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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

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Date: **MAR 15 2012**

Office: SAN ANTONIO, TX

FILE: [REDACTED]

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for Certificate of Citizenship under former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).

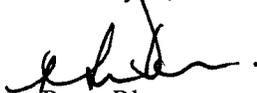
ON BEHALF OF APPLICANT:

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 appeal was denied by the Field Office Director, San Antonio, Texas, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Mexico on [REDACTED] 1977. The applicant claims he was born out of wedlock to [REDACTED]. The applicant's father became a U.S. citizen upon his naturalization on [REDACTED] 1983, when the applicant was six years old. 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 upon his father's naturalization.

The field office director determined that the applicant failed to establish eligibility for derivative citizenship because the record did not establish that he was born out of wedlock or, alternatively, that he was in his father's custody upon a legal separation of his parents. The director also found that the applicant could not establish that he was admitted to the United States as a lawful permanent resident. The application was denied accordingly.

On appeal, the applicant, through counsel, contends that his parents were never married and that he resided in his father's custody since his mother abandoned him. *See* Statement of the Applicant on Form I-290B, Notice of Appeal to the AAO. Counsel argues that it is "unconstitutional and discriminatory to afford automatic citizenship only to children of mothers and not fathers out of wedlock." *Id.* Lastly, counsel maintains that the director erred in interpreting the statute to require the applicant's admission for lawful permanent residence. *Id.*

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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, was in effect at the time of the applicant's father's naturalization and 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.

The record establishes that the applicant has not been admitted to the United States as a lawful permanent resident. Regardless of the applicant's claims concerning whether he was born out of wedlock, he cannot establish eligibility for citizenship because he was not and has never been a lawful permanent resident of the United States. Counsel claims that the director erred in requiring that the applicant establish that he was admitted as a lawful permanent resident because former section 321(a)(5) of the Act allows for derivation in the case of a child who "thereafter begin[s] to reside permanently in the United States." However, the phrase "thereafter begin[s] to reside permanently in the United States while under the age of eighteen years" has consistently been interpreted to mean that the child must have been admitted as a lawful permanent resident of the United States while under the age of 18, *see Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1062 (9th Cir.2008) (stating that the second phrase at section 321(a)(5) alters the timing of the residence requirement, not the requirement of legal residence). In addition, the Board of Immigration Appeals (BIA) held in *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008):

[T]he phrase "begins to reside permanently in the United States while under the age of eighteen years," when considered in light of the definitions of "permanent" and "residence" and the realities of the immigration laws of this country, is most reasonably interpreted to mean that the alien must acquire lawful permanent resident status while under the age of 18 years.

The BIA continued: "[I]f we were to allow something less than lawful permanent residence to satisfy the requirements for derivative citizenship, the second clause would effectively negate the lawful permanent residence requirement of the first clause." *Id* at 6132, 614. The applicant cannot establish that he was admitted to the United States as a lawful permanent resident and therefore did not derive U.S. citizenship under 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 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.