U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-C-Z-

DATE: JUNE 22, 2016

APPEAL OF SAN FERNANDO VALLEY, CALIFORNIA FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Mexico, seeks a Certificate of Citizenship. *See* Immigration and Nationality Act (the Act) section 321, 8 U.S.C. § 1432, *repealed by* Sec. 103(a), title I, Child Citizenship Act of 2000, Pub.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). An individual born outside the United States who acquired U.S. citizenship at birth, or who automatically derived U.S. citizenship after birth but before the age of 18, may apply to receive a Certificate of Citizenship. Generally, an individual claiming automatic U.S. citizenship after birth and who was born between December 24, 1952, and February 27, 1983, must meet the last of certain conditions by February 26, 2001. For individuals born to foreign national parents, only one of whom naturalized before the individual turned 18, the individual may become a U.S. citizen if one of three conditions is met. That individual's non-naturalized parent is deceased, the U.S. citizen parent has custody over the individual after a legal separation or divorce, or, if the individual was born to unmarried parents and is claiming to be a U.S. citizen through a naturalized mother, the father must not have made the individual his legitimate child.

The Field Office Director, San Fernando Valley, California, denied the application. The Director concluded that the Applicant did not derive citizenship under former section 321 of the Act because only his mother became a naturalized U.S. citizen, and he did not establish that he was in his mother's legal custody after his parents legally separated and before he turned 18. The Director determined that the Applicant also did not derive citizenship from his mother under section 320 of the Act, 8 U.S.C. § 1431, because he was over the age of 18 on February 27, 2001, when the law went into effect.

The matter is now before us on appeal. On appeal, the Applicant submits additional evidence and claims that the Director erred in not approving his Form N-600, Application for Certificate of Citizenship. The Applicant asserts that his father abandoned their family in 1994, and that his father was charged and convicted for offenses pertaining to child abuse and was therefore not entitled to obtain legal custody under California Family Code §§ 3020-3032. The Applicant indicates that his parents therefore legally separated, and that his mother had sole legal custody over him prior to his 18th birthday.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The Applicant was born to unmarried parents in Mexico on His parents married in Mexico in 1985 when the Applicant was years old. On June 16, 1993, the Applicant was admitted into the United States as a lawful permanent resident pursuant to an approved immigrant visa petition filed on his behalf by his lawful permanent resident father. There is no evidence that the Applicant's father became a U.S. citizen; however, the Applicant's mother became a naturalized U.S. citizen on September 24, 1999, when the Applicant was years old. The Applicant's parents divorced on 2000, when the Applicant was over The Applicant seeks a Certificate of Citizenship based on the claim that he derived citizenship through his U.S. citizen mother.

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). Former section 321 of the Act was in effect when the Applicant turned 18, on 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 individuals 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). Therefore, the Applicant's derivative citizenship claim must be considered under the provisions of former section 321 of the Act.

Former section 321 of the Act 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:
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> (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-
>
> (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. . . .

II. ANALYSIS

The Director concluded that the Applicant did not derive citizenship under former section 321 of the Act, because only his mother became a naturalized U.S. citizen, and he did not establish that he was in his mother's legal custody after his parents legally separated and prior to turning 18. On appeal, the Applicant asserts that his father abandoned their family in 1994 due to criminal activity, and that his father was charged and convicted for offenses pertaining to child abuse and was therefore not entitled to obtain legal custody under California Family Code §§ 3020-3032. He indicates that his parents therefore legally separated, and that his mother had sole legal custody over him prior to his 18th birthday. The Applicant submits affidavits and information related to his father's criminal history. The entire record has been reviewed and considered in arriving at a decision on the appeal.

Because the Applicant was born abroad, he is presumed to be a foreign national 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 Applicant has established that he meets several requirements for derivative citizenship under former section 321 of the Act. The record reflects that the Applicant was admitted into the United States as a lawful permanent resident when he was years old. The record also demonstrates that the Applicant's mother became a naturalized U.S. citizen when the Applicant was years old. He has therefore satisfied the conditions contained in former section 321(a)(4) and (5) of the Act.

The record does not demonstrate, though, that the Applicant's father became a naturalized U.S. citizen, or that his father is deceased, as set forth in former section 321(a)(1) and (2) of the Act. The issue in this case is therefore whether the Applicant has shown that his parents were legally separated prior to the Applicant's 18th birthday, and if so, that he was in his citizen mother's legal custody after the legal separation and prior to his 18th birthday, as required under former section 321(a)(3) of the Act.

We find that the Applicant has not shown his parents were legally separated prior to the Applicant's 18th birthday, or that his mother had sole legal custody over him. We further conclude that the Applicant's paternity was established by legitimation prior to his 18th birthday.

A. Legal separation of the parents

The Applicant may establish derivative citizenship through his U.S. citizen mother if his parents were legally separated, he resided in the mother's legal custody pursuant to lawful admission for permanent residence, and all of these requirements, including the mother's naturalization, were satisfied prior to the Applicant's 18th birthday on

The term, "legal separation" means "either a limited or absolute divorce obtained through judicial proceedings." *Matter of H,* 3 I&N Dec. 742, 744 (BIA 1949). Here, the record reflects that the Applicant's parents obtained a divorce on 2000, when the Applicant was over 18 years old. Because the Applicant's parents did not legally separate before his 18th birthday, the Applicant cannot establish derivative citizenship under former section 321(a)(3) of the Act.

