



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF T-Q-H-

DATE: MAY 19, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Applicant, a native and citizen of Vietnam, 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 *See* Immigration and Nationality Act (the Act) section 321, 8 U.S.C. § 1432, *repealed by* Sec. 103(a), title I, Child Citizenship Act of 2000, Pub.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, to derive citizenship under former section 321 of the Act, 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.

Alternatively, under former section 322 of the Act, a U.S. citizen parent may apply for the certificate of citizenship on behalf of a child born outside the United States. At least one parent must be a citizen of the United States by birth or naturalization, the child must be physically present in the United States pursuant to a lawful admission, and must be under the age of 18 years and in the legal custody of the citizen parent. In addition, in order to be issued a certificate of citizenship, the application for the certificate of citizenship must be approved and the individual must take an oath of allegiance to the United States prior to the individual's 18th birthday. *See* Immigration and Nationality Act section 322, 8 U.S.C. § 1433, *amended by* Sec. 102(a), Immigration and Nationality Technical Corrections Act of 1994, Act of October 25, 1994, Pub. L. No. 103-416, 108 Stat. 4305; Sec. 1(b), Pub. L. No. 106-139, Act of Dec. 7 1999, 113 Stat. 1696; *further amended by* Sec. 102(a), title I, Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000).

The Field Office Director, Santa Ana, California, rejected the application on August 7, 2013. The Director found that the Applicant previously filed Form N-600, Application for Certificate of Citizenship, on June 4, 2004, which was denied on February 17, 2005. The Director rejected the application under 8 C.F.R. § 341.6, which states that after an application for a Certificate of Citizenship has been denied and the appeal time has run, a second application by the same individual shall be rejected and the applicant shall be instructed to submit a motion for reopening or

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reconsideration in accordance with 8 C.F.R. § 103.5. We dismissed an appeal of that 2005 decision on July 17, 2006.

The Applicant filed a motion to reconsider on September 6, 2013. We dismissed the motion on October 31, 2013, finding that the motion was not timely, as it was filed 7 years after our decision of July 17, 2006, in which we dismissed the Applicant's appeal of the Director's decision of February 17, 2005. In addition, we concluded that the Applicant did not establish that he derived U.S. citizenship under former section 322 of the Act, noting that an application filed by the Applicant's father on January 15, 1986, on the Applicant's behalf under former section 322 of the Act, was not approved and the Applicant did not take an oath of allegiance prior to his 18th birthday.

The matter is now before us on a motion to reconsider. On motion, the Applicant contends that U.S. Citizenship and Immigration Services (USCIS) erred in failing to find that he derived U.S. citizenship under former section 321 of the Act. The Applicant further contends that, in the alternative, he is eligible for a certificate of citizenship as he satisfied all the requirements set forth in former section 322(a) of the Act.

We will deny the motion to reconsider.

I. LAW

The Applicant seeks a certificate of citizenship indicating that he derived U.S. citizenship from the Applicant's U.S. citizen father. The Applicant was born in Vietnam on [REDACTED] to married foreign national parents. The Applicant was admitted to the United States as a lawful permanent resident on June 7, 1979. The Applicant's father became a citizen through naturalization on November 21, 1985.

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 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 contends that his claim should 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:

- (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.

In the alternative, the Applicant contends that he qualifies for U.S. citizenship under the provisions of former section 322 of the Act, which required a U.S. citizen parent to apply for the certificate of citizenship on behalf of a child born outside the United States.

Former section 322 of the Act provided in pertinent part that:

(a) Application of citizen parents: requirements

A parent who is a citizen of the United States may apply to [Secretary, Department of Homeland Security, (Secretary)] for a certificate of citizenship on behalf of a child born outside the United States. The [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the [Secretary] that the following conditions have been fulfilled:

- (1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- (2) The child is physically present in the United States pursuant to a lawful admission.
- (3) The child is under the age of 18 years and in the legal custody of the citizen parent.

