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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



U.S. Citizenship
and Immigration
Services

Date: FEB 06 2014 Office: KENDALL, FL

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (repealed).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

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Kendall, Florida Field Office Director (the director) denied the Application for Certificate of Citizenship (Form N-600) and the matter is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be affirmed and the application will remain denied.

Pertinent Facts and Procedural History

The applicant was born on July 14, 1973 in Morocco. The record shows that his parents, [REDACTED] and [REDACTED] were married on October 20, 1961 and later divorced on November 9, 1981 in Morocco. The applicant's mother became a naturalized U.S. citizen on March 9, 1987, when the applicant was thirteen years old. His father is not a U.S. citizen. The applicant became a lawful permanent resident on May 12, 1988 at the age of fourteen. The applicant seeks a certificate of citizenship, on the basis that he derived U.S. citizenship through his mother under the first clause of former section 321(a)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432(a)(3) (repealed).

Applicable Law

The applicable law for derivative citizenship purposes is that 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); *accord Jordon v. Attorney General*, 424 F.3d 320, 328 (3d Cir. 2005). The Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), effective as of February 27, 2001, repealed section 321 of the Act. The provisions of the CCA are not retroactive and thus, the amended provisions of sections 320 and 322 of the Act apply only to persons who were not yet eighteen years of age on February 27, 2001. The applicant was over the age of eighteen on the effective date of the CCA and thus, cannot benefit from the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Accordingly, former section 321 of the Act is applicable in this case.

Former section 321 of the Act 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:
 - (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 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 (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 18 years.

The director initially denied the instant application on June 7, 2010. On appeal, in a decision, dated September 27, 2011, the AAO determined that the petitioner had not established that he derived U.S. citizenship through his mother pursuant to former section 321(a)(3) of the Act, because the record was unclear as to which of the applicant's parents was awarded legal custody over the applicant upon their divorce. The proceedings were remanded to the director, however, because the record contained a copy of the applicant's U.S. passport, issued by the U.S. Department of State, Passport Office. On remand, the director referred the matter to the Department of State, which reviewed the case and revoked the applicant's passport. Thereafter, the director reaffirmed his prior decision, concluding that the applicant had failed to establish that he derived U.S. citizenship because he had not shown that his father was a U.S. citizen or that he had been in the legal custody of his U.S. citizen mother while under the age of eighteen, following his parents' divorce in Morocco. The director denied the application accordingly and certified the matter to the AAO.

On certification, counsel asserts that the director violated the applicant's administrative due process rights by failing to provide the applicant with a copy of the divorce decree containing the custody order upon which the director relied in denying the application. Further, counsel maintains that the applicant was in the legal custody of his citizen mother as required by former section 321(a)(3) of the Act.¹

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).

Analysis

The record shows that the applicant has satisfied several of the requirements for derivative citizenship set forth in former section 321(a) of the Act. Specifically, the applicant's mother became a

¹ Counsel asserts that the U.S. government should be barred under the principle of estoppel from denying the applicant's Form N-600 because the U.S. government (specifically, the U.S. Department of State, Passport Office) declared the applicant to be a U.S. citizen over seventeen years ago. However, the jurisdiction of the AAO is limited to the authority specifically granted through the regulations at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on Feb. 28, 2003) and subsequent amendments. As counsel acknowledges on brief, such claims based on estoppel go beyond the purview of this administrative appeal and are outside the jurisdiction of this office. More importantly, on April 1, 2013 the U.S. Department of State notified the applicant that it was revoking the applicant's current passport and any other passports that had been previously issued to him.

naturalized U.S. citizen and was admitted to the United States as a lawful permanent resident before his eighteenth birthday as required by statute. However, the applicant has not shown that his U.S. citizen mother was awarded legal custody over him while he was under the age of 18 years, as required by former section 321(a)(3) of the Act. In response to a request from United States Citizenship and Immigration Services (USCIS) for the applicant's parents' divorce decree and marital settlement or custody order, counsel submitted the following: a brief statement explaining that the applicant's parents' divorce decree had been lost; the translation of the applicant's parents' divorce certificate, declaring them divorced in December 1981; and the statement of the applicant's noncitizen father. The divorce decree does not contain a custody award or determination. In the absence of a judicial order granting custody to the naturalized parent upon legal separation, the parent having actual, uncontested custody of the child is to be regarded as having "legal custody." See *Matter of M*, 3 I&N Dec. 850,856 (BIA 1950). However, here, the record contains a second, more detailed divorce decree obtained from the applicant's mother's administrative file, indicating that the applicant's parents were divorced on November 9, 1981. The decree further shows that both parents agreed that the applicant's father would have custody of the applicant and that his mother would have visitation rights. The record contains no other subsequent judicial determination amending the original order to award custody of the applicant to his U.S. citizen mother. The divorce decree translation provided earlier by the applicant, dated December 8, 1981, briefly acknowledges only his parents' divorce, without addressing custody of the couple's children at all.

