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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 20 2014

Office: CHICAGO, IL

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

Application for Certificate of Citizenship under Section 320 of the Immigration and Nationality Act, 8 U.S.C. § 1431 (2013), and former Section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (repealed).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,

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

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Chicago, Illinois Field Office Director (the director) denied the Application for Certificate of Citizenship (Form N-600). The applicant appealed that decision to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The applicant filed a motion to reopen and a motion to reconsider the AAO decision. The motion will be granted, and the previous decision of the AAO, dated October 4, 2013, will be affirmed. The application will remain denied.

*Pertinent Facts and Procedural History*

The applicant was born on June 30, 1985 in [REDACTED] Mexico. His parents, [REDACTED] were married on November [REDACTED] 1973 and later divorced on October [REDACTED] 1981. As the applicant was born after his parents' divorce, he was born out of wedlock. The applicant's father became a naturalized U.S. citizen on October 16, 1992, when the applicant was seven years old. His mother is a lawful permanent resident of the United States and never naturalized. The applicant was admitted to the United States as a lawful permanent resident on September 8, 1993 when he was eight years old. He seeks a certificate of citizenship on the basis that he derived U.S. citizenship through his father pursuant to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431 (2013), or former section 321 of the Act, 8 U.S.C. 1432 (repealed).

The director denied the applicant's Form N-600, concluding that the applicant had failed to demonstrate that he resided in the legal and physical custody of his U.S. citizen father on or after the effective date of the Child Citizenship Act of 2000 and prior to his eighteenth birthday, as required by section 320(a) of the Act. On appeal, the AAO affirmed the decision of the director.

On November 6, 2013, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision. On motion, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) erred as a matter of law in failing to apply the presumption of legal and physical custody under 8 C.F.R. § 320.1 and in failing to find that the applicant had derived U.S. citizenship under either section 320 of the Act, as amended, or under former section 321 of the Act. The applicant proffered a supporting brief and additional evidence in support of the instant motion.

*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 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, is not retroactive. The CCA repealed former section 321 of the Act in its entirety and amended provisions of sections 320 and 322 of the Act, which apply only to persons who were not yet eighteen years of age on February 27, 2001. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). As the applicant was born in 1985 and was under the age of eighteen on the effective date of the CCA, section 320 of the Act, as amended, is applicable in this case.

Section 320 of the Act provides:

- (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
  - (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
  - (2) The child is under the age of eighteen years.
  - (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

On motion, the applicant also asserts his citizenship claim under former section 321 of the Act, which provides 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.

*Citizenship Claim Under The Child Citizenship Act*

Pursuant to 8 C.F.R. § 320.2(a), an applicant must establish that the conditions of section 320 of the Act have been met on or after February 27, 2001, the effective date of the CCA. *See also Rodriguez-Tejedor*, 23 I&N Dec. at 156. Here, the applicant satisfied some of the requirements of section 320

of the Act. For instance, the applicant's father is a U.S. citizen by naturalization and the applicant resided in the United States pursuant to a lawful admission for permanent residence before the applicant's eighteenth birthday as required by statute. Further, as set forth in detail in the AAO's October 2013 decision, for purposes of the citizenship statute, the applicant, who was born out of wedlock, qualifies as a "child" under section 101(c) of the Act as the legitimated child of a U.S. citizen.<sup>1</sup> The sole contested issue relating to the applicant's citizenship claim under section 320 of the Act is whether the applicant has demonstrated that he resided in the United States in the "legal and physical custody" of his U.S. citizen father on or after February 27, 2001 and prior to his eighteenth birthday.

The regulations define the term "legal custody" to refer to "the responsibility for and authority over a child." 8 C.F.R. § 320.1. Additionally,

[f]or the purpose of the CCA, the Service will presume that a U.S. citizen parent has legal custody of a child, and will recognize that U.S. citizen parent as having lawful authority over the child, absent evidence to the contrary, in the case of . . . (iii) a biological child born out of wedlock who has been legitimated and currently resides with the natural parent.

*Id.*

The record contains the applicant's parents' joint statement, dated January 19, 2012, briefly indicating that the applicant resided with and in the legal custody of his father since September 1986. A June 11, 2012 "Acknowledgement of Paternity" by the applicant's father and a "Custody Affidavit" of the same date by his mother also assert that the applicant was in the custody of his father since September 1986. Additionally, copies of the applicant's father's U.S. tax returns for 1987 through 1989 list his address as [REDACTED] and indicates that the applicant was residing with him for twelve months of the year each of those years. Copies of four medical bills for the applicant from October 1994, May 1999, and June 1999 show they were sent to the applicant's father at [REDACTED]. A fifth medical bill from May 31, 1999 was sent to the applicant's father at [REDACTED]. The applicant

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<sup>1</sup> For naturalization and citizenship purposes, under section 101(c) of the Act, 8 U.S.C. § 1101(c)(1), the term "child" means:

an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere. . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation . . . .

