



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAY 16 2013** OFFICE: DALLAS, TX 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 Form N-600, Application for Certificate of Citizenship (Form N-600) was denied by the Field Office Director, Dallas, Texas (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant was born in Mexico on November 25, 1976, and he was adopted in Mexico on July 31, 1984. The applicant's adoptive father was a citizen of Mexico and a U.S. lawful permanent resident, who died in 1990 when the applicant was 13 years old. The applicant's adoptive mother became a naturalized U.S. citizen on December 1, 1984, when the applicant was 8 years old. The applicant was admitted into the United States as a lawful permanent resident on May 5, 1987, when he was 10 years old. He 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 citizenship through his adoptive mother.

In a decision dated April 6, 2012, the director determined that the applicant did not meet requirements for citizenship under section 321(b) of the former Act, because he did not reside in the United States pursuant to a lawful admission for permanent residence at the time his adoptive mother became a naturalized citizen. The application was denied accordingly.

Citing to the U.S. Fifth Circuit Court of Appeals decision, *Bustamante-Barrera v. Gonzalez*, 447 F.3d 388 (5th Cir. 2006), and the Board of Immigration Appeals (Board) decision, *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008), counsel for the applicant asserts on appeal that the applicant would be eligible for U.S. citizenship under section 321(a) of the former Act if he were the biological child of a naturalized parent. Counsel acknowledges the U.S. Second Circuit Court of Appeals holding in *Smart v. Ashcroft*, 401 F. 3d. 119 (2nd Cir. 2005) that requiring a foreign-born adopted child to reside with the parent at the time of the parent's naturalization did not violate the equal protection rights of the child. However, counsel disagrees with the rationale in *Smart v. Ashcroft*, and he asserts that section 321(b) of the former Act unconstitutionally discriminates against adopted children, and that the applicant's Form N-600 should therefore be approved.

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

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, 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. at 468.

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). Section 321 of the former Act, in effect at the time the applicant became a lawful permanent resident in 1987, is applicable in this case.

Section 321 of the former Act provided that:

(a) 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.

(b) Subsection (a) of this section shall apply to an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent or parents, in the custody of his adoptive parent or parents, pursuant to a lawful admission for permanent residence.

Because the applicant is an adopted child, the provisions of section 321(b) of the former Act apply to his citizenship claim.

Counsel indicates that the AAO should disregard clear statutory language contained in section 321(b) of the former Act because the provision unconstitutionally discriminates against adopted children. Counsel provides no legal support for his assertions. Moreover, in *Smart v. Ashcroft* the Second Circuit held that the requirements for deriving U.S. citizenship from an adoptive parent under section 321(b) of the former Act did not violate equal protection rights of adopted children. The AAO notes further that it does not have appellate jurisdiction over constitutional issues. See, e.g., *Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997) (like the Board, the AAO does not have appellate jurisdiction over constitutional issues.)

The record reflects that the applicant's adoptive mother became a naturalized U.S. citizen on December 1, 1984. The applicant's admission into the United States as a lawful permanent resident occurred over 2 years later on May 5, 1987. The applicant therefore did not satisfy section 321(b) of the former Act, because he did not reside in the United States pursuant to a lawful admission for permanent residence at the time of his adoptive parent's naturalization.

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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. Here, the applicant has failed to establish that he meets the requirements for citizenship under section 321 of the former Act. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.