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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-M-B-

DATE: DEC. 8, 2015

MOTION ON ADMINISTRATVE APPEALS OFFICE DECISION

APPLICATION: FORM N-600, APPLICATION FOR CERTIFICATE OF CITIZENSHIP

The Applicant, a native of Colombia, seeks a Certificate of Citizenship. *See* Immigration and Nationality Act (the Act) § 321, 8 U.S.C. § 1432 (Repealed by Sec. 103(a), title I, Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000)).[1] The Field Office Director, Mount Laurel, New Jersey, denied the application. The Applicant appealed from that decision, and we dismissed his appeal. We later reopened the matter on our own motion and issued a request for additional evidence. The Applicant responded to the request. After further review, the appeal will again be dismissed.

The Applicant was born in Colombia on [redacted] 1977. The Applicant was born out of wedlock to two Colombian parents. The Applicant's birth certificate was registered on April 22, 1977, when the Applicant was [redacted] old, and listed both the Applicant's father and mother. The birth certificate was signed by the Applicant's father. The Applicant's mother became a U.S. citizen through naturalization on November 15, 1988, when the Applicant was 11 years old. The Applicant was admitted to the United States as a lawful permanent resident on October 6, 1989, at the age of 12, based on the approval of a Form I-130, Petition for Alien Relative, filed by his mother. The Applicant's parents were never married, and his father never became a citizen of the United States. The Applicant seeks a certificate of citizenship indicating that he derived U.S. citizenship through his mother under former section 321(a) of the Act.

Under former section 321 of the Act, a mother could confer derivative citizenship on her natural non-citizen child upon her naturalization but only if the paternity of that child had not been established through legitimation. The United States Citizenship and Immigration Services (USCIS) Field Office Director, Mount Laurel, New Jersey, determined that the Applicant did not establish eligibility for derivative citizenship because, although he was the natural child of his mother when she naturalized, he was disqualified because he had been acknowledged by his father. On appeal, we concurred with the Director that the Applicant did not establish eligibility for derivative citizenship

[1] The Child Citizenship Act of 2000, which took effect on February 27, 2001, repealed section 321 of the Act. However, the provisions of the CCA are not retroactive, and 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.

under former section 321(a) of the Act, because he had been legitimated by his father under operation of Colombian law.

The matter is again before us on our own motion to reopen. On motion, the Applicant asserts that he was never legitimated by his father, and therefore contends that he qualifies for derivative citizenship through his mother's naturalization. In particular, the Applicant argues that although the distinction between legitimate and illegitimate children in Colombian law was abolished in 1982, he was not legitimated at that time because he was not then in the legal custody of his father, as required by the definition of child in section 101(c) of the Act, 8 U.S.C. § 1101. [2]

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 (BIA 1989)).

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. The Applicant's 18th birthday was on [redacted] 1995. Because the Applicant was over the age of 18 on February 27, 2001, his application is adjudicated under former section 321 of the Act. *See Matter of Rodriguez-Tejedor,* 23 I&N Dec. 153 (BIA 2001).

To determine whether the Applicant derived citizenship from his mother, we apply "the law in effect when [he] fulfilled the last requirement for derivative citizenship." *Ashton v. Gonzales,* 431 F.3d 95, 97 (2d Cir. 2005) (citing *Rodriguez–Tejedor,* 23 I&N Dec. 153, 163 (BIA 2001)). The Applicant does not dispute that the relevant citizenship law in effect when he fulfilled the last requirement, that is, when the Applicant became a lawful permanent resident in 1989, was former section 321(a) of the Act. It provided, in pertinent part:

(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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[2] Section 101(c) of the Act provides, in relevant part:

> 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, and except as otherwise provided in section 320 and 321 of the title III, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

> (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
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> (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-
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> (4) Such naturalization takes place while said child is under the age of 18 years; and
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> (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.

(Emphasis supplied).

The Applicant contends that he meets two of the conditions for U.S. citizenship as he was under the age of 18 when his mother became a naturalized U.S. citizen, as required under former section 321(a)(4) of the Act, and that he began to reside permanently in the United States after his mother naturalized while under the age of 18, as required under former section 321(a)(5) of the Act. We agree: the Applicant's mother became a naturalized U.S. citizen when he was 11 years old, and he was admitted to the United States as a lawful permanent resident when he was 12 years old.

