



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 5652955

Date: NOV. 15, 2019

Appeal of New York, New York Field Office (New York District Office) Decision

Form N-600, Application for Certificate of Citizenship

The Applicant seeks a Certificate of Citizenship to reflect that he acquired U.S. citizenship from his mother under former section 301(a)(7) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401(a)(7).¹

The Director of the New York, New York District Office denied the application and a subsequent motion to reopen, concluding that the Applicant provided insufficient evidence to demonstrate that prior to his birth, his U.S. citizen mother was physically present in the United States for the required time period under section 301 of the Act.²

The matter is now before us on appeal. In his appeal, the Applicant submits additional evidence and claims that he has sufficiently demonstrated that his mother met required U.S. physical presence conditions.

It is the Applicant's burden to establish eligibility for the requested benefit. Section 341 of the Act, 8 U.S.C. § 1452. Because the Applicant was born abroad, he is presumed to be a foreign national and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. *See Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008). Upon *de novo* review, we will dismiss the appeal.

I. LAW

The record reflects that the Applicant was born in the Philippines on 1977, to married parents, a U.S. citizen mother and a foreign national father.

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*

¹ Amended by Act of October 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046.

² The Director also found in the initial denial decision that the Applicant did not establish eligibility to derive citizenship through his mother under current and former sections 320 of the Act, 8 U.S.C. § 1431, and former section 321 of the Act, 8 U.S.C. § 1432. The Applicant did not contest these findings in the motion to reopen filed with the Director, and these findings are not the subject of his current appeal.

Naturalization Service, 247 F.3d 1026, 1029 n.3 (9th Cir. 2001). Based on the Applicant's year of birth in 1977, his acquisition of citizenship at birth claim falls within the provisions of former section 301(a)(7) of the Act, which provided that:

[A] person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is a [foreign national], 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.³

The former section 301(a)(7) of the Act provisions pertaining to service in the Armed Forces of the United States were amended by the Act of November 6, 1966, Pub. L. No. 89-770, 80 Stat. 1322, to read in pertinent part that:

[A]ny periods of honorable service in the Armed Forces of the United States . . . by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States . . . may be included in order to satisfy the physical presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

II. ANALYSIS

The issue on appeal is whether the Applicant sufficiently demonstrated that his U.S. citizen mother was physically present in the United States for ten years prior to the Applicant's birth (on [redacted] 1977), at least five years of which occurred after she turned 14 (on [redacted] 1965).⁴

The Applicant does not contest (and his mother's affidavit, as well as immigration admission evidence in the record reflects) that his mother did not physically enter the United States until 1978, which was after the Applicant's birth. The Director determined on this basis that the Applicant's mother was therefore not present in the United States for the ten years prior to the Applicant's birth, as required. On appeal, however, the Applicant suggests two reasons why we should find that his mother satisfied

³ The Director's decision indicates that the Applicant's citizenship claim falls under former section 301(g) of the Act. The error is harmless. 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), and the requirements under former sections 301(a)(7) and 301(g) of the Act were the same after the re-designation, and until 1986.

⁴ Evidence in the record demonstrates that the Applicant's mother, who was born in the Philippines in [redacted] 1951, acquired U.S. citizenship at birth through her father under section 201(g) of the Nationality Act of 1940 (the 1940 Act), 8 U.S.C. § 601(g) (*repealed by* Immigration and Nationality Act, ch. 477, title IV, § 403(a)(42), Pub. L. No. 82-414, 66 Stat. 163, eff. Dec. 24, 1952 (June 27, 1952)).

former section 301(a)(7) of the Act U.S. physical presence requirements, regardless of the fact that she was not physically present in the country prior to his birth.

A. Constructive Physical Presence

The Applicant claims first that his mother should be deemed to have been constructively present in the United States, because she did not learn about her U.S. citizenship until she was 28 years old; she constructively satisfied section 201(g) of the 1940 Act U.S. residence retention requirements (which required the child to reside in the United States for five years in order to retain his or her acquired U.S. citizenship), and she was thereby able to acquire U.S. citizenship through her father. The Applicant refers to two Board of Immigration Appeals cases that allow the application of constructive U.S. presence in the context of retaining citizenship under section 201(g) of the 1940, and he contends that these policies should apply to former section 301(a)(7) of the Act physical presence requirements as well. *See Matter of Farley*, 11 I&N Dec. 51 (BIA 1965); *Matter of Yanez-Carillo*, 10 I&N Dec. 366 (BIA 1963). The Applicant provides no legal authority, however, to support his claims that the section 201(g) of the 1940 Act-related constructive residence retention policies also apply for section former section 301(a)(7) of the Act U.S. physical presence purposes.

Moreover, the U.S. Second Circuit Court of Appeals (the court with jurisdiction in the Applicant's case) has clearly distinguished the application of constructive residence policies for section 201(g) of the 1940 Act *retention of citizenship* purposes, from former section 301(a)(7) of the Act U.S. physical presence requirements for *transmission of citizenship* purposes; and has specifically determined that although the principle of constructive residence may apply to cases involving *retention* of citizenship, the principle does not apply to the *transmission* of citizenship under former section 301(a)(7) of the Act. *See Drozd v. INS*, 155 F.3d 81, 85-87 (2nd Cir. 1998)(the court also indicates that other federal cases have also rejected the argument that statutory requirements to transmit citizenship can be constructively satisfied.) The Applicant has therefore not established that his mother met U.S. physical presence requirements pursuant to claimed constructive physical presence policies.

B. Physically Present Abroad as Dependent of U.S. Armed Service Member

Although not entirely clear, the Applicant also appears to claim that his mother may constructively meet former section 301(a)(7) of the Act U.S. physical presence requirements based on constructive residence retention policies that applied to dependents of World War II-era U.S. Armed Service members. However, again he provided no legal authority to demonstrate that retention of citizenship provisions apply for former section 301(a)(7) of the Act transmission of citizenship purposes.

In addition, the Applicant seems to indicate that his maternal grandfather served honorably in the U.S. Navy during World War II, and that his mother satisfied former section 301(a)(7) of the Act U.S. physical presence requirements in his case based on the provision's honorable service in the Armed Forces exception.

The previously discussed amendments to former section 301(a)(7) of the Act would allow for any periods of time during which the Applicant's (unmarried) mother lived abroad as a dependent and member of her father's household while he served honorably with the U.S. Navy, to be counted towards satisfying her U.S. physical presence requirements. In this case, however, although the

Applicant submits documents indicating that his maternal grandfather served honorably in the U.S. Navy between 1942 and 1945, the Applicant's mother was not born until several years later, in 1951. The former section 301(a)(7) of the Act U.S. Armed Services exception therefore does not apply to the Applicant's claim.

Again, it is undisputed that the Applicant's mother did not enter the United States (or any of its territories) prior to the Applicant's birth in 1977. The Applicant has therefore not established that his mother was physically present in the United States for ten years prior to his birth, at least five years after she turned 14, as required for her to transmit U.S. citizenship to the Applicant under former section 301(a)(7) of the Act.

ORDER: The appeal is dismissed.