed. 2d 882, 108 S. Ct. 2210 (1988)(quotations omitted). See also Miller v. Albright, 523 U.S. 420, 140 L. Ed. 2d 575, 118 S. Ct. 1428 (1998).

The AAO denied plaintiff's appeal from the denial of citizenship in part because plaintiff did not submit a birth certificate. In addition, the AAO questioned the [\*18] father's name listed on plaintiff's baptismal certificate because it named Bernard Widner, rather than the putative father, Vearon Allen Widner, as plaintiff's father.<sup>7</sup> The AAO did acknowledge that "some reviewers of the record are satisfied with the present documentation and supporting affidavits," recognizing that the record included a November 20, 1989 memorandum from

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<sup>7</sup>The AAO ultimately found that the baptismal certificate did not satisfy the secondary documentary evidence requirement under 8 C.F.R. § 204.1(g)(2)(i), concluding that "for a baptismal certificate to satisfy the documentary requirement that the person named thereon was a United States citizen at birth, the baptism had to take place within two months of the person's birth. The applicant in this matter was baptized seven months after his birth." (AAO Decision, Ex. 5 at pg. 4 to defendants' opposition).

Supervisory General Attorney Charles A. Weigand, III in which he stated that INS was satisfied that plaintiff had acquired United States citizenship, and a December 16, 1989 report from Senior Legal Specialist Jose S. Dapena at the Library of Congress in which he stated that, by public deed, the Juvenile Court was satisfied that Vearon Allen Widner, plaintiff's putative father, acknowledged and legitimated plaintiff as his natural child when he consented to his adoption by Thomas North, plaintiff's adoptive father.

[\*19] This Court finds that plaintiff has demonstrated a likelihood of success on the merits of his citizenship claim. Plaintiff has alleged substantial proof of his United States citizenship, dating from the 1950s onward, which is belied only by the absence of his birth certificate. In 1989, removal proceedings were terminated on the ground that plaintiff was a United States citizen. In 2001, the AAO acknowledged that other reviewers have been satisfied with documentary evidence that supports plaintiff's status as a United States citizen, but denied his claim of citizenship based primarily on the absence of a birth certificate in the record. The Court thus finds that it is highly probable that plaintiff may be able to provide sufficient proof, on *de novo* review by this Court pursuant to 8 U.S.C. § 1503, to answer the admittedly unresolved questions posed by the AAO in denying the appeal, and to show his citizenship.<sup>8</sup> Accordingly, based on this abundance of secondary evidence that supports plaintiff's claim of United States citizenship, plaintiff has satisfied his burden of establishing a likelihood of prevailing on the merits in this case.

#### [\*20] 2. Irreparable harm to plaintiff

The Court also finds that plaintiff has demonstrated imminent and irreparable harm absent issuance of a temporary restraining order. Upon his release from incarceration on June 17, 2003, plaintiff faces immediate detention in BCIS custody due to the detainer that was lodged against him during the 1999 removal proceedings which were terminated in November 2000. Restraint of liberty pending resolution of this action, even for one month, clearly constitutes irreparable harm if imposed without reason.

Defendants concede that plaintiff is not currently subject

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<sup>8</sup>While the Court likewise questions the absence of plaintiff's birth certificate, it is plausible that record of plaintiff's birth in the Republic of Panama may have been misplaced due to the adoption proceeding that took place there.

to removal proceedings or a threat of removal. (See defendants' opposition brief at pg. 14, stating "As matters presently stand, Plaintiff is not facing a deportation order"). Further, there is no apparent statutory requirement that an applicant for citizenship be detained pending a final decision on his application for a certificate of citizenship. Therefore, this Court finds that plaintiff has demonstrated irreparable harm if he is released to BCIS custody on June 17, 2003 pending resolution of his declaratory judgment action in this Court.<sup>9</sup>

### **[\*21]** 3. Balance of hardships

This Court has also considered the possibility of harm to others from the grant or denial of injunctive relief and finds that there is a minimal likelihood of harm to the defendants and to others if plaintiff is not held in BCIS custody. Plaintiff will be released under supervision of the Probation Department for the United States District Court for the Eastern District of Virginia, so any concern the defendants have that he may flee from future removal proceedings is alleviated. Moreover, plaintiff appears to have a sincere belief in the legal remedy he seeks, such that there seems to be no threat that he would not appear at further court proceedings in this matter. Thus, because there is minimal likelihood of harm to others if a temporary restraining order is granted and substantial likelihood of harm to plaintiff if one is not granted, plaintiff has shows that this third factor weighs in favor of granting injunctive relief.

