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U.S. Citizenship
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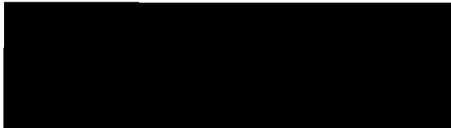
Office: NEW YORK, NY

FILE:

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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).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

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 was denied by the District Director, New York, New York. The matter came before the Administrative Appeals Office (AAO) on appeal. The AAO remanded the matter to the director. The director's decision on remand was certified to the AAO for review. The director's decision will be affirmed. The appeal will be dismissed, and the application will remain denied.

The record reflects that the applicant was born on [REDACTED] 1977 in the Dominican Republic. The applicant's parents were married but divorced on January 30, 1976. The applicant therefore was born out of wedlock. The applicant's father became a U.S. citizen upon his naturalization on July 7, 1995, when the applicant was 17 years old. The applicant's mother naturalized after the applicant's eighteenth birthday. The applicant was admitted to the United States as a lawful permanent resident on March 20, 1985, when he was seven 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 under former section 321 of the Act because he could not establish that both his parents naturalized prior to his eighteenth birthday. The director noted that the applicant was born out of wedlock and that, because his parents did not remarry after his birth, legal separation and legal custody were not at issue in the case. The application was accordingly denied.

On appeal, the applicant, through counsel, conceded that the applicant was born out of wedlock but maintained that he derived U.S. citizenship through his father because he resided in his legal custody. *See Applicant's Appeal Brief.* Counsel cited *Matter of Fuentes-Martinez*, 21 I & N Dec. 893 (BIA 1997), in support of his claim that the timing of his parents divorce is irrelevant so long as it occurred prior to his eighteenth birthday. *Id.*

On August 25, 2010, the AAO remanded the matter to the director upon noting that the applicant was the bearer of a U.S. passport. The appeal was remanded to the director to request, pursuant to the instruction in the USCIS Adjudicator's Field Manual at § 71.1(e), that the U.S. Department of State review and decide whether to revoke the applicant's passport. The U.S. Department of State revoked the applicant's U.S. passport on August 31, 2010. The director subsequently issued a new decision denying the applicant's application for certificate of citizenship and certified her decision to the AAO.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). As noted in the AAO's August 25, 2010 decision, former section 321 of the Act is applicable to this case. *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(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.

At issue in this case is whether the applicant derived U.S. citizenship under former section 321(a)(3) of the Act. The applicant in this case was born out of wedlock, but his paternity was established by legitimation. See *Lewis v. Gonzales*, 481 F.3d 125, 131 (2nd Cir. 2007) (noting that the second clause of former section 321(a)(3) of the Act does not apply to children who were born out of wedlock but were legitimated). As the applicant's parents were divorced prior to his birth, the divorce record contains no provision regarding the applicant's custody. In derivative citizenship cases where the parents have legally separated but there is no formal, judicial custody order, the parent having "actual, uncontested custody" will be regarded as having "legal custody" of the child. *Bagot v. Ashcroft*, 398 F.3d 252, 266-67 (3d Cir. 2005) (citing *Matter of M-*, 3 I&N Dec. 850, 856 (Cent. Office 1950)).

The applicant maintains that he was in the legal custody of his father prior to his eighteenth birthday, but the record does not support that claim. The record shows that the applicant immigrated to the United States on the basis of an approved alien relative petition filed by his mother, not his father. The applicant's immigrant visa application stated that his purpose in going to the United States was to reunite with his mother. The applicant's immigrant visa and alien registration lists his mother's address at the time. Although the applicant's parents executed a sworn statement in 2006 indicating that the applicant had been under his father's care since he was one, the only contemporaneous evidence of record indicates that the applicant was residing with and in the actual custody of his mother upon his admission to the United States in 1985. Accordingly,

the petitioner has not established that he was in the legal custody of his father such that he could derive citizenship through his father under former section 321(a)(3) of the Act.

“There 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 burden of proof in citizenship cases is on the claimant to establish the claimed citizenship by a preponderance of the evidence. *See* Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant has not met his burden of proof to establish eligibility for U.S. citizenship. The application is therefore denied.

ORDER: The director’s decision is affirmed. The appeal is dismissed. The application is denied.