



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: HONOLULU, HI

Date: AUG 19 2009

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under Section 321 of the former Immigration and Nationality Act, 8 U.S.C. §1432.

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Honolulu, Hawaii, 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 July 11, 1969 in the Philippines. His birth certificate indicates that his parents are [REDACTED] and [REDACTED]. The applicant's mother became a U.S. citizen upon her naturalization in 1986, when the applicant was 17 years old. The applicant was admitted to the United States as a lawful permanent resident in 1984. The applicant seeks a certificate of citizenship pursuant to section 321 of the former Immigration and Naturalization Act (the former Act), 8 U.S.C. § 1432 (repealed), claiming that he derived citizenship through his mother.

The field office director denied the applicant's citizenship claim. The director first noted that the applicant was ineligible for benefits under the Child Citizenship Act of 2000 (CCA) because he was over 18 years old on its effective date. The director further found that the applicant did not derive U.S. citizenship pursuant to section 321 of the former Act, 8 U.S.C. § 1432 (repealed), because he was legitimated by his father. The application was accordingly denied.

On appeal, the applicant, through counsel, maintains that the director misinterpreted the legitimation laws in the Philippines and that he was not legitimated upon his parents' subsequent marriage because his father was married to someone else at the time of his conception and he was therefore not subject to legitimation. *See Applicant's Appeal Brief.*

"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." *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The applicant in this case was born in 1969. The applicant was over 18 on February 27, 2001, the effective date of the CCA. The CCA is not retroactive, and therefore not applicable to this case. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Section 321 of the former Act, 8 U.S.C. § 1432, is therefore applicable to the applicant's case.

Section 321 of the former Act, 8 U.S.C. § 1432, provided, in pertinent part, 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.

Section 101(c) of the Act, 8 U.S.C. § 1101(c) states, in pertinent part, that for Title III naturalization and citizenship purposes:

The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation¹

The AAO notes that the record contains, in relevant part, a copy of the applicant's birth certificate (indicating that he was illegitimate), a copy of his parents' birth certificates, a copy of his father's divorce decree (indicating he was divorced from ██████████ on October 1970, and an affidavit by the applicant's sister. The applicant's sister indicates that the applicant's father was married to ██████████, and divorced from her in 1971. See Affidavit of ██████████ at ¶ 3-6. She further indicates that the applicant's parents were married to each other in 1971. *Id.* Applicant's counsel indicates in his appeal brief that the applicant's parents were married in 1972. The record does not contain the applicant's parents' marriage certificate.

Pursuant to *Matter of Espiritu*, 16 I&N Dec. 426 (BIA 1977), Int. Dec. 2626 (BIA 1977), the 1950 Civil Code of Philippines provides that to legitimate a child born out of wedlock, the following primary conditions must be met: (1) the child must qualify as a natural child (a child born out of wedlock to parents who were free to marry each other at the time of conception); (2) the child must be acknowledged or recognized by its parents; and (3) the parents of the child must marry one another. Thus, if the applicant's father was indeed married to someone other than his mother at the time of his conception, the applicant may not be legitimated under the Philippine Civil Code. The AAO notes that the only evidence in the record relating to his father's marriages is a 1970 divorce decree and the applicant's sister's affidavit. The AAO further notes important inconsistencies between these two documents; specifically, the date of divorce and the name of the applicant's father's first wife. The applicant's sister states in her affidavit that her parents were married in 1971, and the applicant's appeal brief indicates that they were married in 1972. It is unclear when or

¹ The definition of "child" in section 101(b)(1)(D) of the Act, 8 U.S.C. § 1101(b)(1)(D), is inapplicable to citizenship and naturalization cases.

whether the applicant's parents were married, or whether (and to whom) the applicant's father was married at the time of the applicant's conception. The AAO therefore cannot find, on the basis of the evidence presented, that the applicant has established that he was not legitimated in accordance with the law of the Philippines.

Under Section 338–21(a) of the Hawaii Revised Statutes, all children born out of wedlock, irrespective of the marriage of either parent to another, become legitimate upon (a) the marriage of the parents with each other; (b) the voluntary, written acknowledgment of paternity by the father and mother; or (c) the establishment of the parent and child relationship. A parent and child relationship may be established if, while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child. *See* Section 584–4(a)(4), Hawaii Revised Statutes. The record suggests that the applicant's father received the applicant into his home and openly held him out as his child. The AAO must find that the applicant was legitimated in accordance with the law of Hawaii.

The AAO notes the Second Circuit's decision in *Lewis v. Gonzales*, 481 F.3d 125 (2nd Cir. 2007) where the court emphasized that "because derivative citizenship is automatic, and because the legal consequences of citizenship can be significant, the statute is not satisfied by an informal expression, direct or indirect. In all cases besides death, the statute requires formal, legal acts indicating either that both parents wish to raise the child as a U.S. citizen or that one parent has ceded control over the child such that his objection to the child's naturalization no longer controls." 481 F.3d at 131; *see also Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000)(stating that "both the language of [section 321(a)] and its apparent underlying rationale suggest that Congress was concerned with the legal custody status of the child *at the time* that the parent was naturalized and during the minority of the child")(emphasis in original).

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 order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The applicant has failed to meet his burden to prove that he was not legitimated by his father, under either Philippine or Hawaiian law, and therefore that he could derive U.S. citizenship solely upon the naturalization of his mother. The AAO therefore finds that the applicant did not derive U.S. citizenship under section 321 of the former Act, 8 U.S.C. § 1431. The appeal will be dismissed.

ORDER: The appeal is dismissed.