



U.S. Citizenship
and Immigration
Services

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[REDACTED]

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FILE: [REDACTED]

Office: HOUSTON, TX

Date: DEC 29 2006

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship pursuant to former Section 321(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1432(a)(3), now repealed

ON BEHALF OF APPLICANT:

[REDACTED]

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Houston, Texas and the applicant appealed the decision to the Administrative Appeals Office (AAO). On October 3, 2006, the AAO dismissed the appeal, but subsequently reopened the matter providing the applicant with an opportunity to submit additional evidence. Counsel submitted a timely brief on November 6, 2006. The AAO will affirm its prior decision. The application will be denied.

The record reflects that the applicant was born on February 14, 1974 in Managua, Nicaragua and legally recognized as his father's son in the same year. The applicant's father, [REDACTED] born in Nicaragua, became a naturalized U.S. citizen on July 6, 1990, when the applicant was sixteen years old. The applicant's alleged mother, [REDACTED] also born in Nicaragua, naturalized on April 14, 1994. The applicant's parents married on March 25, 1982. The applicant attained lawful permanent resident status as of May 27, 1983 when he was nine years old. The applicant seeks a certificate of citizenship pursuant to former section 321(a)(3) of the Immigration and Nationality Act (INA or "the Act"), 8 U.S.C. § 1432(a)(3), repealed as of February 27, 2001.

As just noted, the section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001. However, any person who would have acquired automatic citizenship under its provisions prior to February 27, 2001 may apply for a certificate of citizenship at any time. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Therefore, the issue before the AAO is whether the applicant has established that he acquired U.S. citizenship under the provisions of section 321(a)(3) of the Act prior to February 27, 2001.

Former section 321 of the Act, 8 U.S.C. § 1432, provided that:

(a) a child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

- (1) The naturalization of both parents; or
- (2) The naturalization of the surviving parent if one of the parents is deceased;
or
- (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if-
- (4) Such naturalization takes place while said child is under the age of 18 years;
and
- (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

The director denied the petition because she found that the evidence submitted by the applicant did not establish [REDACTED], the ex-wife of the applicant's father, as the applicant's mother. The director further determined that the record did not include sufficient evidence to demonstrate a legal separation between [REDACTED] and the applicant's father, [REDACTED].

Counsel contends that the applicant is not required to establish that his parent's legal separation occurred prior to the father's naturalization in 1990. The AAO agrees. Guidance issued by the former INS on February 18, 1997¹ provides the following discussion of former section 321(a) requirements:

Section 321(a) of the Act provides for acquisition of citizenship of a minor upon the naturalization of both his/her parent(s) (or the surviving parent or the parent with legal custody) provided certain conditions are satisfied. There is no specific order in which the conditions of the law must be satisfied for citizenship as long as all conditions are satisfied before the child's 18th birthday.

A child who is given into the custody of a parent following that parent's naturalization (the other parent being an alien) would derive citizenship under Section 321(a)(3) of the Act on the date custody is awarded provided such date is prior to the child's 18th birthday and the child is residing in the United States pursuant to lawful permanent residence on that date. If the child is not residing in the United States on that date but enters the United States to begin lawful permanent residence before age 18, citizenship would be acquired on the date of such entry.

Therefore, to establish eligibility for citizenship under the language of former section 321(a)(3) of the Act, the applicant need only prove that prior to the date of his 18th birthday, February 14, 1992, his father had become a U.S. citizen, and that he was a lawful permanent resident in the legal custody of his father subsequent to the legal separation of his parents.

The applicant contends that he acquired U.S. citizenship through the naturalization of his father in 1990, which occurred when he was 16 years of age. He asserts that as a lawful permanent resident who was in his father's custody following his parents' separation in 1991, when he was 17 years of age, he has satisfied the requirements at section 321 (a)(3) of the Act.

The AAO has reviewed the record in its entirety, as well as counsel's assertions regarding the proof it provides in relation to the applicant's case. As noted above, the record documents that the applicant became a lawful permanent resident when he was 9 years of age and that his father naturalized when he was 16 years of age. Accordingly, the one issue before the AAO is whether prior to turning 18 years of age, the applicant was in his father's legal custody following the legal separation of his parents.

¹ Memorandum from Terrance M. O'Reilly, Acting Assistant Commissioner, Naturalization Division, Immigration and Naturalization Service, *Section 321(a) of the INA*, HQ321 (February 18, 1997).

The AAO turns first to the question of whether the record establishes [REDACTED] as the applicant's mother. The identity of the applicant's mother is critical to the determination of whether he can derive United States citizenship. Without the identity of the mother, it cannot be established that the applicant's parents were ever married.

