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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

E2

[redacted]

DATE: APR 29 2011 Office: DALLAS FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (1998)

ON BEHALF OF PETITIONER:

[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 $630. 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 for Certificate of Citizenship (Form N-600) was denied by the director of the Dallas Field Office and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application will remain denied.

The record reflects that the applicant was born in Nigeria on May 10, 1977. The applicant's parents married in 1983 and divorced in 1987. The applicant's father became a naturalized citizen of the United States on January 18, 1995 when the applicant was 17 years old. The applicant's mother is not a U.S. citizen. The applicant entered the United States as a lawful permanent resident on September 19, 1998 when he was 21 years old. The applicant seeks a Certificate of Citizenship under former section 321 of the Immigration and Nationality Act (the Act), claiming that he derived citizenship through his father.

The director determined that the applicant was ineligible to derive citizenship through his father under former section 321 of the Act because the applicant was over the age of 18 at the time he began to reside permanently in the United States.

On appeal, counsel reasserts the applicant's eligibility to derive citizenship through his father and submits a legal brief and copies of documents previously filed.

The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Because the applicant was born abroad, he is presumed to be an alien and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. *See Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008).

The applicable law for derivative citizenship purposes is that in effect at the time the critical events giving rise to eligibility occurred. *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005); *accord Jordon v. Attorney General*, 424 F.3d 320, 328 (3d Cir. 2005). Former section 321 of the Act, as in effect in 1998 when the applicant immigrated to the United States, is applicable to this case[1] and stated, in pertinent part:

> (a) A child born outside of the United States of alien parents . . . 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

[1] Section 320 of the Act, 8 U.S.C. § 1431, as amended by the Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), is inapplicable to this case because the applicant was over 18 years old on the effective date of the CCA. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

> (4) Such naturalization takes place while such child is under the age of eighteen 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 eighteen years.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) should be estopped from denying the application because of the Department of State's delay and misconduct in processing the applicant's immigrant visa, which prevented him from entering the United States prior to his eighteenth birthday. Neither the applicable law nor the facts of this case support counsel's claim.

Equitable estoppel may lie against the federal government only where it is shown to have engaged in affirmative misconduct. *INS v. Miranda,* 459 U.S. 14, 17 (1982). Affirmative misconduct is "more than mere negligence, delay, inaction, or failure to follow an internal agency guideline." *Fano v. O'Neill*, 806 F.2d 1262, 1265 (5th Cir. 1987). The record in this case fails to show that the delay in the issuance of the applicant's immigrant visa was due to affirmative misconduct on the part of the Department of State or the former Immigration and Naturalization Service. The record shows that the applicant's father filed an alien relative petition on the applicant's behalf which was approved on July 29, 1991 when the applicant's father was still a lawful permanent resident. The applicant's immigrant visa case record indicates that his father was sent the instruction package for immigrant visa applicants (formerly known as "packet 3") on August 26, 1991, less than one month after the alien relative petition was approved.

Counsel asserts that the applicant was eligible for an immigrant visa as early as 1994 when his former priority date became current. Counsel claims that the Department of State's three-year delay in issuing his visa was "inexplicable" and that the agency's "failure to notify Applicant and/or his father of Applicant's immediate entitlement to an immigrant visa and/or to request them to provide the final interview and/or materials to process Applicant's immigrant visa amounts to affirmative misconduct." Although the applicant turned 18 on May 10, 1995, the record indicates that the Department of State did not have all the documents necessary for his visa application until May 1996 and the Department initially sent the appointment package for immigrant visa applicants (formerly known as "packet 4") to the applicant's father less than one month later in June 1996. The record reflects that the applicant's father had moved and the appointment package was resent to him in June 1997. The applicant was rescheduled for an interview in October 1997 at which time his visa application was approved. Contrary to counsel's claim, the record contains no indication of unwarranted delay amounting to affirmative government misconduct in the issuance of the applicant's immigrant visa.

Even if counsel had shown that the delay was unwarranted, the Supreme Court has repeatedly declined to determine "whether affirmative misconduct in a particular case would estop the Government from enforcing the immigration laws" because no affirmative misconduct was shown in the individual cases before the Court. *See INS v. Miranda,* 459 U.S. at 19; *INS v. Hibi*, 414 U.S. 5,

8-9 (1973) (citing *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961) and noting that it would again not reach "the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship" because no such misconduct was shown). As the Court explained in *Miranda*, "Proof only that the Government failed to process promptly an application falls far short of establishing such conduct." *INS v. Miranda,* 459 U.S. at 19. Accordingly, counsel has failed to establish that USCIS should be estopped from denying the applicant's citizenship claim due to allegedly inexplicable delay in the issuance of the applicant's immigrant visa.

On appeal, counsel also asserts that under the Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (Aug. 6, 2002), the applicant's age should be frozen at 17 for immigration purposes, which would allow him to derive citizenship through his father. Counsel is again misguided. As codified at section 201(f) of the Act, 8 U.S.C. § 1151(f), the CSPA prevents certain individuals from "aging out" of immediate relative status prior to the final adjudication of their applications for an immigrant visa or adjustment of status. However, the CSPA is not retroactive and does not apply to the applicant because his immigrant visa application was adjudicated and his visa was issued five years before the CSPA was enacted in 2002. CSPA § 8, 116 Stat. 930 (CSPA applies to immigrant petitions approved prior to enactment "only if a final determination has not been made on the beneficiary's application for an immigrant visa . . ."). More importantly, the CSPA only applies to applications for immigrant visas and adjustment of status under Title II of the Act; the CSPA is inapplicable to citizenship claims under Title III of the Act.[2]

The applicant did not derive citizenship through his father under former section 321(a) of the Act. Although the applicant's father had legal custody of him and naturalized before the applicant's eighteenth birthday, the applicant did not begin to reside permanently in the United States while under the age of 18, as required by former section 321(a)(5) of the Act.

The applicant bears the burden of proof to establish his eligibility for citizenship under the Act. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c). Here, the applicant has not established by a preponderance of the credible evidence that he is eligible for derivative citizenship pursuant to former section 321 of the Act. Accordingly, the appeal will be dismissed and the application will remain denied.

ORDER: The appeal is dismissed.

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[2] Counsel cites *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007), in support of her assertion that the applicant should be considered to be 17 under section 201(f)(2) of the Act because that was his age on the date of his father's naturalization. *Matter of Avila-Perez* is not on point. That case and the CSPA amendments to section 201 of the Act concern the eligibility of a son or daughter of a U.S. citizen who was a child at the time a visa petition was filed on his or her behalf to be classified as an immediate relative child for purposes of an immigrant visa or adjustment of status granted under Title II of the Act. *Matter of Avila-Perez* did not address derivative or acquired citizenship under Title III of the Act.