

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

E2

[Redacted]

FILE:

[Redacted]

Office: SAN FRANCISCO

Date:

JUL 21 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 (1996)

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 San Francisco, California Field Office. 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 for a certificate of citizenship was denied by the director of the San Francisco Field Office and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The AAO is now reopening the matter upon its own motion. The prior decision of the AAO will be withdrawn and the appeal will be sustained. The matter will be returned to the field office for issuance of a certificate of citizenship.

The record in this case provides the following pertinent facts and procedural history. The applicant was born in Afghanistan. On May 23, 1989, he was admitted to the United States as the child of a refugee and in 1990 he was granted lawful permanent residency as of the date of his admission. The applicant's parents became U.S. citizens upon their naturalization in April 1996.

The applicant claims he derived citizenship through his parents upon their naturalization. The sole issue in this case is the applicant's age at the time of his parents' naturalization in April 1996. The applicant's entry documents and record of lawful permanent residency list his date of birth as September 6, 1977. In the late 1990s, however, the applicant obtained an Afghani identification document stating his date of birth as September 3, 1981. In 1998, a California criminal court referred the applicant for a dental examination to determine his age, after which the judge found the applicant to be born in 1981 and referred him to juvenile court. In 2008, the San Francisco Immigration Court terminated the removal proceedings against the applicant upon the immigration judge's determination that the applicant was under 18 at the time of his parents' naturalization and had therefore derived citizenship through them.

The field office director determined that the evidence that the applicant was born in 1981 did not outweigh the repeated iteration of 1977 as his birth year in his immigration records. In its March 24, 2009 decision dismissing the applicant's appeal, the AAO similarly deferred to the date of birth recorded in the applicant's immigration records and noted that USCIS was not bound by the immigration judge's determination that the applicant was a U.S. citizen.

After the AAO's prior decision was issued, it received additional evidence which warrants reopening and reconsideration of this case pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(i). Specifically, the record now contains lengthy transcripts of the applicant's hearings before the immigration judge including the testimony and cross examination of expert witnesses and the applicant's parents.

The Applicable Law

Both the field office director and the immigration judge analyzed the applicant's citizenship claim under section 320 of the Act, as amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395 (CCA). The CCA does not apply to the applicant, however, because he was over 18 years old on its effective date, February 27, 2001. *See* CCA §104; *see also* *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

Derivative citizenship "is determined under 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 critical events in this case are the applicant's lawful admission for permanent residence and his parents'

naturalization in 1996. Former section 321 of the Act, 8 U.S.C. § 1432, as in effect in 1996, is therefore applicable in this case. Former section 321 of the Act 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 such 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 record clearly establishes that the applicant's parents both naturalized in April of 1996 and that he was residing in the United States pursuant to a lawful admission for permanent residence at the time of their naturalization. The sole issue is whether or not the applicant was under the age of 18 at the time of his parents' naturalization.

USCIS is Not Bound by the Citizenship Determination of an Immigration Judge

In support of the appeal, counsel submitted copies of the immigration judge's orders terminating removal proceedings against the applicant and releasing him from custody based on the immigration judge's determination that the applicant was under 18 at the time his parents naturalized and had therefore derived citizenship through them.

As noted in our prior decision, we are not bound by a determination of the Executive Office for Immigration Review (EOIR) that an applicant is a U.S. citizen. An immigration judge may credit an individual's citizenship claim in the course of terminating removal proceedings for lack of jurisdiction because the government has not established the individual's alienage by clear and convincing evidence. See 8 C.F.R. § 1240.8(a), (c) (prescribing that the government bears the burden of proof to establish alienage and removability or deportability by clear and convincing

evidence). The immigration judge's decision regarding citizenship, however, is not binding on USCIS. USCIS retains sole jurisdiction to issue a certificate of citizenship and the agency's decision is reviewable only by the federal courts, not EOIR. Sections 341(a) and 360 of the Act, 8 U.S.C. §§ 1452(a), 1503; 8 C.F.R. 341.1. *See also Minasyan v. Gonzalez*, 401 F.3d at 1074 n.7 (noting that the immigration court had no jurisdiction to review the agency's denial of Minasyan's citizenship claim). In addition, while the government bears the burden of proof to establish an individual's alienage in removal proceedings before EOIR; in certificate of citizenship proceedings before USCIS, the applicant bears the burden of proof to establish the claimed citizenship by a preponderance of the evidence. Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 C.F.R. 341.2(c).

