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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: [redacted] Office: EL PASO Date: MAR 24 2009

IN RE: Applicant: [redacted]

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

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.

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, El Paso, Texas, 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 [redacted] in Mexico. The applicant's parents are [redacted] The applicant's parents were married in Mexico in 1955. The applicant's mother acquired U.S. citizenship at birth. She was born in Mexico on [redacted] The applicant seeks a certificate of citizenship claiming that he acquired citizenship at birth through his mother pursuant to section 301 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401.

The field office director denied the applicant's citizenship claim upon finding that he had failed to submit sufficient evidence to establish his mother's physical presence in the United States for the required period. The application was accordingly denied.

On appeal, the applicant claims that the field office director erred in not granting his claim on the basis of the immigration court documents, and other evidence, submitted. *See* Applicant's Appeal Brief.

"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 was born in 1962. Section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7), is therefore applicable to his citizenship claim.[1]

Section 301(a)(7) of the former Act stated 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] Section 301(a)(7) of the former Act was re-designated as section 301(g) by the Act of October 10, 1978, Pub. L. 95-432, 92 Stat. 1046. The requirements of section 301(a)(7) remained the same after the re-designation and until 1986.

The applicant must thus establish that his mother was physically present in the United States for at least 10 years prior to the applicant's birth in 1962, five of which after his mother's 14th birthday in 1953.

The applicant claims that his mother began residing in the United States in 1951 when she moved from Mexico to New Mexico. He further indicates, in a chronology submitted in support of the appeal, that she had her first two children in New Mexico in 1955 and 1957, respectively. Her third child was born in Mexico in 1958 and her fourth in 1960 in Deming New Mexico. The record contains the applicant's siblings' birth certificates. The record also contains affidavits submitted by the applicant's relatives and family friends. The record also contains the immigration judge's order terminating proceedings in the applicant's case and a transcript of his removal hearing.

The AAO first notes that USCIS is not bound by the immigration judge's finding regarding the applicant's U.S. citizenship status. The immigration judge does not have jurisdiction or authority to declare that an alien is a U.S. citizen. Rather, the immigration judge's termination of removal proceedings against the applicant was based on the judge's jurisdictional determination that the U.S. Department of Homeland Security had failed to meet its burden of proving the applicant's alienage and deportability by clear, convincing and unequivocal evidence. *See Murphy v. INS,* 54 F.3d 605 (9th Cir. 1995) (holding that in deportation proceedings, the government must prove alienage by clear, unequivocal and convincing evidence). *Minasyan v. Gonzalez,* 401 F.3d 1069 (9th Cir. 2005) clarifies further that an immigration judge does not have authority to declare that an alien is a citizen of the United States, and that such jurisdiction rests with the USCIS citizenship unit and with the federal courts. 8 C.F.R. § 341.3(c), specifies further that USCIS has jurisdiction over certificate of citizenship proceedings, with the burden of proof being on the applicant.

The AAO finds that the evidence in the record does not establish that the applicant's mother was physically present in the United States for 10 years prior to 1962, five of which while after 1953 (her 14th birthday). The applicant claims that his mother was present in the United States from 1951 until January 1962. The record establishes that she was in the United States from 1956 to 1960. The affidavits submitted suggest that she was in the United States from the early 1950's, but there is no documentary evidence corroborating the claim. The AAO further notes that the affidavits submitted are vague in terms of dates, and are submitted by individuals as young as 10 years old in the early 1950's.

The AAO notes the Board of Immigration Appeals finding in *Matter of Tijerina-Villarreal,* 13 I&N Dec. 327, 331 (BIA 1969), that:

> [W]here a claim of derivative citizenship has reasonable support, it cannot be rejected arbitrarily. However, when good reasons appear for rejecting such a claim such as the interest of witnesses and important discrepancies, then the special inquiry officer need not accept the evidence proffered by the claimant. (Citations omitted.)

The applicant's mother testified at his removal hearing that she first arrived in the United States in 1951, and moved back to Mexico in 1953 or 1954. *See* Transcript at 14-23. The testimony is unclear as to when the applicant's mother came back to the United States after that, but the record reflects that she married the applicant's father in Mexico in 1955 and returned at some point before the birth of her first child (also in 1955). *Id.* The applicant's mother testified that she returned to Mexico in December of 1961. *Id.* Where, as here, there is no documentary evidence to support the applicant's claim that his mother resided in the United States in the "early 1950's," the AAO cannot find that he has established that his mother had the required physical presence in the United States.

Pursuant to 8 C.F.R. § 341.2(c), 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 failed to meet his burden to establish that his mother was present in the United States for 10 years prior to January 1962, five of which were after April 1953. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.