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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: NEWARK, NJ

Date:

JUN 04 2010

IN RE:

Applicant:

APPLICATION:

Application for Certificate of Citizenship under Former Section 301(a)(7) of the  
Immigration and Nationality Act; 8 U.S.C. § 1401(a)(7) (1972).

ON BEHALF OF APPLICANT:

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 a fee of \$585. 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 Acting District Director, Newark, New Jersey, 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 December 12, 1972 in Sweden. The applicant's parents are [REDACTED]. The applicant's father was born in Illinois on September 20, 1950. The applicant's parents were married in Sweden in 1970. The applicant seeks a certificate of citizenship claiming that she acquired U.S. citizenship at birth through her father.

The Acting District Director found that the applicant had failed to establish that her father had been physically present in the United States for five years after attaining the age of 14, as is required by former section 301(a)(7) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401(a)(7) (1972).<sup>1</sup> The Acting District Director determined that the applicant's father's period of military service was under less than honorable conditions, and therefore his period of service abroad could not be counted toward the required five years of physical presence after the age of 14.<sup>2</sup>

On appeal, the applicant, through counsel, maintains that her father's less than honorable discharge from the military did not render his entire period of service abroad dishonorable for purposes of transmission of U.S. citizenship. See Appeal Brief. Specifically, counsel distinguishes the provisions regarding military service in the naturalization context in section 328 of the Act, 8 U.S.C. § 1439, and notes that the language therein requires an honorable discharge as opposed to the language in section 301(a)(7) of the Act which simply requires a period of honorable service. *Id.* at 7-8. Counsel also cites to the Foreign Affairs Manual, at 7 FAM 1133.2(d)(4), and notes that the U.S. Department of State interprets the term "period of honorable service" to include periods of honorable service even in the case of a less than honorable discharge. *Id.* at 9.

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." See *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1028 n.3 (9<sup>th</sup> Cir. 2001) (citations omitted). The applicant was born in 1972. Former section 301(a)(7) of the Act is therefore applicable to this case.

Former section 301(a)(7) of the Act stated that the following shall be nationals and citizens of the United States at birth:

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<sup>1</sup> Former section 301(a)(7) of the 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.

<sup>2</sup> The Acting District Director also noted that the applicant was a lawful permanent resident but ineligible for benefits under the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), which took effect on February 27, 2001 and apply only to persons who were not yet 18 years old as of February 27, 2001. See CCA § 104.

[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.

Former section 301(a)(7) of the Act, thus requires that the applicant establish that her father was physically present in the United States for at least 10 years prior to 1972, five of which after September 20, 1964 (his fourteenth birthday).

The record in this case establishes that the applicant's father was physically present in the United States from birth until his military service abroad, which commenced on April 25, 1969. The record further establishes that the applicant's father was physically present in the United States for one month in October 1969. The question remains whether the applicant's father's period of military service abroad may be included in computing the five years of physical presence required between September 20, 1964 and the applicant's birth.

As noted by applicant's counsel, the U.S. Department of State's Foreign Affairs Manual states that "some persons who have received other than honorable discharges may have some periods of honorable service that can be confirmed by the military authority." *See* 7 FAM 1133.3(d)(4).

The applicant's father's discharge papers, his Form DD-214, specifically characterizes his separation from military service as a "discharge" and his character of service as "under other than honorable conditions." The Form DD-214 cites to Presidential Proclamation #4313, but does not confirm that the applicant's father had any period of "honorable service." As such, the AAO cannot determine, even under the interpretation of the Foreign Affairs Manual, that the applicant's father's service abroad between April and September 1969 was "a period of honorable service" that could be included in the computation of his physical presence. The AAO must therefore find that the applicant has not established that her father had the required five years of physical presence in the United States after September 20, 1964 (and before December 12, 1972).

The Supreme Court has explained that there "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). The regulation at 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 has not met her burden of proof, and her appeal will be dismissed.

**ORDER:** The appeal is dismissed.