To derive U.S. citizenship, however, the Applicant must also meet the requirements of either subsection (1), (2), or (3) of former section 321(a) of the Act. The Applicant does not claim that he is eligible under subsections (1) or (2), and the record reflects that he is not. In addition, because the Applicant's parents were never married, there could never have been a legal separation between them, and thus he cannot derive U.S. citizenship under the first clause of section 321(a)(3) of the Act. The issue in this case therefore is whether the Applicant qualifies under the second clause of that provision, which is only the case if his paternity had not been established by legitimation, as all other requirements have been met.

The Applicant argues that his paternity has not been established by legitimation under the law of Colombia, which is the applicable jurisdiction in this case.[3] We therefore turn to the question of how "legitimation" is interpreted under the immigration laws, and whether the facts in this record establish that the Applicant was or was not legitimated under the law of Colombia.

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[3] The Applicant previously claimed he was not legitimated by his father under the laws of his residence in New York, and we agree. In order to be legitimated in New York, the state requires the marriage of biological parents, and in this case, the Applicant's parents were never married to each other. See *Matter of Patrick*, 19 I&N Dec. 726 (BIA 1988).

The Board of Immigration Appeals (the Board) has defined "legitimation" as "the act of putting a child born out of wedlock in the same legal position as a child born in wedlock." *In re Cabrera,* 21 I&N Dec. 589, 591 (BIA 1996); *see also Lau v. Kiley,* 563 F.2d 543, 550 (2d Cir.1977). "Where less than equality of status results, an act of legitimation is not deemed to have occurred." *Cabrera,* 21 I&N Dec. at 591.

The U.S. Court of Appeals for the Second Circuit stated: "Legitimacy is a legal concept. The law makes a child legitimate or illegitimate." *Lau,* 563 F.2d at 548. The Second Circuit further explained:

> There must be some purpose in the distinction the law makes between legitimate children and illegitimate children. The distinction must have some effect and must have been designed to distinguish between the two categories in order that they have different rights or obligations. Whether a child is born in wedlock or out of wedlock may be sociologically, religiously, or psychologically significant, but there is no legal significance unless the law makes one.

Id. Thus, the Applicant's paternity is established by legitimation if the law of Colombia placed him "in the same legal position as a child born in wedlock." *Cabrera*, 21 I&N Dec. at 591.

In *Matter of Hernandez*, 19 I&N Dec. 14 (BIA 1983), the Board referred to a Library of Congress memorandum regarding legitimation in Colombia, stating that Law No. 29, which became effective March 9, 1982,[4] altered the law on the civil status of children. The Board included the following excerpt from the Library of Congress memorandum in its decision:

> All children have the same rights and obligations (art. 1). The equality in rights and obligations granted to children by this law was also extended to inheritance rights, as provided by article 2. Thus, as of March 9, 1982, Colombian law did not acknowledge legal differences in the civil status of children.

Id. at 16. The Board held that by enacting Law No. 29, "Colombia has eliminated all legal distinctions between Legitimate and illegitimate children." *Id.* at 17. Thus, through the enactment of Colombian Law No. 29, the Applicant was placed "in the same legal position as a child born in wedlock." *Cabrera*, 21 I&N Dec. at 591. The Applicant is deemed to be his natural father's legitimated child from the time Colombian law was changed. *Hernandez*, 19 I. & N. Dec. at 16. The applicant's biological paternity is not an issue in this case; the record reflects that the Applicant's paternity was established shortly after his birth in 1977, when Henry Ballares Hernandez named himself as the father on the Applicant's birth certificate and gave the Applicant his last name.[5] As such, the Applicant's paternity was established, and he was legitimated in accordance

[4] The Board noted that the Library of Congress cites an effective date of March 29, 1982, in a different paragraph of the memorandum.

[5] The Applicant provides us with a translated copy of Article 53 of Decree No. 1260 of 1970, in effect at the time of the

with Colombian law in March 1982, the effective date of Law No. 29.[6] Therefore, the Applicant does not qualify for derivative U.S. citizenship due to his inability to establish eligibility under the second clause of former section 321(a)(3).

