06-0947-ag

To Be Argued By:
JOHN H. DURHAM

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-0947-ag

RICHARDSON CHARLES,

Petitioner,

-vs-

U.S. IMMIGRATION & CUSTOMS ENFORCEMENT ("USICE"), ALBERTO R. GONZALES, ATTORNEY GENERAL ,

Respondents.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR RESPONDENTS

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STATEMENT OF JURISDICTION

Petitioner is an alien subject to an administratively final order of removal. Because petitioner was ordered removed based on his status as an aggravated felon, this Court's appellate jurisdiction under § 242(b)(2)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b)(2)(D) (2004), is limited to a review of petitioner's claim to be a citizen, and constitutional claims and questions of law raised in his challenge to the Board of Immigration Appeals' affirmance on January 31, 2006 (GA 2) of a final removal order issued by an Immigration Judge on September 14, 2005 (GA 85).[1] The petition for review was filed on March 1, 2006 – within 30 days of the BIA's decision – and was therefore timely.

[1] Because petitioner's appendix is incomplete, all citations are to the Government's Appendix ("GA"), which contains the full certified administrative record.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether petitioner was deprived of his right to due process when the IJ declined to grant him a fifth continuance after he continually failed to produce any evidence from Haiti regarding his mother's presumed death, in support of his derivative citizenship claim.

2. Whether the BIA abused its discretion in declining to reopen petitioner's case for further proceedings before the IJ based on a one-page document from a Haitian court that declared his mother "absent," but did not indicate whether she was presumed dead, much less whether she died before petitioner's eighteenth birthday – as would be necessary to establish his derivative citizenship.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-0946-ag

RICHARDSON CHARLES,

Petitioner,

-vs-

U.S. IMMIGRATION & CUSTOMS ENFORCEMENT ("USICE"), ALBERTO R. GONZALES, ATTORNEY GENERAL ,

Respondents.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENTS

Preliminary Statement

Petitioner, Richardson Charles, is a citizen of Haiti who was convicted in August 2004 in Connecticut Superior Court of Sexual Assault in the 2nd Degree. In June 2005, removal proceedings were initiated against Charles based on his status as a convicted aggravated felon. During the removal process, petitioner claimed that

he was a citizen of the United States by operation of the derivative citizenship statutes, former § 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432(a) (repealed 2000).

Specifically, Charles asserted that because his father became a naturalized citizen of the United States after petitioner emigrated to this country to live with his father and petitioner's mother died, all while he was under the age of eighteen, petitioner automatically became a United States citizen by operation of law. Despite four continuances, petitioner never presented the IJ with any evidence of his biological mother's death to support his derivative citizenship claim. Accordingly, an Immigration Judge ("IJ") rejected petitioner's claim and ordered him removed.

Petitioner appealed the IJ's removal order to the Board of Immigration Appeals ("BIA"). The BIA reviewed the record, including a Haitian decree relating to petitioner's mother's "absentee" status, which had not been produced during the removal proceedings before the IJ or in support of any motion to reopen the removal hearings. Based on its review of the record before it, the BIA affirmed the removal order and denied petitioner's request that the matter be remanded to the IJ for further proceedings.

Petitioner now seeks to have this Court vacate his removal order on the ground that he was denied due process of law when the IJ declined to grant him a fifth continuance, and when the BIA declined to remand his case to the IJ. The Court should deny the petition because petitioner failed to produce any evidence – to say nothing of a prima facie case – of the essential element of his

derivative citizenship claim under former § 321(a)(2) of the INA, namely his mother's death before he had reached the age of eighteen. Further, subsequent to the IJ entering an order directing petitioner's removal, he failed to ask the IJ to reopen the removal proceedings and/or produce evidence which would establish a prima facie case for the claimed derivative citizenship. Finally, the BIA did not abuse its discretion in declining to remand his case to the IJ because petitioner never obtained a legal decree regarding his mother's presumed death in support of his citizenship claim.

Statement of the Case

On August 20, 2004, petitioner, a citizen of Haiti, was convicted in the Connecticut Superior Court of Sexual Assault in the 2nd Degree, Conn. Gen. Stat. § 53a-71(a)(1). Petitioner was sentenced to five years' imprisonment, execution suspended after nine months, and ten years of probation. GA 139.

On June 22, 2005, petitioner was served with a Notice to Appear on an application seeking his removal from the United States based on his status as a convicted aggravated felon. GA 149-51. On June 29, 2005, petitioner appeared before IJ Michael W. Straus in Hartford, Connecticut, on the removal application. Because petitioner was represented, but did not wish to go forward without his counsel actually present, the matter was continued to July 6, 2005. GA 92-94.

On July 6, 2005, petitioner appeared before the IJ with his attorney. GA 95-98. Counsel sought and obtained a

second continuance of two weeks for purposes of familiarizing herself with petitioner's file. GA 96-97. A new hearing date was scheduled for July 20, 2005. GA 97.

On July 20, 2005, petitioner again appeared with counsel. GA 99-114. In petitioner's written, form response to the charge of removability, he asserted he was not removable based on his derivative citizenship. GA 138. Petitioner sought a third continuance, this one for 45 days, so that counsel could obtain certain documents from Haiti. GA 106-07. The IJ granted the request and the removal hearing was recessed until August 31, 2005. GA 113. In doing so, it was suggested to petitioner that he file an Application of Citizenship (form N-600) concerning his citizenship claim. GA 107.

