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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 12 2005

IN RE: Applicant: [redacted]

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

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 Director, Vermont Service Center, 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 April 20, 1998, in Canada. The applicant's father, was born in Guatemala on January 31, 1960, and became a naturalized U.S. citizen on January 16, 1996. The applicant's mother, was born in Canada, and she is not a U.S. citizen. The applicant's parents married in Virginia on September 11, 1995. The applicant presently seeks a certificate of citizenship pursuant to section 301(g) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1401(g), based on the claim that he derived U.S. citizenship at birth through his father.

The director determined that the applicant had failed to establish his father was physically present in the United States as a U.S. citizen, for five years prior to the applicant's birth, at least two years of which occurred after his father's fourteenth birthday. The application was denied accordingly.

On appeal, counsel asserts that the evidence contained in the record establishes the applicant's father (Mr. was physically present in the United States for the requisite time period set forth in section 301(g) of the Act. Counsel asserts further that section 301(g) of the Act does not require Mr to have been a U.S. citizen during the requisite period of his physical presence in the United States.

"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 in Canada in April 1998. Section 301(g) of the Act, therefore applies to his derivative citizenship claim.

Section 301(g) of the Act, 8 U.S.C. § 1401, states in pertinent part, that the following shall be nationals and citizens of the United States at birth:

> (g) a person born outside the geographical limits of the United States and its outlying possessions 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 or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years

Counsel asserts on appeal that the director's decision is unsupported by any legal authority that requires Mr. to be a U.S. citizen during the period that he was physically present in the U.S., for purposes of section 301(g) of the Act. Counsel asserts that the plain language of section 301(g) of the Act reflects that the five-year period of physical presence can be satisfied at any time prior, or subsequent to a parent's obtaining citizenship status in the United States. Counsel asserts further that legal authority relating to the issue of physical presence for section 301 of the Act and previous section 201(g) of the Nationality Act of 1940 cases, does not specify that physical presence requirements must be met while a U.S. citizen parent is a U.S. citizen.

The AAO finds counsel's assertions to be correct. The AAO notes that in *Matter of Y,* 7 I&N Dec. 667 (Reg. Comm. 1958), the Regional Commissioner found, in pertinent part, that, "[a]s long as the citizen parent resided at any time (for the required period, prior to the birth of the child) in a territory which was then a United States possession . . .the requirement in section 201(g) with respect to the parent's residence is

satisfied." The Regional Commissioner noted in *Matter of Y, supra,* that the U.S. citizen father had been naturalized on October 7, 1946, and that the applicant was born less than three years later, on July 7, 1949. The Regional Commissioner found that the father's residence in a United States possession prior to his naturalization as a U.S. citizen satisfied the section 201(g) requirement that he reside in the U.S. or an outlying possession for ten years prior to the child's birth, at least five years of which were after attaining the age of fourteen.[1]

The AAO notes further that Volume 7 of the U.S. Department of State Foreign Affairs Manual (7 FAM) section 1133.3-3(a)(2), addresses the issue of whether physical presence in the U.S. may be satisfied prior to a parent's becoming a U.S. citizen for derivative citizenship purposes, by stating that:

> (2) Naturalized citizens may count any time they spent in the United States or its outlying possessions both before and after being naturalized, regardless of their status. Even citizens who, prior to lawful entry and naturalization, had spent time in the United States illegally could include that time.

Given the director's failure to provide a legal basis for the requirement that a U.S. citizen parent must comply with physical presence requirements while she or he is a U.S. citizen, and based on the above legal case law and guidance, the AAO finds that the physical presence requirement set forth in section 301(g) of the Act may be satisfied by time spent in the United States prior to, as well as subsequent to, a parent's naturalization as a U.S. citizen.

Accordingly, the AAO must determine whether the evidence contained in the record establishes that the applicant's father was physically present in the U.S. for five years between January 31, 1960, and the applicant's birth on April 20, 1998, and that two of the years occurred after January 31, 1974, when Mr. [redacted] fourteen.

The record contains the following evidence pertaining to Mr. [redacted] physical presence in the U.S. during the requisite time period:

> Federal Tax Returns and Federal Wage and Tax Statements reflecting Mr. [redacted] earnings and residence in the U.S. for ten years between 1988 and 1998.
>
> Social Security Administration Summary Earnings statement reflecting Mr. [redacted] earnings in the United States between 1988 and 1998.
>
> Immigration and Naturalization Service (Service) Temporary Resident Card issued to Mr. [redacted] in May 1988, and Service correspondence reflecting that Mr [redacted] resided in the U.S. at that time.
>
> 1988-1989 bills and loan application reflecting that Mr [redacted] resided in the United

[1] The AAO notes that in order for a child born outside of the United States to derive citizenship from one U.S. citizen parent pursuant to section 201(g) of the NA, it must be established that, when the child was born, the U.S. citizen parent resided in the U.S. or its outlying possession for 10 years, at least 5 of which were after the age of 16. *See* § 201(g) of the Nationality Act.

States.

Unemployment benefit documentation, apartment lease, and payment receipts reflecting that Mr. Aroche resided in the U.S. between 1990 and 1993.

Affidavits from friends and employers stating that Mr rented an apartment and was employed in the U.S. between 1996 and 1997.

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

The AAO finds that the physical presence evidence contained in the record establishes, by a preponderance of the evidence, that the applicant's U.S. citizen father was physically present in the United States for a period of five years prior to the applicant's birth, at least two years of which occurred after Mr urned fourteen on January 31, 1974. Accordingly, the applicant has met the burden of establishing that he qualifies for U.S. citizenship under section 301(g) of the Act, and the appeal will be sustained.

ORDER: The appeal is sustained.