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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

E<sub>2</sub>

FILE:

Office: BUFFALO, NY

Date: MAY 03 2010

IN RE:

Applicant:

APPLICATION:

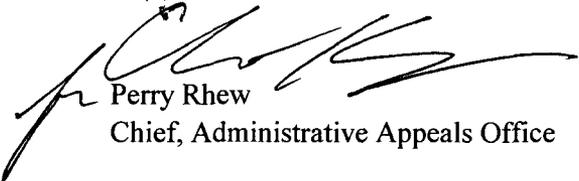
Application for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).

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, Buffalo, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on December 11, 1978 in Haiti. The applicant's parents are [REDACTED] and [REDACTED]. The applicant's parents were never married to each other. The applicant's father became a U.S. citizen upon his naturalization on January 21, 1987, when the applicant was nine years old. The applicant's mother, who is deceased, was not a U.S. citizen. The applicant's father married [REDACTED] on February 19, 1983. The applicant was admitted to the United States as a lawful permanent resident on June 2, 1990, when he was 11 years old. The applicant presently seeks a certificate of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (repealed).

The field office director determined that the applicant could not derive U.S. citizenship through his father or step-mother. The director noted that the applicant's biological parents were not married, that the applicant's mother was not a U.S. citizen, and that his step-mother had not adopted him. Therefore, the director found the applicant ineligible for citizenship under former section 321 of the Act. The application was accordingly denied.

On appeal, the applicant, through counsel, maintains that the applicant's father legitimated him in 1978. *See* Statement of the Applicant on Form I-290B, Notice of Appeal to the AAO. The applicant further claims that he is entitled to U.S. citizenship because both his father and step-mother naturalized prior to his eighteenth birthday. *Id.* The applicant indicates that he was "abandoned" by his natural mother. *Id.*

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9<sup>th</sup> Cir. 2005). The Child Citizenship Act of 2000 (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 (repealed), is therefore applicable in this case.

Former section 321 of the Act, stated, 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.

8 U.S.C. § 1431 (emphasis added).

The term “child” as applicable to the citizenship and nationality provisions in Title III of the Act is defined as, in pertinent part,

...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, and except as otherwise provided in section 320 and 321 of title III, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

Section 101(c) of the Act, 8 U.S.C. § 1101(c).

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 applicant maintains that his natural mother is deceased. The AAO notes that the applicant has not submitted any evidence of his mother’s death.

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 “the second clause of [former section 321(a)(3)] explicitly provides for the circumstance in which ‘the child was born out of wedlock’ . . . .” *Lewis v. Gonzales*, 481 F.3d 125, 130 (2<sup>nd</sup> Cir. 2007). The second clause of former section 321(a)(3) of the Act, which allows for derivation of U.S. citizenship only through the mother in the case of a child born out of wedlock, is applicable in this

case. Thus, former section 321(a)(3) of the Act, not section 321(a)(2), is applicable to this case and the issue of the applicant's natural mother's death is not a relevant consideration in this case.

Here, the applicant does not meet the requirements to derive citizenship under former section 321(a)(3) of the Act for two reasons. First, there is no evidence to suggest that the applicant's mother naturalized. Second, as the applicant concedes, his paternity was established by legitimation when his father registered his birth. *See* Applicant's Birth Certificate; Statement of the Applicant on Form I-290B, Notice of Appeal to the AAO; *see also* *Matter of Richard*, 18 I&N Dec. 208 (BIA 1982)(discussing legitimation under Haitian law).

The applicant alternatively claims that he derived U.S. citizenship from his step-mother. The AAO notes that there is no evidence in the record suggesting that the applicant's step-mother legally adopted the applicant. The Act does not provide for derivation or acquisition of U.S. citizenship through a step-parent. In contrast to Section 101(b) of the Act, 8 U.S.C. § 1101(b), the definition of "child" for Title III purposes, cited above, does not include a "step-child." Therefore, the applicant did not derive U.S. citizenship from his step-mother.

Counsel cites to *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9<sup>th</sup> Cir. 2005). *See* Statement of the Applicant on Form I-290B, Notice of Appeal to the AAO; *see also* Applicant's Appeal Brief (also citing *Scales v. INS*, 232 F.3d 1159 (9<sup>th</sup> Cir. 2000)). His reliance on this case is misplaced. This Ninth Circuit decision is not binding in this case as this matter arises within the jurisdiction of the Second Circuit Court of Appeals. The Ninth Circuit in *Solis-Espinoza* found that the applicant in that case was born in wedlock, and was therefore legitimated as required by section 309 of the Act, 8 U.S.C. § 1409.<sup>1</sup> There is no claim here that the applicant was born in wedlock. The Ninth Circuit's decision is therefore neither binding on, nor pertinent to the applicant's case.

It is well established 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 is statutorily ineligible to derive U.S. citizenship through his father or step-mother. The appeal will therefore be dismissed.

**ORDER:** The appeal is dismissed.

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<sup>1</sup> The Ninth Circuit found that the applicant in *Solis-Espinoza* was born in wedlock because he was born after his natural father's marriage to his step-mother. The applicant in this case was born prior to his father's marriage to his step-mother. He was born out of wedlock. *See* Black's Law Dictionary (defining "born out of wedlock" as born to "parents [who] are not, and have not been, married to each other regardless of marital status of either parent with respect to another").