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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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JAN 27 2010

FILE: [REDACTED] Office: BOSTON Date:

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 (1980).

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Boston Field Office Director and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO upon the applicant's motion to reopen. The motion will be dismissed.

Pertinent Facts and Procedural History

The record shows that the applicant was born on September 11, 1980 in Jamaica. The applicant's birth certificate identifies his father as [REDACTED] and his mother as [REDACTED]. The applicant's parents never married each other. The applicant was admitted to the United States as a lawful permanent resident on June 3, 1994, at the age of 13. The applicant's father became a naturalized U.S. citizen on November 2, 1998 when the applicant was 18 years old. The applicant seeks a certificate of citizenship under section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432 (1980), claiming that he derived citizenship through his father.

The director determined that the applicant did not qualify for citizenship under section 321 of the former Act because his father naturalized after the applicant turned 18. On appeal, counsel asserted that the applicant's father would have naturalized before the applicant's eighteenth birthday but for scheduling delays of the former Immigration and Naturalization Service. *Brief in Support of Appeal* at 2. Counsel further claimed that the applicant was in his father's legal custody from the time of his admission to the United States in 1994. *Id.* at 3-4. In its prior decision, incorporated here by reference, the AAO explained that it lacked jurisdiction to consider counsel's claim of equitable estoppel. The AAO found the applicant ineligible for citizenship under former section 321 of the Act because his father did not naturalize prior to the applicant's eighteenth birthday and because his parents never married, hence, they were never legally separated (the former statutory prerequisite for a child born out of wedlock to derive citizenship through his or her father). *AAO Decision on Appeal*, dated December 3, 2009.

On motion, counsel reasserts his claim of equitable estoppel and also repeats his claim that the applicant is eligible to derive citizenship through his father, despite the fact that his parents never married, because he was in the "actual, uncontested custody" of his father. With the motion to reopen, counsel submits a one-paragraph letter from the applicant's mother, stating assertions previously documented in the record or addressed in the AAO's prior decision.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Counsel's submission does not meet the regulatory requirements for a motion to reopen and will be dismissed.¹

¹ Although counsel stated that he was filing a motion to reopen, he cites caselaw in his brief to support his claim that the AAO's prior decision was "unfair" and should be reconsidered. *Form I-290B, Notice of Motion*, dated December 30, 2009; *Brief in Support of Motion to Reopen*, dated January 15, 2010. Even if treated as a motion to reconsider, counsel's submission would be dismissed. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services

Applicable Law

In its prior decision, the AAO explained the general principle that 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. *See Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir. 2000) (internal citations omitted). The applicant was born in 1980. Former section 321 of the Act is therefore applicable to his case.

Former section 321(a) of the Act, 8 U.S.C. § 1432(a) (1980), provided, in pertinent part, that:

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 such child is under the age of eighteen 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 eighteen years.

As explained in the AAO's prior decision, the record shows that the applicant's biological mother is alive, remains in Jamaica and is not a citizen of the United States. Accordingly, the applicant does not meet the requirements set forth in sections 321(a)(1), (2) and (4) because both of his parents are alive and neither parent naturalized before his eighteenth birthday.

On motion, counsel reasserts that were it not for administrative delay, the applicant's father would have naturalized before his eighteenth birthday. In his affidavit previously submitted on appeal, the applicant's father stated that he passed the citizenship exam "prior to" the applicant's eighteenth birthday, but "due to circumstances beyond [his] control, [his] actual swearing in was delayed." *Affidavit of Henry Scott* at 1. However, the applicant's father did not assert that the former

(USCIS) policy. 8 C.F.R. § 103.5(a)(3). As discussed *infra*, the cases cited by counsel are either not precedent decisions binding on this matter or do not support his claims. Counsel's submission fails to establish that the AAO's prior decision was an incorrect application of pertinent law or policy.

Immigration and Naturalization Service (INS) caused the alleged delay of his naturalization. The applicant's father also did not state the approximate date he filed his application for naturalization, the amount of time that passed between his interview and his oath ceremony, or any other detailed information to support his claim that his naturalization was unduly delayed. On motion, counsel provides no new facts or evidence of the purported delay in the naturalization of the applicant's father. The unsupported statements of counsel on appeal or in a motion are not evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Rather than providing evidence to support his claim on motion, counsel cites cases decided by the Ninth Circuit Court of Appeals and the Northern District Court of California. None of those decisions are applicable or binding on the instant case, which arose within the jurisdiction of the First Circuit Court of Appeals. The only case of the First Circuit cited by counsel does not support his assertion. In that case, the First Circuit found no merit in the petitioner's claim of equitable estoppel because he could not demonstrate that government agents had been guilty of affirmative misconduct. *Costa v. INS*, 233 F.3d 31, 38 (1st Cir. 2000). The applicant here is also unable to meet this threshold requirement, as the record contains no evidence that USCIS engaged in affirmative misconduct in connection with the applicant's father's naturalization.