The Applicant contends that section 101(c) of the Act, 8 U.S.C. § 1101, requires that a child legitimated under the law of the child's residence of domicile be in the legal custody of the legitimating parent at the time of such legitimation. The Applicant further asserts that he was not in his father's legal custody in 1982, at the time Colombian Law No. 29 was enacted, and therefore he was not legitimated for purposes of former section 321(a)(3) of the Act. In essence, the Applicant contends that section 101(c) of the Act adds another requirement to his claim for derivative citizenship under former section 321(a)(3) of the Act – that he was in his father's legal custody at the time of legitimation.[7] Although the record is unclear as to whether the Applicant was in his father's legal custody at the time, we need not reach that factual issue as we find that no such requirement exists.

The language of former section 321(a)(3) of the Act makes it clear that there is no such legal custody requirement; it only requires the legitimation of the child. Furthermore, "the general definition of 'child' in section 101(c) of the Act cannot trump a plain reading of Section 321(a)." *Langhorne v. Ashcroft*, 377 F.3d 175, 180 (2d Cir. 2004). Section 101(c) serves to establish the relationship between a child and the parent from whom citizenship is derived, whereas the lack-of-legitimation requirement in former section 321(a)(3) serves the opposite purpose: to verify that the birth father has no parental rights. It would be inconsistent with the purposes of former section 321(a) to insert the legal custody requirement of section 101(c), as explained by the court in *United States v. Simpson*, 929 F. Supp. 2d 177, 184 (E.D.N.Y. 2013):

> Equally important, § 1432(a)(3) would make no sense if it contained a custody requirement. In order for a child in [the Appellant's] shoes to derive citizenship, he must be (1) born outside of the United States, (2) born out of wedlock, (3) not legitimated by his birth father, (4) under the age of sixteen years at the time of his mother's naturalization, and (5) residing in the United States as a legal permanent resident at the time of his mother's naturalization. It would... make little sense to require the child to have been in the custody of the legitimating parent—here, the

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Applicant's birth. Article 53 amended the Colombian law on the status of children, stating that the father's name will be recorded on the certificate of birth of the child if the child is legitimate, or an illegitimate child recognized, or a child whose paternity is judicially recognized.

[6] In *Matter of Hines,* 21 I&N Dec. 544 (BIA 2008), the Board found in the context of legitimation for purposes of former section 321(a)(3) of the Act that the Jamaican Legitimation Act still required an additional act for establishment of paternity by legitimation (the marriage of the parents), despite the elimination of distinctions between legitimate and illegitimate children. In the present matter, there is no evidence that an additional act is required; the enactment of Colombian law No. 29 therefore constitutes the sole and sufficient act of legitimation. *Hernandez,* 19 I&N at 17.

[7] The Applicant makes reference to a non-precedent decision we rendered in 2008 with a similar fact pattern to this case, in which we held that the Applicant did qualify for derivative citizenship. We are unable to establish the exact facts of that previous case; in addition, we are not bound by non-precedent decisions.

> birth father—when § 1432(a)(3) expressly requires the child *not* to have been legitimated by his birth father if he is to derive citizenship from his mother. Indeed, importing the custody requirement would wholly undermine the purpose underlying the derivative citizenship statute: single parent derivative citizenship only where the absent alien parent has no rights vis-à-vis the child.

Therefore, we find that the Applicant's paternity was established by legitimation when Colombian Law No. 29 became effective in 1982.[8] As such, we conclude that the Applicant has not fulfilled the requirements for derivative citizenship under former section 321 of the Act. Strict compliance with statutory prerequisites is required to acquire citizenship. *See Fedorenko v. U.S.*, 449 U.S. 490, 506 (1981).

It is the Applicant's burden to establish the claimed citizenship by a preponderance of the evidence. Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 C.F.R. § 341.2(c). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of A-M-B-*, ID# 15447 (AAO Dec. 8, 2015)

[8] As we find that the Applicant became legitimated under Colombian Law No. 29, we need not determine whether the Applicant was legitimated in 1977 when his birth certificate was registered.