The applicant here was born out of wedlock, but as noted, the record indicates that he was legitimated by his U.S. citizen father prior to his sixteenth birthday to qualify as a "child" under the Act.

also submitted a copy of the signature page of a Form I-134, Affidavit of Support, signed by the applicant's father in May 1992 and indicating that the applicant was wholly dependent on his father.

As referenced in the AAO's prior decision, the administrative file also contains a copy of the applicant's Form I-130, Petition for Alien Relative (Form I-130). The applicant's father, who filed and signed the form on August 21, 1992, lists his address as [REDACTED]. Contrary to the 2012 statements of the applicant's parents asserting that the applicant resided with his father since September 1986, the applicant's father states on the Form I-130 that the applicant resided at a separate address located at [REDACTED]. He also lists the [REDACTED] address as the applicant's intended address upon immigration to the United States. The record also contains the applicant's Illinois criminal history records from 2004, 2005, and 2008, all reflecting the applicant's address as [REDACTED] which is the applicant's mother's address.

On motion, the applicant now proffers an amended divorce judgment for his parents from the Circuit Court of the [REDACTED] Judicial District, State of Illinois, filed May 7, 2013 and entered *nunc pro tunc* to October 1, 1981, the original date of the couple's divorce. The order purports to add a custody determination *nunc pro tunc* to the original order, granting legal custody of the applicant's two older siblings and the applicant to their father. It is noted that at the time of the 1981 divorce, unlike his older siblings, who were born during their parents' marriage, the applicant was not yet born and had not even been conceived.

In support of his claim that his father also had physical custody over him, the applicant submits on motion his 2000 juvenile court hearing notice, addressed to his father at [REDACTED] and a 1993 Illinois circuit court Petition for Guardian, indicating that the applicant's father had custody of the applicant's older brother. Additionally, he proffers a more detailed, undated statement from his father, who asserts that the applicant resided with him in his physical custody from 1995 to 2001 at [REDACTED] and from 2001 until 2004 at [REDACTED]. The applicant's father also states that the applicant resided on and off with him and with the applicant's mother between 1989 and 1995 and again beginning in 1999. He does not explain why both he and the applicant's mother failed to state in their 2012 statements that they had shared custody of the applicant and that the applicant had resided with both of them at different times. The applicant's father also contends that he, the applicant's mother, and the applicant never resided or owned property at the [REDACTED] address indicated for the applicant on his Form I-130. The record contains a number of records from 2001 to 2012 showing the various properties the applicant's father owned during that period, none of which reference the [REDACTED] property. However, the applicant's father offers no explanation for why he stated that the applicant resided separately from him at [REDACTED] Street on the Form I-130.

Upon de novo review of the record, the AAO affirms its prior determination, concluding that the record failed to establish that the applicant had resided in the legal and physical custody of his U.S. citizen father during the period beginning on February 27, 2001 until his eighteenth birthday on June 30, 2003. Outside of the applicant's parents' statements, none of the documents submitted, including the tax records, medical bills, *nunc pro tunc* divorce decree and custody order, and the juvenile records, relate to the applicant's residence and legal custody during this relevant period.

Although both the director's and the AAO's decisions apprised the applicant that the record lacked independent evidence of legal and physical custody *on or after* the CCA effective date, the record on motion still lacks such evidence of the applicant's residence with his father for the referenced period, such school, tax, and medical records. No explanation was provided as to why such evidence was not submitted.

Moreover, as noted, the Form I-130, the criminal history records listing the applicant's residence at his mother's address, and the applicant's father's statement on motion are materially inconsistent with his parents' initial statements contending that he resided with his father since September 1986. These inconsistencies were noted in the AAO's original decision. It was incumbent upon the applicant to resolve any inconsistencies in the record such as this by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, aside from the applicant's father's statement, the documents submitted on motion, or already in the record, fail to address the noted inconsistencies in the record or provide independent corroboration of the applicant's claim that he resided with his father in his legal and physical custody sometime on or after the CCA effective date and prior to his eighteenth birthday. The discrepancies, without independent evidence, further cast doubt on the reliability of the applicant's father's assertions in his statement submitted on motion.

On motion, counsel contends that USCIS erred in failing to favorably apply the presumption of legal and physical custody with the U.S. citizen parent under 8 C.F.R. § 320.1. However, that presumption exists only in the absence of contrary evidence. Here, as discussed, material inconsistencies in the record and evidence showing the applicant to have resided with his noncitizen mother rebut the regulatory presumption of legal and physical custody with the U.S. citizen father, particularly as the record also lacks independent, objective evidence of the applicant's residence with his U.S. citizen father on or after the CCA effective date and before his eighteenth birthday.

