



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date: **DEC 19 2013** Office: EL PASO, TX

[Redacted]

IN RE:

[Redacted]

APPLICATION: Application for Certificate of Citizenship

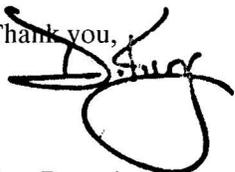
ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Application for Certificate of Citizenship (Form N-600) was denied by the Field Office Director (director), El Paso, Texas, 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 Mexico on May 19, 1979. The applicant's parents, [REDACTED] were married on January 17, 1976. The applicant was admitted to the United States as lawful permanent resident on April 27, 1987. The applicant's mother was born in Mexico, but acquired U.S. citizenship at birth through a U.S. citizen parent. The applicant's eighteenth birthday was on May 19, 1997. She seeks a Certificate of Citizenship under former section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433, claiming that she derived citizenship through her mother.

The director determined that the applicant failed to establish eligibility for derivative citizenship finding that she did not acquire U.S. citizenship under any of the relevant provisions of the Act. The director noted that the Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), became effective on February 27, 2001 and applied only prospectively to individuals under the age of 18. The director concluded that the applicant did not derive U.S. citizenship because she could not establish that her parent had the required physical presence in the United States to transmit U.S. citizenship to the applicant at birth, or that both her parents had naturalized or that they were legally separated such that the applicant could derive U.S. citizenship solely through her mother. The application was denied accordingly.

On appeal, the applicant contends that she "meets the requirement under INTCA (the 1994 revisions to INA 322) for acquired citizenship." See Statement of the Applicant on Form I-290B, Notice of Appeal or Motion. The applicant further claims that the appointment of her mother as managing conservator means she was her sole custodian, such that the applicant could derive U.S. citizenship solely through her. *Id.*; see also Appeal Brief.

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, she is presumed to be an alien and bears the burden of establishing her 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 transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth. See *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1028 n.3 (9th Cir. 2001) (internal citation omitted). The applicant in the present matter was born in 1979. Former section 301(a)(7) of the Act therefore applies to the present case.

Former section 301(a)(7) of the Act stated, in pertinent part, that the following shall be nationals and citizens of the United States at birth:

[A] person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United

States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

The applicant concedes that her mother was not physically present in the United States prior to her birth such that she could transmit U.S. citizenship to her at birth. The applicant did not acquire U.S. citizenship at birth under former section 301 of the Act.

The applicant also did not derive U.S. citizenship under former sections 320, 321 or 322 of the Act. Former sections 320 and 321 of the Act, as in effect prior to the CCA, provide for derivation of U.S. citizenship upon the naturalization of a parent. The applicant's mother acquired U.S. citizenship at birth and did not naturalize. Therefore, former sections 320 and 321 of the Act are inapplicable to this case.¹

Former section 322 of the Act provided, in pertinent part, that:

(a) A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, "Secretary"] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [Secretary] that the following conditions have been fulfilled:

- (1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- (2) The child is physically present in the United States pursuant to a lawful admission.
- (3) The child is under the age of 18 years and in the legal custody of the citizen parent.

.....

(b) Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this chapter of an

¹ It is further noted that although the applicant's mother's managing conservatorship over the applicant may be relevant to the issue of legal custody, the applicant did not establish that her parents were legally separated such that she could derive U.S. citizenship solely through her mother. 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). A married couple, even when living apart with no plans of reconciliation, is not legally separated. *Matter of Mowrer*, 17 I&N Dec. 613, 615 (BIA 1981); *see also Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001).

applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

Unlike the automatic derivation of U.S. citizenship under former section 321 of the Act, former section 322(b) requires that the applicant not only fulfill the requirements but also that she apply and be approved prior to her eighteenth birthday. Whether or not the applicant satisfied the requirements set forth in former section 322(a) of the Act, she was required submit her application and the application had to have been approved and the Oath of Allegiance administered prior to her eighteenth birthday. The applicant in the present case did not meet the requirements set forth in former section 322(b) of the Act because she did not apply for a certificate of citizenship before she turned 18, because no such application was adjudicated or approved, and because she did not take an oath of allegiance prior to her eighteenth birthday.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.