On August 31, 2005, petitioner appeared before the IJ with his counsel, GA 115-23, and the IJ was informed by counsel that petitioner had filed the Application for Citizenship (N-600) just that day, GA 116; *see* GA 65-85 (N-600 application). On that same date, counsel advised the IJ that petitioner had been unsuccessful in locating and/or securing documents in Haiti to support his claimed derivative citizenship. GA 119-20. When petitioner sought his fourth continuance in the proceedings so that additional efforts could be made to gather relevant documents from Haitian authorities, the IJ granted the request while advising petitioner and his counsel that a final decision on the removal question would likely occur at the next scheduled hearing. GA 121-22. Petitioner's case was then continued to September 14, 2005. GA 123.

On September 14, 2005, petitioner again appeared before the IJ with counsel, GA 124-36, and again it was reported to the IJ that no documentation in support of petitioner's derivative citizenship claim had been obtained, GA 126. Counsel was hopeful that such documents would be forthcoming soon, but no firm representations could be made as to when. GA 131-33. In addition, the IJ and petitioner were advised by Department of Homeland Security ("DHS") counsel that petitioner's Application for Citizenship (form N-600) had been denied that day by the United States Citizenship and Immigration Services. GA 125-26; *see also* GA 63. The IJ denied petitioner's request for another continuance of his case, GA 134, and petitioner was ordered removed from the United States to Haiti based on his status as a convicted aggravated felon, GA 85-91.

On October 14, 2005, petitioner appealed the IJ's order of removal to the BIA. GA 54. Petitioner's brief in support of his appeal and request for remand to the IJ was filed on January 9, 2006. GA 6-20. In his brief, petitioner argued, *inter alia*, that the matter should be remanded to the IJ based on "new evidence," namely a document from a Haitian Justice of the Peace Office purporting to be a declaration of the "absentee" status of petitioner's biological mother. GA 9.

On January 31, 2006, the BIA denied the request to remand the matter to the IJ and affirmed the IJ's removal order. GA 2. Thereafter, on February 28, 2006, petitioner filed a timely petition for rview with this Court.

During the pendency of the instant petition for review, the Government consented to a Stipulation of Withdrawal of Appeal Without Prejudice, which was filed and granted. The stipulated withdrawal was intended to provide petitioner with additional months to secure evidence from Haiti which might provide the basis for a joint motion to remand the matter to the district court for a citizenship hearing. No such evidence was ever obtained. As a result, petitioner gave notice of his desire to reinstate his petition, and on February 20, 2007, this Court issued an order granting the requested reinstatement.

Statement of Facts

Petitioner was born in Carrefour, Haiti on January 31, 1980. His father is Josue Charles and his biological mother Yvrose Theodore. GA 26. Petitioner's father emigrated to the United States, and on March 18, 1987, petitioner entered the country as a legal permanent resident to live with his father. GA 67, 87. Petitioner's father became a naturalized citizen of the United States on April 21, 1989. GA 23, 69, 87.

On August 20, 2004, petitioner was convicted in the Connecticut Superior Court, Judicial District of Fairfield, of Sexual Assault in the 2nd Degree, in violation of Conn. Gen. Stat. § 53a-71(a)(1). GA 139. He was sentenced to a term of imprisonment of five years, execution suspended after nine months, and ten years of probation. *Id*.

On May 19, 2005, a warrant for arrest was issued for petitioner, and on June 22, 2005, the warrant was served on him. GA 153. In addition, petitioner was served with

a Notice to Appear which provided notice of the grounds on which his removal from the United States was being sought under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), as amended. The grounds involved his conviction of an "aggravated felony" as defined in § 101(a)(43)(A) of the INA (sexual abuse of a minor) and § 101(a)(43)(F) of the INA (crime of violence). GA 151.

Petitioner's first appearance before the IJ took place on June 29, 2005, GA 92-94, at which time petitioner advised that he was represented by counsel and wished time to talk with his counsel. The IJ adjourned the matter at petitioner's request until counsel could be present.

On July 6, 2005, petitioner appeared before the IJ with counsel, and counsel asked for an adjournment to review petitioner's file. GA 96. The second request for a continuance was granted and the matter was continued to July 20, 2005. GA 97.

Once the removal proceedings reconvened on July 20, 2005, petitioner's counsel filed form pleadings with the IJ, GA 137-38, and gave notice of his claim of derivative citizenship. GA 138. The IJ inquired about the basis on which derivative citizenship was being claimed, and petitioner's counsel explained the legal theory. GA 100-04.

Counsel told the IJ she was attempting to locate documentation to establish that petitioner's biological mother was dead (a death certificate) or to establish that some applicable statutory period had been met so she

could be legally presumed to be dead. GA 104. Counsel sought an adjournment for 45 days for that purpose, and the IJ granted the continuance.[2] Accordingly, the removal proceedings were continued to August 31, 2005, GA 113, to afford counsel the opportunity to obtain documents from Haiti in support of petitioner's derivative citizenship claim. In addition, counsel stated that petitioner would be filing an Application for Citizenship (form N-600) regarding his claim that he was a U.S. citizen. GA 187.

