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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEWARK, NJ Date: MAR 16 2004

IN RE: Applicant [redacted]

APPLICATION: Application for Certificate of Citizenship under sections 301 and 320 of the Immigration and Nationality Act, 8 U.S.C. §§ 1401 and 1431.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 District Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant was born on October 19, 1989, in Vancouver, Canada. The record reflects that the applicant's mother was born in California, and that she is a U.S. citizen. The applicant's father, was born in Ontario, Canada. The record reflects that the applicant's father has a passport issued by the U.S. State Department in January 1998, and that he is a U.S. citizen.[1] The applicant's parents were married on October 16, 1986, in Colorado. The applicant seeks a certificate of citizenship pursuant to sections 301 and 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1401 and 1431.

The district director determined the applicant had failed to submit sufficient documentation to establish that he qualified for U.S. citizenship under sections 320 of the Act. The application was denied accordingly for lack of prosecution.

On appeal, the applicant, through his father, asserts that he submitted sufficient documentation to establish his eligibility for a certificate of U.S. citizenship. The applicant submits federal tax, school, marriage and affidavit documentation to establish that his mother is a U.S. citizen who was physically present in the United States for the requisite time period.

"The applicable law for transmitting citizenship [at birth] 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 in Canada in 1989. Thus, the version of section 301 of the Act that was in effect at that time (section 301(g)) controls his claim to derivative citizenship. In order to derive citizenship pursuant to section 301(g) of the Immigration and Nationality Act, it must be established that when a child was born, the U.S. citizen parent was physically present in the U.S. or its outlying possession for 5 years, at least 2 of which were after the age of 14. *See* § 301(g) of the Act.

The definition of "physical presence" was addressed by the Board of Immigration Appeals (BIA) in *Matter of V,* 9 I&N Dec. 558, 560 (BIA 1962). The BIA 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(g) of the Act, the applicant must establish that his mother was physically present in the U.S. for five years between April 19, 1961, and October 19, 1989, and that two of those years occurred after April 19, 1975.

The evidence pertaining to the applicant's mother's physical presence in the United States prior to October 19, 1989, consists of the following documents:

> A Birth Certificate reflecting that the applicant's mother (Mrs. was born in Los Angeles, California on April 19, 1961;
>
> A May 1979, high school diploma reflecting that Mrs. graduated from Brighton, High School in Colorado;

[1] The AAO notes that the record contains no information to indicate the basis of the applicant's father's U.S. citizenship, or the date on which he obtained his citizenship.

A certificate indicating that Mrs. completed 90 units of Brighton High School, Frontier Airline reservations training in May 1979;

An employee identification card that expired on May 29, 1980, reflecting that Mrs. was employed with Frontier Airlines;

A Colorado Driver's License issued to Mrs. in April 1979;

U.S. Federal Tax Return / W-2 Statements reflecting earnings by Mrs. during the years 1981, 1982, and 1983;

An unemployment Insurance Benefit Statement reflecting Mrs. earnings at Frontier Airlines between April 1985 and March 1986;

A marriage certificate reflecting that Mrs. married her husband in Colorado on October 16, 1986;

An affidavit written by Mrs. father, stating that Mrs. resided in the U.S. from the time of her birth until October 18, 1986.

The AAO finds that the evidence submitted reasonably demonstrates that the applicant's mother was physically present in the United States for at least five years between 1961 and 1989, and that two of those years occurred after April 1975 as required by section 301(g) of the Act in effect at the time of his birth.[2]

The regulation at 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. *See also* § 341 of the Act, 8 U.S.C. § 1452. The AAO finds that applicant has met his burden in the present matter. The appeal will therefore be sustained.

**ORDER:** The appeal is sustained and the application approved.

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[2] The AAO notes that the applicant's certificate of citizenship application was also under consideration pursuant to automatic citizenship provisions set forth in section 320 of the Act, 8 U.S.C. § 1431. Section 320 of the Act states in pertinent part that:

(a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

(1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
(2) The child is under the age of eighteen years.
(3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

Based on the evidence contained in the record, the applicant meets the requirements set forth in section 320(a)(1) and (a)(2) of the Act. However, the record contains no evidence to establish that the applicant entered the U.S. pursuant to a lawful admission for permanent residence. He therefore does not appear to be eligible for automatic citizenship under section 320 of the Act.