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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: NEW YORK, NY

Date: AUG 25 2010

IN RE: Applicant: [Redacted]

APPLICATION: Application for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).

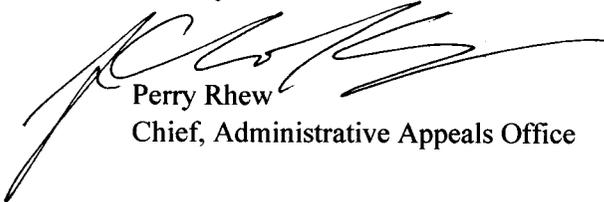
ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, New York, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director for action consistent with this decision.

The record reflects that the applicant was born on December 23, 1977 in the Dominican Republic. The applicant's parents were married but divorced on January 30, 1976. The applicant therefore was born out of wedlock. The applicant's father became a U.S. citizen upon his naturalization on July 7, 1995, when the applicant was 17 years old. The applicant's mother naturalized after the applicant's eighteenth birthday. The applicant was admitted to the United States as a lawful permanent resident on March 20, 1985, when he was seven years old. The applicant presently seeks a certificate of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (repealed).

The field office director determined that the applicant could not derive U.S. citizenship under former section 321 of the Act because he could not establish that both his parents naturalized prior to his eighteenth birthday. The director noted that the applicant was born out of wedlock and that, because his parents did not remarry after his birth, legal separation and legal custody were not at issue in the case. The application was accordingly denied.

On appeal, the applicant, through counsel, concedes that the applicant was born out of wedlock but maintains that he derived U.S. citizenship through his father because he resided in his legal custody. See Applicant's Appeal Brief. Counsel cites *Matter of Fuentes-Martinez*, 21 I & N Dec. 893 (BIA 1997), in support of his claim that the fact that the timing of his parents divorce is irrelevant so long as it occurred prior to his eighteenth birthday. *Id.*

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). The Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), which took effect on February 27, 2001, amended sections 320 and 322 of the Act, and repealed section 321 of the Act. The provisions of the CCA are not retroactive, and the amended provisions of section 320 and 322 of the Act apply only to persons who were not yet 18 years old as of February 27, 2001. Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Former section 321 of the Act is therefore applicable in this case.

Former section 321 of the Act, stated, 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 (1) of this subsection, or the parent 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 applicant was born out of wedlock because his parents were not married to each other at the time of his birth. Former section 321(a)(3) allows for the derivation of U.S. citizenship by a child born out of wedlock upon the naturalization of the mother where “the paternity of the child has not been established by legitimation.” If the paternity of a child born out of wedlock has been established by legitimation, the child may derive citizenship through the father under this provision only if the child is in the legal custody of the father pursuant to a legal separation of the parents. Former section 321(a)(3) of the Act, 8 U.S.C. § 1432 (1977). *See Lewis v. Gonzales*, 481 F.3d 125, 131 (2nd Cir. 2007) (noting that the second clause of former section 321(a)(3) of the Act does not apply to children who were born out of wedlock but were legitimated). In this case, the applicant was born out of wedlock, but his paternity was established by legitimation. Nonetheless, there was no legal separation of the applicant’s parents after his birth. Accordingly, the first clause of former section 321(a)(3) of the Act is inapplicable to this case.

Even if the first clause were applied, the applicant would not qualify. The applicant’s parents were divorced prior to his birth and the divorce record contains no provision regarding the applicant’s custody. In derivative citizenship cases where the parents have legally separated but there is no formal, judicial custody order, the parent having “actual, uncontested custody” will be regarded as having “legal custody” of the child. *Bagot v. Ashcroft*, 398 F.3d 252, 266-67 (3d Cir. 2005) (citing *Matter of M-*, 3 I&N Dec. 850, 856 (Cent. Office 1950)). On appeal, counsel asserts that the applicant was in the legal custody of his father prior to his eighteenth birthday, but the record does not support that claim. The record shows that the applicant immigrated to the United States on the basis of an approved alien relative petition filed by his mother, not his father. The applicant’s immigrant visa application stated

that his purpose in going to the United States was to reunite with his mother. The applicant's immigrant visa and alien registration lists his mother's address at the time. Although the applicant's parents executed a sworn statement in 2006 indicating that the applicant was under his father's care since he was one year old, the only contemporaneous evidence of record indicates that the applicant was residing with and in the actual custody of his mother upon his admission to the United States in 1985. Accordingly, the petitioner has not established that he was in the legal custody of his father such that he could derive citizenship through his father under former section 321(a)(3) of the Act.

Additionally, the applicant's mother is alive and became a U.S. citizen only after the applicant's eighteenth birthday. The applicant consequently did not derive citizenship under subsections (1) or (2) of former section 321(a) of the Act. See *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1067-68 (9th Cir. 2003).

The AAO nevertheless notes that the record contains a copy of the applicant's U.S. passport. In *Matter of Villanueva*, 19 I&N Dec. 101 (BIA 1984), the Board of Immigration Appeals (Board) held that a valid U.S. passport is conclusive proof of U.S. citizenship. Specifically, the Board held in *Matter of Villanueva* that:

unless void on its face, a valid United States passport issued to an individual as a citizen of the United States is not subject to collateral attack in administrative immigration proceedings but constitutes conclusive proof of such person's United States citizenship.

Where, as here, the applicant has failed to establish statutory eligibility for U.S. citizenship, a Certificate of Citizenship cannot be issued. The USCIS Adjudicator's Field Manual at § 71.1(e) instructs that

An unexpired United States passport issued for 5 or 10 years is now considered prima facie evidence of U.S. citizenship. Because it does not provide the actual basis upon which citizenship was acquired or derived, the submission of additional documentation may be required or the passport file may be requested. If after review there are differences or discrepancies between the USCIS information and the Passport Office records which would indicate that the application should not be approved, no action should be taken until the Passport Office has an opportunity to review and decide whether to revoke the passport.

The matter must therefore be remanded to the director to request that the Passport Office review and decide whether to revoke the applicant's passport. The director shall issue a new decision once the Passport Office's review is completed and, if adverse to the applicant, certify the decision to the AAO for review.

ORDER: The matter is remanded to the director for action consistent with this decision.