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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: PHILADELPHIA, PA Date:

MAR 10 2010

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under Sections 321 and 322 of the former Immigration and Nationality Act; 8 U.S.C. §§ 1432 and 1433 (2000).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 Field Office Director, Philadelphia, Pennsylvania, 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 October 10, 1974 in Vietnam to [REDACTED] and [REDACTED]. The applicant's parents were and remain married. The applicant's father became a U.S. citizen upon his naturalization on November 29, 1984, when the applicant was 10 years old. The applicant's mother became a U.S. citizen upon her naturalization in 1994, when the applicant was over the age of 18 years. The applicant was admitted as a lawful permanent resident of the United States on August 22, 1978, when he was three years old. The applicant's 18th birthday was on October 10, 1992. The applicant presently seeks a certificate of citizenship under former sections 321 and 322 of the Immigration and Nationality Act (the former Act), 8 U.S.C. §§ 1432 and 1433 (2000).

The field office director determined, in relevant part, that the applicant did not derive U.S. citizenship because his mother did not become a U.S. citizen prior to the applicant's 18th birthday. The applicant subsequently filed a motion to reopen, and the field office director dismissed it upon finding that the applicant's father had not filed the required naturalization form on the applicant's behalf. The applicant's citizenship claim was accordingly denied.

On appeal, the applicant asserts that the citizenship application filed by his father on his behalf remains pending and that he is eligible for U.S. citizenship under former section 322 of the Act, 8 U.S.C. § 1433 (2000). *See* Form I-290B, Notice of Appeal to the AAO.

“[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 Child Citizenship Act (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 sections 321 and 322 of the Act, 8 U.S.C. §§ 1432 and 1433 (2000), are therefore applicable in this case.

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 (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, and remain, married. The applicant therefore was required to establish that both parents naturalized prior to his 18th birthday in order to derive U.S. citizenship.¹ The applicant's mother, however, was naturalized after the applicant's 18th birthday. 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).

The AAO also notes that the applicant fails to qualify for U.S. citizenship under former section 322 of the Act, 8 U.S.C. § 1433. Former section 322 of the Act provided, in pertinent part, that:

(a) A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, "Secretary"] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [Secretary] that the following conditions have been fulfilled:

- (1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- (2) The child is physically present in the United States pursuant to a lawful admission.
- (3) The child is under the age of 18 years and in the legal custody of the citizen parent.

¹ 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.

....

(b) Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

The AAO notes that, whether or not an applicant satisfied the requirements set forth in former section 322(a) of the former Act, and whether or not a form was filed on his behalf, he is required to establish that his application for citizenship was approved, and that he took the oath of allegiance, prior to his 18th birthday. The AAO finds that the applicant in the present case did not meet the requirements set forth in section 322(b) of the former Act, because he did not apply for a certificate of citizenship before he turned 18, because no such application was approved, and because he did not take an oath of allegiance prior to his 18th birthday.

“There must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.” *Fedorenko v United States*, 449 U.S. 490, 506 (1981). 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 AAO finds that the applicant has not met his burden of proof, and his appeal will be dismissed.

ORDER: The appeal is dismissed.