Even if the applicant's father's naturalization was delayed, the AAO lacks authority to apply the doctrine of equitable estoppel. The AAO, like the Board of Immigration Appeals, is "without authority to apply the doctrine of equitable estoppel against the Service [USCIS] so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation." *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991). The jurisdiction of the AAO is limited to that authority specifically granted through the regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on Feb. 28, 2003) and subsequent amendments.

Counsel's second, repeated claim on motion, is that the applicant is eligible to derive citizenship through his father because he was in his father's actual custody. To support this claim, counsel submits a letter from the applicant's mother dated December 29, 2009 and briefly stating that the applicant resided with his father prior to and after his immigration to the United States. This letter asserts facts already established in the record through, for example, the Form I-130, petition for alien relative, filed by the applicant's stepmother on his behalf and his immigrant visa. While the applicant's mother asserts that his father "had legal custody" of the applicant, such assertion is not supported by any documentation.

Regardless of custody, the applicant cannot meet the requirements of section 321(a)(3) of the former Act because his parents were never married,² and therefore never legally separated. Section

² The record contains ample evidence that the applicant's biological parents never married each other. *See February 12, 1992 Letter of [REDACTED]* (stating that she and the applicant's father "were not married at the time of our son's birth"); *Affidavit of [REDACTED]* dated November 12, 2009 (stating "I was never married to my son's mother"); and Form N-600, noting that the applicant stated that his biological parents "never married" (annotated at the applicant's interview on Sept. 17, 2009).

321(a)(3) of the former Act provides that an applicant born out of wedlock whose paternity has been established may derive citizenship through the father only when the father had legal custody of the applicant and “there has been a legal separation of the parents.” Former section 321(a)(3) of the Act, 8 U.S.C. § 1432(a)(3) (1980).

On appeal, counsel conceded that numerous federal courts of appeals have held that children born to parents who never marry each other cannot derive citizenship under section 321(a) of the former Act because there is no “legal separation” of the parents in that situation. *Id.* at 3. On motion, counsel does not address this pivotal issue.

The term “legal separation,” as used in section 321(a)(3) of the former Act, means either a limited or absolute divorce obtained through judicial proceedings. *See Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001); *Matter of H*, 3 I&N Dec. 742, 743-44 (1949). If an applicant’s parents were never married to each other, they could not have obtained a legal separation. *Matter of H*, 3 I&N Dec. at 744. *See also Lewis v. Gonzales*, 481 F.3d 125, 130 (2nd Cir. 2007) (listing cases and noting that “every other court confronted with the question has held that the first clause of § [321](a)(3) requires a legal separation even if the child's parents never married”); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003); *Wedderburn v. I.N.S.*, 215 F.3d 795, 799-800 (7th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

A person may only obtain citizenship in strict compliance with the statutory requirements imposed by Congress. *INS v. Pangilinan*, 486 U.S. 875, 885 (1988). *See also Fedorenko v United States*, 449 U.S. 490, 506 (1981) (“[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.”). The applicant bears the burden of proof in these proceedings to establish the claimed citizenship by a preponderance of the evidence. 8 C.F.R. § 341.2(c). In this case, the applicant has failed to establish his parents’ naturalization prior to his eighteenth birthday or their “legal separation,” as required by former section 321(a)(1), (3) and (4) of the Act. The applicant therefore has not derived citizenship through his father under former section 321(a) of the Act.

Although counsel submitted one additional letter from the applicant’s mother on motion, he provides no explanation for why the letter was not previously available or submitted with the application or on appeal. Counsel also fails to state any new facts supported by the additional letter. In the one-paragraph letter, the applicant’s mother reiterates previously-documented facts and one unsupported assertion. Consequently, counsel’s submission does not meet the requirements for a motion to reopen pursuant to the regulation at 8 C.F.R. § 103.5(a)(2). **The applicant’s motion will be dismissed and the AAO’s prior decision will be affirmed.**

ORDER: The motion to reopen is dismissed. The December 3, 2009 decision of the Administrative Appeals Office is affirmed.