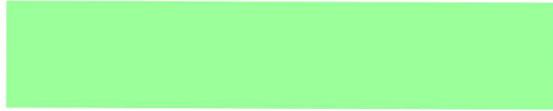




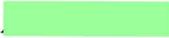
U.S. Citizenship
and Immigration
Services

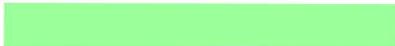
(b)(6)



DATE: **MAY 06 2013**

OFFICE: NEWARK, NJ

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:

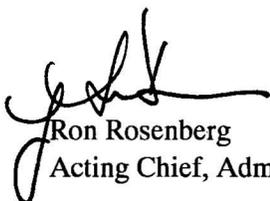


INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Application for Certificate of Citizenship (Form N-600) was denied by the Field Office Director, Newark, New Jersey (the director), and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reconsider. The motion to reconsider will be granted. The underlying application will remain denied.

The applicant was born in Guyana on November 28, 1977. His parents married in 1983, and they divorced on March 30, 1988. The applicant was admitted into the United States as a lawful permanent resident on May 13, 1987. His father became a naturalized U.S. citizen on November 24, 1992, when the applicant was 14 years old. His mother became a naturalized U.S. citizen on February 10, 1996, after the applicant's 18th birthday. The applicant presently seeks a certificate of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432, based on the claim that he derived U.S. citizenship through his father.¹

The director determined in a decision dated February 14, 2012, that the applicant had failed to establish that he acquired U.S. citizenship through his father under section 321 of the former Act. The citizenship application was denied accordingly. In a decision dated June 14, 2012, the AAO agreed that the applicant had failed to establish that he acquired U.S. citizenship through his father under section 321 of the former Act. The appeal was dismissed accordingly.

Counsel asserts on motion that documentary evidence is no longer available in the applicant's case; that affidavits contained in the record meet the evidentiary requirements set forth in 8 C.F.R. § 103.2(b)(2); and that the AAO incorrectly determined that affidavits from the applicant's mother and father were insufficient to establish the applicant's father's legal custody over the applicant prior to his 18th birthday. Counsel cites to U.S. Circuit Court of Appeal decisions and asserts further that because evidence establishes the applicant met statutory requirements for citizenship under section 321 of the former Act, the AAO also erred in finding the applicant's case could not be granted in the interest of marital and family harmony. In addition, counsel asserts that the AAO improperly failed to address appeal assertions that the applicant acquired citizenship under section 321(a)(1) of the former Act, based on the naturalization of both of his parents.

¹ Section 321 of the former Act provided in pertinent part that:

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, 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 said child is under the age of 18 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 (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

The entire record was reviewed and considered in rendering a decision on the motion.

The regulations state in pertinent part at 8 C.F.R. § 103.5:

(a) Motions to reopen or reconsider

* * *

(3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

(4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

Counsel has met the requirements for a motion to reconsider. The motion to reconsider the June 14, 2012 AAO decision is therefore granted.

Counsel asserts on motion that due to the passage of time, documentary evidence is no longer available to demonstrate the applicant's father's legal custody over the applicant between 1993 and 1995, and that the affidavits contained in the record therefore satisfy evidentiary requirements as set forth in 8 C.F.R. § 103.2(b)(2).

The regulation at 8 C.F.R. § 103.2(b)(2) pertains to the submission of affidavits and secondary evidence and provides in pertinent part that:

(i) [T]he non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Counsel fails to submit evidence demonstrating that the applicant attempted to obtain documentation such as apartment rental information or training program evidence to corroborate assertions that the applicant resided with his father in New York, and that he enrolled in a training program while he lived in New York. The record also lacks evidence demonstrating the applicant attempted to obtain academic documentation to corroborate assertions that he dropped out of high school in New Jersey

and moved to his father's home in New York. Moreover, the record fails to demonstrate that such evidence is unavailable. The requirements of 8 C.F.R. § 103.2(b)(2) have therefore not been met.

Counsel refers to U.S. Circuit Court of Appeals cases, *Vera-Villegas v. INS*, 330 F.3d 1222 (9th Cir. 2003) and *Ugbome v. Att'y Gen.*, 195 Fed. Appx. 106 (3rd Cir. 2006) to support the assertion that affidavit evidence suffices to establish the applicant's citizenship claim, and that it is unreasonable to expect the applicant to submit additional documentary evidence given the amount of time that has passed since relevant events occurred in the applicant's case. It is noted that the cases referred to by counsel pertained to affidavits that were not credible and which were submitted in conjunction with a form of relief in removal proceedings. The findings in *Ugbome* and *Vera-Villegas* are not relevant to the applicant's case. The June 14, 2012 AAO decision did not make a negative credibility finding with regard to the affidavits submitted by the applicant on appeal.