Although the immigration judge's finding regarding the applicant's citizenship is not binding on these proceedings, the transcript of the pertinent hearings and evidence before the immigration judge, if also part of the record before USCIS, may provide probative evidence relevant to the N-600 application. On appeal, counsel did not, however, submit copies of the transcripts of the hearings conducted before the immigration judge. Those transcripts were entered into USCIS' records after our prior decision was issued. The testimony and cross examination of the expert witnesses and the applicant's parents, documented in over 100 pages of transcripts from the applicant's hearings in Immigration Court, provide additional, probative evidence that he was under the age of 18 at the time of his parents' naturalization.

The Applicant's Age and Eligibility for Citizenship

Based on an examination of the immigration court transcripts and a through review of the record, a preponderance of the evidence shows that the applicant was under the age of 18 when his parents naturalized. Although the applicant's administrative file states his date of birth as September 6, 1977, a close review of the record reveals no primary source for this date. The record lacks, for example, a birth certificate or documentation issued by the United Nations High Commissioner for Refugees (UNHCR) attesting to the 1977 birth date. The only primary evidence of the applicant's birth and identity prior to his arrival in the United States is the copy of his Afghani *taskera*, which states his birth year as 1981. The record contains no evidence that this document is fraudulent or otherwise unreliable. In addition, the record now contains expert testimony regarding the issuance of the *taskera* in Afghanistan during the period of the applicant's youth and its relative reliability as one of the few government-issued identification documents. *See Declarations of Professor Thomas J. Barfield*, dated May 7 and August 16, 2008; *Transcript of Applicant's Removal Hearing*, U.S. Department of Justice, Executive Office for Immigration Review, San Francisco Immigration Court, 19-51 (June 25, 2008).

In addition, the record now contains extensive testimony and cross-examination of the applicant and his parents explaining the circumstances of their flight from Afghanistan, their lack of documentation at the time and their inability to recall the exact date of the applicant's birth. *June 25, 2008 Hearing Transcript* at 53-89; *July 2, 2008 Hearing Transcript* at 16-40. The applicant's mother repeatedly explained that she did not believe the applicant was born in 1977, but chose that date when applying for refugee status in order to ensure that the applicant would be considered old enough to attend school. *June 25, 2008 Hearing Transcript* at 53-89. The record also contains

declarations and testimony from expert witnesses regarding the relative unimportance of birth dates in Afghani culture, the inability of Afghani refugees to recall or document their exact dates of birth and the difficulties inherent in converting dates from the Afghan calendar to the Gregorian calendar used in the United States. *See Declarations of Professor Barfield, supra; Declarations of Rona Popal, dated May 2 and August 15, 2008; June 25 Hearing Transcript at 24-25, 34-36, 38-39; July 2, 2008 Hearing Transcript at 7-15.*

Finally, the record contains a report from [REDACTED] to the California criminal court judge who had referred the applicant for a dental examination to determine the applicant's age. [REDACTED] determined that based on an examination and x-rays of the applicant's molars, the applicant had a mean age of 19 years old with a standard deviation of 1.2 years in December 1998. [REDACTED] explained that consequently, the applicant was between 17.8 and 20.2 years old at the time. Based on [REDACTED] determination, the applicant was between 15.2 and 17.6 years old in April 1996 when his parents naturalized. The record shows that [REDACTED] was an independent third party, whose examination was conducted pursuant to the California criminal court's request and we have no basis to question his expertise. *See Letter of [REDACTED] Santa Clara Valley Health and Hospital System, to [REDACTED] dated January 4, 1999; [REDACTED] Santa Clara County, Referral of Applicant for Dental Testing, dated December 23, 1998; Order Suspending Proceedings and Directing Defendant Be Taken Before Juvenile Court, Superior Court of California, Santa Clara County (Dec. 1, 1998).*

Based upon newly acquired evidence and a reexamination of the record, the prior decision of the AAO is withdrawn. The applicant has established by a preponderance of the evidence that he was under 18 in April 1996 when his parents naturalized and that he was then residing in the United States as a lawful permanent resident. The applicant is consequently eligible for citizenship under former section 321 of the Act and the appeal will be sustained. The matter will be returned to the field office for issuance of a certificate of citizenship.

ORDER: The March 24, 2009 decision of the Administrative Appeals Office is withdrawn. The appeal is sustained. The matter is returned to the San Francisco Field Office for issuance of a certificate of citizenship.