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**U.S. Citizenship
and Immigration
Services**

[REDACTED]

FILE:

[REDACTED]

Office: MIAMI, FLORIDA

Date: JUL 22 2004

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Application for Certificate of Citizenship pursuant to Section 301 of the former Immigration and Nationality Act; 8 U.S.C. § 1401.

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting District Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on July 8, 1956, in Caracas, Venezuela. The applicant's father, [REDACTED] was born in Alabama on December 9, 1904, and he was a United States citizen. The applicant's father died in Venezuela on March 1, 1969. The applicant's mother [REDACTED] was born in Venezuela on December 10, 1915, and she was not a U.S. citizen. The applicant's mother died in Venezuela in June 2000. The applicant's parents married on April 26, 1955, in Venezuela. The applicant seeks a certificate of citizenship pursuant to section 301 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1401, based on the claim that he acquired U.S. citizenship at birth through his father.

The acting district director (ADD) found that the evidence submitted by the applicant failed to conclusively establish his father [REDACTED] was physically present in the United States for 10 years prior to the applicant's birth, at least 5 years of which occurred after [REDACTED] reached the age of 14. The application was denied accordingly.

On appeal, counsel asserts that the evidence submitted in the applicant's case establishes by a preponderance of the evidence that [REDACTED] was physically present in the United States for the requisite time period under section 301 of the Act.

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026,1029 (9th Cir. 2000) (citations omitted). The applicant was born on July 8, 1956. Section 301(a)(7) of the former Act is therefore applicable to his derivative citizenship claim.

Section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7) states in pertinent part that:

The following shall be nationals and citizens of the United States at birth: . . . a person born outside the geographical limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States . . . for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

In *Matter of V*, 9 I&N Dec. 558, 560 (BIA 1962), the Board of Immigration Appeals determined that the term "physical presence" meant "continuous physical presence" or "residence" in the United States. In order to meet the physical presence requirements as set forth in section 301(a)(7) of the former Act, the applicant must establish by a preponderance of the evidence that [REDACTED] was physically present in the U.S. for ten years between December 9, 1904 and July 8, 1956, and that at least five of those years occurred after December 9, 1918.

The evidence relating to [REDACTED] physical presence in the United States between December 9, 1904, and July 8, 1956, consists of copies of the following documents:

A Birth Affidavit prepared on June 21, 1948, by [REDACTED] mother, stating that Mr. Byrd was born in Alabama on December 9, 1904, and that as of June 21, 1948, he resided in Florida;

An initial U.S. passport issued to [REDACTED] on June 25, 1948, by the Department of State in Washington. The passport contains an initial visa for travel to Venezuela, issued to [REDACTED] on July 8, 1948, by the Venezuelan Consulate in Miami, Florida. The passport indicates that [REDACTED] obtained temporary resident status in Venezuela on October 18, 1948. The passport contains what appear to be several exit and entry stamps into Venezuela between 1948 and 1951;

A letter from the Social Security Administration, Retirement, Survivors and Disability Insurance office reflecting that, "Social Security coverage went into effect for Mr. Byrd in 1937. Therefore, we do not have any record of [REDACTED] employment prior to 1937. We were also unable to identify his employers for the years 1937, 1938, 1939, 1940, 1944 and 1950 even though we have earnings reported for those years." The letter then identifies the name of Mr. Byrd's U.S. based employers in 1941, 1942, 1943, 1945, 1946, 1947, 1948, 1949 and 1952.

A July 29, 1999, letter from the Social Security Administration certifying and demonstrating that the applicant and/or his mother received survivor benefits under Mr. Byrd's social security number from approximately 1972 through 1999.

A June 28, 1948, letter from [REDACTED] of New York, requesting a visa for [REDACTED] and stating that [REDACTED] would be employed in Venezuela for approximately eighteen months;

A June 21, 1948 certificate from the Fort Lauderdale, Florida police department stating that [REDACTED] had no criminal record;

A June 19, 1948, medical letter by a Daytona Beach, Florida doctor stating that he examined [REDACTED] and found him to be in good health.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence.¹ In *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989), the Commissioner indicated that in order to satisfy the preponderance of evidence standard, it is generally sufficient that the evidence establish that something is probably true.

The AAO finds that the cumulative evidence contained in the record establishes by a preponderance of the evidence that the applicant's father was physically present in the U.S. for a period of ten years between December 9, 1904 and July 8, 1956, and that at least five of those years occurred after December 9, 1918.

The AAO notes that the Social Security Administration, Retirement, Survivors and Disability Insurance letter submitted by counsel states that the agency has earnings reported for [REDACTED] in 1937-1940, 1944 and 1950. The letter additionally lists various U.S. based employers that [REDACTED] worked for between 1941 and 1958. The AAO notes further that the July 29, 1999, survivor benefits evidence from the Social Security Administration demonstrates that [REDACTED] earned sufficient work based credits to obtain survivor benefit rights.² Although neither document establishes exactly where [REDACTED] resided during the years that he

¹ The AAO notes that any indication by the Acting District Director that the applicant must provide conclusive evidence of his father's physical presence in the U.S. was therefore in error.

² The AAO notes that widows, unmarried children under eighteen and disabled children can be eligible for social security survivor's benefits if the deceased family member paid Social Security taxes and earned enough work credits prior to their death. "Social Security eligibility and beneficiaries are determined by the "insured status" of the deceased,

reported U.S. earnings and worked for U.S. based companies, the combined social security and employment evidence, along with the affidavit and passport evidence submitted in the present case, persuade the AAO that it is probably true that [REDACTED] was physically present in the U.S. for a period of ten years between December 9, 1904 and July 8, 1956, and that five years were after December 9, 1918. The applicant has therefore established by a preponderance of the evidence that his father was physically present in the U.S. for the requisite period of time under section 301(a)(7) of the Act, and the appeal will be sustained.

ORDER: The appeal is sustained.

which . . . depends on how long the deceased has been working and having social security tax deducted from her [his] pay." See Government Survivor Benefits, <http://www.eplin.af.mil/legal/sur-ben.htm>. "In order to qualify as "currently insured", "the deceased must have 6 quarters earned . . . during the 13 quarters (3 ½ years) ending with the quarter in which death occurs." *Id.* Benefit payments are then made either in one lump sum of \$255.00, or in monthly payments to surviving dependent children under 18, or any age if disabled, or in monthly payments to a widow if caring for a child under 16. "In order to be considered "fully insured", the deceased must have earned a total of 40 quarters (worked at least 10 years)." *Id.* The survivor then receives all benefits received by those who are "currently insured" as well as the deceased retirement benefits and monthly payments for surviving disabled children of any age if disabled before age 22.