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 "preponderance of the evidence" standard requires that the record demonstrate that the applicant's claim is "probably true," based on the specific facts of each case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989)). Even where some doubt remains, applicants will meet this standard if they submit relevant, probative and credible evidence that their claim is "more likely than not" or "probably" true. *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)).

The affidavit assertions in the present matter were regarded as relevant and were taken into consideration by the AAO. It was found however, that little weight could be afforded them in the absence of supporting evidence demonstrating that the facts contained in the affidavits were probably true.

Counsel asserts on motion that high school transcript and federal income tax information contained in the record corroborates assertions that the applicant resided in his father's custody between 1993 and 1995. However, as discussed in the June 14, 2012 AAO decision, the 1992 to 1994 high school transcript reflects that the applicant resided with his mother in New Jersey during that time period. The evidence does not establish or corroborate assertions that the applicant resided with his father in New York from 1993 to 1995. Moreover, although counsel asserts that the applicant's claim is supported by income tax evidence reflecting his father claimed four dependents in 1993 and five in 1994, the AAO notes that the tax summaries are general and do not contain the addresses or the names of the claimed dependents. It is additionally noted that the applicant's father states in his February 24, 2011 affidavit that he has five children from a second marriage. The evidence thus fails to demonstrate or corroborate assertions that the applicant resided with his father between 1993 and 1995.

Because the record lacks documentary evidence to corroborate assertions that the applicant resided with his father between 1993 and 1995, the applicant failed to establish by a preponderance of the evidence that he was in the legal custody of his father during that time period. The applicant therefore failed to meet the requirements of section 321(a)(3) of the former Act.

Counsel also asserts on motion that the June 14, 2012 AAO decision improperly failed to address appeal assertions that the applicant acquired citizenship under section 321(a)(1) of the former Act

based on the naturalization of both of his parents. Counsel indicates that although the applicant's mother became a U.S. citizen after the applicant's 18th birthday, this fact should be disregarded for equity reasons because she filed her naturalization application prior to the applicant's 18th birthday and the Service unreasonably delayed processing of her application. Counsel refers to U.S. Circuit Court of Appeals decisions *Poole v. Mukasey*, 522 F.3d 259 (2nd Cir. 2008) and *Calix-Chavarria v. Att'y General*, 182 F. Appx. 72 (3rd Cir. 2006) to support his assertions.

The AAO notes that neither *Poole* nor *Calix-Chavarria* held that an applicant who does not meet statutory requirements for U.S. citizenship can acquire citizenship based on equity principles. Instead, the cases were remanded to the Board of Immigration Appeals for examination of whether principles of fairness entitled an applicant to citizenship, where the applicant was under 18 when the naturalized parent applied for citizenship, but due to processing delays of over two years turned 18 before the parent naturalized. The AAO notes that the U.S. Circuit Court of Appeals for the Third Circuit revisited the issue in its January 18, 2013 decision, *Calix-Chavarria v. Att'y General*, Slip Copy, 2013 WL203393 (3rd Cir. 2013) (not selected for publication in the Federal Reporter). The court clarified that the applicant in the case:

[R]equests that we exercise our equitable powers to recognize an effective naturalization date for his mother, Reina Calix, of not later than November 16, 1999, which would, in effect, confer derivative citizenship on Chavarria-Calix and prevent his removal to his native Honduras. Under *INS v. Pangilinan*, 486 U.S. 875, 103 S. Ct. 2210, 100 L. Ed. 2d 882 (1988), we lack the authority to exercise our equitable powers to confer citizenship upon an alien where the statutory requirements for naturalization have not been met and, accordingly, we must deny his petition.

Moreover, as discussed in the June 14, 2012 AAO decision, the U.S. Supreme Court has held that strict compliance with statutory prerequisites is required to acquire citizenship. See *Fedorenko v. U.S.*, 449 U.S. 490, 506 (1981). Counsel therefore failed to establish that an individual who does not meet the statutory requirements for citizenship under section 321 of the former Act may nevertheless be granted citizenship based on equity grounds.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. The applicant failed to establish by a preponderance of the evidence that prior to turning eighteen, he resided in the legal custody of his father as required by section 321(a)(3) of the former Act. The applicant also failed to establish that both of his parents naturalized prior to his eighteenth birthday, as required by section 321(a)(1) of the former Act. The applicant is not otherwise eligible for citizenship. The application will therefore remain denied.

ORDER: The motion to reconsider is granted. The AAO'S prior decision, dated June 14, 2012, is affirmed. The underlying application remains denied.