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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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FILE:



Office: MIAMI, FL

Date:

JAN 24 2011

IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship under Former Section 301 of the
Immigration and Nationality Act, 8 U.S.C. § 1401 (1975)

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 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, Miami, Florida, 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 May 16, 1975 in Colombia. The applicant's parents are [REDACTED]. The applicant's parents were married in 1972. The applicant's father is not a U.S. citizen. The applicant's mother was born in California on December 8, 1953. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship at birth through his mother.

The field office 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 required by former section 301 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401 (1975).

On appeal, the applicant maintains, in relevant part, that his mother was kidnapped by her father and taken to Colombia in 1955. *See* Applicant's Brief. The applicant claims that it was impossible for his mother to return to the United States when she was being held against her will by her father in Colombia. *Id.* Thus, the applicant claims that his mother "constructively" fulfilled the physical presence requirement of former section 301 of the Act, even though she only returned to the United States in 1967. *Id.*

The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 1975. Former section 301(a)(7) of the Act, as in effect in 1975, 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 1975, including five years after she attained the age of 14 (after 1967). The record indicates that the applicant's mother was physically present in the United States from birth (in 1953) until 1955 and then between 1967 and 1972. The applicant's mother therefore was not present in the United States for the required 10 years prior to the applicant's birth. The applicant nevertheless maintains that his mother should be deemed to have been present in the United States, constructively, because she was kidnapped and forced to reside outside of the United States against her will. *See Applicant's Brief.*

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). Counsel attempts to distinguish *Drozd* stating that the applicant's mother was involuntarily and illegally transported abroad as opposed to departing with her family. Counsel's arguments in this regard are unpersuasive. The parent in the *Drozd* case was, like the applicant's mother, prevented from residing in the United States by factors outside his control. Nevertheless, the fact remains that he was not present in the United States for the period required by the Act. The applicant's mother cannot constructively fulfill the physical presence requirement in former section 301 of the Act. Because the applicant's mother was not in fact physically present in the United States for 10 years prior to 1975, including five years after 1967, 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.

² 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 *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).