



U.S. Citizenship
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Services

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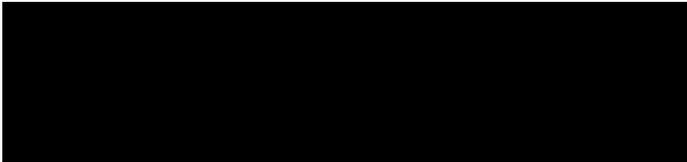
MAR 25 2010

FILE:  Office: SAN JOSE, CA Date:

IN RE: 

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

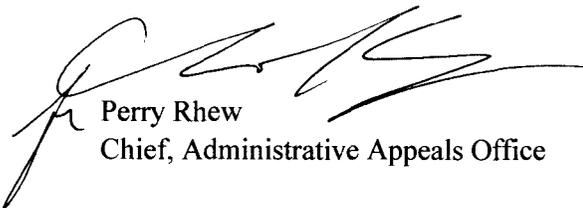
ON BEHALF OF APPLICANT:



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, San Jose, California, 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 May 13, 1977 in the Philippines. The applicant's parents, as indicated in his birth certificate, are [REDACTED] and [REDACTED]. The applicant's parents were married in 1983, and divorced on April 4, 1997. The applicant's father became a U.S. citizen upon his naturalization on November 16, 1988, when the applicant was 11 years old. The applicant's mother became a U.S. citizen upon her naturalization on October 17, 1995, when the applicant was 18 years old. The applicant was admitted as a lawful permanent resident of the United States on December 6, 1991, when he was 14 years old. The applicant's eighteenth birthday was on May 13, 1995. 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 under former section 321 of the Act because his parents did not obtain a "legal separation" prior to his eighteenth birthday. The application was accordingly denied.

On appeal, the applicant, through counsel, asserts that the applicant's parents were legally separated in "late 1992 or early 1993." See Applicant's Appeal Brief at 1. Counsel cites, *inter alia*, *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005), in support of his claim that the applicant's parents were legally separated prior to his eighteenth birthday. *Id.* at 3, 5. The applicant further claims that he was in his father's legal custody following the separation. *Id.* at 6-8.

"[D]erivative citizenship is determined under the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan, supra*, at 1075. 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 section 321 of the Act, 8 U.S.C. § 1432 (2000), 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 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.

In this case, the applicant was born out of wedlock. The record shows that the applicant's parents were not married when he was born. The plain language of former section 321(a)(3) of the Act allows for derivation of U.S. citizenship by a child born out of wedlock only through a naturalizing mother when the paternity of the child has not been established by legitimation. The Second Circuit Court of Appeals has explained that "because the second clause of [former section 321(a)(3)] explicitly provides for the circumstance in which 'the child was born out of wedlock,' we cannot interpret the first clause to silently recognize the same circumstance" *Lewis v. Gonzales*, 481 F.3d 125, 130 (2nd Cir. 2007). In other words, the second clause of former section 321(a)(3) of the Act provides the mechanism for derivation of U.S. citizenship when a child is born out of wedlock and the first clause cannot be read to provide a way around the listed requirements.¹

Here, the applicant does not meet the requirements to derive citizenship under former section 321(a) of the Act for two reasons. First, the applicant's mother did not naturalize until after his eighteenth birthday. Former section 321(a)(4) required that the parent's naturalization occur before the child turned 18. Second, the paternity of the applicant was established by legitimation when his parents married nearly six years after his birth.² Former section 321(a)(3) permitted the derivation of citizenship through a mother only if the child's paternity had *not* been established by legitimation. The applicant therefore did not derive U.S. citizenship through his mother and is ineligible for a certificate of citizenship under former section 321(a) of the Act.

The Supreme Court has emphasized that "[t]here 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). 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. The applicant in this case has not met his burden of proof, and his appeal will be dismissed.

ORDER: The appeal is dismissed.

¹ Accordingly, the issues of legal separation and legal custody addressed in counsel's appellate brief are inapposite.

² See *Matter of Espiritu*, 16 I&N Dec. 426 (BIA 1977) (parents' marriage required for legitimation of child in the Philippines).