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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

E<sub>2</sub>

FILE:

Office: NEW ORLEANS, LA

Date: **DEC 30 2010**

IN RE:

Applicant:

APPLICATION: Application for Certificate of Citizenship under Former Section 301 of the  
Immigration and Nationality Act, 8 U.S.C. § 1401 (1973)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Field Office Director, New Orleans, Louisiana, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the [REDACTED] in [REDACTED]. The applicant's [REDACTED], but acquired U.S. citizenship at birth through the applicant's grandfather, a naturalized U.S. citizen. The applicant's parents [REDACTED]. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship at birth through his father.

The field office director denied the applicant's citizenship claim upon finding that the applicant had failed to establish that his father was physically present in the United States as is required by former section 301 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401 (1973). The director further noted that the applicant was also ineligible for U.S. citizenship under section 320 of the Act, 8 U.S.C. § 1431.

On appeal, the applicant maintains, in relevant part, that his father was not recognized as a U.S. citizen until diplomatic relations were restored between the United States and Albania in 1992. *See Applicant's Brief in Support of United States Citizenship Claim.* The applicant claims that it was impossible for his father to be physically present in the United States as required due to circumstances beyond his control. *Id.* Thus, he claims that his father "constructively" fulfilled the physical presence requirement of former section 301 of the Act, even though he only began residing in the United States in 1995. *Id.*

The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The applicant has not established his eligibility for derivative citizenship and the appeal will be dismissed for the reasons discussed below.

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. *See Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1028 n.3 (9<sup>th</sup> Cir. 2001) (internal citation omitted). The applicant in the present matter was born in 1973. Former section 301(a)(7) of the Act, as in effect in 1960, therefore applies to the present case.<sup>1</sup>

Former section 301(a)(7) of the Act stated, in pertinent part, 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

<sup>1</sup> Section 301(a)(7) of the former Act was re-designated as section 301(g) upon enactment of the Act of October 10, 1978, Pub. L. 95-432, 92 Stat. 1046. The substantive requirements of this provision remained the same until the enactment of the Act of November 14, 1986, Pub. L. 99-653, 100 Stat. 3655.

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.

The applicant must thus establish that his father was physically present in the United States for 10 years prior to 1973, including five years after he attained the age of 14 (after 1947). The record indicates that the applicant's father was not physically present in the United States until 1995. *See* Form N-600, Application for Certificate of Citizenship. The applicant nevertheless maintains that his father should be deemed to have been present in the United States, constructively, because political circumstances prevented him from obtaining evidence of his U.S. citizenship and moving to the United States prior to 1995. *See* Applicant's Brief in Support of United States Citizenship Claim.

In *Drozdz v. INS*, 155 F.3d 81, 87 (2<sup>nd</sup> Cir. 1998), 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.<sup>2</sup> The Circuit Court of Appeals clarified 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). The applicant's father therefore cannot constructively fulfill the physical presence requirement in section 301 of the Act. Because the applicant's father was not in fact physically present in the United States for 10 years prior to 1973, including five years after 1947, the applicant did not acquire U.S. citizenship at birth under former section 301 of the Act.

The burden in these proceedings is on the applicant to establish eligibility for U.S. citizenship by a preponderance of the evidence. Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant in this case has not met his burden of proof. The appeal will therefore be dismissed.

**ORDER:** The appeal is dismissed.

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<sup>2</sup> The applicant cites *Matter of Navarrete*, 12 I&N Dec. 138 (BIA 1967) and *Matter of Farley*, 11 I&N Dec. (BIA 1965). These cases are discussed, and rejected, in *Drozdz v. INS*, *supra*, because they relate to retention of U.S. citizenship under section 301(b) of the Act, not transmission under section 301(a).