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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 31 2005

IN RE: Applicant: [redacted]

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

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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on April 22, 1980, in Israel. The applicant's father, was born on February 7, 1947, in Germany. He became a naturalized U.S. citizen on June 29, 1971. The applicant's mother was not a U.S. citizen. The applicant's parents married on August 8, 1971, in Israel. The applicant presently seeks a certificate of citizenship pursuant to section 301(a)(7) of the former Immigration and Nationality Act (the former Act); 8 U.S.C. § 1401(a)(7), based on the claim that he derived U.S. citizenship at birth through his father.

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

On appeal, counsel asserts that neither the provisions contained in section 301of the former Act, nor legal authority relating to physical presence under section 301 of the former Act, require the applicant's father (Mr. to have been a U.S. citizen during the requisite period of his physical presence in the United States, and that the evidence contained in the record establishes the was physically present in the United States for the requisite time period set forth in section 301(a)(7) of the former Act.

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 [derivative citizenship] requirement in section 201(g) [of the Nationality Act of 1940, (the Nationality Act)] with respect to the parent's residence is satisfied." The Regional Commissioner noted in *Matter of Y,* that the U.S. citizen father had been naturalized on October 7, 1946, and that the applicant was born approximately three years later, on July 7, 1949. The Regional Commissioner found, however, 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.

Volume 7 of the U.S. Department of State Foreign Affairs Manual (7 FAM) section 1133.3-3(a)(2), also addresses the issue of whether physical presence in the U.S. may be satisfied for derivative citizenship purposes, prior to a parent's becoming a U.S. citizen. 7 FAM 1133.3-3(a)(2) states, in pertinent part 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.

Based on the above legal case law and guidance, the AAO finds that the physical presence requirement set forth in section 301(a)(7) of the former 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.

"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 Israel in April 1980. Section 301(a)(7) of the former Act, therefore applies 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 the present matter, 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 ten years between February 7, 1947 and April 22, 1980, five years of which occurred after February 7, 1961, whe[redacted]urned fourteen.

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

> [redacted] U.S. Certificate of Citizenship, dated June 29, 1971, reflecting that he resided in Brooklyn, New York.
>
> A sworn affidavit signed by [redacted] stating that he lived in the U.S. between December 5, 1965 and May 1971, and that he traveled back and forth and stayed in the U.S. for up to thirty days in November 1975 and April 1978.[1]

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 fails to establish, by a preponderance of the evidence, that the applicant's father was physically present in the United States for a period of ten years prior to the applicant's birth, at least five years of which occurred afte[redacted] turned fourteen. The AAO notes that the record contains no corroborating evidence to substantiate Mr. [redacted] U.S. physical presence claims. Moreover, assumin[redacted] U.S. physical presence claims are all true, he has established only that he was physically present in the U.S. for up to six years (5 ½ years between December 1965 and May 1971, possibly one month in June 1971, and at most, two months in November 1975 and April 1978). The applicant has therefore failed to establish that he is entitled to derivative U.S. citizenship pursuant to section 301(a)(7) of the former Act, and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.

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[1] The affidavit notes numerous visits through the year 2002, but any time after the applicant's birth in 1980 is not relevant.