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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

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[redacted]

FILE: [redacted] Office: SAN DIEGO, CA Date: NOV 29 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under former Section 301 of the Immigration and Nationality Act, 8 U.S.C. § 1401 (1960)

ON BEHALF OF APPLICANT:

[redacted]

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 District Director, San Diego, California, 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 June 21, 1960 in Mexico to [redacted] The applicant's mother was born in Arizona on January 25, 1921. The applicant's parents were married in Mexico in 1936. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship at birth through his mother.

The district director denied the applicant's citizenship claim upon finding that the applicant had failed to establish that his mother was physically present in the United States as is required by section 301 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401 (1960).

On appeal, the applicant, through counsel, maintains that his mother "constructively" fulfilled the physical presence requirement of section 301 of the Act, even though she moved to Mexico shortly after her birth and resided there during the period prior to the applicant's birth. *See* Applicant's Appeal Brief.

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 (9th Cir. 2001) (internal citation omitted). The applicant in the present matter was born in 1960. Former section 301(a)(7) of the Act, as in effect in 1960, therefore applies to the present case.[1]

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 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) 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.

The applicant must thus establish that his mother was physically present in the United States for 10 years prior to 1960, five of which were after she attained the age of 14 (after 1935). The applicant concedes that his mother was not physically present in the United States prior to his birth. *See* Appeal Brief at 1 (indicating that the applicant's mother's family relocated to Mexico "a few days after her birth" and "resided in Mexico from that date forward"). The applicant nevertheless states that his mother was constructively present in the United States because, due to an erroneous interpretation of the law, she did not believe she was entitled to U.S. citizenship.

The AAO finds the applicant's "constructive retention" theory inapposite. In *Rodriguez-Romero v. INS*, 434 F.2d 1022 (9th Cir. 1970), the Ninth Circuit Court of Appeals noted that while the residence requirement can be satisfied despite short absences, residence abroad without maintaining an abode in the United States cannot be deemed to be "residence" for transmission of citizenship purposes. *See also* 7 FAM 1134.2-2(d). In *Drozd v. INS*, 155 F.3d 81, 87 (2nd 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.[2] 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 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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[2] Counsel cites *Matter of Navarrete*, 12 I&N Dec. 138 (BIA 1967), *Matter of Farley*, 11 I&N Dec. (BIA 1965) and *Matter of Yanez-Carrillo*, 10 I&N Dec. 366 (BIA 1963). These cases are discussed, and rejected, in *Drozd 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).