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U.S. Department of Homeland Security
Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

FILE: [REDACTED]

Office: PHILADELPHIA, PA

Date: OCT 07 2003

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under former section 320 of the Immigration and Nationality Act, 8 U.S.C. § 1431.

ON BEHALF OF APPLICANT:

[REDACTED]

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 Citizenship and Immigration Services (CIS) 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.



Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Philadelphia, Pennsylvania. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous AAO decision and order dated July 10, 2002, will be withdrawn and the application approved.

The record reflects that the applicant was born on November 24, 1964, in Lebanon. The applicant's [REDACTED] was born in January 1929, in Syria. The applicant claims that his mother acquired U.S. citizenship at birth through her mother [REDACTED] - the applicant's grandmother) who was born in Allentown, Pennsylvania, in September 1903. The applicant's grandfather [REDACTED] was born in Syria in April 1895. He and the applicant's grandmother were married in the U.S. in May 1918.

The AAO found on appeal that, pursuant to section 3 of the Act of March 7, 1907, the applicant's grandmother lost her U.S. citizenship because she married an alien during a period from March 2, 1907, and prior to September 22, 1922.¹

The AAO noted that the applicant's grandmother left the U.S. with her husband in 1921, gave birth to the applicant's mother in Syria in 1929, and subsequently returned to the U.S. in June 1953. On April 20, 1954, the applicant's grandmother filed a petition to be repatriated as a U.S. citizen, and she was sworn in as a U.S. citizen on June 15, 1954. Based on these facts, the AAO found that, pursuant to section 324 of the Act, the applicant's grandmother was a U.S. citizen from birth until her marriage in May 1918, and that she regained her U.S. citizenship on June 15, 1954.²

¹ Section 3 of the Act of March 2, 1907, Pub. L. 59-193, 34 Stat. 1228, states that:

[A]ny American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

² Section 324 of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1435, provides, in pertinent 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, or by the loss of United States citizenship of such person's spouse, or (2) on or after September 22, 1922, lost United States citizenship by marriage to an alien ineligible to citizenship, 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 this title, except-

The record reflects that the applicant was placed into removal proceedings, and that the applicant was ordered removed by an immigration judge on May 28, 2002. A subsequent appeal to the Board of Immigration Appeals ("Board") was dismissed on March 10, 2003. Counsel then appealed the applicant's case to the Federal District Court for the Eastern District of Pennsylvania. Based on a decision issued by [REDACTED] of the District Court, counsel filed a motion to reopen and remand with the Board on March 27, 2003. The motion was granted by the Board on April 15, 2003, and the matter was remanded to the Immigration Court and Citizenship and Immigration Services ("CIS") for resolution regarding the issue of the applicant's U.S. citizenship in light of the December 20, 2002, Memorandum and Order issued by Judge Fullam of the Federal District Court for the Eastern District of Pennsylvania.

In his Memorandum and Order ("Order") the judge indicated that the Act of 1907 was unconstitutional and that the Supreme Court decision, *Afroyim v. Rusk*, 387 U.S. 253 (1967), "[r]uled definitively that the Constitution prohibits Congress from depriving an American citizen of her citizenship because of marriage to an alien; there must be other evidence establishing an actual intent to abandon United States citizenship." *Id.* at 4. The judge indicated further that "[i]t seems highly probable that the 1907 Act is invalid on equal protection grounds, since it strips women, but not men, of their citizenship when they marry aliens." The judge additionally indicated that, even if the 1907 Act was constitutional, it would not apply to the applicant's grandmother because "[s]he was only 14 at the time of her marriage, and therefore does not qualify as a woman who marries a foreigner - she was only a child." *Id.* The judge concluded, however, that, although certificate of citizenship proceedings had been addressed by the AAO in July 2002, his court did not have jurisdiction over the citizenship issue

(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 applicant to reside permanently within the United States.

Such person, or any person who was naturalized in accordance with the provisions of section 317(a) of the Nationality Act of 1940, shall have, from and after her naturalization, the status of a native-born or naturalized citizen of the United States, whichever status existed in the case of such person prior to the loss of citizenship: Provided, That nothing contained herein or in any other provision of law shall be construed as conferring United States citizenship retroactively upon such person, or upon any person who was naturalized in accordance with the provisions of section 317(a) of the Nationality Act of 1940, during any period in which such person was not a citizen.

because it had been raised before his court in the context of an appeal related to the applicant's removal proceedings. The judge thus found that his court lacked jurisdiction to grant declaratory relief under 28 U.S.C. § 2201 during the pendency of removal proceedings. See *Memorandum and Order* at 7.

In *Afroyim v. Rusk*, the U.S. Supreme Court held that neither the Fourteenth Amendment nor any other provision of the Constitution expressly grants Congress the power to take away U.S. citizenship. The Supreme Court stated further that:

[T]his Court has consistently invalidated on a case-by-case basis various . . . statutory sections providing for involuntary expatriation. It has done so on various grounds and has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship.

