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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

**PUBLIC COPY**



**U.S. Citizenship  
and Immigration  
Services**

[REDACTED]

E<sub>2</sub>

FILE:

[REDACTED]

Office: NEW YORK, NY

Date **MAR 14 2011**

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Application for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (1996).

ON BEHALF OF APPLICANT:

[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.

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Field Office Director, New York, New York. The Administrative Appeals Office (AAO) sustained the applicant's appeal. The AAO subsequently reopened the proceedings for issuance of a new decision. The prior decision of the AAO will be withdrawn. The matter will be remanded to the New York Field Office to reopen the applicant's Form N-600, approve the application and issue a certificate of citizenship.

*Pertinent Facts and Procedural History*

The applicant was born on February 21, 1979 in Mexico to [REDACTED] who had married in Mexico in 1968. The applicant's parents divorced in Mexico in 1988. The applicant was admitted to the United States as a lawful permanent resident on March 8, 1995 when he was 16 years old. The applicant's father became a U.S. citizen upon his naturalization on April 5, 1996 when the applicant was 17 years old.

In August 2007, the applicant filed a Form N-600, Application for Certificate of Citizenship. The New York City Field Office denied the application based, in relevant part, upon its determination that the applicant was not in his father's legal custody following his parents' divorce and consequently did not derive citizenship through his father under former section 321(a)(3) of the Act, 8 U.S.C. § 1432 (1996). Counsel filed a motion to reopen and reconsider the denial of the Form N-600, which the field office dismissed as untimely. The applicant attempted to file a second Form N-600, which was rejected by the field office on June 10, 2008. The rejection notice stated that the Form N-600 was being returned because the applicant resided abroad and should submit a Form N-600K, Application for Citizenship and Issuance of a Certificate under Section 322.

The applicant then filed a Form N-600K, which the field office denied because the applicant was over 18 years old and that provision requires that the application be approved and the applicant take an oath of allegiance prior to his eighteenth birthday. Section 322(b) of the Act, 8 U.S.C. § 1433(b). Counsel timely appealed. On July 19, 2010, the AAO sustained the appeal because the applicant established that he derived citizenship through his father under former section 321(a)(3) of the Act. On January 24, 2011, the AAO reopened the proceedings due to a perceived procedural error. Counsel timely filed a brief and additional evidence upon reopening.

*Applicable Law and Regulations*

The applicable law for derivative citizenship purposes is that in effect at the time the critical events giving rise to eligibility occurred. *See Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9<sup>th</sup> Cir. 2005); *accord Jordon v. Attorney General*, 424 F.3d 320, 328 (3<sup>rd</sup> Cir. 2005). In this case, the last qualifying event was the naturalization of the petitioner's father in 1996. Accordingly, former section 321(a) of the Act is the applicable law.

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 . . . ; 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 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.

To obtain a certificate of citizenship derived under former section 321(a) of the Act, individuals must file a Form N-600. 8 C.F.R. § 341.1. The regulation at 8 C.F.R. § 341.6 further prescribes, in pertinent part:

After an application for a Certificate of Citizenship has been denied and the appeal time has run, a second application submitted by the same individual shall be rejected and the applicant instructed to submit a motion for reopening or reconsideration in accordance with 8 CFR 103.5. . . . A decision shall be issued with notification of appeal rights in all Certificate of Citizenship cases . . . .

Motions to reopen and reconsider must be filed within 30 days after service of the unfavorable decision. 8 C.F.R. § 103.5(a)(1). If the decision was mailed, the motion must be filed within 33 days. 8 C.F.R. § 103.5a(b). Service by mail is complete upon mailing. *Id.* The regulation at 8 C.F.R. § 1.1(h) also states:

The term *day* when computing the period of time for taking any action provided in this chapter . . . shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday.