While the applicant has submitted a document issued by the Civil Registrar in Managua, Nicaragua to demonstrate that [REDACTED] is his father, he has provided no such primary evidence to establish [REDACTED] as his mother. In her decision, the director noted that the record does not include the applicant's birth certificate, which would list his mother. On appeal, counsel asserted that the former U.S. INS previously reviewed the applicant's "birth certificate" and submitted as proof a copy of a list of exhibits submitted by the INS in relation to the applicant's removal proceedings. He also provided a 1983 affidavit signed by the applicant's father identifying the applicant's mother as [REDACTED] and indicated that the applicant's Form I-485, Application for Status as a Permanent Resident, lists [REDACTED] as the applicant's mother. Counsel noted that the issue of the applicant's maternity has not been previously questioned. In his November 6, 2006 brief in response to the AAO's reopening of this matter, counsel reiterates the documentation provided by the record to establish [REDACTED] as the applicant's mother.

The AAO has reviewed the evidence referenced by counsel. The "birth certificate" noted in the exhibits prepared by the former INS is the recognition document noted above and not a birth certificate. While the 1983 affidavit signed by the applicant's father and the Form I-485 both indicate that [REDACTED] is the applicant's mother, they are not sufficient proof of the applicant's maternity in the absence of any primary evidence to establish the relationship.

The regulation at 8 C.F.R. § 103.2(b)(2)(i) requires the following when evidence does not exist or is unavailable:

If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The applicant has not submitted a copy of his birth certificate or other primary evidence to establish the identity of his mother. He neither indicates nor offers proof that his birth certificate does not exist or is not available. In response to a direct AAO request for a copy of the applicant's birth certificate, counsel contended that the existing record offers sufficient proof to establish [REDACTED] as the applicant's mother. He asserted that significant weight should be given to the fact that in the course of six years of removal proceedings involving the applicant, his maternity was not questioned, that the applicant's maternity is clearly indicated by the name on his Nicaraguan passport – [REDACTED] and that [REDACTED] and the applicant have always listed each other as mother and son. Counsel further pointed to the court documents issued by the Harris County family court in which the applicant is listed as one of five children from the marriage of [REDACTED] and [REDACTED] in accordance with the Texas

Family Code. Counsel's brief filed in response to the AAO's reopening of this case continues to make these claims. Again, he does not submit a copy of the applicant's birth certificate or indicate that a birth certificate does not exist or is otherwise unavailable. Counsel's contention that the record establishes the applicant's maternity is not persuasive.

The record fails to provide documentation of the applicant's birth to [REDACTED] and neither the petitioner nor his counsel have indicated or demonstrated that such primary documentation does not exist or is otherwise unavailable. The applicant has failed to comply with the requirements at 8 C.F.R. § 103.2(b)(2)(i). Moreover, the Nicaraguan recognition document submitted by the applicant, the only primary document in the record related to the applicant's birth, lists his name as [REDACTED] not [REDACTED]. Accordingly, the record does not establish that [REDACTED] is the applicant's mother. Also, it cannot be established that the applicant's biological parents were ever married and, consequently, that they were legally separated as required by the statute.

Even were the applicant able to prove that [REDACTED] is his mother and that his parents had legally separated, the evidence of record does not establish that prior to his 18th birthday the applicant was in his father's legal custody. The applicant has not demonstrated that he resided in the legal custody of his U.S. citizen father following his parents alleged separation. Legal custody vests "by virtue of either a natural right or a court decree." *See Matter of Harris*, 15 I&N Dec. 39 (BIA 1970). The record contains temporary orders issued by the Harris County family district court on January 17, 1992 that assign custody of the applicant and his siblings to [REDACTED] who is designated as the sole temporary managing conservator or custodial parent. The applicant's father is named as the sole possessory conservator or non-custodial parent and provided with visitation rights in relation to [REDACTED]. Accordingly, the record demonstrates that prior to his 18th birthday, the applicant's legal custody was awarded to [REDACTED].

The record does not support counsel's assertions on appeal and on motion that the applicant was physically residing with his father following his father's separation from [REDACTED]. Instead, the temporary orders issued on January 17, 1992, which identify the applicant and each of his siblings by name, indicate that [REDACTED] was enjoined from "hiding or secreting the children from [the] Petitioner [REDACTED] or changing the childrens' [sic] current place of domicile at [REDACTED]." The address listed is that of [REDACTED] not [REDACTED]. Accordingly, the record also fails to prove that the applicant was in the physical custody of his father prior to his 18th birthday. On this basis as well, the applicant has failed to satisfy the requirements of former section 321(a)(3) of the Act.

For the foregoing reasons, the applicant has not established that he is eligible for a certificate of citizenship under former section 321(a)(3) of the Act. The burden of proof in these proceedings rests solely with the applicant. 8 C.F.R. § 341.2(c) The applicant has not met that burden. Accordingly, the AAO will not disturb the director's denial of the application.

ORDER: The appeal is dismissed.