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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE  Office: Philadelphia

Date: JUL 10 2002

IN RE: Applicant: 

APPLICATION: Application for Certificate of Citizenship under Section 341(a) of the Immigration and Nationality Act, 8 U.S.C. 1452(a)

IN BEHALF OF APPLICANT: 

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Philadelphia, Pennsylvania, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on November 24, 1964, in Syria. The applicant's father, [REDACTED], was born in Syria in April 1926 and became a naturalized U.S. citizen on June 15, 1977. The applicant's mother, [REDACTED] was born in January 1929 in Syria and alleges to have been a United States citizen at birth. The applicant's parents married each other on August 15, 1949. The applicant was lawfully admitted for permanent residence on April 2, 1979.

The applicant claims that his mother acquired U.S. citizenship at birth through her own mother (the applicant's grandmother) who was born in the United States. The district director noted that the applicant's mother was lawfully admitted to the United States as a permanent resident on April 2, 1979, and her immigrant visa reflects that she had never been in the United States prior to that date. It is noted that consular officers carefully review claims of U.S. citizenship before issuing a person an immigrant visa because U.S. citizens are ineligible to receive immigrant visas.

Although the prerequisites of the various statutes differ, common to all are the requirements that the parents through whom citizenship descends must be United States citizens at the time the child is born and must have resided in the United States prior to the child's birth. Therefore, the applicant did not acquire U.S. citizenship at birth under section 301(g) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1401, even assuming *arguendo* that the applicant's mother was a United States citizen at the time of the applicant's birth, because his mother had not resided or been physically present in the United States prior to the applicant's birth.

On appeal, counsel states that to the extent that the decision may be correct in interpreting the statute, the statute is unconstitutional. The Service cannot pass upon the constitutionality of the statutes it administers. See Matter of Church of Scientology International, 19 I&N Dec. 593 (Comm. 1988). Moreover, it is settled that an immigration judge and the Board of Immigration Appeals lack jurisdiction to rule upon the constitutionality of the Act and the regulations. See Matter of C-, 20 I&N Dec. 529 (BIA 1992).

The parents of the applicant's mother are listed as [REDACTED] who was born in Syria in April 1895, and [REDACTED] was born in Allentown, Pennsylvania in September 1903. The applicant's grandparents married each other in May 1918. As of the date of the marriage, [REDACTED] lost her U.S. citizenship due to the fact that she married an alien during a period from March 2,

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1907 and prior to September 22, 1922. Section 3, Act of March 7, 1907.

Section 324 of the Act, 8 U.S.C. 1435, provides, in part, that:

(a) Any person formerly a citizen of the United States who (1) prior to September 22, 1922, lost United States citizenship by marriage to an alien ... may if no other nationality was acquired by an affirmative act of such person other than by marriage be naturalized upon compliance with all requirements of residence of this title, except -

(1) no period of residence or specified period of physical presence within the United States or within the State or district of the Service in the United States where the application is filed shall be required; and

(2) the application need not set forth that it is the intention of the petitioner to reside permanently within the United States.

Such person...shall have, from and after her naturalization, the status of a native born...citizen of the United States...: Provided that nothing contained herein or in any other provision of laws shall be construed as conferring United States citizenship retroactively upon such person ... during any period in which such person was not a citizen.

After the applicant's grandmother married in 1918, she left the United States with her Syrian husband [REDACTED] in November 1921. In 1929, she gave birth to the applicant's mother in Syria. On September 21, 1948 [REDACTED] returned to the United States on an immigrant visa. [REDACTED] remained in Syria until June 1953. On April 20, 1954 [REDACTED] filed a petition to be repatriated as a U.S. citizen. [REDACTED] was sworn in as a U.S. citizen on June 15, 1954. [REDACTED] became a naturalized U.S. citizen in 1954.

Pursuant to section 324 of the Act, [REDACTED] was a U.S. citizen from birth until her marriage on May 12, 1918, and she regained her U.S. citizenship on June 15, 1954.

INTERP 324.2(a)(7) states that restoration to citizenship is prospective and under any one of the three statutes is not regarded as having erased the period of alienage that immediately preceded it. When the applicant's mother, [REDACTED] was born, neither parent was a U.S. citizen. When [REDACTED] repatriated and [REDACTED] naturalized, both in 1954, the applicant's mother, born in 1929, was 25 years old and could no longer obtain citizenship through derivation.

On appeal, counsel states that the applicant's grandmother could not have formed the requisite intent to voluntarily relinquish citizenship at the age of 15. Counsel asserts that the statute expressly permits individuals to still pass on citizenship even if she had not yet re-attained the status of U.S. citizen herself.

The effect of Afroyim v. Rusk, 387 U.S. 253 (1967), on the Act of September 22, 1922, provided that citizenship lost in accordance with the Act of March 2, 1907, was resumed upon termination of marriage before September 22, 1922, provided the expatriate resided in the United States and, if residing abroad, upon her return to the United States. Under the Act of June 25, 1936, any woman who had acquired citizenship at birth but no longer had that status on June 24, 1936, was restored to citizenship on June 25, 1936, if her marriage had terminated on or before that date or upon termination of her marriage on a date prior to January 13, 1941. Lacking termination of the marriage, citizenship was resumed on July 2, 1940, if the expatriate had resided continuously in the United States since the date of the marriage. The applicant's grandmother failed to meet any of these criterion. Therefore, the applicant's mother was not a U.S. citizen at birth.

The viewpoint that expatriation by marriage pursuant to section 3 of the Act of March 2, 1907, remains a constitutional basis for citizenship loss despite the decision in Afroyim, shall continue to represent the Service's position notwithstanding a per curium decision by the United States Court of Appeals for the First Circuit which withdrew its earlier decision in Rocha v. INS, 351 F. 2d 523, (1965), cert. denied 383 U.S. 927, and in effect found section 3 of the Act of 1907 to be unconstitutional by reason of Afroyim. See INTERP 324.1(b)(3)(i).

On appeal, counsel states that the applicant derived U.S. citizenship under section 320 of the Act, 8 U.S.C. 1431.

Sections 320 of the Act was amended by the Child Citizenship Act of 2000 (CCA), and took effect on February 27, 2001. The CCA benefits all persons who have not yet reached their 18th birthdays as of February 27, 2001. The applicant was 35 years, 5 months and 22 days old on February 27, 2001. Therefore, he is not eligible for the benefits of the CCA.

Former section 320 of the Act prior to its amendment provided that:

(a) A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such parent is naturalized, become a citizen of the United States, when

(1) such naturalization takes place while such child is under the age of 18 years; and

(2) such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of 18 years.

Section 320 of the Act requires one of the child's parents to be a United States citizen at the time of the child's birth. Neither of the applicant's parents was a United States citizen when he was born in 1965. The applicant's father naturalized in 1979 when the applicant was 12 years old. The applicant's mother did not acquire U.S. citizenship at birth because her mother (the applicant's grandmother) had expatriated in 1918 and did not re-acquire her U.S. citizenship until 1954. As previously stated, the applicant's mother was 25 years old when her mother (the applicant's grandmother) re-acquired U.S. citizenship, and the applicant's mother had never resided in the United States nor was she ever physically present in the United States until after the applicant's birth. Therefore, the applicant's mother was not a U.S. citizen at the time of his birth, and the applicant did not acquire U.S. citizenship under section 301(g) or section 320 of the Act.

8 C.F.R. 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met that burden.

ORDER: The appeal is dismissed.