On August 31, 2005, the removal hearing was again convened. The IJ asked about an N-600 being filed, and counsel advised she had filed it just that day, a copy of which was then handed to counsel for DHS. GA 116-17. DHS counsel indicated she would get the application to

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[2] Counsel also stated, in response to the IJ's comment that petitioner appeared to be removable based on his conviction for sexual assault of a minor, that she had a problem with the second allegation of the removal notice, namely that the offense of conviction was a crime of violence. GA 105. The IJ invited petitioner to file a brief on the question, and counsel stated she would. The certified administrative record does not reflect any such brief being filed on petitioner's behalf. Petitioner does not dispute in his petition for review that he is an aggravated felon, and so any claim in that regard is deemed abandoned. *See Liang Chen v. U.S. Attorney General*, 454 F.3d 103, 104 n.1 (2d Cir. 2006) (per curiam); *Yueqing Zhang v. Gonzales*, 426 F.3d 540, 542 n.1, 545 n.7 (2d Cir. 2005). Nor did he argue this issue before the BIA, and so the claim would be barred as unexhausted in any event. *See* 8 U.S.C. § 1252(d)(1); *Lin Zhong v. Dep't of Justice*, 2007 WL 704891, at *10-13 (2d Cir. Jan. 17, 2007).

the United States Citizenship and Immigration Services for action.

During the August 31 hearing, the IJ asked if petitioner had located a death certificate in Port au Prince, Haiti for the mother, and counsel conceded she had pretty much hit a dry-hole in her efforts. GA 119-20. Counsel indicated she was investigating whether the mother could be presumed to be dead by operation of law, but petitioner had no substantive information to provide the court on the subject. GA 117. Counsel for the Department of Homeland Security stated she would seek an expedited review of petitioner's N-600 application, and counsel for petitioner requested two additional weeks to try to secure documentation of the mother's whereabouts. GA 121. The IJ agreed to the fourth requested continuance, but advised petitioner and his counsel that the court in all likelihood would make a final decision on the removal question at the next hearing. GA 122.

On September 14, 2005, the removal hearing reconvened. The IJ was advised by counsel for DHS that petitioner's application for citizenship had been denied by the United States Citizenship and Immigration Services, and a copy of the decision was provided to petitioner.[3]

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[3] Petitioner's N-600 application did not present CIS with his claim that his mother had died before his eighteenth birthday, such that he could derive citizenship through his U.S. citizen father. In fact, his application made no mention at all of his mother. Understandably, then, the application was denied on the grounds that not both of his parents had become (continued...)

GA 125-26, *see also* 63-64. Further, when the IJ inquired of petitioner whether anything had been found out about his mother, counsel advised that a lawyer in Haiti was attempting to get a decree from a court in Haiti that the mother was missing and presumed dead. Petitioner's counsel informed the IJ that she had been told that morning that she would have the decree available by Friday of that same week. GA 131. Counsel went on to advise that if such a decree could be obtained, then counsel would go to the appropriate Connecticut Probate court in an attempt to have the decree recognized as a valid foreign order. GA 126. Other than counsel's comments to the court, however, no evidence – no affidavits, no testimony and no documents – were presented to the IJ.

The IJ found that petitioner had failed to make out a prima facie case for his derivative citizenship claim and noted that even if petitioner obtained a death certificate or a Haitian court order regarding his mother's presumed death, he still would not be able to prove that her death occurred prior to the time petitioner turned eighteen years old. GA 89. Accordingly, the IJ rendered a decision on the removal question, as he had indicated he was likely to do at the conclusion of the August 31, 2005 hearing. Petitioner was ordered removed to Haiti and he reserved his right to appeal the removal order to the BIA. GA 135.

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[3] (...continued)
naturalized U.S. citizens, former INA § 321(a)(1), 8 U.S.C. § 1432 (repealed 2000), and petitioner was already over the age of 18 years when the newer provisions of the Child Citizenship Act of 2000 went into effect on February 27, 2001. GA 64.

The IJ, however, invited petitioner to file a motion to reopen if it were to become appropriate. GA 134.

Petitioner filed a notice of appeal with the BIA on October 14, 2005, GA 54-55, and a brief in support of his appeal on January 9, 2006. GA 6-41. Petitioner sought to have the IJ's removal order reversed, or, in the alternative to have the matter remanded to the IJ for further action based on "new evidence." The new evidence was a document from Haiti dated November 20, 2005, which was proffered to be a valid decree from the Court of Justice of Peace in the town of Carrefour, Haiti that petitioner's mother, Yvrose Theodore, had been declared an "absentee." The decree appears to be based on the statements of three persons with unknown connections or attachments to Ms. Theodore who stated that following the September 30, 1991, "Coup d'Etat" in Haiti she was reported missing and had not been seen alive since. *See* GA 29. The basis of the purported knowledge on the part of the three persons was not included in the document, aside from their declaration that they had "personally known" her and "maintained a friendly relationship" with her, nor is there any indication of the reliability of any one or more of the persons. In addition, while not addressed in the brief filed by petitioner with the BIA, the applicable portion of the Haitian Civil Code seems to provide that a decree concerning a person being an absentee is only a preliminary step in the Haitian system. *See* "Haitian Civil Code, Chapter II, By the Declaration of the Absence," GA 35-36.

