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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: BOSTON, MA Date: JUN 09 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 (2000)

ON BEHALF OF APPLICANT:

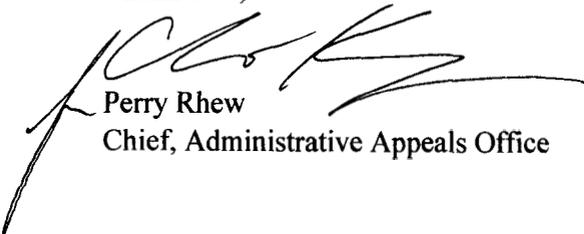
[REDACTED]

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank You,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Boston, Massachusetts, 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 March 13, 1972 in Cape Verde. The applicant's parents are [REDACTED]. The applicant's parents were never married to each other. The applicant's father became a U.S. citizen upon his naturalization on February 22, 1985, when the applicant was 14 years old. The applicant's mother is not a U.S. citizen. The applicant was admitted as a lawful permanent resident of the United States on October 26, 1985, when he was 15 years old. The applicant's 18th birthday was on March 13, 1990. The applicant presently seeks a certificate of citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (2000).

The field office director determined, in relevant part, that the applicant did not derive U.S. citizenship because his mother was not a U.S. citizen and because he could not establish that his parents were legally separated or that both parents were U.S. citizens. The application was accordingly denied.

On appeal, the applicant, through counsel, asserts that, although his parents were never married to each other, he was legitimated by his father and therefore derived U.S. citizenship upon his naturalization. *See Applicant's Appeal Brief* at 1, 3-4. Counsel states that former section 321(a)(3) of the Act allows for derivation of U.S. citizenship "through the parent who is identifiable." *Id.* at 3. He maintains that because the applicant was legitimated, any interpretation of section 321(a)(3) of the Act not allowing derivation through the father violates equal protection principles. *Id.* at 4. Alternatively, counsel maintains that the applicant is eligible for benefits under the Child Citizenship Act (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000). *Id.* at 5.

"[D]erivative 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 CCA, 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, however, 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. *See CCA* §104; *see also Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).¹ Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. Former section 321 of the Act is therefore applicable in this case.

¹ The AAO cannot apply the CCA retroactively, as counsel suggests, to individuals such as the applicant who were over the age of 18 on its effective date. The AAO is bound by the precedent decisions of the Board. *See* Section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1) (providing that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). Pursuant to the regulation at 8 C.F.R. § 1003.1(g), decisions of the Board "shall be binding on all officers and employees of the Department of Homeland Security" and "selected decisions designated by the Board . . . shall serve as precedents in all proceedings involving the same issue or issues." The AAO is therefore bound by the Board's precedent decision in *Matter of Rodriguez-Tejedor*, *supra*.

Former section 321 of the Act provides, 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 record indicates that the applicant's parents were never married to each other. Former section 321(a)(3) of the Act provides for derivation of U.S. citizenship upon "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." Former section 321(a)(3) of the Act thus allows for derivation of U.S. citizenship by a child born out of wedlock only upon the naturalization of the applicant's mother. *See Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003) (holding that the child of a U.S. citizen father could not derive U.S. citizenship, despite the fact that the father's naturalization and the child's immigrant admission took place before the child's 18th birthday and that the child was residing with the father, because the child's parents were never married and therefore never legally separated); *see also Lewis v. Gonzales*, 481 F.3d 125, 130 (2nd Cir. 2007) (stating that "because the second clause of § 321(a)(3) explicitly provides for the circumstance in which "the child is born out of wedlock," we cannot interpret the first clause to silently recognize the same circumstance, and moreover, to do so by excusing the express requirement of a legal separation"). The applicant's mother is not a U.S. citizen. Therefore, the AAO finds that the applicant cannot establish eligibility for U.S. citizenship pursuant to the former section 321(a) of the Act, 8 U.S.C. § 1432(a) (2000).

On appeal, counsel asserts that former section 321(a) of the Act violates the equal protection clause of the U.S. Constitution if interpreted to permit children born out of wedlock to derive citizenship only through the mother, but not the father. Like the Board of Immigration Appeals, the AAO

cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992). Even if we were to identify a constitutional infirmity in the statute, we lack the authority to remedy it. *Matter of Fuentes-Campos*, 21 I&N Dec. at 912.

In this case, the applicant was born out of wedlock and his parents never married. Hence, they never legally separated. *See Matter of H-*, 3 I&N Dec. 742, 744 (1949) (noting that if a child's parents never married, they could not have obtained a "legal separation."). Although the applicant's father naturalized, his mother did not. The applicant is consequently unable to derive citizenship under former section 321(a) of the Act.

The applicant bears the burden of proof in these proceedings to establish the claimed citizenship by a preponderance of the evidence. Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant has not met his burden of proof, and his appeal will be dismissed.

ORDER: The appeal is dismissed.