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U.S. Citizenship
and Immigration
Services

Handwritten initials 'EJ'



FILE:

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IN RE:

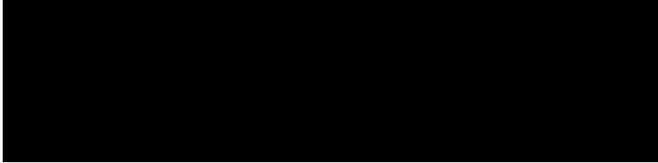
Applicant:



APPLICATION:

Application for Certificate of Citizenship under Section 322 of the former Immigration and Nationality Act, 8 U.S.C. § 1433.

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Interim District Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant was born on March 29, 1977, in El Salvador. The record reflects that the applicant was formally adopted by [REDACTED] on March 1, 1978. Both of the applicant's adoptive parents were U.S. citizens at the time of the applicant's adoption. The applicant entered the U.S. pursuant to a lawful admission for permanent residence on December 29, 1978. The applicant seeks a certificate of citizenship pursuant to section 322 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1433.

The interim district director (IDD) concluded that the applicant was ineligible for citizenship under section 320 of the amended Immigration and Nationality Act (the Act), 8 U.S.C. § 1431, because he was over the age of eighteen when the provision became effective on February 27, 2001. The interim district director additionally found that the applicant was ineligible for citizenship under section 322 of the former Act because he filed his own Form N-600, Application for a Certificate of Citizenship (N-600 application) application and was over the age of eighteen when the N-600 application was filed. The application was denied accordingly.

On appeal, counsel asserts that the applicant was eligible for a certificate of citizenship under section 322 of the former Act when he entered the U.S. in 1978, and that he continuously remained eligible for citizenship under that provision. Counsel asserts that the applicant's mother [REDACTED] retained an attorney in 1981, to file a certificate of citizenship application on the applicant's behalf, but that the attorney did not file the application. Counsel asserts further that [REDACTED] herself attempted to apply for a certificate of citizenship for the applicant on several occasions between 1978 and 1995. Counsel asserts that each time [REDACTED] was told by Immigration and Naturalization Service (Service, now Citizenship and Immigration Services, CIS) officers, that her son had obtained citizenship through an automatic operation of the law, and that no application was necessary. Counsel asserts that [REDACTED] relied on the information she received from Service officers and that she subsequently did not file a certificate of citizenship application on her son's behalf, pursuant to section 322 of the former Act. Counsel concludes that the applicant's constitutional Fifth Amendment due process and equal protection rights were therefore violated and that the applicant should retroactively be granted U.S. citizenship pursuant to either section 322 of the former Act, or section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431. Counsel asserts further that the applicant is entitled to a certificate of citizenship because his Fifth Amendment due process rights were violated by ineffective assistance of counsel.

The Child Citizenship Act of 2000 (CCA), took effect on February 27, 2001, and amended sections 320, 321 and 322 of the former Act, 8 U.S.C. §§ 1431, 1432 and 1433. The AAO finds that legal precedent decisions clearly establish that the provisions of the CCA are not retroactive, and that the amended provisions apply only to persons who were not yet eighteen years old as of February 27, 2001. Section 320 of the Act, effective on February 27, 2001, provides in pertinent part that:

- (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
 - (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

- (2) The child is under the age of eighteen years.
- (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

Because the applicant was twenty-three years old on February 27, 2001, he is not eligible for the benefits of section 320 of the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

Section 322 of the former Act provides, in pertinent part:

(a) Application of citizen parents; requirements

A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, "Secretary"] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [Secretary] that the following conditions have been fulfilled:

- 1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- 2) The child is physically present in the United States pursuant to a lawful admission.
- 3) The child is under the age of 18 years and in the legal custody of the citizen parent.

....

b) Attainment of citizenship status; receipt of certificate

Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service [CIS] within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

(Emphasis added.) The AAO finds the statutorily mandated terms of section 322 of the former Act make clear that, in addition to meeting the requirements set forth in section 322(a) of the former Act, an applicant must also establish that his or her application for citizenship was adjudicated and approved by the Service, and that an oath of allegiance was taken before the applicant's eighteenth birthday. *See* Section 322(b) of the former Act.

Despite the clear statutory language contained in section 322(b) of the former Act, and despite the evidence in the record that the applicant's N-600 application for a certificate of citizenship was filed for the first time by the applicant himself when he was twenty-five years old, counsel argues that the applicant is a U.S. citizen in fact or by operation of law, and that "[t]he 'irregularities' by the Immigration Service have breached Mr. [redacted] Fifth Amendment due process rights and deprived him of benefits for which he is and was entitled to as a matter of law." *See* Appeal at 4. Counsel asserts that [redacted] applied for citizenship on the applicant's behalf in 1981, 1990 and/or 1995, but that all three times, the applicant "[w]as denied his right to naturalization by Immigration Service misinformation and 'irregularities'." Counsel asserts that "[t]he due process violations must be remedied [through equitable tolling] by granting [redacted] U.S. Citizenship pursuant to INA Section 322 and considering only factors in existence at the time of application

in 1981, 1990 and/or 1995.” See Appeal at 5. Counsel asserts further that “equitable tolling should be granted and is proper relief where misinformation is at issue.” See Appeal at 6.