### 4. Public interest

Finally, this Court finds that the public interest favors the granting of a temporary restraining order. Without one, plaintiff will be immediately detained in BCIS custody. There is no statutory requirement **[\*22]** that an applicant for declaration of citizenship be detained pending resolution of his claim for citizenship. The public clearly has an interest in ensuring that applicants for citizenship, who are not presently undergoing removal proceedings, are not deprived of their fundamental right of liberty. Plaintiff will be released

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<sup>9</sup>At the hearing on this matter, AUSA Bizzarri conceded the possibility of irreparable harm based on the final administrative determination denying plaintiff a certificate of citizenship. He acknowledged that it is improbable that an Immigration Judge would revisit the INS's administrative denial of citizenship during the removal proceedings, if such proceedings are reopened, and therefore, plaintiff would not have that additional remedy at law through which his application for citizenship may be addressed.

from incarceration, but he will be subject to special parole supervision as imposed by his 1999 federal sentence, which will ensure the protection of the community and the ability of defendants to institute removal proceedings in the future if plaintiff's claim for citizenship is ultimately denied by the Court. Accordingly, plaintiff has met his burden in establishing the final factor for injunctive relief.

### III. CONCLUSION

For all of the foregoing reasons, plaintiff's motion for default judgment is denied, and his motion for a temporary restraining order is granted. The Court finds that plaintiff is entitled to a temporary restraining order enjoining BCIS from taking plaintiff into custody upon his scheduled release from federal imprisonment on June 17, 2003, pursuant to the 1999 detainer lodged by INS. The Court will further order that a preliminary **[\*23]** injunction hearing be scheduled on August 1, 2003 for determination of plaintiff's application under [8 U.S.C. § 1503\(a\)](#) and [28 U.S.C. § 2201](#) for a declaration of U.S. citizenship.

The appropriate Order pertaining to these findings was filed on June 17, 2003.

Date June 18, 2003

JEROME B. SIMANDLE

United States District Judge

### ORDER

THIS MATTER having come before the Court on plaintiff's application for an order to show cause and temporary restraining order enjoining defendants from detaining plaintiff in INS custody upon his release from prison on June 17, 2003, and on plaintiff's application for a preliminary injunction regarding his claim for U.S. citizenship and for entry of default and default judgment; and the Court having considered the moving papers and opposition thereto, the oral arguments by the parties, and for good cause shown;

IT IS on this 18th day of June, 2003,

ORDERED that plaintiff's motion for entry of default and default judgment against defendants is hereby DENIED; and it is further

ORDERED that plaintiff's motion for a temporary restraining order enjoining defendants from **[\*24]** detaining plaintiff in INS custody upon his release from

prison on June 17, 2003 is hereby GRANTED; and it is further

ORDERED that plaintiff be released to commence serving his term of supervised release under his judgment of conviction dated January 8, 1999 in Docket No. 1:98-CR-00327-001 in the United States District Court for the Eastern District of Virginia; and it is further

ORDERED that plaintiff's application for a preliminary injunction hearing seeking determination of his claim for U.S. citizenship shall be continued until August 1, 2003 at 1:30 *p.m.*, to enable the parties to provide the Court with full and complete documentary evidence in support of their claims and defenses; the defendants shall supplement their papers by memorandum of law and/or affidavit not later than July 17, 2003, and plaintiff's reply papers shall be served not later than July 28, 2003; further, plaintiff's motion for summary judgment will be heard on August 1, 2003.

JEROME B. SIMANDLE

United States District Judge

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