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- (4) If the citizen parent is an adoptive parent of the child, the child was adopted by the citizen parent before the child reached the age of 16 years and the child meets the requirements for being a child under subparagraph (e) or (F) of section 101(b)(1).
- (5) If the citizen parent has not been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years –
 - (A) the child is residing permanently in the United States with the citizen parent, pursuant to a lawful admission for permanent residence, or
 - (B) a citizen parent of the citizen parent has been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

(b) Attainment of citizenship status; receipt of certificate

Upon approval of the application . . . and . . . upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the [Secretary] with a certificate of citizenship.

II. ANALYSIS

The Applicant was born on [REDACTED] in Vietnam to married foreign-national parents. The Applicant was admitted to the United States as a lawful permanent resident on June 7, 1979, when he was [REDACTED]. The Applicant's father became a United States citizen through naturalization on November 21, 1985, when the Applicant was [REDACTED]. There is no indication in the record that the Applicant's mother became a naturalized U.S. citizen.

On January 15, 1986, the Applicant's father submitted an Application to File Petition for Naturalization in Behalf of Child Under Section 322 of the Immigration and Nationality Act. A Form N-407, Petition for Naturalization (In Behalf of a Child) was submitted on August 6, 1986, and the Applicant and his father were interviewed on that date. At the interview, the Applicant's father was requested to submit a copy of his marriage certificate and a copy of the birth certificate of the Applicant. There is no indication in the record that the Applicant's father complied with this request to submit the required documents, or that the Applicant took his oath of allegiance prior to his 18th birthday, as required under former section 322(b) of the Act.

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The record indicates that the Applicant submitted Form N-400, Application for Naturalization, on June 5, 1995, when he was [REDACTED] years of age. However, the record reflects that the Applicant did not attend his citizenship interview on April 3, 1996, thus the application was abandoned.

The Applicant's mother died on [REDACTED] 1998, when the Applicant was 23 years of age. The Applicant's father died on [REDACTED] 2002, when the Applicant was 26 years of age.

The Applicant submitted Form N-600 on June 7, 2004. The Director determined that the Applicant was over the age of 18 and did not establish eligibility for a certificate of citizenship under former section 322 of the Act, or any other section of law. The application was denied on February 17, 2005. We dismissed an appeal of the denial on July 17, 2006, holding that documents required to complete the application filed on January 15, 1986, were not submitted prior to the Applicant's 18th birthday, and the record contained no documentation showing that the Applicant's citizenship application of 1986 was completed and approved. We further found that the Applicant was not administered an oath of allegiance prior to his 18th birthday, as required under former section 322(b) of the Act.

The Applicant submitted a second Form N-600 on December 6, 2012. The Director rejected the application under 8 C.F.R. § 341.6, which states that after an application for a Certificate of Citizenship has been denied and the appeal time has run, a second application by the same individual shall be rejected and the applicant shall be instructed to submit a motion for reopening or reconsideration in accordance with 8 C.F.R. § 103.5.

The Applicant filed a motion to reconsider on September 6, 2013. On October 13, 2013, we dismissed the motion as untimely, as it was filed 7 years after we rendered our decision of July 17, 2006. In addition, we determined that the Applicant did not establish that he derived U.S. citizenship through his father, stating that under former section 322(b) of the Act, an application must be approved before the Applicant's 18th birthday, and the Applicant must take an oath of allegiance prior to his or her 18th birthday, and the record did not establish that the Applicant's Form N-600 was approved, or that he took an oath of allegiance prior to his 18th birthday.

The matter is again before us on a motion to reconsider. On motion, the Applicant contends that his N-600 was erroneously denied as USCIS failed to consider that he derived U.S. citizenship under former section 321 of the Act. The Applicant further contends that, in the alternative, he is eligible for a certificate of citizenship as he has satisfied all the requirements set forth in former section 322(a) of the Act.

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).

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We find that the Applicant did not establish that he qualifies for derivative citizenship under former section 321 of the Act, as only the Applicant's father naturalized prior to his 18th birthday, his mother was still living at the time he turned 18 years of age, and his parents were never separated. In addition, we find that the Applicant did not establish that he met the conditions of former section 322 of the Act prior to his 18th birthday.