On January 31, 2006, the BIA affirmed the Immigration Judge's removal decision, finding that the IJ

correctly concluded that petitioner had not established he was a citizen of the United States and that petitioner was removable. GA 2. The Board went on to find that petitioner had failed to establish that he was entitled to additional continuances before the IJ so that he could attempt to gather evidence in support of his claim of citizenship. *Id.*

The BIA also concluded that petitioner's request for a remand based on the "new evidence" he included in his appeal papers involved information which purportedly had been known for over a decade and, therefore, should have been presented to the IJ. GA 2. Further, the IJ concluded that the information did not establish a prima facie case for petitioner's derivative citizenship claim. The appeal was denied, as was the requested remand to the IJ for further evidentiary hearings. GA 3. The instant appeal followed.

Summary of Argument

1. Petitioner was given a full and fair opportunity to present evidence to the IJ to prove his derivative citizenship claim. His request for a fifth continuance to explore the whereabouts of his mother in Haiti and to gather evidence regarding derivative citizenship was properly denied since petitioner presented absolutely no evidence – no affidavits, no testimony, no documents – to make a prima facie showing of such citizenship. Indeed, three prior continuances, which were designed to afford petitioner a fair opportunity to make such a showing, were granted and no evidence was forthcoming. Given the wide latitude afforded to IJs in managing their docket, it cannot

be said that the IJ here abused his broad discretion in denying yet another continuance.

2. The BIA did not abuse its broad discretion in declining to reopen petitioner's removal proceedings. Petitioner's submission of "newly discovered evidence" to the BIA in support of his claimed derivative citizenship neither proved such citizenship, nor provided a reasonable basis for remanding the matter to the IJ for further proceedings. The single document purportedly constituting "newly discovered evidence" was a foreign document of uncertain utility which would have been previously available, and which fell far short of meeting petitioner's burden of establishing, even on a prima facie basis, his status as a non-alien. The BIA's decision was rational, and did not inexplicably depart from established policies. Given that motions to reopen are disfavored because of the threat they pose to the finality of removal proceedings, the BIA did not abuse its discretion by declining to reopen.

ARGUMENT

I. The IJ Did Not Violate Due Process by Denying Petitioner a Fifth Continuance, Nor Did the BIA Violate Due Process by Declining to Remand in Light of the One-Page Haitian Document Submitted on Appeal

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts, *supra*.

B. Governing Law and Standard of Review

1. Jurisdiction

Under 8 U.S.C. § 1252(a)(2)(C), federal courts generally lack jurisdiction to consider petitions for review which challenge final orders of removal based on convictions for, *inter alia*, aggravated felonies under 8 U.S.C. § 1101(a)(43)(A) & (F). As noted by this Court in *Santos-Salazar v. United States Dep't of Justice*, 400 F.3d 99, 103 (2d Cir. 2005), "[o]ne of Congress's principal goals in introducing § 1252(a)(2)(C)'s jurisdiction-stripping provision was to expedite the removal of aliens who have been convicted of certain types of crimes." Nevertheless, despite § 1252(a)(2)(C), there remain limited areas of review still available in federal courts in cases like the present one where it is undisputed that the person subject to removal is an aggravated felon. Those limited topics open to review include "whether the petitioner is in fact an alien, whether he has in fact been convicted, and whether his offense is one that is within the scope of 8 U.S.C. § 1182(a)(2)." *Id.* at 104. Accordingly, this Court retains jurisdiction over petitioner's claim that he is a citizen, and therefore not subject to removal.

A second area of judicial review which is not barred under § 1252(a)(2)(C) and which the Supreme Court addressed in *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.2 (2001), relates to "the courts of appeal retain[ing] jurisdiction to review 'substantial constitutional challenges' raised by aliens who come within the strictures of § 1252(a)(2)(C)." As provided by 8 U.S.C. § 1252(a)(2)(D), nothing in Chapter 12 of Title 8 "which

limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review" filed pursuant to 8 U.S.C. § 1252. Here, petitioner has couched his argument in terms of a denial of due process and a fair hearing. In this regard, "[i]t is well settled that the Fifth Amendment entitles an alien to due process of law in deportation proceedings." *Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996) (citing *Reno v. Flores*, 507 U.S. 292, 305-07 (1993)).

2. Continuances

The regulations governing the procedures in immigration court provide that "[t]he Immigration Judge *may* grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29 (emphasis added). *See also* 8 C.F.R. § 1240.6 ("After the commencement of the hearing, the immigration judge *may* grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.") (emphasis added). In reviewing discretionary decisions under this regulation, this Court affords substantial deference to the IJ to manage his calendar. *See Morgan v. Gonzales*, 445 F.3d 549, 551 (2d Cir. 2006) ("IJs are accorded wide latitude in calendar management, and we will not micromanage their scheduling decisions any more than when we review such decisions by district judges."); *Zafar v. U.S. Attorney General*, 461 F.3d 1357, 1362 (11th Cir. 2006) ("The grant of a continuance is within the IJs' broad discretion.").