Afroyim v. Rusk, supra, at 255. The constitutionality of the 1907 Act was raised as an issue by counsel on initial appeal to the AAO. The previous AAO decision addressed the issue by stating that:

The Service [now CIS] 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. 29 (BIA 1992).

See *AAO Decision* at 2. The previous AAO decision stated further that:

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 [REDACTED] shall continue to represent the Service's [CIS] position notwithstanding a per curiam 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 [REDACTED]. See *INTERP 324.1(b)(3)(i)*.

Id. at 4. The AAO now notes that the above quotation from Interpretations 324.1(b)(3)(i), is incomplete and does not fully reflect the Service [CIS] position regarding the effect of *Afroyim v. Rusk* on cases arising pursuant to section 3 of the 1907 Act. Rather, the Service's [CIS] position as reflected in the Interpretations 324.1(b)(3)(i), is that expatriation under the 1907 Act **may** be constitutional under certain circumstances.

Interpretation 324.1(b)(3)(i), states in pertinent part:

(b) Effect of *Afroyim v. Rusk*

. . .

(3) Expatriation by marriage to an alien between March 2, 1907, and September 22, 1922. (i) Rule and evidentiary requirements generally. The United States Supreme Court in *MacKenzie v. Hare*, [239 U.S. 299 (1915)] held that a native-born citizen woman who married an alien within the captioned period, in this instance on August 14, 1909, lost her citizenship by such marriage under section 3 of the Act of March 2, 1907. While the court apparently accepted the fact that [REDACTED] desired to retain her citizenship, and therefore, presumably, her native allegiance, it rejected argument on her behalf which contended in part that expatriation could not occur without acts indicating an intention to transfer allegiance to a foreign state. Although this decision has never been expressly overruled by the Supreme Court, it is regarded as having been modified by the court's later ruling in *Afroyim v. Rusk*.

The Attorney General's [now Secretary of Homeland Security (Secretary)] Statement of Interpretation construing the effect of [REDACTED] upon citizenship loss declared that, under any reading of the decision, an act which does not reasonably manifest an individual's abandonment of allegiance to the United States, or a transfer of allegiance from the United States to a foreign state (otherwise defined as an act which is not in derogation of allegiance to the United States), cannot be made a basis

for expatriation. However, the rules formulated for applying the Attorney General's Statement of Interpretation do not preclude expatriation by marriage to an alien, as contemplated by section 3 of the Act of March 2, 1907. Nonetheless, since under these rules such marriage is not regarded as an act in derogation of allegiance to the United States, citizenship loss based thereon can no longer be deemed to have occurred, unless, as required by the Attorney General's reading of [REDACTED] and the aforesaid rules there is other affirmative persuasive evidence establishing that, in marrying the alien, the citizen woman also intended the aforementioned transfer or abandonment of allegiance or a relinquishment of United States citizenship. Moreover, under these conditions, the Service has the initial burden of proving both the marriage and the requisite intention.

The viewpoint expressed above, namely, 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 [REDACTED] shall continue to represent the Service position, notwithstanding a per curiam decision by the United States Court of Appeals for the First Circuit, which withdrew its earlier decision in *Rocha v. Immigration and Naturalization Service*, [450 F.2d 946 (1st. Cir. 1971)] and in effect found section 3 of the 1907 enactment to be unconstitutional by reason of *Afroyim*. (Added).

(ii) Specific considerations relating to proof. Obviously, to determine whether the burden of proof described in (i) above has been met, one must ascertain the motivations and intentions of the citizen woman at the time she married the alien. It is conceivable that, to promote the most complete unity of husband and

wife, and assure the closest possible marital union between the parties, a United States citizen woman who marries an alien may wish and intend to relinquish her citizenship and transfer her allegiance from the United States to the foreign state of which her husband is a national, especially if she plans to take up residence in the foreign state and become a national thereof under its law. Information of this nature is peculiarly within the knowledge of the parties to the marriage and where they are both deceased and cannot give testimony, or are otherwise unavailable to testify, it is considered exceedingly improbable that any secondary proof which may be forthcoming would amount to the "persuasive" evidence of the intention required to sustain a finding of expatriation.

Moreover, since nationality change is not a normal objective of the marital union, it is to be expected that most marriages were in fact actually contracted for the usual reasons, entirely unconnected with any transfer or abandonment of allegiance, or relinquishment of United States citizenship, and without the citizen woman giving any thought or consideration to such matters. While never foreclosing the possibility of expatriation because of special circumstances in a given case, this truism supported by the citizen woman's affirmative testimony that she did not intend to transfer her allegiance from the United States to the foreign state of which her husband was a national, or

otherwise abandon her allegiance to and citizenship of the United States, will make it exceedingly difficult to sustain a finding of expatriation upon the basis of evidence from other sources. Comparable difficulty in proof will prevail when the citizen woman is deceased or unavailable to give testimony, and the required interview with her available surviving husband elicits similarly favorable testimony relative to the nonexpatriatory intentions of his deceased wife at the time of the marriage.