*Procedural Errors*

A full review of the record upon reopening shows that U.S. Citizenship and Immigration Services (USCIS) committed procedural errors to the applicant's detriment. First, the New York Field Office improperly dismissed the applicant's motion to reopen and reconsider the denial of his Form N-600 as untimely. Although the field office's decision is dated December 6, 2007, the record shows that the decision was not mailed to the applicant until December 17, 2007. The 33-day period for filing a motion of the denial decision ended on January 19, 2008, a Saturday. The following Monday, January 21, 2008, was a federal holiday. Accordingly, the filing period extended to the following day, January 22, 2008. *See* 8 C.F.R. § 1.1(h). The applicant's motion was timely filed on that date. Second, the field office decision dismissing the applicant's motion did not inform the applicant of his appeal rights pursuant to the regulation at 8 C.F.R. § 341.6. Third, the field office improperly rejected the applicant's second Form N-600. Rather than instructing the applicant to file a motion to reopen or reconsider the denial of the first Form N-600 pursuant to the regulation at 8 C.F.R. § 341.6, the field office returned the second Form N-600 and instructed the applicant to file a Form N-600K, an application for a benefit for which the applicant was ineligible.

In our January 24, 2011 decision, we reopened the proceedings because the applicant derived citizenship through his father in 1996 under former section 321(a)(3) of the Act, but the matter was before us on appeal of the denial of the applicant's Form N-600K, which only pertains to claims of citizenship under section 322 of the Act.

The record now shows that the applicant attempted to obtain reconsideration and reopening of his claim to citizenship under former section 321(a)(3) of the Act, but his motion was improperly dismissed as untimely and his subsequent attempt to file a new Form N-600 was rejected. The applicant then filed a Form N-600K based on an erroneous instruction from the field office. In light of the procedural errors of USCIS, we will consider the appeal in this matter to concern the merits of the applicant's claim to derivative citizenship under former section 321(a)(3) of the Act. As the applicant derived citizenship under that provision of law, but the issue is before us on appeal from the denial of his claim under section 322 of the Act, we will remand the matter to the New York Field Office to reopen and approve the applicant's Form N-600.

*The Applicant Derived Citizenship in 1996 under Former Section 321(a)(3) of the Act*

As stated in our prior decisions, the applicant derived U.S. citizenship upon his father's naturalization in 1996 pursuant to former section 321(a)(3) of the Act, the law in effect at that time. The record shows that before the applicant's eighteenth birthday, his father had naturalized and he was residing in the United States pursuant to his admission as a lawful permanent resident.

The applicant was also in his father's legal custody before he turned 18. The agreement entered into by his parents and incorporated into their divorce decree retained *patria potestad* for both his mother

and father. The legal term *patria potestas* refers to the “responsibility to support and maintain family members.” Black’s Law Dictionary (9<sup>th</sup> ed. 2009). Although the agreement acknowledged that the applicant’s mother had “custody” over him and his siblings at the time, the record indicates that she ceded physical custody to the applicant’s father in 1995 after the applicant immigrated to the United States.<sup>1</sup> However, regardless of the applicant’s physical custody, the relevant evidence shows that he was in his parents’ joint legal custody following their divorce pursuant to their divorce certificate. Accordingly, the applicant has shown by a preponderance of the evidence that he was in his father’s legal custody before he turned 18.

The applicant bears the burden of proof in these proceedings. See Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2. The applicant has met his burden and established his eligibility for issuance of a certificate of citizenship derived under former section 321(a)(3) of the Act. The prior decision of the AAO will be withdrawn. The matter will be remanded to the New York Field Office to reopen on USCIS motion the applicant’s Form N-600 pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(i), approve the application and timely issue a certificate of citizenship.

**ORDER:** The July 19, 2010 decision of the Administrative Appeals Office is withdrawn. The matter is returned to the New York Field Office for reopening and approval of the applicant’s Form N-600 and timely issuance of a certificate of citizenship.

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<sup>1</sup> The record indicates that the field office never considered the additional evidence regarding the applicant’s custody that counsel submitted with the motion to reopen and reconsider the denial of the Form N-600.