This Court reviews the IJ's discretionary denial of a motion for continuance "under a highly deferential standard of abuse of discretion." *Morgan*, 445 F.3d at 551; *Sanusi*, 445 F.3d at 199 (review of denial of motion for continuance under abuse of discretion); *Khan v. Att'y General of U.S.*, 448 F.3d 226, 233 (3d Cir. 2006) (same). "Just as United States District Judges have broad discretion to schedule hearings and to grant or to deny continuances in matters before them, IJs have similarly broad discretion with respect to calendaring matters." *Sanusi* v. *Gonzale*s, 445 F.3d 193, 199 (2d Cir. 2006).

The abuse of discretion standard is a difficult one to satisfy. *Id.* "An abuse of discretion may be found . . . where the [challenged] decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the [agency] has acted in an arbitrary or capricious manner." *Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 93 (2d Cir. 2001) (citations omitted). *See also Morgan*, 445 F.3d at 51-52 (IJ abuses discretion if decision rests on legal error or clearly erroneous factual finding, or if decision "cannot be located within the range of permissible decisions") (internal quotation marks omitted).

3. Derivative Citizenship

This Court has specifically held that the provisions of the Child Citizenship Act of 2, Pub.L. No. 106-396, §§ 101 & 104 (codified at 8 U.S.C. § 1431), are not applicable retrospectively. *Drake v. Ashcroft*, 323 F.3d

189, 191 (2d Cir. 2003) (per curiam). Accordingly, the statute involved in the instant matter is former INA § 321(a), 8 U.S.C. § 1432(a) (repealed 2000). That section stated, in pertinent part:

> A child born outside of the United States of alien parents . . . becomes a citizen of the United States upon fulfillment of the following conditions:
>
> (1) The naturalization of both parents; or
>
> (2) The naturalization of the surviving parent if one of the parents is deceased; or
>
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
>
> (4) Such naturalization takes place while such child is under the age of eighteen years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of the subsection, or the parent naturalized

> under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years. . . .

See also Langhorne v. Ashcroft, 377 F.3d 175, 177-78 (2d Cir. 2004).

In *Lewis v. Gonzales*, No. 05-1677-ag, 2007 WL 869029 at *5 (2d Cir. Mar. 23, 2007) (per curiam), this Court noted that "[i]t is important to understand that derivative citizenship is automatic; that is, when certain conditions exist, a child becomes a U.S. citizen even though neither parent, nor the child, has requested it and regardless of whether any of them actually desires it. *See* 8 U.S.C. § 1432 (providing that a child becomes a citizen 'upon the fulfillment' of certain conditions, none of which includes a request that the child become a citizen)."

As noted by the Court in *Brissett v. Ashcroft*, 363 F.3d 130, 134 (2d Cir. 2004), the automatic naturalization that occurs via derivative citizenship can have "unforeseen and undesirable implications" associated with it. *See also Barthelemy v. Ashcroft*, 329 F.3d 1062, 1066 (9th Cir. 2003) ("If United States citizenship were conferred to a child where one parent naturalized, but the other parent remained an alien, the alien's parental rights could be effectively extinguished."). Accordingly, "because derivative citizenship is automatic, and because the legal consequences of citizenship can be significant, the statute [8 U.S.C. § 1432] is not satisfied by an informal expression, direct or indirect." *Lewis*, 2007 WL 869029 at *6.

With respect to a petitioner's claim of citizenship, it has long been held that a petitioner or plaintiff has the burden of proof to establish his citizenship. *See Pandolfo v. Acheson*, 202 F.2d 38, 40 (2d Cir. 1953); *Matter of Tijerina-Villarreal*, 13 I. & N. Dec. 327, 330 (BIA 1969) ("When there is a claim of citizenship . . . one born abroad is presumed to be an alien and must go forward with the evidence to establish his claim to United States citizenship"); *Matter of A–M–*, 7 I. & N. Dec. 332, 336 (BIA 1956); *see also United States v. Ghaloub*, 385 F.2d 567, 570 (2d Cir. 1966) ("It is settled that a plaintiff seeking a declaratory judgement of citizenship . . . has the burden of proving that he is a United States citizen.").

Accordingly, when the government presents evidence establishing that an individual is foreign born, the burden of proof shifts to the individual. *United States ex rel. Barilla v. Uhl*, 27 F. Supp. 746, 746-47 (S.D.N.Y. 1939), *aff'd,* 108 F.2d 1021 (2d Cir. 1940) (per curiam). The petitioner's evidence must then establish a prima facie case for his derivative citizenship and it is only at that point the burden then shifts to the government to prove "by clear, unequivocal and convincing evidence that plaintiff [is] not a United States citizen." *McConney v. INS*, 429 F.2d 626, 629 (2d Cir. 1970) (citing, *inter alia*, *Ghaloub*, 385 F.2d at 570).