Counsel contends on certification that the applicant has established that his citizen mother had legal custody over him before his eighteenth birthday through "other factual circumstances."² Counsel maintains that the director did not take into consideration "the possibility that the consent by the father for the child to leave Morocco permanently and live with the mother in the U.S. may have affected a change of custody according to Moroccan or Jewish religious law." The applicant's father's statement indicates that he consented to having the applicant move to the United States to reside with his mother. 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). Counsel submits no evidence that such an informal agreement between the parties to change a judicial custody order would be, or was, accepted under Moroccan or Jewish religious law.

As counsel noted, the parent having actual, uncontested custody of the child has legal custody only in the absence of a judicial determination or grant of custody. See *Matter of M*-, *supra*. Here, the record contains a judicial custody determination, giving legal custody of the applicant to his noncitizen father. The applicant has not provided evidence, on remand or upon certification, that the custody order was amended, or any evidence that a voluntary change in the custody order between the parents may be recognized without a court order under the laws of the relevant jurisdiction, as counsel contends. Accordingly, the applicant has failed to demonstrate that his citizen mother had legal custody over him upon his parents' legal separation. Consequently, he has failed to show that he derived citizenship through his mother under former section 321(a)(3) of the Act.

The applicant is also ineligible to derive citizenship under any other subsection of former section 321(a) of the Act. He cannot derive citizenship under former section 321(a)(1) of the Act, because

² In a prior submission, counsel relied upon 8 C.F.R. § 320.1 in support of this assertion. However, this regulation is inapplicable to this case because it applies to applications that fall under section 320 of the Act.

both of his parents must have naturalized prior to his eighteenth birthday and there is no evidence that his father naturalized. He is also ineligible under former section 321(a)(2) of the Act, because he could only have derived U.S. citizenship under that subsection if his mother had been the applicant's sole surviving parent and had naturalized prior to the applicant attaining eighteen years of age. The applicant is also ineligible to derive citizenship through his mother under the second clause of former section 321(a)(3) of the Act because he was born in wedlock and his paternity was established at birth.

On certification, counsel also asserts that the director's failure to provide the applicant with a copy of the divorce decree from his mother's file violated 8 C.F.R. § 103.2(b)(16) and the applicant's administrative due process rights.³ Counsel contends that the applicant must be provided a copy and translation of the document, and an opportunity to review his mother's administrative file so that rebuttal information can be obtained from abroad. The regulation at 8 C.F.R. § 103.2(b)(16)(i) provides that if an adverse decision by USCIS is based on derogatory information unknown to the applicant, USCIS shall advise the applicant "of this fact" and offer the applicant an opportunity to rebut the information. Here, the applicant was advised in the director's June 2010 decision that his mother's administrative record contained a copy of his parents' divorce decree. The director specified further that the document was issued by the [REDACTED] on November 9, 1981. This information was again provided to the applicant in the Department of State's April 1, 2013 letter, notifying the applicant of his passport revocation. These proceedings were previously pending on appeal before the AAO, again on remand before the director, and are now again before the AAO upon certification. The applicant therefore had sufficient notice, information, time, and opportunity to obtain and provide additional rebuttal evidence regarding his parents' full divorce decree that was relied upon by the director. Consequently, the record does not support counsel's assertion that the director failed to comply with the regulation at 8 C.F.R. § 103.2(b)(16)(i).

Conclusion

The applicant bears the burden of proof to establish his eligibility for derivative citizenship. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c). The applicant has failed to satisfy his burden of demonstrating that he derived citizenship through his U.S. citizen mother under former section 321(a)(3) of the Act.

ORDER: The director's April 22, 2013 decision to deny the application is affirmed. The application remains denied.

³ Administrative due process claims are not within the authority of the AAO. *See supra* note 2.