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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: NEW YORK, NY Date: DEC 18 2008

IN RE: Applicant: [Redacted]

APPLICATION: Application for Certificate of Citizenship pursuant to former Section 201(g) of the Immigration and Nationality Act; 8 U.S.C. § 1151(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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, New York, New York 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 September 22, 1952 in Canada. The applicant's father, [REDACTED] was born on September 27, 1922 in Ohio. The applicant's mother, [REDACTED], was, at the time of the applicant's birth, a citizen of Canada, becoming a naturalized U.S. citizen on April 12, 1955. The applicant's parents married on July 21, 1951. The applicant seeks a certificate of citizenship based on the claim that she acquired U.S. citizenship at birth through her father.

In her decision, the district director determined that the applicant had failed to establish that her father had been physically present in the United States for the ten years required by section 201(g) of the Nationality Act of 1940. In light of this finding, the district director indicated that the question of the applicant's biological relationship to [REDACTED] would not be addressed, although she noted that the record did not provide sufficient evidence to establish this relationship.

On appeal, counsel contends that the district director incorrectly applied section 301(g) of the Act to the applicant's case, requiring that the applicant establish that [REDACTED] had ten years of physical presence in the United States, rather than the ten years of residence required by section 201(g) of the Nationality Act of 1940 (1940 Act), the law in effect at the time of the applicant's birth. Counsel further asserts that the evidence submitted in support of the Form N-600, the affidavits and supporting documentation, establish that the applicant is 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 in this case was born on September 22, 1952. Therefore, she must establish her claim to U.S. citizenship under section 201(g) of the Nationality Act of 1940, the applicable immigration statute in effect at the time of her birth.

Section 201(g) of the 1940 Act states in pertinent part that:

A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien. *Provided*, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

Therefore, in the present matter, the applicant must establish that her father resided in the United

States for ten years between his birth on September 27, 1922 and her birth on September 22, 1952, and that five of those years followed September 27, 1938, the date on which [REDACTED] turned 16 years of age. Further, the applicant must, herself, satisfy certain residency requirements, initially set forth in section 201(g) and amended by subsequent immigration legislation.

The AAO first addresses the district director's determination that to establish her claim to U.S. citizenship the applicant is required to demonstrate that [REDACTED] was *physically present* in the United States for ten years prior to her birth. The AAO notes that the language of section 201(g) of the 1940 Act requires an applicant to establish his or her parent's *residence* in the United States, not physical presence. As defined by section 104 of the 1940 Act, residence means "the place of general abode." To satisfy the residence requirement of section 201(g) of the 1940 Act, the applicant must establish only that, for ten years prior to her birth, [REDACTED] principal place of dwelling¹ was in the United States and that he was over the age of 16 for five of those years. Accordingly, the district director erred in applying a physical presence requirement to the applicant's case and her decision in this matter will be withdrawn.

The record provides the following evidence in support of the applicant's claim to U.S. citizenship:

- [REDACTED]'s 1922 birth certificate indicating he was born in Ohio
 - The applicant's Canadian birth certificate identifying [REDACTED] as her mother and [REDACTED] as her mother's husband
 - A letter from The Office of the Registrar General, Ministry of Government Services for the Province of Ontario, dated September 19, 2008, which establishes statutory requirements for the registration of births in Ontario in 1952
 - A certificate of marriage for Mr. and Ms. [REDACTED] establishing the date of their marriage as July 21, 1951
 - Affidavits from [REDACTED], a second cousin of [REDACTED], dated April 18, 2007; [REDACTED], a first cousin of [REDACTED], dated April 11, 2007; [REDACTED], a cousin of [REDACTED] dated April 13, 2007; [REDACTED], Mr. [REDACTED]'s sister, dated March 27, 2007; and [REDACTED], Mr. [REDACTED]'s daughter and the applicant's half sister, dated April 16, 2007
- A certification issued by the Michigan Department of the Treasury, dated November 13, 2007 and a letter from the Ohio Department of Taxation, dated October 23, 2007, regarding the unavailability of tax records for [REDACTED]; and a copy of Form 4506, Request for Copy of Tax Return, which indicates that federal tax returns are destroyed seven years after they are filed
- A letter from the General Motors Corporation establishing [REDACTED]'s employment from October 1946 until December 1980, dated September 28, 2006
 - Social security earnings for [REDACTED] for the years 1951-1980
- A letter from Student Information Systems in Detroit, Michigan reporting that the applicant attended school in Detroit, from September 4, 1957 until June 13, 1969,

¹ In *Savorgnan v. United States*, 338 U.S. 491, 505 (S.C. 1950), the Supreme Court interpreted residence as the principal dwelling place of a person without regard to intent.

when she graduated from high school, dated November 9, 2007; and Detroit Public School attendance records for the applicant showing her enrollment from 1957 through 1969

- An application for a social security number, signed by the applicant on November 4, 1966 and showing her as residing in Detroit, Michigan; and social security earnings statements for the applicant showing income for the years 1968 -1972, 1982, 1984-1989, and 1998-2001
- The applicant's marriage certificate establishing that she was married on September 19, 1971 in Michigan
- [REDACTED] Petition for Naturalization, dated January 10, 1955 indicating her residence in the United States since September 19, 1951 and that the applicant was, at the time of the petition's filing, living with her.