The Applicant claims, nevertheless, that his parents were legally separated prior to his 18th birthday because his father abandoned their family and did not live with them after 1994; however, these facts do not establish that the Applicant's parents were "legally separated," as defined by former section 321 of the Act and related case law, prior to their divorce in 2000.

In *Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003), the Ninth Circuit Court of Appeals (the court with jurisdiction in the Applicant's case) referred to, and agreed with the following court decision interpretations of the term "legal separation":

> *Nehme v. Immigration and Naturalization Serv.,* 252 F.3d 415, 425-26 (5th Cir.2001) (holding that legal separation under § 321(a)(3) means "a formal, *judicial* alteration of the marital relationship") (emphasis in original); *Wedderburn v. Immigration and Naturalization Serv.,* 215 F.3d 795, 799-800 (7th Cir.2000) (disregarding petitioner's argument that "legal separation" under § 321(a)(3) means only "not being legally joined"); *Charles v. Reno,* 117 F.Supp.2d 412, 418 (D.N.J.2000) (noting that § 321(a)(3) requires *legal* separation, which means that "the separation of the parents must be recognizable legally").

Id. at 1065. The Ninth Circuit also referred, in a footnote, to the Board of Immigration Appeals case, *Matter of Mowrer,* 17 I&N Dec. 613, 615 (BIA 1981), indicating that a married couple living apart with no plans for reconciliation is not considered to be legally separated. *Id.* at 1068 n.2. *See also, Brissett v. Ashcroft*, 363 F.3d 130, 133 (2nd Cir. 2004) ("[A]n informal separation is not sufficient to render the parties legally separated, and children of informally separated parents do not automatically acquire citizenship when their custodial parent is naturalized"); and *Lewis v. Gonzales*, 481 F.3d 125, 131 (2nd Cir. 2007) ("[B]ecause 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.")

The Ninth Circuit determined in *U.S. v. Casasola*, 670 F.3d 1023 (9th Cir. 2012), that an individual did not derive citizenship under former section 321(a) of the Act, where only one parent naturalized before his 18th birthday, and his non-citizen parent was alive, married to, and not legally separated from the U.S. citizen parent at all times before the child turned 18. *See id.* at 1027. Here, only the Applicant's mother is a naturalized citizen, and the Applicant has not demonstrated that his parents were legally separated prior to their divorce on 2000. Because the Applicant was not under the age of 18 when his parents divorced, he did not meet the legal separation related requirements set forth in former section 321(a)(3) of the Act.

B. Sole Custody [1]

The Applicant also asserts that his mother had sole legal custody over him beginning in 1994, because his father committed child abuse related offenses and was thus not entitled to legal custody under California Family Code §§ 3020-3032. However, legal custody vests "[b]y virtue of either a natural right or a court decree." *Matter of Harris,* 15 I&N Dec. 39, 41 (BIA 1970). Here, the Applicant's assertions are uncorroborated by evidence demonstrating that a court divested the Applicant's father of his natural right to legal custody over the Applicant. Accordingly, the Applicant did not demonstrate that his mother had sole legal custody prior to the Applicant's 18th birthday.

C. Birth out of wedlock

Although not discussed in the Director's decision, the second clause in former section 321(a)(3) of the Act provides that an individual born out of wedlock may derive citizenship upon naturalization of the mother, if the individual's paternity has not been established by legitimation, and the individual has satisfied the age and residence requirements of section 321 before his or her 18th birthday. The record reflects that the Applicant was born to unmarried parents in Mexico on The Applicant has not, however, demonstrated that his paternity was not established by legitimation under the law in Mexico.

Birth certificate evidence reflects that the Applicant's father acknowledged the Applicant as his child when he registered the Applicant's birth, on 1982, before a Civil Registry Officer in Mexico. The Applicant was less than year old at the time his birth was registered. In addition, marriage certificate evidence reflects that the Applicant's parents married on 1985, when the Applicant was years old.

As stated above, the burden of proof is on the Applicant to establish his claimed citizenship by a preponderance of the evidence. Upon review, the evidence in the record is insufficient to demonstrate that the Applicant's paternity was not established by legitimation. The Applicant

[1] The Ninth Circuit held that the phrase "legal custody" means sole legal custody. *U.S. v. Casasola*, 670 F.3d at 1029, *supra*.

therefore does not meet the conditions of former section 321(a)(3) of the Act which pertain to derivative citizenship for children born out of wedlock.

III. CONCLUSION

In view of the above, the Applicant has not demonstrated that both of his parents naturalized, that his father was deceased, or that his parents legally separated prior to the Applicant's 18th birthday. In addition, although the Applicant was born out of wedlock, he has not shown that his paternity was not established by legitimation prior to his 18th birthday. Accordingly, the Applicant has not established eligibility for derivative citizenship pursuant to former section 321 of the Act.

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). The Applicant has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of J-C-Z-*, ID# 16108 (AAO June 22, 2016)