4. Motions to Reopen

A motion to reopen "asks that the proceedings be reopened for new evidence and a new decision, usually after an evidentiary hearing." *Ke Zhen Zhao v. U.S. Dep't*

of Justice, 265 F.3d 83, 90 (2d Cir. 2001). Motions to reopen – like petitions for rehearing and motions for re-trial based on new evidence – are disfavored because of the threat they pose to finality. *See INS v. Doherty*, 502 U.S. 314, 323 (1992). "This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Id.* Indeed, the Supreme Court has expressly cautioned that granting motions to reopen "too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case." *INS v. Abudu*, 485 U.S. 94, 108 (1988) (quoting *INS v. Jong Ha Wang*, 450 U.S. 139, 144 n.5 (1981) (internal citation omitted)); *see also Iavorski v. U.S. INS*, 232 F.3d 124, 131 (2d Cir. 2000) (Congress sought to "eliminat[e] the prior practice under which an alien could ignore a deportation or voluntary departure order, and years later, attempt to reopen the proceedings without any adverse consequences").

"A motion to reopen proceedings shall not be granted unless it appears to the [BIA] that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . ." 8 C.F.R. § 1003.2(c)(1). In addition, a motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material." *Id.*; *see also Ke Zhen Zhao*, 265 F.3d at 90.

The BIA also may deny a motion to reopen on its merits for a number of independent reasons, including as

relevant here: (1) the movant has not established a prima facie case for the underlying relief sought; or (2) the movant has not introduced previously unavailable, material evidence. *See Doherty*, 502 U.S. at 322-23; *Abudu*, 485 U.S. at 104-05; 8 C.F.R. § 1003.2(a) (BIA "has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief").

This Court reviews the BIA's denial of a motion to reopen for abuse of discretion. *See Jian Huan Guan v. BIA*, 345 F.3d 47, 48 (2d Cir. 2003) (per curiam); *Iavorski*, 232 F.3d at 128. Because a motion to reopen seeks a new hearing after proceedings are over and a final removal order has been issued, such a motion is disfavored and judicial review of its denial is circumscribed. *See Doherty*, 502 U.S. at 323 ("[T]he Attorney General has 'broad discretion' to grant or deny such motions.") (citations omitted); *Abudu*, 485 U.S. at 108 ("If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive.") (quoting *Wang*, 450 U.S. at 144 n.5).

Indeed, the reopening regulation "is couched solely in negative terms; it requires that under certain circumstances a motion to reopen be denied, but does not specify the conditions under which it shall be granted." *Doherty*, 502 U.S. at 322; *see also* 8 C.F.R. § 1003.2(c)(1). Accordingly, significant deference is accorded to the BIA's administrative discretion in reopening matters. *Abudu*, 485 U.S. at 110 ("[T]he reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply

with even greater force in the INS context."); *see also Doherty*, 502 U.S. at 323 ("[T]he abuse-of-discretion standard applies to motions to reopen 'regardless of the underlying basis of the alien's request [for relief].'") (quoting *Abudu*, 485 U.S. at 99 n.3).

This Court may find an abuse of discretion only "in those circumstances where the [BIA]'s decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the [BIA] has acted in an arbitrary or capricious manner." *Ke Zhen Zhao*, 265 F.3d at 93 (citations omitted); *see also Morgan v. Gonzales*, 445 F.3d 549, 551 (2d Cir. 2006) (holding that IJ abuses discretion if decision rests on legal error or clearly erroneous factual finding, or if decision "cannot be located within the range of permissible decisions") (internal quotation marks omitted); *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994) (abuse of discretion exists only if BIA's decision was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group") (internal quotation marks and citation omitted); *Dhine v. Slattery*, 3 F.3d 613, 619 (2d Cir. 1993) ("We need only decide whether or not the [BIA] . . . came to a decision that has any rational basis.").

C. Discussion

A person who is born outside of the United States "is presumed to be an alien and must go forward with the

evidence to establish his claim to United States citizenship." *Matter of Tijerina-Villarreal*, 13 I. & N. Dec. at 330 (citing *Matter of A– M–*, 7 I. & N. Dec. 332 at 336; *United States ex rel Rongetti v. Neelly*, 207 F.2d 281, 284 (7th Cir. 1953)). The record before both the IJ and BIA established, and it is uncontested, that petitioner was born in Haiti to Haitian parents. GA 26. Accordingly, the burden of proof fell upon him to produce "a preponderance of credible evidence sufficient to overcome the presumption of alienage which attaches by reason of his [foreign] birth . . . ." *Id*. Because petitioner continually failed to offer *any* evidence whatsoever before the Immigration Court, he did not satisfy his burden of providing a overcoming this presumption of alienage, and the IJ did not violate his due process rights by denying him a *fifth* continuance to pursue documentation of his mother's death from Haiti. Moreover, the BIA did not abuse its discretion in declining to reopen the proceedings based upon the one-page document submitted by petitioner from a Haitian court, declaring his mother an "absentee."

