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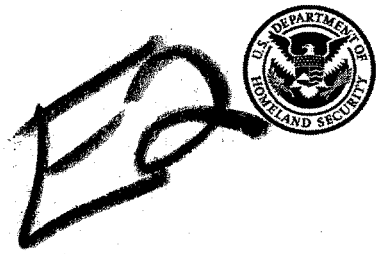

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: FEB 02 2004

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Section 301(a)(7) of the former Immigration and Nationality Act, 8 U.S.C. § 1401(a)(7).

ON BEHALF OF APPLICANT: Self-represented

PUBLIC COPY

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 waiver application was denied by the Acting District Director, Miami, Florida. A subsequent appeal was sustained by the Administrative Appeals Office (AAO). The matter is now before the AAO on a Service motion to reopen. The motion will be dismissed and the order sustaining the appeal will be affirmed.

The record reflects that the applicant was born on February 18, 1986, and that he is a native and citizen of Canada. The applicant's father, born in Haiti in May 1954, and he became a naturalized United States (U.S.) citizen on July 25, 1978. The applicant's mother was born in September 1954 in Canada. She is not a U.S. citizen. The applicant's parents married in New York on January 11, 1982. The applicant seeks a certificate of citizenship based on the claim that he acquired U.S. citizenship at birth pursuant to section 301(a)(7) of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1401(a)(7).

The acting district director determined that the applicant had failed to establish his U.S. citizen father (Mr. Archer) met physical presence requirements set forth in section 301 of the Act, at the time of the applicant's birth. The application was denied accordingly.

8 C.F.R. § 103.5(a) states in pertinent part:

Motions to reopen or reconsider

. . . .

(2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.

. . . .

(4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

In a decision dated, October 15, 2002, the AAO found that based on income tax and school records, as well as information contained in Mr 1978, naturalization alien file, the applicant had established that his father met section 301 of the Act, physical presence requirements at the time of the applicant's birth.

"When there is a claim of citizenship . . . one born abroad is presumed to be an alien and must go forward with evidence to establish his claim to United States citizenship." Matter of Tijerina-Villarreal, 13 I&N Dec. 327, 330 (BIA 1969) (citations omitted). Absent discrepancies in the evidence, where a claim of derivative citizenship has reasonable support, it will not be rejected. See Murphy v. INS, 54 F.3d 605 (9th Cir. 1995).

"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).

In the present matter, in order to derive citizenship pursuant to section 301(a)(7) of the former Act, it must be established that when the applicant was born, his U.S. citizen parent was physically present in the U.S. or its

outlying possession for 10 years, at least 5 of which were after the age of 14. See § 301(a)(7) of the former Act.

In a Service motion to reopen, the acting district director asserts that the AAO misapplied amended section 301(g) naturalization law in the applicant's case, and that based on new and additional evidence, the applicant is ineligible for a certificate of U.S. citizenship pursuant to section 301(a)(7) of the former Act. Specifically, the acting district director asserts that the AAO erroneously applied a five year physical presence standard to the applicant's case, pursuant to section 301(g) of the amended Act, rather than applying the required 10 year physical presence standard required under section 301(a)(7) of the former Act.[1]

The AAO notes that its October 15, 2002, decision erroneously stated, "[i]t is concluded that the father satisfied the 5-year physical presence requirement for the applicant under section 301(g) of the [amended] Act in effect on November 14, 1986." Further review of the decision reflects, however, that, although a concluding paragraph of the AAO's October 15, 2002, decision erroneously referred to the 5 year physical presence requirements set forth in section 301(g) of the amended Act, the entire decision was in fact based on meeting the 10-year residency standard set forth in section 301(a)(7) of the former Act.

