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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE:



Office: HOUSTON, TX

Date: MAR 06 2010

IN RE:



APPLICATION: Application for Certificate of Citizenship under Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (2000).

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.

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, 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 District Director, Houston, Texas, 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 September 7, 1977 in El Salvador. The applicant was born out of wedlock to [REDACTED] and [REDACTED]. The applicant's parents were never married to each other. The applicant's mother became a U. S. citizen upon her naturalization on May 27, 1994, when the applicant was 16 years old. The applicant was admitted to the United States as a lawful permanent resident on September 14, 1985, when he was eight years old. The applicant seeks a certificate of citizenship claiming that he derived U.S. citizenship through his mother.

The district director denied the applicant's application finding that the applicant's father's paternity was established by legitimation. On appeal, the applicant, through counsel, maintains that at the time of his birth and his father's acknowledgment, the legitimation law in El Salvador required his parents' marriage. *See Applicant's Appeal Brief.* The applicant further states that his U.S. citizenship was already determined by the Immigration Judge who terminated his removal proceedings. *Id.*

The applicable law for derivation of U.S. citizenship is "the law in effect at the time the critical events giving rise to eligibility occurred." *See Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). The applicant in this case was born in 1977. His 18th birthday was on September 7, 1995. The Child Citizenship Act of 2000 (CCA), Pub. L. 106-395, 114 Stat. 1631 (Oct. 30, 2000), amended sections 320 and 322 of the Immigration and Nationality Act (the Act), and repealed section 321 of the Act. The provisions of the CCA took effect on February 27, 2001, are not retroactive, and apply only to persons who were not yet 18 years old as of February 27, 2001. *See CCA § 104.* 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, 8 U.S.C. § 1432 (2000), is therefore applicable to this case.

Former section 321 of the Act, 8 U.S.C. § 1432 (2000), 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 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.

Section 101(c) of the Act, 8 U.S.C. § 1101(c) states, in pertinent part, that for Title III naturalization and citizenship purposes:

The term “child” means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in the United States or elsewhere . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation....

The record establishes that the applicant’s mother naturalized, and that the applicant was admitted to the United States as a lawful permanent resident, prior to his 18th birthday. The record further establishes that the applicant was born out of wedlock, but that his natural father acknowledged him before the civil authorities by appearing before the Civil Registry and signing his birth registration days after the applicant’s birth.

In order to derive U.S. citizenship solely through his mother, the applicant must establish that his father’s paternity was not established by legitimation. 8 U.S.C. § 1432(a)(3). The AAO notes that the 1983 Constitution in El Salvador eliminated all legal distinctions between children born in and out of wedlock, making those born on or after December 16, 1965 legitimated for purposes of the Act once paternity is established. *Matter of Moraga*, 23 I.&N. Dec. 195 (BIA 2001), *modifying Matter of Ramirez*, 16 I.&N. Dec. 222 (BIA 1977)(requiring acknowledgement and marriage of biological parents for legitimation).

The applicant, through counsel, maintains that the legitimation law in El Salvador in effect at the time of his birth required his parents’ marriage. *See Applicant’s Appeal Brief* at 3-7. Specifically, the applicant indicates that his father 1977 acknowledgment served to establish his paternity by means other than legitimation. *Id.* The applicant contends that the 1983 Constitution is not retroactive, and cannot serve to “reestablish” his paternity. *Id.* at 5.

As noted above, however, the applicable law for derivation of U.S. citizenship is “the law in effect at the time the critical events giving rise to eligibility occurred.” *See Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). The applicable law in this case is the law in effect prior to the applicant’s 18th birthday. The AAO notes that the 1983 Constitution collectively legitimated all children in El Salvador, by operation of law. The applicant was under 18 years old when the 1983 Constitution became effective in El Salvador. The AAO

therefore finds that the applicant's paternity was established by legitimation. The applicant therefore did not derive U.S. citizenship solely through his mother.

The AAO notes the Second Circuit's decision in *Lewis v. Gonzales*, 481 F.3d 125 (2nd Cir. 2007) where the court emphasized that "because derivative citizenship is automatic, and because the legal consequences of citizenship can be significant, the statute is not satisfied by an informal expression, direct or indirect. In all cases besides death, the statute requires formal, legal acts indicating either that both parents wish to raise the child as a U.S. citizen or that one parent has ceded control over the child such that his objection to the child's naturalization no longer controls." 481 F.3d at 131. The record in this case clearly establishes that the applicant's father acknowledged him a few days after his birth. There is no indication that he "ceded control" over the applicant such that his citizenship could automatically be changed upon his mother's naturalization alone.

The applicant further states that his citizenship claim has already been favorably decided when his removal proceedings were terminated by the immigration judge, the AAO notes that USCIS is not bound by an immigration judge's citizenship determination. The immigration judge does not have jurisdiction or authority to declare that an alien is a U.S. citizen. Rather, the immigration judge's termination of removal proceedings against the applicant was based on the judge's jurisdictional determination that the U.S. Department of Homeland Security had failed to meet its burden of proving the applicant's alienage and deportability by clear, convincing and unequivocal evidence. *See Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995) (holding that in deportation proceedings, the government must prove alienage by clear, unequivocal and convincing evidence.) *Minasyan v. Gonzalez*, *supra*, clarifies further that an immigration judge does not have authority to declare that an alien is a citizen of the United States, and that such jurisdiction rests with the USCIS citizenship unit and with the federal courts. The regulation at 8 C.F.R. § 341.3(c) specifies further that USCIS has jurisdiction over certificate of citizenship proceedings, with the burden of proof being on the applicant to establish his or her claim to U.S. citizenship by a preponderance of the evidence.

The requirements for citizenship, as set forth in the Act, are statutorily mandated by Congress, and USCIS lacks statutory authority to issue a certificate of citizenship when an applicant fails to meet the relevant statutory provisions set forth in the Act. 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 United States v. Manzi*, 276 U.S. 463, 467 (1928) (stating that "citizenship is a high privilege, and when doubts exist concerning a grant of it ... they should be resolved in favor of the United States and against the claimant"). Moreover, "it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect." *Berenyi v. District Director, INS*, 385 U.S. 630, 637 (1967).

The regulation at 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. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80

(Comm. 1989). The applicant is statutorily ineligible to derive citizenship solely through his mother under section 321 of the Act. He therefore cannot meet his burden of proof. The appeal will be dismissed.

ORDER: The appeal is dismissed.