

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



E 2

FILE: [REDACTED] Office: PHILADELPHIA(PITTSBURGH) Date: AUG 08 2007

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:



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 "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting District Director, Philadelphia, Pennsylvania 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 August 7, 1964 in Czechoslovakia. The applicant's father, who was born in Czechoslovakia on July 5, 1940, acquired U.S. citizenship at birth through his mother, the applicant's grandmother (a native-born U.S. citizen). The applicant's mother is not a U.S. citizen. The applicant presently seeks a Certificate of Citizenship claiming that he derived U.S. citizenship through his father.

The acting district director found the applicant to be ineligible for citizenship because his father had failed to comply with applicable retention requirements. The acting district director, citing Public Law 103-416, Immigration and Naturalization Technical Amendments Corrections Act of 1994 (INTCA), noted that the applicant's father was not eligible for a waiver of the retention requirements. The acting district director thus concluded that the applicant's father was not a U.S. citizen at the time of the applicant's birth. The application was denied accordingly.

On appeal, the applicant contends that the acting district director erred in citing the INTCA. He maintains that he is a U.S. citizen under the law in effect at the time of his birth. In support of his appeal, the applicant, through counsel, submits an appellate brief where the applicant contends that his father had a valid defense for his failure to comply with the retention requirements.

At the outset, the AAO notes that "[t]he 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 on August 7, 1964. Section 301(a)(7) of the former Immigration and Nationality Act, 8 U.S.C. § 1401(a)(7) is therefore applicable to his citizenship claim.

Section 301(a)(7) of the former Act states 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 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 by such citizen parent may be included in computing the physical presence requirements of this paragraph.

In order to acquire U.S. citizenship at birth through his father, the applicant must prove that his father was a U.S. citizen in 1964 and that he had the required 10 years of physical presence, at least five of which after attaining the age of 14 years.

The applicant's father acquired U.S. citizenship at birth through his mother under the Act of May 24, 1934 (the 1934 Act), which was the law in effect at the time of his birth on July 5, 1940. As such, the applicant's father's citizenship was subject to retention requirements.

The applicant's father has never resided in the United States. *See* Form N-600, Application for Certificate of Citizenship; *see also* Applicant's Memorandum of Law in support of Application for Certificate of Citizenship at ¶ 7. The record contains an affidavit executed by the applicant's father, explaining that he was unaware of his claim to U.S. citizenship and unable, due to the political situation in Czechoslovakia, to fulfill the required retention requirements. The applicant maintains that his father was thus constructively residing in the United States, such that he did not lose his U.S. citizenship. The applicant further maintains that his father's constructive presence in the United States is sufficient to establish the physical presence required for transmission of U.S. citizenship to him.

The AAO finds the applicant's counsel's constructive presence assertions to be unpersuasive. In *Drozod v. INS*, 155 F.3d 81, 87 (2nd Cir. 1998), the U.S. Court of Appeals for the Second Circuit made clear that the principle of constructive residence applies only to cases involving *retention* of citizenship. The principle does not apply to the *transmission* of citizenship. The Second Circuit stated further that courts "have rejected the argument that statutory requirements to transmit citizenship can be constructively satisfied," and that "[t]he application of constructive residence was inappropriate in a citizenship transmission case." *Id.* (citations and quotations omitted).

As previously noted, the record clearly establishes that the applicant's father never resided in the United States. Because the applicant cannot establish that his father had the required 10 years of physical presence in the United States, prior to his birth in 1964, five of which after attaining the age of 14, the AAO must conclude that the applicant did not acquire U.S. citizenship from his father.

The AAO notes further that the applicant does not qualify for citizenship pursuant to sections 320, 321 or 322 of the former Act, 8 U.S.C. §§ 1431, 1432 or 1433 because, among other things, neither of the applicant's parents are naturalized U.S. citizens, because the applicant is not a lawful permanent resident of the United States, and because his application was not adjudicated prior to his 18th birthday.

Sections 320 and 322 of the former Act were amended by the Child Citizenship Act of 2000 (CCA), which took effect on February 27, 2001, and section 321 of the former Act, 8 U.S.C. § 1432, was repealed. It has been clearly established that the provisions of the CCA are not retroactive and that the amended provisions of the Act apply only to persons who were not yet eighteen years old as of February 27, 2001. Because the applicant was over the age of eighteen on February 27, 2001, the AAO finds that he is not eligible for the benefits of sections 320 or 322 of the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant in the present case has not met his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.