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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

[redacted]

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FILE: [redacted] Office: DENVER, COLORADO Date: MAR 01 2011

IN RE: [redacted]

APPLICATION: Application for Certificate of Citizenship under former section 301 of the Immigration and Nationality Act; 8 U.S.C. § 1401 (1976)

ON BEHALF OF PETITIONER:

[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 a fee of $630. 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, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Italy on June 7, 1976, to married parents The applicant's father was born in the United States on July 14, 1953. The applicant's mother was born in Italy and is not a U.S. citizen. The applicant seeks a certificate of citizenship based on the claim that she acquired U.S. citizenship at birth through her father.

The director reviewed the case pursuant to former section 301(g) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401(g), and determined that the applicant failed to establish that her father had the requisite physical presence in the United States. The application was denied accordingly. On appeal, the applicant contends through counsel that she should not be subject to the physical presence requirements set forth in former section 301(g) of the Act, and that she "should be eligible for U.S. citizenship based on the equal protection ground currently being reviewed by the U.S. Supreme Court" in *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1878 (2010). *See Brief on Appeal* at 1.

The AAO conducts appellate review on a de novo basis. *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. INS*, 247 F.3d 1026, 1028 n.3 (9th Cir. 2001). The applicant in this case was born in 1976. Accordingly, former section 301(a)(7) of the Act, 8 U.S.C. § 1401(a)(7), controls her claim to acquired citizenship.[1]

Former section 301(a)(7) of the 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 . . . 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 . . . for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years. . .

Therefore, the applicant must establish that her father was physically present in the United States for no less than ten years before her birth on June 7, 1976, and that at least five of these years were after her father's fourteenth birthday on July 14, 1967.

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[1] Former section 301(a)(7) of the Act was re-designated as section 301(g) by the Act of October 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046 (1978). Although the director erred in citing to former section 301(g) of the Act, this error is harmless because the requirements of former section 301(a)(7) remained the same after the re-designation and until 1986.

The record reflects that the applicant's father was born in Wisconsin on July 14, 1953. *See Birth Certificate for Nicholas Paul Volenec.* The applicant's father testified that he was physically present in the United States from his birth until June 17, 1971, and from September, 1974, until December, 1974. Because the applicant's father was present in the United States for only four years and three months after his fourteenth birthday and before the applicant's birth, the applicant cannot establish that her father satisfied the physical presence requirements in former section 301(a)(7) of the Act.

The applicant claims that she is eligible for U.S. citizenship based on a pending equal protection challenge to the different physical presence requirements for unwed fathers and mothers. *See United States v. Flores-Villar, supra.* Because the applicant was born in wedlock, former section 309 of the Act, 8 U.S.C. § 1409, which contains more lenient physical presence requirements for children born out of wedlock to U.S. citizen mothers, does not apply to her. Accordingly, this contention lacks merit.

The applicant bears the burden of proof to establish the claimed citizenship by a preponderance of the evidence. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c). The applicant has failed to establish by a preponderance of the evidence that she meets the requirements set forth in former section 301(a)(7) of the Act. Accordingly, the applicant is not eligible for a certificate of citizenship, and the appeal will be dismissed.

ORDER: The appeal is dismissed.