1. Petitioner Was Not Denied Due Process or a Fair Hearing Before the IJ

Petitioner's claim that he was denied due process and a fair hearing finds no support in the record before the IJ. First, it is clear that neither the Child Citizenship Act of 2, nor former INA §§ 321(a)(1) and (3) would confer derivative citizenship on petitioner. This Court has held that the provisions of the CCA, which otherwise would benefit petitioner, are not applicable retrospectively. *Drake*, 323 F.3d at 191. Further, §§ 321(a)(1) and (a)(3) are not applicable since only one of his parents became a

naturalized U.S. citizen, and no claims were made before the IJ or BIA that his parents were legally separated or that his mother was naturalized. Accordingly, to have succeeded before the IJ, petitioner would have had to have satisfied the criteria of former § 321(a)(2) which, in turn, would have required proof both that his father was naturalized and his mother had died prior to his eighteenth birthday. As to the first prong, there was evidence in the record that his father became a naturalized citizen on April 21, 1989 when petitioner was 9 years old and living in the United States in his father's custody. GA 23. As to the second prong, however, petitioner offered *no* evidence to the IJ to support the proposition that his mother had in fact died prior to his eighteenth birthday.

The IJ in this case granted petitioner not a mere one or two continuances to enable him to have counsel appear on his behalf and to present evidence which purportedly would establish his derivative citizenship status, but rather granted him four such continuances. GA 94, 96-97, 113, 122-23. Further, it was the DHS counsel who suggested that petitioner file an Application for Citizenship relating to his derivative citizenship claim which could be acted upon quickly by the U.S. Citizenship and Immigration Services Office. GA 107. While petitioner has represented to this Court that he "was not afforded an evidentiary hearing" on the question of his citizenship, Pet. Br. at 6, he never sought such a hearing. In fact, at no point in time did the IJ prevent petitioner from placing in the record any evidence or from making any argument in support of his position. *See Michel v. INS*, 206 F.3d 253, 259 (2d Cir. 2000) (finding no due process violation where IJ "never prevented [the alien] from presenting arguments

or evidence in his favor"). Yet, as the record makes clear, petitioner never presented the IJ with a single piece of evidence to establish or prove an essential element of his derivative citizenship claim under § 321(a)(2), that is, that petitioner's mother was in fact deceased. No affidavit relating to this element was ever submitted to the IJ for consideration. No witnesses were called to testify on this critical point.[4] No documentary evidence was brought to the IJ's attention on the topic of the alleged death of petitioner's mother. Counsel's references in petitioner's brief to this Court to what was "common knowledge" to him and his family about his mother's death and there being no death certificate in Haiti because she "was presumably murdered on the streets of Haiti," *see* Pet. Br. at 3, 4, do not qualify as evidence and, obviously, was not subjected to any real scrutiny, much less cross-examination, before the IJ.

The IJ should hardly be faulted for not granting petitioner yet a fifth continuance in the removal proceedings on the mere representation that counsel had been told by some unidentified person on the morning of the September 14, 2005, hearing that a document of some

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[4] Petitioner states in the brief he filed with this Court that "[a]ccording to testimony in the Record of proceedings, the petitioner's mother, Yvrose Theodore, abandoned the petitioner when he was 10 months old . . . ." Pet. Brief at 3. No such testimony was ever received by the IJ. Rather, petitioner's counsel made comments about these matter, but no evidence – testimonial or in any other form – was produced to substantiate counsel's assertions.

sort was expected from Haiti within a few days. GA 131.[5] Not only was the IJ's decision to deny the fifth request for a continuance reasonable, but the IJ left the door open for petitioner to come back to the court if he secured evidence to support his claim. In no way can this decision be said to have "provide[d] no rational explanation, inexplicably depart[ed] from established policies, [been] devoid of any reasoning, or contain[ed] only summary or conclusory statements." *Zhao*, 265 F.3d at 93 (citations omitted). Indeed, the IJ told petitioner and his counsel that he would permit them to file a motion to reopen the removal proceeding if they obtained appropriate evidence. GA 134. Petitioner never filed such a motion with the IJ. Given the "wide latitude" afforded to IJs to manage their dockets, and this Court's disinclination to "micromanage" such decisions, *Morgan*, 445 F.3d at 551, it cannot be said that the IJ here abused his broad discretion in denying a fifth continuance, or that he thereby deprived petitioner of due process.

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[5] Assuming the document contained on pages 4-8 of petitioner's appendix is the document to which petitioner's counsel was making reference, it was not received by petitioner until some three months later in December 2005, and appears to be merely a preliminary decree regarding petitioner's mother being an "absentee" rather than a death certificate or final decree relating to the mother's presumed death.

2. The BIA Did Not Abuse Its Discretion in Declining to Reopen Petitioner's Removal Proceedings Based on the One-Page Haitian Decree Dated November 29, 2005, That Declared His Mother an "Absentee"

The BIA properly denied petitioner's "motion to remand" the case to the IJ based on the one-page Haitian document which declared petitioner's mother an "absentee." This is so for two reasons.

First, the BIA rationally found that the information contained in the document was previously available and therefore could not support a motion to reopen under 8 C.F.R. § 1003.2(c)(1) and (4). GA 2. As the BIA properly observed, the document proffered by petitioner purports to be based on information known to the three declarants since 1991. Because that information had been available "for over a decade before the institution of the instant removal proceedings," GA 2, there was no reason why petitioner could not have presented such information earlier. At a minimum, he could have presented the IJ with affidavits from the three declarants who claim to know that his mother has been missing since 1991. Petitioner has not alleged that he was somehow prevented from seeking that information earlier. Because petitioner failed to provide the IJ with any affidavits – from himself, his father, or other witnesses – regarding events dating nearly 14 years before his removal hearing, the BIA did not act irrationally in declining to reopen petitioner's proceedings.

