October 4, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: P[redacted] A[redacted] W[redacted] I[redacted]

This case involves an administrative determination of the t of [redacted] W[redacted] I[redacted] born [redacted], a United tize ovisions of section 301(g) of the Immigration 1/ he Department found that [redacted] had not fulfilled the st nsmit citizenship to his son, [redacted] on behalf of his son, appeals the Department's i

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1/ Section 301(g) of the Immigration and Nationality Act, 8 U.S.C. 1401(g), reads:

Sec. 301. 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 ten years, at least five of which were after attaining the age of fourteen years; Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 1 of the Intennational Organization Immunities Act (59 Stat. 669, 22 U.S.C. 288) by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 1 of the International Organization Immunities Act, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

For reasons stated below, it is our conclusion that the Board does not have jurisdiction to entertain a matter of this nature. The appeal is denied.

I

Philipp [redacted]. His father, [redacted] mother, a citizen of Switzerland. On December 15, 1982 [redacted] father applied at the Branch Office of the United States [redacted]n Geneva for issuance of a consular report of his son's birth [redacted] United States citizen and a passport. The information Mr. I[redacted] presented at that time was insufficient to enable the Branch Office to conclude that he had met the statutory physical residence requirements in the United States to transmit American citizenship to his son.

In early 1984 John I[redacted] submitted documents to the Branch Office in support of his c[redacted]hat he had met the statutory requirements to transmit citizenship to Philippe. He established that he had lived in the United States for the required period of time, save for two years while he was studyin[redacted] Sw[redacted]nd. He contended, however, that since his father, R[redacted] I[redacted], was employed in Zambia under contract with the United States Agency for International Development and he was a dependent member of his father's household during the two years in question, 1966-1968, he had complied with the provisions of section 301(g) of the Act.

The Branch Office in April 1984 requested the Department's opinion on whether R[redacted] I[redacted] employment with the African-American Institute c[redacted]be[redacted]ed employment with the United States Government. "If so," the Branch Office inquired, "can Mr. I[redacted] /John H./ include this 1966-1968 period in the computation of his physical presence?"

The Department responded in July 1984 that contract workers are not considered Government employees, adding: "Post may not consider Mr. I[redacted] father's employment with African-American Institute as U.S. Government employment. Mr. I[redacted] cannot consider the period 1966-1968 in the computatio[redacted]s physical presence."

Accordingly, the Branch Office informed J[redacted] I[redacted] of the Department's ruling, and denied his application for a passport and report of birth for his son.

In December 1984, J[redacted] I[redacted], through counsel, requested that the Department make an "informal administrative review" of the

Branch Office's denial of his request that his son be documented as a United States citizen. The Department informed counsel on February 7, 1985 that upon review of the case, it was satisfied that Philippe did not acquire United States citizenship. The Department's letter continued:

> According to t state physical presence submitted by J I , his physical presence in the United States after age fourteen totals four years, two months and twenty-eight days. It is the Department's opinion that his physical presence abroad from August 12, 1966 through May 1968 as a dependent, unmarried member in his father's household cannot be considered for the purpose of section 301(g).
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> After careful review, the Department upholds its determination that Mr. R I employment with the Afri m ic tute under contract to the U.S. Agency for International Development (AID) does not qualify as U.S. Government employment, notwithstanding the fact that it required a United States government security clearance, that he reported periodically to government employees and that the Institute was funded by AID.
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> U.S. Government employment is generally characterized, in part, by a civil service appointment, performance of a Federal function, and supervision by other Federal employees, While it is arguable that many aspects of Mr. Inglehart's employment resembled U.S. Government employment, it is clear that he was a contract employee and did not receive an appointment to the civil service. Nor does it appear that he was subject to the many regulations and procedures governing Government employment. See generally 5 USC 2105.

The Department suggested that Philippe's father might inquire of the Immigration and Naturalization Service how his son could become naturalized,

On June 12, 1985 counsel for Philippe's father wrote to the Board of Appellate Review submitting an appeal "pursuant to the Board's jurisdiction under 22 CFR **7.3(a)**" from the Department's determination that Philippe did not acquire United States citizen-

ship. Counsel stated that the Department's administrative record contained documents establishing that the major criteria for United States government employment under section 1401(g)(B) have been met and that /we believe/ "the Board of Appellate Review has the discretion to so determine." Counsel concluded:

> ...John was, throughout the period of his father's service with the African-American Institute, an unmarried dependent of and member of the household of his father. We hope that upon careful review of the dossier and the equities involved, the Board will agree that J[redacted] I[redacted] did meet the statutory re re five years' presence in the United States after age 14, and that his son [redacted] acquired United States citizens irth.
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> I therefore respectfully request that the Board of Appellate Review reverse the administrative determination rendered below a er te on hing P[redacted] A[redacted] W[redacted] I[redacted] United States citizenship at birth.