In her decision, the district director noted that the applicant's birth certificate failed to identify Mr. [REDACTED] as the applicant's father and, instead, indicated that he was the husband of [REDACTED]

While the AAO acknowledges that the applicant's birth certificate does not specifically identify Mr. [REDACTED] as the applicant's father, it finds the September 19, 2008 letter from the Ontario Office of the Registrar General to offer compelling evidence that [REDACTED]'s designation as [REDACTED] husband should not be viewed as evidence that he is not the applicant's biological father. The submitted letter from the Ontario government clearly indicates that under the Ontario law in effect at the time of the applicant's 1952 birth, birth registrations were not allowed to indicate paternity, although they could include information on the birth mother's husband. In light of this restriction and the fact that the record demonstrates that [REDACTED] was the applicant's birth mother and that she and [REDACTED] were married as of July 21, 1951, the AAO finds the record to establish, by a preponderance of evidence, that [REDACTED] is the applicant's natural father.

The AAO also finds the record to establish that [REDACTED]'s residence in the United States satisfies the requirements of section 201(g) of the 1940 Act. While it notes that [REDACTED] was not counted in the U.S. census conducted in 1940 in Cincinnati, Ohio, it does not find the absence of a census record for [REDACTED] to be meaningful as the record includes an Issue Brief, published by the U.S. Census Monitoring, entitled "Who Gets Missed in the Census?" that indicates that the U.S. decennial census has historically undercounted African-Americans in large numbers. The absence of any tax returns for [REDACTED] is addressed by letters from the Ohio and Michigan state governments and the Form 4506, which indicates that federal tax returns are generally retained for no more than seven years. While the documentary evidence of [REDACTED]'s residence in the United States prior to the applicant's birth is limited to a social security earnings report for the years 1951-1980 and the documentation of his General Motors employment in Detroit, which began in 1946, the AAO acknowledges the difficulty of obtaining records for an individual born more than 85 years ago and notes that the regulation at 8 C.F.R. § 103.2(b)(2)(i) allows for the submission of affidavits when primary or secondary documentation is unavailable:

If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue.

If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit *two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances*. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Although the district director found the affidavits submitted in support of the applicant's claim to citizenship to be insufficient to establish [REDACTED] physical presence in the United States, section 201(g) of the 1940 Act, as previously discussed, requires the applicant to prove only that Mr. [REDACTED] principal place of abode was in the United States for ten years prior to her birth. The affidavits submitted by [REDACTED]'s cousins, [REDACTED] and [REDACTED] who were born in 1930, 1922 and 1931 respectively, attest that they grew up in Cincinnati and had personal contact with [REDACTED] in Cincinnati and that he lived there until several years after the birth of his daughter, [REDACTED], which occurred in 1941. [REDACTED] sister, [REDACTED], states that she is his junior by two years and that he lived with her and his family at several different Cincinnati addresses until he married his first wife. She also reports that Mr. [REDACTED] lived in Cincinnati until several years after his daughter was born but then moved to Detroit and found employment with General Motors. The applicant's half-sister, [REDACTED], states that although [REDACTED] moved to Detroit when she was not yet five years old, she remembers when he lived with her and her mother in Cincinnati. [REDACTED] also reports that she remembers visiting [REDACTED] in Detroit when she was eight, nine and ten years old.

Having reviewed the affidavits, the AAO finds them to have been sworn by persons with direct knowledge of the information they are providing and to be sufficiently detailed and consistent to serve as reliable evidence of [REDACTED] residence in the United States. When the submitted affidavits are considered in conjunction with [REDACTED] employment history, as established by the employment letter from General Motors, the AAO finds the record to demonstrate that the length of [REDACTED]'s residence in the United States exceeds the ten years required by section 201(g) of the Act, and that five of the years he resided in the United States followed his 16th birthday.

The AAO turns finally to the issue of whether the applicant has satisfied the residence requirements for retention of citizenship under the 1940 Act. As previously noted, section 201(g) of the 1940 Act originally required that an individual who acquired citizenship through a U.S. citizen parent reside in the United States for a period or periods totaling five years between 13 and 21 years of age. However, section 301(a)(7)(b) of the Immigration and Nationality Act of 1952 (the Act) established new retention requirements for individuals born during the period of validity of the 1940 Act:

Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following such coming be continuously physically present in the United

States for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

The Act of October 27, 1972, Pub.L. 92-582, 86 Stat. 1289 further amended the retention requirements of section 301, stating in pertinent part:

Any person who is a national and citizen of the United States under paragraph (7) of subsection (a) shall lose his nationality and citizenship unless – (1) he shall come to the United States and be continuously present therein for a period of not less than two years *between* the ages of fourteen years and twenty-eight years In the administration of this subsection absence from the United States of less than sixty days in the aggregate during the period for which continuous physical present in the United States is required shall not break the continuity of such physical presence.²

The record on appeal includes school records for the applicant that establish she was enrolled in the Detroit public school system throughout the period beginning September 4, 1957 and ending June 13, 1969. Therefore, the AAO finds that the applicant has met the retention requirements established by the 1972 amendments as her school attendance records demonstrate that she was physically present in the United States for at least two years following her 14th birthday, September 22, 1966.

The AAO notes “[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.” *Fedorenko v United States*, 449 U.S. 490, 506 (1981). As previously noted, the regulation at 8 C.F.R. § 341.2 provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is “probably true” or “more likely than not.” See *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The applicant has met her burden in this proceeding. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.

² Under the 1972 amendments, individuals who had arrived in the United States prior to their enactment could choose to comply with the retention requirements set forth in the 1952 Act.