Counsel also asserts that USCIS denial of the applicant's citizenship claim is improper because the applicant's older sibling, [REDACTED] was granted a certificate of citizenship in March 2005 under the same facts and evidence here. The AAO does not have the applicant's brother's administrative record before it, but notes that the copy of the applicant's brother's citizenship certificate contained in the record reflects his 1980 birthdate. He therefore would have been over the age of eighteen on the effective date of the CCA. Accordingly, the applicant's brother's citizenship claim would have been under former section 321 of the Act, rather than section 320 of the Act under which the applicant's citizenship case here falls. Further, the applicant's brother was born to his parents during their marriage, while the applicant was born out of wedlock to the same parents nearly four years after their 1981 divorce. Thus, the law and relevant facts applicable to the applicant's citizenship claim are significantly different from those of his brother's.

Accordingly, the applicant has failed to demonstrate that he meets the requirements of section 320(a)(3) of the Act to derive citizenship through his U.S. citizen father under that provision.

*Citizenship Claim Under Former Section 321 of the Act*

As previously discussed, the CCA is applicable to the applicant's derivative citizenship claim, because

he was not yet eighteen on the effective date of that statute. Nevertheless, even if former section 321 of the Act applied in this instance, the applicant's claim to derivative citizenship would still fail. The record shows that the applicant satisfies some, but not all, of the requirements for derivative citizenship set forth in former section 321(a) of the Act. The applicant's father was naturalized and the applicant was residing in the United States pursuant to a lawful admission for permanent residence, all before his eighteenth birthday. He does not derive U.S. citizenship under former section 321(a)(1) of the Act, however, because both his parents must be naturalized before his eighteenth birthday and the applicant's mother never naturalized. Likewise, the applicant does not derive under former section 321(a)(2) of the Act because his U.S. citizen father was not his sole surviving parent before he turned eighteen years of age. Thus, if the applicant's claim was to succeed, it must be under former section 321(a)(3) of the Act.

The second clause of former section 321(a)(3) of the Act allows a child born out of wedlock to derive through his or her U.S. citizen mother if paternity has not been established by legitimation. Here, the applicant cannot derive through his mother since she never naturalized. Moreover, even if she had naturalized, the AAO has concluded, and counsel concedes, that the applicant has been legitimated by his father. Accordingly, the applicant cannot derive U.S. citizenship under the second clause of former section 321(a)(3) of the Act.

The first clause of former section 321(a)(3) of the Act provides that a child may derive U.S. citizenship from the naturalized parent having legal custody of the child "when there has been a legal separation of the parents." The U.S. Court of Appeals of for the Seventh Circuit (Seventh Circuit) held that under U.S. domestic relations laws, the term "legal separation" is defined as the judicial suspension or dissolution of a marriage. *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000) (citing *Matter of H-*, 3 I&N Dec. 742, 743-44 (BIA 1949), which found that for derivative citizenship purposes, "legal separation" refers to a situation where there has been a termination of the marital status).

As this case arises within the [redacted] Circuit, the definition of "legal separation" set forth in *Wedderburn* is applicable. Here, the applicant's parents' original 1981 divorce did not include the applicant, as he had not yet been conceived or born. As noted previously, the applicant was born out of wedlock subsequent to his parents' divorce. Although the applicant's father's statement on motion indicates that the applicant's parents resided together in the United States for a time after his birth, there is no evidence that the applicant's parents remarried after their divorce. Accordingly, pursuant to the holdings in *Wedderburn* and *Matter of H-*, the applicant's parents were not legally separated after his birth, once they ceased living together.

On motion, counsel submits an amended divorce judgment, filed in 2013, which purports to establish legal separation and custody determination *nunc pro tunc* to the original October 1981 divorce. The *nunc pro tunc* order, was obtained for purposes of meeting the derivative citizenship requirements and refers back to a date nearly four years prior to the birth of the applicant. The order, therefore, does not establish that the applicant was in his father's legal custody pursuant to a legal separation for purposes of former section 321(a)(3) of the Act. *See generally, Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 400 (5th Cir. 2006) (rejecting the contention that a *nunc pro tunc* amended custody order expressly obtained to affect an immigration outcome satisfies the legal custody requirement of former section 321(a)(3) of the Act); *see also Fierro v. Reno*, 217 F.3d 1 (1st Cir. 2000) (same).

Accordingly, the applicant has not satisfied his burden to demonstrate that he derived citizenship through his U.S. citizen father under former section 321 of the Act.

*Conclusion*

The applicant bears the burden of proof to establish his eligibility for citizenship under the Act. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c); 8 C.F.R. § 320.3. Here, the applicant has failed to meet his burden. Accordingly, the applicant is not eligible for a certificate of citizenship under section 320 or former section 321(a) of the Act. Although the motion to reopen and reconsider is granted, the AAO's decision of October 4, 2013 dismissing the appeal is affirmed, and the underlying application remains denied.

**ORDER:** The motion to reopen and reconsider is granted. The AAO's prior decision, dated October 4, 2013, is affirmed. The application remains denied.