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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: PHILADELPHIA, PA Date:

JUL 17 2009

IN RE:

APPLICATION: Application for Certificate of Citizenship under Section 301(a)(7) of the former
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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office 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 February 28, 1963 in the Dominican Republic. The applicant's parents, as indicated on his birth certificate, are [REDACTED] and [REDACTED].

The applicant's parents were divorced in 1973. The applicant's mother acquired U.S. citizenship at birth through her father, the applicant's grandfather. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship at birth through his mother.

The field office director found that the applicant had failed to establish that his mother had the required 10 years of physical presence in the United States prior to his birth, and therefore concluded that he did not derive U.S. citizenship under section 301(a)(7) of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1401(a)(7).¹

On appeal, the applicant, through counsel, maintains that his mother can satisfy the physical presence requirement constructively. See Statement of the Applicant on Form I-290B, Notice of Appeal to the AAO. Specifically, the applicant states that his "grandfather's physical presence in the United States can be tacked on to the physical presence that is required of the applicant's mother." *Id.*

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 in 1963. Section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7), is therefore applicable to this case.

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.

¹ Although the requirements of sections 301(a)(7) and 301(g) were the same until 1986, section 301(a)(7) of the former Act was not re-designated as section 301(g) until the Act of October 10, 1978, Pub. L. 95-432, 92 Stat. 1046.

Section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7), thus requires that the applicant establish that his mother was physically present in the United States for at least 10 years prior to 1963, five of which were after 1940 when his mother turned 14 years old.

The record clearly establishes that the applicant's mother acquired U.S. citizenship at birth through her father. It further establishes that she did not enter the United States until 1973. The applicant's mother was not physically present in the United States prior to the applicant's birth in 1963. Therefore, the applicant did not acquire U.S. citizenship under section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7).

The AAO finds the applicant's "constructive residence" assertions to be unpersuasive. In *Wong Gan Chee v. Acheson*, 95 F. Supp. 816, 817 (N.D. Cal. 1951), the U.S. District Court held that for section 201(g) of the Nationality Act, purposes, "[t]he term 'residence' . . . is entitled to a broad and liberal construction. It need not be actual or continuous, nor does it require physical presence during the full statutory period." In *Drozod v. INS*, 155 F.3d 81, 87 (2nd Cir. 1998), however, the Second Circuit Court of Appeals made clear that the principle of constructive residence applies only to cases involving *retention* of citizenship, and that the principle does not apply to the *transmission* of citizenship. The Circuit Court of Appeals clarified further that legal "[c]ases 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).

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). 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. 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." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The applicant has not met his burden of proof and the appeal will be dismissed.

ORDER: The appeal is dismissed.