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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: MAY 14 2013 Office: PHILADELPHIA, PA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for a Certificate of Citizenship under former Section 321(a) of the Act, 8 U.S.C. § 1401(a)(repealed).

ON BEHALF OF APPLICANT:

[redacted]

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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on in Jamaica on January 29, 1976. His parents are [redacted] The applicant's parents were married on July 26, 1969, and divorced in 1990. The applicant's mother became a U.S. citizen on April 13, 1988, when the applicant was twelve years old. The applicant was admitted to the United States as a lawful permanent resident on December 14, 1981, when he was four years old. The applicant seeks a certificate of citizenship pursuant to former section 321(a)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432(a)(3) (repealed).

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001. However, any person who would have acquired automatic citizenship under its provisions prior to February 27, 2001 may apply for a certificate of citizenship at any time. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Therefore, the issue before the AAO is whether the applicant has established that he acquired U.S. citizenship under the provisions of former section 321(a)(3) of the Act prior to February 27, 2001.

Former section 321 of the Act, 8 U.S.C. § 1432, provided 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:
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> (1) The naturalization of both parents; or
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> (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 field office director denied the application finding that she was bound by the Third Circuit's decisions in *Jordan v. Attorney General*, 424 F.3d 320 (3d Cir. 2005) and *Bagot v. Ashcroft*, 398 F.3d 252 (3d Cir. 2005). The director noted that the applicant's parent's legal separation did not precede his mother's naturalization, and concluded on that basis that the applicant did not derive U.S. citizenship. The application was accordingly denied.

On appeal, the applicant, through counsel, contends that he is not required to establish that his parents' legal separation occurred prior to his father's naturalization. *See* Appeal Brief at 5-10. In support of the appeal, the applicant cites the recent decision by the Board of Immigration Appeals (the Board) in *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008). *Id.* The applicant also cites the USCIS Adjudicator's Field Manual and a U.S. Department of State Passport Bulletin providing that a child may derive citizenship so long as the requirements were fulfilled prior to his or her 18th birthday, regardless of the order in which they occurred. *Id.* The applicant further cites *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X*). Alternatively, counsel maintains that the applicant's parents were "legally separated" prior to his mother's naturalization arguing that the 1990 divorce decree recognizes that the couple was separated for at least two years prior to the divorce. *See Id.* at 9-13.

The Board's decision in *Matter of Baires-Larios*, *supra*, unequivocally holds "that in order to establish derivative citizenship under section 321(a) of the former Act, [the applicant] must show only that she was in the legal custody of her father before she reached the age of 18 years, rather than on the date her father naturalized." 24 I&N Dec. at 470. In so doing, the Board reiterated the guidance issued by the U.S. Department of State and USCIS (then legacy Immigration and Naturalization Service), and rejected the holdings of the Third Circuit in *Jordan* and *Bagot*, *supra*. The Board's interpretation of former section 321(a) of the Act is entitled to deference under *Brand X*.[1] Consequently, an applicant may derive U.S. citizenship as long as the requirements of the statute were met, in no particular order, prior to the applicant's 18th birthday.

The regulation at 8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant in this

[1] Insofar as a question involves interpretation of an ambiguous statute, the Supreme Court has made clear that administrative agencies are not bound by prior judicial interpretations of ambiguous statutory provisions because there is "a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *Brand X Internet at* 982 (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)) ("[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction"); *see also Matter of R-A-*, 24 I&N Dec. 629, 631 (A.G. 2008).

case fulfilled the conditions listed in former section 321(a)(3) of the Act prior to his 18th birthday. The applicant in the present case therefore met his burden to establish that he automatically acquired U.S. citizenship as he was in his U.S. citizen father's legal custody upon his parents' legal separation, prior to his 18th birthday. The appeal will therefore be sustained. The matter will be returned to the field office director for issuance of a certificate of citizenship.

ORDER: The appeal is sustained. The matter is returned to the field office director for issuance of a certificate of citizenship.