II

The first issue that confronts the Board in this novel case is whether it falls within the purview of the Board's jurisdiction. Counsel asserts that the Board of Appellate Review has jurisdiction to consider an appeal from administrative determinations of non-acquisition of United States citizenship under section 301(g) of the Act. We disagree.

Section 7.3 of Title 22, Code of Federal Regulations, 22 CFR 7.3, sets forth the jurisdiction of the Board. It provides as follows:

> The jurisdiction of the Board shall include appeals from decisions in the following cases:
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> (a) Appeals from administrative determinations of loss of nationality or expatriation under Subpart C of Part 50 of this chapter.
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> (b) Appeals from administrative decisions denying, revoking, restricting

or invalidating a passport under sections 51.70 and 51.71 of this chapter.

(c) Appeals from final decisions of contracting officers arising under contracts or grants of the Department of State, not otherwise provided for in the Department of State contract appeal regulations (Part 6-60 of Title 41).

(d) Appeals from administrative decisions of the Department of State in such other cases and under such terms of reference as the Secretary of State may authorize.

The Board's jurisdiction under 22 CFR 7.3(a) is specifically qualified by reference to Subpart C of Part 50 (22 CFR 50.40 through 50.52), which relates to loss of nationality, and prescribes procedures that consular officers shall follow in processing cases involving loss of nationality and reporting them to the Department for decision, as required by section 358 of the Act. 2/

2/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

Section 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be entitled to forward a copy of the certificate to the person to whom it relates.

The cases that consular officers are required to report to the Department, in compliance with section 358, are those involving performance of one of the expatriating acts in Chapter 3 of Title III - Loss of Nationality - of the Immigration and Nationality Act of 1952, that is, section 349(a) of that Act, 3/ or any provision of Chapter IV - Loss of Nationality - of the Nationality Act of 1940, as amended. 4/

Thus, it is evident that the Board's jurisdiction under 22 CFR 7.3(a) is limited to hearing appeals from determinations of loss of nationality.

The Board's jurisdiction to consider appeals from an adverse decision with respect to a passport under 22 CFR 7.3(b) is expressly limited to appeals from denial, revocation or restriction of a passport on the grounds enumerated in 22 CFR 50.70 and 50.71, generally, that a person is under some form of legal restraint warranting denial, revocation or restriction of a passport. 22 CFR 50.80 expressly excludes administrative review, or appeal to this Board from denial of a passport on the grounds of non-citizenship.

Nor may we entertain this case under 22 CFR 7.3(d). The Secretary of State has not yet authorized the Board to hear any appeals from administrative decisions of the Department not enumerated in 22 CFR 7.3(a), (b) and (c).

Loss of nationality and non-acquisition of nationality are not to be treated as equal or equivalent acts; they are semantically and conceptually distinguishable. Non-acquisition of nationality under section 301(g) of the Act, which appears in Chapter 2 - Acquisition of Nationality - does not arise from performance or non-performance of any specific act by the affected person, but results simply from the inability of his or her

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3/ Under section 349(a), paragraphs (1) through (7), 8 U.S.C. 1481(a)(1) through (7), a national of the United States shall lose his nationality by performing any one of the 7 enumerated acts.

4/ Sections 401 through 410 of the Nationality Act of 1940, as amended, 8 U.S.C. 801 through 810, prescribe the acts that worked loss of nationality under that Act.

citizen parent to fulfill a congressionally mandated condition precedent to confer citizenship, Non-acquisition of citizenship for failure of a parent to possess the legal prerequisites to transmit citizenship cannot be defined as "loss of nationality."

Although in some cases of non-acquisition of nationality there may be issues of fact or law that would be appropriate for an administrative appellate body to review, the present regulations make no provision therefor, and the Board may not read into them authority that simply is not there, however meritorious the claim of an appellant may appear to be.

III

Upon consideration of the foregoing, we conclude the Board has no jurisdiction to hear the case of P [redacted] I [redacted]. Accordingly, we deny the request that we do so.

Alan G. James, Chairman

Edward G. Misey, Member

Frederick Smith, Jr. Member