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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

Date: **OCT 31 2011** Office: DALLAS, TX

File:

IN RE:

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

ON BEHALF OF APPLICANT: 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 Field Office Director, Dallas, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.¹

The record reflects that the applicant was born in Nigeria on May 22, 1980. The applicant's father became a naturalized U.S. citizen on October 20, 1994. The applicant's mother was born in Nigeria and is not a U.S. citizen. The applicant was admitted to the United States as a lawful permanent resident on September 21, 1996. 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 director determined that the applicant failed to establish eligibility for derivative citizenship under former section 321 of the Act, and denied the application accordingly. *See Decision of the Field Office Director*, dated July 8, 2011. On appeal, the applicant contends that his parents were "common law" married, his father had legal and physical custody of him under customary law and that former section 321 is unconstitutional as a violation of the equal protection clause. *See Form I-290B and Applicant's Case Summary*, dated August 1, 2011.

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. *See 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 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

¹ The applicant filed his first Form N-600 in July 2010, which the director denied in November 2010. The applicant appealed that decision to the AAO, and the AAO rejected the appeal in March 2011 because it was untimely filed. The applicant then filed a second Form N-600 in May 2011 that is the subject of the present appeal. Pursuant to the regulation at 8 C.F.R. § 341.6 a second Form N-600 filed by an applicant shall be rejected and the applicant instructed to file a motion to reopen or reconsider pursuant to 8 C.F.R. § 103.5. The director should have rejected the second Form N-600 that the applicant filed in May 2011; however, for the sake of administrative efficiency, the AAO shall render a decision on the merits of the case.

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.

The order in which the requirements are fulfilled is irrelevant, as long as all requirements are satisfied before the applicant's 18th birthday. *Matter of Baires-Larios*, 24 I&N Dec. at 470.

The term legal separation means "either a limited or absolute divorce obtained through judicial proceedings." *Afeta v. Gonzales*, 467 F.3d 402, 406 (4th Cir. 2006) (affirming the Board of Immigration Appeals' construction of the term legal separation as set forth in *Matter of H*, 3 I&N Dec. 742, 744 (BIA 1949)) (internal quotation marks omitted); see also *Minasyan v. Gonzales*, 401 F.3d at 1076 (stating that the term legal separation refers to a separation recognized by law; considering the law of California, which had jurisdiction over the applicant's parents' marriage).

On appeal, the applicant contends that he qualifies for derivative citizenship based on the naturalization of his father because he was born out of wedlock, was legitimated by his father and his father had legal and physical custody of him prior to his eighteenth birthday.

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 sixteen years old, and the applicant's father became a naturalized U.S. citizen when he was fourteen years old. However, while the applicant was born out of wedlock, the applicant was legitimated under Nigerian law. The applicant cannot derive citizenship under section 321(a)(3) of the Act because his father did not have custody over him pursuant to a legal separation between his parents.

In filing the Form N-600 the applicant stated that his parents were never married in Nigeria; however, on appeal, the applicant now contends that his parents were married under cultural/traditional law without any legal documentation, or "common law" married. The applicant contends that Nigerian law does not recognize legal separation if the marriage is considered to be a cultural/traditional union and that, in the event of a separation, both parties can mutually agree to part and that the applicant's father therefore had actual and uncontested custody of the applicant.

Pursuant to *Matter of Coker*, 14 I&N Dec. 521 (BIA 1974), Int. Dec. 2255 (BIA 1974), under the Native Law and Custom of Nigeria, a child born out of wedlock may be legitimated through the subsequent marriage of the child's natural parents or by the father's acknowledgment. Acknowledgment involves conduct or an act by the father that definitely indicates that the child is

his own. According to a February 2004 advisory opinion from the Library of Congress (2004-416), legitimacy is governed by both statutory and customary laws. Under statutory law, the Legitimacy Law of 1929, as amended, still distinguish between children born in wedlock and out of wedlock. Under the Native Law and Custom of Nigeria, a child born out of wedlock may be legitimated through the subsequent marriage of the child's natural parents or by the father's acknowledgment. Acknowledgment involves conduct or an act by the father that definitely indicates that the child is his own. Under customary law of Yoruba, Kware, and Igbirra ethnic groups (South-West Nigeria), children born out of wedlock may be legitimated by the acknowledgment of the father of the child, irrespective whether the father marries the mother. The record reflects that the applicant is from the Yoruban tribe, the applicant's father was listed on the applicant's Registration of Birth and the applicant's father also petitioned for the applicant to enter the United States as a lawful permanent resident. As such, the applicant was born out of wedlock but was legitimated.

The applicant has not, however, established that his father had legal custody over him pursuant to a legal separation as required by section 321(a)(3) of the Act. The record contains conflicting affidavits, dated January 4, 2011 and September 19, 1994, from the applicant's mother. In the most recent affidavit the applicant's mother indicates that she never had custody of the applicant, who was raised by his paternal grandmother in Nigeria prior to his entry into the United States, at which time the applicant's father took custody of the applicant. In 1994, the applicant's mother indicated that the applicant was in her custody, that his father provided adequately for the child and that the applicant's father resided in the United States. The record contains an affidavit, dated October 15, 2010, from the applicant's father indicating that the applicant is his biological son but that he did not marry his son's mother because he was too young. The applicant's father states that there was no formal legal separation agreement drawn up between him and the applicant's mother and that a government never granted him sole legal custody of the applicant. The applicant's father, however, claims that it is customary tradition for the father to raise the children and that the applicant resided with him from 1980 to 1981 and then again from 2001 until 2002, outside of which the applicant resided with his paternal grandparents. The record contains an affidavit, dated January 4, 2011, from the applicant's paternal grandmother indicating that she raised the applicant and that his father provided monetarily for him. The applicant's paternal grandmother indicates that in the process of entry into the United States as a lawful permanent resident, she gave full parental custody of the applicant to his father.

None of these affidavits constitutes evidence of the father's legal custody over the applicant pursuant to a legal separation. Consequently, the applicant did not derive citizenship through his father under former section 321(a)(3) of the Act. The applicant is also ineligible to derive citizenship under any other subsection of former section 321(a) of the Act.

Finally, the applicant contends that former section 321 of the Act is unconstitutional as a violation of the equal protection clause. *Applicant's Case Summary*. The AAO, like the Board of Immigration Appeals, lacks jurisdiction to rule on the constitutionality of the Act and regulations that U.S. Citizenship and Immigration Services (USCIS) administers. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997). *See also United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (holding that government officials are bound to adhere to the governing statute and regulations).

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.