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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: JUN 2 1 2013 Office: HARLINGEN, TX [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Section 301 of the Immigration and Nationality Act, 8 U.S.C. § 1401 (1966)

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Harlingen, Texas, 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 November 4, 1966 in Mexico to [redacted] The applicant's parents were married in Mexico in 1959. The applicant's father was born in Mexico on July 31, 1938, but acquired U.S. citizenship at birth through his U.S. citizen parent. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship at birth through his father under former section 301(a)(7) of the Immigration and Nationality Act (the Act), 8 U.S.C.§ 1401(a)(7)(1966).

The field office director denied the applicant's citizenship claim upon finding that he had failed to establish that his father was physically present in the United States for the period of time required by former section 301(a)(7) of the Act.

On appeal, the applicant, through counsel, states that the applicant's father had the required physical presence in the United States. *See* Appeal Brief. Specifically, counsel maintains that there is sufficient evidence to establish that the applicant's father was present in the United States since 1950. *Id.* Counsel further states that the application should be approved because the applicant's father was subject to a five-year retention requirement, which he necessarily fulfilled before obtaining his certificate of citizenship. *Id.* Lastly, counsel maintains that the applicant's claim should be granted on the basis of the approval of his brother's claim. *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 1966. Former section 301(a)(7) of the Act therefore applies to the present case.[2]

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

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[1] Some of the evidence in the record indicates that the applicant's father's first name is [redacted]

[2] 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.

> 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.

The applicant must therefore establish that his father was physically present in the United States for 10 years prior to 1966, five of which were after the age of 14 (after 1952).

The record contains a letter from the applicant's father and affidavits executed by his mother and two aunts in support of the applicant's claim that his father was physically present in the United States for the statutorily required period. On appeal, counsel maintains that the affidavits submitted provide sufficient evidence of the applicant's father's presence in the United States since 1950. The Board of Immigration Appeals held in *Matter of Tijerina-Villarreal,* 13 I&N Dec. 327, 331 (BIA 1969), that:

> [W]here a claim of derivative citizenship has reasonable support, it cannot be rejected arbitrarily. However, when good reasons appear for rejecting such a claim such as the interest of witnesses and important discrepancies, then the special inquiry officer need not accept the evidence proffered by the claimant. (Citations omitted.)

The letter and affidavit submitted do not provide sufficient details and only generally state in one case that the applicant's father was in the United States starting in 1950 and in another that he arrived in "the early 1950s." Additionally, the social security earning statement included in the record contains only evidence of employment after 1967. Lastly, the record indicates that the applicant's parents met in 1957, thus the applicant's mother had no personal knowledge of the applicant's father's physical presence prior to 1957. Further, the applicant's parents met and married in Mexico. The record does not, by a preponderance of the evidence, demonstrate that the applicant's father was physically present in the United States for 10 years prior to the applicant's birth in 1966.

The AAO notes that the applicant's brother was born in 1975 and the period of physical presence required to be established is not the same as in the present matter. In any event, the AAO must determine the applicant's eligibility based on the evidence in the record before it, and not on the basis of another application. The evidence in the record does not establish that the applicant's father was physically present in the United States for ten years prior to 1966. Similarly, the AAO cannot approve an application on the basis of counsel's assertion that the applicant's father was subject to a retention requirement that he necessarily fulfilled. Again, the AAO must determine the applicant's eligibility based on the evidence in the record before it. Moreover, the applicant's father was subject to a two year retention requirement. *See* 7 Foreign Affairs Manual (FAM) § 1133.5-7 (explaining that a two-year retention requirement replaced the five year retention requirement in 1972 and applied retroactively to persons born between 1934 and 1952).

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 failed to meet his burden of proof to establish that his father was physically present in the United States as required by former section 301(a)(7) of the Act. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.