



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date: **MAY 20 2015**

Office: [Redacted] CALIFORNIA

FILE: [Redacted]

IN RE:

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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed)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

[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 Field Office Director, [REDACTED] denied the Application for Certificate of Citizenship (Form N-600) and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The application will remain denied.

Pertinent Facts and Procedural History

The applicant was born in Thailand on [REDACTED] 1975. The applicant's parents' divorce was finalized on [REDACTED] 1986. The applicant's father became a U.S. citizen through naturalization on [REDACTED] 1991. The applicant became a lawful permanent resident on June 8, 1992. The applicant seeks a certificate of citizenship, claiming that she derived U.S. citizenship through her father under the first clause of former section 321(a)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1421 (1998).

The field office director determined that the applicant failed to establish eligibility for derivative citizenship because the applicant was not in her father's legal custody after her parent's divorce on [REDACTED], 1986. *See Decision of the Director*, dated April 2, 2014. The application was denied accordingly.

On appeal, the applicant, through counsel, contends that although the court gave legal and physical custody of the applicant to the applicant's mother, her mother was not financially stable and informally agreed to give custody of the applicant to her father.

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, she is presumed to be an alien and bears the burden of establishing her 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. The applicant's eighteenth birthday was on October 28, 1993. Because the applicant was over the age of 18 on February 27, 2001, she 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 is therefore applicable in this case and provided, in pertinent part, 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 said 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 (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

Analysis

The applicant satisfied two of the requirements for derivative citizenship set forth in former section 321(a) of the Act before her eighteenth birthday. Specifically, the applicant was admitted to the United States as a lawful permanent resident and her father became a naturalized U.S. citizen when she was 16 years old. However, the applicant has not shown that her father had legal custody of her pursuant to a legal separation while she was under the age of eighteen, as required by the first clause of former section 321(a)(3) of the Act.¹

The record contains a copy of the divorce decree for the applicant's parents issued on [REDACTED] 1986 by the Superior Court of California, County of [REDACTED]. The divorce decree states that the wife (the applicant's mother) "shall have sole legal custody of the minor children of the parties with the wife having sole legal custody of the parties," and lists the names of the three minor children, including the applicant.

The applicant, through counsel, asserts that the court order was voluntarily and informally modified by the parties, and that as the applicant's mother was not able to financially support the applicant,

¹ The second clause of former section 321(a)(3) of the Act provides for derivation of U.S. citizenship by an out of wedlock child upon the mother's naturalization and is therefore inapplicable in this case.

the applicant remained in the custody of her father, the mother having relinquished legal and physical custody of the applicant to the father.

The record includes an undated statement from the applicant's mother, in which she states that she did not have a job nor the financial means to support the applicant, that she did not know what to do, and for the best interest and well-being of the applicant, she decided to immediately give up her legal and physical custody to the applicant's father. The applicant's mother stated that because of her daughter's education and medical needs, her daughter remained with her father until she became an adult. The record also includes a high school transcript for the applicant from 1989 to 1993, and a Form I-134, Affidavit of Support filed by the applicant's father on May 16, 1992 in support of the applicant's request for adjustment of status, both of which show the applicant's address to be the same as her father. However, the record does not contain an official court document amending the original custody award to the applicant's mother in the divorce decree.

The applicant, through counsel, contends that legal relationships between parents and children are typically governed by state law, and that California law recognizes de facto arrangements to determine the type of physical custody a parent has. Counsel cites *In re Marriage of Biallas*, 65 Cal.App.4th 755 (1998), *In re Kieshia E.*, 6 Cal.4th 68 (1993) and *Marriage of Burgess*, 13 Cal.4th 25 (1996) in support of this contention. However, each of these cases examines the ability of a trial court to modify a custody determination, as opposed to a determination that court-ordered custody had been modified by a de facto arrangement. Accordingly, the applicant's assertions concerning her living arrangements after her parents' divorce could affect a court's modification of a custody determination. However, no such modification was made in the applicant's case and, as such, her mother retained legal custody over the applicant after the divorce.

"Congress clearly intended that the naturalization of only one parent would result in the automatic naturalization of an alien child only when there has been a formal, *judicial* alteration of the marital relationship." *Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001)(emphasis in original) (recognizing that requiring the naturalization of both parents, when the parents were married, "was necessary to promote the child from being separated from an alien parent who has a legal right to custody"); see also *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000) (stating that "both the language of [section 321(a)] and its apparent underlying rationale suggest that Congress was concerned with the legal custody status of the child *at the time* that the parent was naturalized and during the minority of the child")(emphasis in original).

In the U.S. Court of Appeals for the Second Circuit's decision in *Lewis v. Gonzales*, 481 F.3d 125 (2d Cir. 2007), the court emphasized that "because derivative citizenship is automatic, and because the legal consequences of citizenship can be significant, the statute is not satisfied by an informal expression, direct or indirect. In all cases besides death, the statute requires formal, legal acts indicating either that both parents wish to raise the child as a U.S. citizen or that one parent has ceded control over the child such that his objection to the child's naturalization no longer controls." 481 F.3d at 131.

Although the evidence in the record suggests that the applicant was in her father's physical custody

beginning in at least 1989, the record contains no evidence to establish that the legal custody of the applicant was transferred to the applicant's father prior her 18th birthday in 1993. Accordingly, we find that the applicant has failed to establish that she resided in his father's legal custody after his parent's divorce and prior to the applicant's 18th birthday, as required by section 321(a)(3) of the former Act.

We note "[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v United States*, 449 U.S. 490, 506 (1981). 8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). We find that the applicant has not met his burden of proof.

Conclusion

The applicant bears the burden of proof to establish the claimed citizenship by a preponderance of the evidence. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c). Here, the applicant has not established that she met all of the conditions for the automatic derivation of U.S. citizenship pursuant to former section 321 of the Act before her eighteenth birthday. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.