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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**

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Date: **MAR 26 2012** Office: SANTA ANA, CA

FILE:

IN RE: Applicant:

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

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 \$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, Santa Ana, California, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on October 18, 1973 in the Philippines. The applicant's mother, [REDACTED] was born in the Philippines on November 4, 1952, but acquired U.S. citizenship at birth through her father who was born in Kansas in 1923. The applicant's father is not a U.S. citizen. The applicant claims that her parents were not married when she was born, although there is evidence in the record indicating that they were married in 1971. The applicant seeks a certificate of citizenship claiming that she acquired U.S. citizenship at birth through her mother.

The field office director denied the applicant's citizenship claim upon finding that she had failed to establish her eligibility for U.S. citizenship because she could not demonstrate that her mother was physically present in the United States for the period of time required under former section 301(a)(7) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401(a)(7)(1973), or for a continuous period of one year as is required by section 309(c) of the Act, 8 U.S.C. § 1409(c).

On appeal, the applicant does not dispute that her mother lacks the statutorily required period of physical presence in the United States. Rather, the applicant, through counsel, maintains that her mother was unaware of her claim to U.S. citizenship and therefore prevented from establishing a residence in the United States until 1978, when she became aware of her citizenship eligibility. *See Applicant's Appeal Brief.* The applicant further claims that the director erred in analyzing her claim under section 301 of the Act, because she has established her out-of-wedlock birth. *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 1973. Former section 301(a)(7) of the Act 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

¹Former 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.

the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

In order to acquire U.S. citizenship at birth under former section 301(a)(7) of the Act, the applicant must therefore establish that her mother was physically present in the United States for 10 years prior to 1973, five of which were after the age of 14 (after 1966). The applicant's mother was not physically present in the United States for 10 years prior to 1973, and therefore did not transmit U.S. citizenship to the applicant under former section 301(a)(7) of the Act.

The applicant claims that her parents were not married at the time of her birth. The applicable statute for children born out-of-wedlock to U.S. citizen mothers is section 309(c) of the Act.

Section 309(c) of the Act provides, in relevant part,

a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the other had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

There is no evidence in the record indicating that the applicant's mother was physically present in the United States for a continuous period of one year prior to the applicant's birth. Therefore, whether or not the applicant was born in wedlock, she cannot establish that her mother transmitted U.S. citizenship to her at birth under either former section 301 or 309 of the Act.

Citing *inter alia* *Matter of Yanez-Carillo*, 10 I&N Dec. 366 (BIA 1963), and *Matter of Farley*, 11 I&N Dec. 51 (BIA 1965), counsel argues that the applicant's mother's lack of physical presence in the United States prior to 1973 was due to ignorance of her U.S. citizenship eligibility and therefore beyond her control. See Applicant's Appeal Brief at 8-12.

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 applicant's mother cannot constructively fulfill the physical presence requirement in former section 301 of the Act or section 309(c) of the Act. Because the applicant's mother was not in fact physically present in the United States prior to the applicant's birth, the applicant did not acquire U.S. citizenship at birth under former section 301 of the Act or section 309(c) of the Act.

² These cases cited by counsel, including *Ramos-Hernandez v. INS*, 566 F.2d 638 (9th Cir. 1977), relate to retention of U.S. citizenship under section 301(b) of the Act, not transmission under section 301(a).

“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 applicant must meet her burden of proof by establishing the claimed citizenship by a preponderance of the evidence. Here, the applicant has not met this burden. Accordingly, the applicant is not eligible for a certificate of citizenship and the appeal will be dismissed.

ORDER: The appeal is dismissed.