On page 2 of its decision, the AAO sets forth the controlling law for persons born before November 14, 1986, which requires that Mr. establish that he was physically present in the United States or its outlying possessions for a period of 10 years, at least 5 of which were after the age of 14. The AAO then analyzes evidence of Mr. physical presence in the United States, beginning in September 1971, and ending in July 1987. Based on information found in Mr. lien file, the AAO decision concludes that Mr. was physically present in the United States between September 29, 1971 and May 18, 1978 (6 years and 4 months), and that according to Mr. statements on appeal, he additionally established physical presence through June 1980, when he went to the Dominican Republic (approximately 2 years). The previous decision further concluded that the applicant established Mr. physical presence in the United States between January 1983 and February 1986 (approximately 3 years). The total physical presence based on the AAO 's analysis was therefore more than 11 years.

The acting district director (ADD) asserts on motion that material discrepancies exist between the physical presence testimony provided by Mr. n his naturalization application and on appeal, and the testimony provided by Mr. uring the applicant's naturalization interviews. Specifically, the ADD states that Mr. tated that he lived in Canada between September 29, 1971, and some point in 1973, and that he had failed to disclose any period of time in Canada on his immigrant or naturalization applications. The ADD asserts further that the evidence in the record reflects U.S. school attendance beginning in June of 1974 rather than in 1973. On this basis, the ADD asserts that the AAO's reliance on Mr. alien file statements regarding his physical presence in the United States beginning in September 29, 1971, rather than in June 1974, are contradicted by subsequent information, and should therefore be given no weight.

The AAO finds the ADD's assertion to be unpersuasive. Although the ADD submits an April 11, 2003,

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[1] It is noted that the acting district director and the AAO decision refer to Mr. physical presence requirement pursuant to section 301(g) of the Act. Section 301(g) replaced former section 301(a)(7) when the Immigration and Nationality Act was amended. The physical presence requirements for sections 301(a)(7) of the former Act and 301(g) of the amended Act, are identical.

memorandum written by the supervisory district adjudications officer (SDAO) to whom the statements were allegedly made, the record does not contain the actual notes of the interview to establish that the statements were made, and the record does not contain a written document by Mr. to indicate that contradictory statements were made. Without actual evidence of contradictory physical presence statements by Mr. the AAO continues to find the information provided under oath and contained in Mr alien file, to be reasonable and persuasive.

The ADD additionally asserts that the Form G-325, Biographic Information (Form G-325), contained in the applicant's mother's alien file (Mrs states that Mr. lived in Canada from October 1972 to June 1974. The record does not contain a copy of this information, however, and the AAO notes that such information, on its own, and without other actual contradictory evidence, would not be strong enough to contradict the information found in Mr. alien file.

The ADD asserts that the fact that Mr did not file U.S. income taxes between 1971 and 1973, and between 1979 and 1984, contradicts his statements that he was physically present in the United States from 1983 to 1991. The ADD additionally asserts that upon questioning at the applicant's citizenship interview, Mr. dmitted that he had become a landed immigrant in Canada in 1983, but denied living there. The ADD also asserts that Mr. stated at the applicant's citizenship interview that his wife worked at a school in New York while he lived at home with his mother studying for medical Board exams. The ADD asserts that this information contradicts information found on Mr Form G-325, indicating that she lived in Canada until February 1983.

The AAO does not find Mr failure to file U.S. income taxes between 1971 and 1973, and between 1979 and 1984, to be contradictory to his statements that he went to school or studied for medical boards during that time period. The AAO notes that the present record contains no interview notes, statements by Mr. or other evidence to indicate that Mr. ecame a landed immigrant in Canada in 1983, or that, if he did become a landed immigrant, that he was living in Canada during that time period. The record additionally contains no copy of Mrs. Form G-325. Moreover, the AAO finds that even if this information were contained in the record, it would not, in and of itself, contradict Mr statement that he lived with his mother while studying for medical Board exams after June 1983, and the general statement that his wife worked at a school in New York to support him.

Accordingly, the AAO finds that the ADD failed to establish that the information used by the AAO in its previous decision was materially contradicted by new evidence, or that the AAO unreasonably relied on the information contained in the record and in Mr alien file.

Because the ADD failed to establish that the AAO erred in its initial decision, the Service motion will be dismissed.

ORDER: The appeal is dismissed and the order of October 15, 2002, sustaining the appeal is affirmed.