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U.S. Citizenship
and Immigration
Services

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FILE:

Office: PHILADELPHIA, PA

Date:

MAR 09 2009

IN RE:

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Immigration and Nationality Act, 8 U.S.C. § 1432(a)(3) (repealed)

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on November 13, 1980 in Hong Kong. His parents are [REDACTED] and [REDACTED]. The applicant's parents were legally separated on December 10, 1995, and divorced on March 26, 1996. The applicant was placed in his father's custody following his parents' separation. The applicant's father became a U.S. citizen on February 13, 1991, when the applicant was ten years old. The applicant attained lawful permanent resident status as of May 28, 1981. The applicant seeks a certificate of citizenship pursuant to former section 321(a)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432(a)(3).

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001.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 field office director denied the application finding that she was bound by the Third Circuit's decisions in *Jordan v. Attorney General*, 424 F.3d 320 (3d Cir. 2005) and *Bagot v. Ashcroft*, 398 F.3d 252 (3d Cir. 2005). The director noted that the applicant's parent's legal separation did not precede his father's naturalization, and concluded on that basis that the applicant did not derive U.S. citizenship. The application was accordingly denied.

On appeal, the applicant, through counsel, contends that he is not required to establish that his parents' legal separation occurred prior to his father's naturalization. In support of the appeal, the applicant cites the recent decision by the Board of Immigration Appeals (the Board) in *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008). The applicant also cites the USCIS Adjudicator's Field Manual and a U.S. Department of State Passport Bulletin providing that a child may derive citizenship so long as the requirements were fulfilled prior to his or her 18th birthday, regardless of the order in which they occurred. The applicant further cites *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

The Board's decision in *Matter of Baires-Larios*, *supra*, unequivocally holds "that in order to establish derivative citizenship under section 321(a) of the former Act, [the applicant] must show only that she was in the legal custody of her father before she reached the age of 18 years, rather than on the date her father naturalized." 24 I&N Dec. at 470. In so doing, the Board reiterated the guidance issued by the U.S. Department of State and USCIS (then legacy Immigration and Naturalization Service), and rejected the holdings of the Third Circuit in *Jordan* and *Bagot*, *supra*. As noted in the applicant's Appeal Brief, the Board's interpretation of section 321(a) of the former Act trumps the Third Circuit's interpretation and is entitled to deference under *Brand X*.¹ See also *Levy v. Sterling Holding Co. LLC*, 544 F.3d 493, 502-503 (3d Cir. 2008); *Duran Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227, 1236 (9th Cir. 2007).

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. The applicant in this case fulfilled the conditions listed in section 321(a)(3) of the former Act prior to his 18th birthday. The applicant in the present case therefore met his burden to establish that he automatically acquired U.S. citizenship as he was in his U.S. citizen father's legal custody upon his parents' legal separation, prior to his 18th birthday. The appeal will therefore be sustained.

ORDER: The appeal is sustained.

¹ The Supreme Court in *Brand X* explained, in relevant part, that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion . . . [o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." 545 U.S. at 982-983 (referring to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).