



U.S. Citizenship
and Immigration
Services

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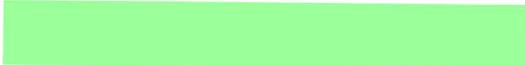


Date: **APR 28 2014**

Office: SAN BERNARDINO, CA

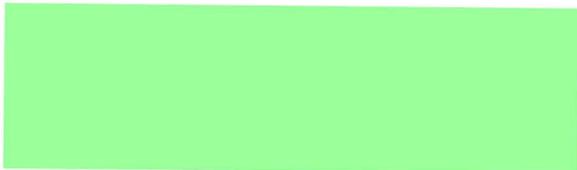
FILE: 

IN RE:

Applicant: 

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for Certificate of Citizenship under former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).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

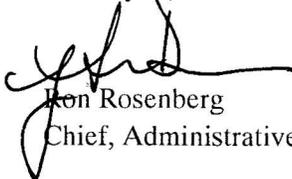


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 Field Office Director of the San Bernardino, California Field Office (the director) denied the Application for Citizenship (Form N-600) and matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Pertinent Facts and Procedural History

The applicant was born in El Salvador on July 29, 1982. His father became a U.S. citizen upon his naturalization on December 8, 1999. His mother naturalized on November 15, 2000, after the applicant's eighteenth birthday. The applicant's parents were married in 1979, and divorced in 1987. The applicant became a lawful permanent resident of the United States in 1994. He seeks a certificate of citizenship claiming that he derived U.S. citizenship upon his father's naturalization pursuant to former section 321 of the Act, 8 U.S.C. § 1432 (repealed).

Applicable Law

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. 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. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r. 1989)).

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *See Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). The Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), which took effect on February 27, 2001, amended sections 320 and 322 of the Act, and repealed section 321 of the Act. The provisions of the CCA are not retroactive, and the amended provisions of section 320 and 322 of the Act apply only to persons who were not yet 18 years old as of February 27, 2001. Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Former section 321 of the Act was the law in effect 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.

Analysis

Here, the applicant satisfied several of the requirements for derivative citizenship set forth in former section 321(a) of the Act before his eighteenth birthday. Specifically, the applicant was admitted to the United States as a lawful permanent resident and the applicant's father became a naturalized U.S. citizen prior to the applicant's eighteenth birthday. At issue in this case is whether the applicant derived U.S. citizenship under former section 321(a)(3) of the Act upon the naturalization of a parent having legal custody of the applicant when there has been a legal separation.

Legal custody vests by virtue of "either a natural right or a court decree." See *Matter of Harris*, 15 I&N Dec. 39, 41 (BIA 1970). The applicant's parents' divorce decree does not include a custody order. See Divorce Decree.

In derivative citizenship cases where the parents have legally separated but there is no formal, judicial custody order, the parent having "actual, uncontested custody" will be regarded as having "legal custody" of the child. *Bagot v. Ashcroft*, 398 F.3d 252, 266-67 (3d Cir. 2005) (citing *Matter of M-*, 3 I&N Dec. 850, 856 (Cent. Office 1950)). In *U.S. v. Casasola*, 670 F.3d 1023, 1030 (9th Cir. 2013), the Ninth Circuit ruled that "legal custody" refers only to an award of sole legal custody.

The applicant submitted affidavits from his parents and Dr. [REDACTED] an Attorney and Notary in the Republic of El Salvador. According to Dr. [REDACTED] at the time of the divorce, the applicant's parents mutually agreed that the applicant's father would have custody of him and his three other siblings and that such agreement was not required to be submitted for a "judicial

decision.” When relying on a foreign law, the application of the foreign law is a question of fact, which must be proved by the applicant. *Matter of Kodwo*, 24 I&N Dec. 479, 482 (BIA 2008). Here, the applicant presents no evidence to establish El Salvadoran laws concerning custody over minor children in divorce proceedings. The applicant also presents no evidence that his parents’ informal agreement gave the applicant’s father “sole legal custody” over him following the divorce. Thus, the applicant cannot establish that he was in his father’s custody when his father naturalized, and did not derive U.S. citizenship upon his father’s naturalization under former section 321(a) of the Act.

Conclusion

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. The application remains denied.