The assignment of almost conclusive probative value to the citizen woman's testimony disclaiming an intent to abandon or transfer allegiance, or to relinquish citizenship, as stated just above, presupposes that such testimony was elicited in an intelligent manner and amounts to more than mere self-serving negative answers to a few direct leading questions which were so phrased as to inevitably point the way to a defense under *Afroyim* (see INTERP 349.1(f)(4(vi))). [Emphasis added.]

The AAO notes that the Attorney General and INS [CIS] position set forth in Interpretations 324.1(b)(3)(i), allows for AAO adjudication of this matter, in spite of jurisdictional issues, with consideration given to concerns regarding the overall constitutionality of the Act of 1907.

The AAO finds further that the evidence in the present record fails to establish that the applicant's grandmother intended to abandon her U.S. citizenship when she married a Syrian citizen in 1918. The AAO notes first, the fact that the applicant's grandmother was a minor when she married her husband in 1918, at the age of 14, and when she moved to Syria with her husband in 1921, at the age of 17. In addition, the evidence indicates that

the applicant's grandmother returned to the U.S. in 1954, and affirmatively repatriated pursuant to the citizenship laws in effect at that time. Moreover, although the applicant's grandmother remained in Syria for more than 32 years and raised a family in that country, the record contains no other affirmative evidence (aside from her marriage to a foreign national) to indicate that the applicant's grandmother intended to expatriate herself from the United States.³

The AAO thus finds that the district director and the prior AAO decisions did not meet the required burden of proof for establishing that the applicant's grandmother intended to relinquish her citizenship under the Act of 1907. Accordingly, the AAO now finds that the applicant's grandmother did not lose her U.S. citizenship, and that she retained her citizenship at the time that her daughter (the applicant's mother) was born in 1929.

The evidence in the record reflects that the applicant's mother, born in 1929, lived in Syria and Lebanon for 50 years before coming to the U.S. in 1979, on an immigrant visa. The evidence additionally indicates that the applicant's mother married a Syrian citizen in 1949, and that the applicant was born in Lebanon on November 24, 1964. The record indicates further that the applicant's father became a naturalized U.S. citizen in June 1977, and that the applicant lived in Lebanon until coming to the U.S. with his mother on April 2, 1979, on an immigrant visa.

The applicable law regarding the automatic acquisition of U.S. citizenship for a child born in 1929 to a U.S. citizen parent, is contained in section 301(h) of the Act, 8 U.S.C. § 1401(h), which states in pertinent part that:

The following shall be nationals and citizens of the United States at birth:

. . .

a person born before noon . . . May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

³ The AAO notes that the applicant's grandmother died in 1976 and that her husband died 2 years earlier in 1974. The record, therefore, contains no direct statements from the applicant's grandparents regarding expatriation intent.

The AAO notes that section 301(h) grants citizenship retroactively to children born either to U.S. citizen mothers or U.S. citizen fathers who were born prior to 1934. See section 101 of the *Immigration and Nationality Technical Corrections Act of 1994 (INTCA)*, Pub. L. 103-416, Title I, 108 Stat. 4305 (Oct. 25, 1994). In order to derivatively pass on U.S. citizenship, the U.S. citizen father or mother must have resided in the U.S. prior to the child's birth. See *Weedin v. Chin Bow*, 274 U.S. 657 (1927). It has been held that any temporary physical presence in the U.S. is sufficient to satisfy the physical presence requirement. See *Matter of V -*, 6 I&N Dec. 1 (BIA 1953).

The evidence in the record indicates that the applicant's grandmother was born in the U.S. in 1903, and that she resided in the U.S. prior to her marriage in 1918. The applicant's grandmother therefore met the physical presence requirements for passing on derivative U.S. citizenship to the applicant's mother.

The evidence in the record also establishes that the applicant's mother and father met the statutory requirements for derivatively passing on U.S. citizenship to the applicant, pursuant to section 320 of the former *Immigration and Nationality Act of 1952*, 8 U.S.C. § 1431 in effect at the time of his birth.

Former section 320 of the Act 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.

The evidence in the record establishes that the applicant's parents married in Syria in 1949, and that the applicant's mother was a U.S. citizen by birth and never ceased to be a U.S. citizen.⁴ The record reflects further that the applicant's father became a naturalized U.S. citizen in 1977, when the applicant was 13 years old, and that the applicant was admitted into the United States on April 2, 1979 as a lawful permanent resident. The AAO thus finds that the applicant meets the requirements as set forth in former section 320 of the Act, and that he therefore acquired automatic U.S. citizenship pursuant to former section 320 of the Act. Accordingly, the prior AAO decision will be withdrawn.

ORDER: The motion to reopen is granted. The previous AAO decision and order is withdrawn and the application approved.

⁴ The evidence in the record reflects that the applicant's mother was also a citizen of Syria. The AAO notes, however, that the applicant's mother did not lose her U.S. citizenship by virtue of maintaining dual citizenship in both countries. See *Mandoli v. Acheson*, 344 U.S. 133, 137-138 (1952).