Second, the BIA reasonably observed that pursuant to the provisions of the Haitian Civil Code, which petitioner provided for the first time on the administrative appeal, the November 2005 Haitian declaration "does not establish that [petitioner's] biological mother was legally recognized as deceased prior to January 31, 1998." GA 2-3. Specifically, Chapter II of the Haitian Civil Code (entitled "By the Declaration of the Absence") provides in 115 Art. 102 that "interested parties" may appear before a civil court when a year has passed since a person's absence, and ask that the person's "absence" be "declared." GA 35. Such declarations appear in the document provided by petitioner at GA 29. That is only the first step in the process, however. Pursuant to 116. Art. 103, the court must then "order that an investigation be made." GA 35. The court must then consider any possible reasons for the person's absence, as well as anything that might prevent news of that person. GA 35. Moreover, "[t]he judgment of declaration of absence" cannot be rendered for six months after the investigation has been ordered. GA 35 (citing 118-119 Art. 105). It falls to the public ministry to relay its findings to a Superior Judge who must then publish them in the "official gazette." *Id.* Petitioner did not provide the BIA with any evidence that any of these subsequent steps mandated by the Haitian Civil Code were ever undertaken. Indeed, the Government assented to a lengthy continuance in this Court to allow petitioner to obtain such materials, with a view toward a possible joint motion for remand. Particularly given the "disfavored" status of motions to

reopen, the BIA did not abuse its "broad discretion" when it denied the motion to reopen. *Doherty*, 502 U.S. at 323.[6]

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[6] Because petitioner has not made out even a prima facie case of derivative citizenship, he has also failed to show a "genuine issue of material fact about [his] nationality" which would warrant transferring the case to a district court for resolution of factual disputes pursuant to 8 U.S.C. § 1252(b)(5).

It bears note that even after removal to Haiti, petitioner would not lack administrative remedies if he were to obtain evidence to support his derivative citizenship claim – for example, by completing the Haitian legal process for obtaining a certificate that his mother was presumed dead as of a date prior to his eighteenth birthday. The regulations governing the filing of a N-600 application for certificate of citizenship contain no time or numerical limitations, *see* 8 C.F.R. §§ 341.1 to 341.7 (2006), and so he could submit those materials in support of an application at a later point in time. Likewise, petitioner would be free to apply for a U.S. passport in Haiti or elsewhere, *see* 22 C.F.R. § 51.44(c), even without a certificate of citizenship if he could otherwise provide proof of citizenship.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the petition for review be denied.

Dated: April 10, 2007

Respectfully submitted,

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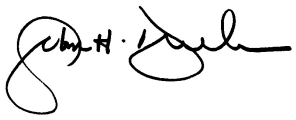
DISTRICT OF CONNECTICUT



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ADDENDUM

8 C.F.R. § 1003.2(c)

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the

Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 1003.23(b)(4)(iii)(A)(1) or § 1003.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

8 C.F.R. § 1003.29 Continuances.

The Immigration Judge may grant a motion for continuance for good cause shown.

8 C.F.R. § 1240.6 Postponement and adjournment of hearing.

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.

8 U.S.C. § 1252. Judicial review of orders of removal.

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

. . . .

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

. . . .

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline
The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order
Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.
. . . .

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and
(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

. . . .

8 U.S.C. § 1432 (repealed 2000). Children born outside of United States of alien parents; conditions for automatic citizenship

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while such child is under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

(b) Subsection (a) of this section shall apply to an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent or parents, in the custody of his adoptive parent or parents, pursuant to a lawful admission for permanent residence.

Conn.Gen.Stat. § 53a-71. Sexual assault in the second degree: Class C or B felony

(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person; or (2) such other person is mentally defective to the extent that such other person is unable to consent to such sexual intercourse; or (3) such other person is physically helpless; or (4) such other person is less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare; or (5) such other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person; or (6) the actor is a psychotherapist and such other person is (A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception; or (7) the actor accomplishes the sexual intercourse by means of false representation that the sexual intercourse is for a

bona fide medical purpose by a health care professional; or (8) the actor is a school employee and such other person is a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor; or (9) the actor is a coach in an athletic activity or a person who provides intensive, ongoing instruction and such other person is a recipient of coaching or instruction from the actor and (A) is a secondary school student and receives such coaching or instruction in a secondary school setting, or (B) is under eighteen years of age; or (10) the actor is twenty years of age or older and stands in a position of power, authority or supervision over such other person by virtue of the actor's professional, legal, occupational or volunteer status and such other person's participation in a program or activity, and such other person is under eighteen years of age.

(b) Sexual assault in the second degree is a class C felony or, if the victim of the offense is under sixteen years of age, a class B felony, and any person found guilty under this section shall be sentenced to a term of imprisonment of which nine months of the sentence imposed may not be suspended or reduced by the court.

ANTI-VIRUS CERTIFICATION

Case Name: Charles v. USICE

Docket Number: 06-0947-ag

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 4/10/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: April 10, 2007