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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

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Date: **JUL 12 2011**

Office: NEW YORK, NY

FILE: 

IN RE: 

APPLICATION: Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (1981)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

The record reflects that the applicant was born in the Dominican Republic on July 21, 1981. The applicant's parents, [REDACTED] were married in 1980 and divorced in 1984. The applicant was admitted to the United States as lawful permanent resident on February 12, 1992. The applicant's father became a U.S. citizen upon his naturalization on February 19, 1999. The applicant's eighteenth birthday was on July 21, 1999. The applicant seeks a Certificate of Citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432, claiming that he derived citizenship through his father.

The district director determined that the applicant failed to establish eligibility for derivative citizenship under former section 321 of the Act because he was not in his father's legal custody following his parents' divorce. The director further noted that the applicant did not automatically acquire U.S. citizenship under section 320 of the Act, 8 U.S.C. § 1431, as amended by the Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), because he was over the age of 18 years old on its effective date. The application was denied accordingly.

On appeal, the applicant contends that he is eligible for U.S. citizenship under section 320(a)(3) of the Act. See Statement of the Applicant on Form I-290B, Notice of Appeal to the AAO. The applicant further states that he was in his father's custody following his parent's divorce. *Id.*

The AAO conducts appellate review on a de novo basis. 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). The CCA, *supra*, 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 (the CCA's effective date). Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the Act, as amended by the CCA. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Former section 321 of the Act was the law in effect prior to the applicant's eighteenth birthday, and is therefore applicable in this case.

Former section 321(a) of the Act provided, in pertinent part:

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
- (4) Such naturalization takes place while such child is unmarried and 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.

Here, the applicant satisfied several of the requirements for derivative citizenship set forth in former section 321(a) of the Act before his eighteenth birthday. Specifically, the applicant was admitted to the United States as a lawful permanent resident when he was under the age of eighteen, and the applicant's father became a naturalized U.S. citizen when the applicant was 17 years old. However, the applicant has not shown that his mother naturalized prior to his eighteenth birthday; he therefore cannot derive citizenship under former section 321(a)(1) of the Act. The record also indicates that the applicant's mother was not deceased prior to the applicant's eighteenth birthday, such that he could derive U.S. citizenship solely through his father under former section 321(a)(2) of the Act.

The applicant is also ineligible to derive citizenship under former section 321(a)(3) of the Act because, as discussed below, he was not in his father's legal custody following his parents' divorce.¹ Legal custody vests by virtue of "either a natural right or a court decree". *See Matter of Harris*, 15 I&N Dec. 39, 41 (BIA 1970). The applicant's parents' divorce decree includes a grant of custody to the applicant's mother. The record contains some evidence suggesting that the applicant resided with his father, such as tax and school records. The record also contains recent notarized statements by the applicant's mother and family acquaintances indicating that the applicant's mother verbally transferred custody to the applicant's father after their separation. Nevertheless, there is no official, contemporaneous court document amending the original custody award to the applicant's mother in the divorce decree. The AAO must therefore find that the applicant was in his mother's legal custody upon

¹ The second clause of former section 321(a)(3) of the Act provides for derivation of U.S. citizenship by an out of wedlock child upon the mother's naturalization and is therefore inapplicable in this case.

his parents' divorce and until his eighteenth birthday. Consequently, the applicant did not derive U.S. citizenship under former section 321 of the Act, or any other provision of law.

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 that he met all of the conditions for the automatic derivation of U.S. citizenship pursuant to former section 321 of the Act before his eighteenth birthday. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.