In *Matter of Carlos Cazares-Alvarez*, 21 I&N Dec. 188, 207 (BIA 1997), the Board of Immigration Appeals held that a right to due process of law under the Fifth Amendment is violated when an applicant is unlawfully or wrongly precluded from an opportunity to obtain relief for which she or he is statutorily eligible.

The AAO finds that the applicant has failed to establish that the Service wrongly or unlawfully precluded him from obtaining citizenship benefits under section 322 of the former Act, prior to his eighteenth birthday. The AAO notes first that counsel fails to support her assertions of Service wrongdoing with any legal or detailed factual evidence. Although counsel asserts that the applicant’s mother applied for citizenship on her son’s behalf in 1981 and 1990 and/or 1995, the record contains no evidence to establish that an N-600 application was completed or filed by the applicant’s mother at any time. Moreover, neither the applicant’s immigration file nor CIS centralized database records contain any evidence of previous N-600 application filings or filing attempts. The AAO notes further that although counsel asserts that immigration officers misinformed Mrs. [REDACTED] about citizenship requirements for her son, the assertions are vague and lack material information and details regarding who the officers were, what she and the officers said, or exactly when the alleged misstatements occurred.¹

Counsel asserts on appeal that evidence of the previous N-600 application filing attempts was destroyed in 1998, by mold in [REDACTED] house. The AAO notes, however, that although a Fungi Investigation Report submitted by counsel contains references to mold on the floors and drywall of [REDACTED] house, the report contains no information to indicate that the house was destroyed by mold or that Mrs. [REDACTED] property and records were destroyed.

The AAO additionally finds that counsel erroneously asserted a theory of “equitable tolling” in the present case. The AAO notes that the theory of “equitable tolling” applies in the immigration context to the tolling of a filing limitations period for motions to reopen and reconsider. See *Socop-Gonzalez v. INS*, 272 F.3d 1176 1186 (9th Cir., 2001) (discussing “[w]hether equitable considerations should toll the limitations period set forth in 8 C.F.R. § 3.2 [Reopening or reconsideration before the Board of Immigration Appeals]). See also *Iturribarria v. INS*, *supra* at 897, stating that, “[t]his court . . . recognizes equitable tolling of deadlines and numerical limits on motions to reopen or reconsider during periods when a petitioner is prevented from filing because of deception, fraud, or error”.

The Ninth Circuit Court of Appeals clarified that, “[a] statute of limitations, unlike a jurisdictional requirement is subject to waiver, tolling, and estoppel”. See *Socop-Gonzalez*, *supra* at 1188. The Court stated further that:

¹ The AAO notes further that counsel herself submits an affidavit on appeal, claiming she witnessed an “irregularity” by CIS officers in August 2003, when an officer allegedly broke a promise to continue the applicant’s citizenship interview so that the applicant could participate more meaningfully. The AAO notes its conflict of interest concerns based on the attorney of record’s attempt to testify as a witness in a case she is representing. Moreover, no proof of any wrongdoing was submitted by counsel. The AAO notes further that the applicant was clearly no longer statutorily eligible for section 322 citizenship benefits at the time of the alleged “irregularity”.

We take as our starting place the presumption, read into “every federal statute of limitation,” that filing deadlines are subject to equitable tolling We presume that Congress is aware of the doctrine of equitable tolling . . . and that it knows how to create a mandatory and jurisdictional filing requirement if it wishes to do so.

Id. (citations and quotations omitted). The AAO notes that the section 322 requirement that an applicant’s U.S. citizen parent must file and complete the citizenship application and process for a child prior to the child’s eighteenth birthday, was clearly a statutorily mandated jurisdictional requirement. The AAO notes further that, although counsel entitles her appeal to the AAO, “Appeal to Reopen and Reconsider Improperly Denied Application to Issue U.S. Citizenship Certificate,” the September 3, 2003, IDD Denial letter, the Form I290B, Notice of Appeal to the Administrative Appeals Unit, and the Regulations make clear that the initial filing with the AAO is an appeal and not a motion to reopen or reconsider.

Moreover, the AAO notes that even if the theory of “equitable tolling” were relevant to the present case, the AAO would have no jurisdiction to rule on its applicability. The jurisdiction of the AAO is limited to that authority specifically granted through the regulations. *See* 8 C.F.R. § 2.1 and 8 C.F.R. § 103.1(f)(3)(iii) (2003). *See also Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991). The AAO finds that “equitable tolling” is an equitable form of relief that is available only through the courts.²

Based on all of the above reasons, the AAO finds that the applicant failed to establish that he qualifies for citizenship under section 322 of the former Act.

8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In this case, the burden has not been met. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.

² The AAO also finds counsel’s claim that the applicant was denied due process based on ineffective assistance of counsel in 1981 to be unpersuasive. The record contains no evidence to indicate that an attorney was hired to file a citizenship application in the applicant’s case, and the implication that the applicant was prejudiced by ineffective assistance of counsel in 1981 is unconvincing in light of the fact that at that time the applicant was only about four years old, and had an additional fourteen years in which to file for naturalization under section 322 of the former Act. *See Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir., 2003). The AAO notes further that its finding as to the applicability of “equitable tolling” to the present case would apply with equal force to counsel’s ineffective assistance of counsel claim.