A. Derivative citizenship under former section 321 of the Act

In order to establish derivative citizenship under former section 321(a)(1) of the Act, the Applicant has to demonstrate that both his parents naturalized. The Applicant may establish derivative citizenship through one parent if the other parent was deceased. The Applicant may also obtain derivative citizenship through his U.S. citizen father if his parents were legally separated. Under former section 321 of the Act, the Applicant must additionally show that he resided in the United States pursuant to a lawful admission for permanent residence at the time of the last parent naturalized or thereafter began to reside permanently in the United States, and that all of these conditions were satisfied before the Applicant's 18th birthday on March 9, 1993.

The Applicant has established that he meets two of the requirements for derivative citizenship under former section 321 of the Act. Specifically, the Applicant has established that he was admitted to the United States as a lawful permanent resident on June 7, 1979, at the age of [redacted] and that his father became a naturalized U.S. citizen on November 21, 1985, when the Applicant was [redacted] years of age.

At issue is whether the Applicant has shown that he meets the requirements set forth in the first three parts of former section 321(a) of the Act. Under former section 321(a)(1) of the Act, the Applicant must demonstrate that both his parents became naturalized U.S. citizens prior to his 18th birthday. The record establishes that only his father became a naturalized U.S. citizen prior to the Applicant's birthday, and his mother did not become a naturalized U.S. citizen. Under former section 321(a)(2) of the Act, in order to establish derivative citizenship through one parent, the Applicant must demonstrate that one of his parents was deceased prior to his 18th birthday. In this case, that requirement was not met because the Applicant's mother died on [redacted] 1998, when the Applicant was 23 years of age. Finally, under former section 321(a)(3) of the Act, the Applicant may also establish derivative citizenship through his U.S. citizen father if his parents were legally separated and he was residing in the legal custody of his father. The term, "legal separation" means "either a limited or absolute divorce obtained through judicial proceedings." See *Matter of H*, 3 I&N Dec. 742, 744 (BIA 1949). Here, there is no evidence that the Applicant's parents were legally separated prior to the death of the Applicant's mother in 1998.

The Applicant has not demonstrated that he meets any of the first three conditions defined in former section 321(a)(1), 321(a)(2), or 321(a)(3) of the Act. Accordingly, the Applicant has not established eligibility for derivative citizenship pursuant to former section 321 of the Act.

B. Derivative citizenship under former section 322 of the Act

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The Applicant contends that if he is not eligible to derive U.S. citizenship under former section 321 of the Act, in the alternative, he is eligible for the issuance of a certificate of citizenship as he satisfied all the requirements set forth in former section 322(a) of the Act.

In order to qualify for a certificate of citizenship under former section 322 of the Act, the Applicant must meet the requirements set forth in former section 322(a) and 322(b) of the Act. The Applicant contends that he met the requirements set forth in former section 322(a) of the Act: specifically, that he was admitted to the United States as a lawful permanent resident on June 7, 1979, when he was [REDACTED] years old, that his father became a naturalized U.S. citizen on November 21, 1985, when the Applicant was [REDACTED] years old, and that the Applicant was in the legal custody of his father prior to his 18th birthday.

The record shows that the Applicant's father submitted an Application to File Petition for Naturalization in Behalf of Child Under Section 322 of the Immigration and Nationality Act on January 15, 1986. The Applicant's father filed Form N-407 on August 6, 1986, and the Applicant and his father were interviewed on that date. In order for the Applicant's father to establish that the Applicant qualifies as a citizen under section 322(a), the Applicant's father must establish that the Applicant is his child. The record indicates that, during the interview, the interviewing officer requested the Applicant's father to submit a copy of his marriage certificate and a copy of the Applicant's birth certificate in order to establish the father-child relationship. There is no evidence in the record that the Applicant's father submitted the required documentation prior to the Applicant's 18th birthday on [REDACTED] and therefore the application was never approved.

In addition, former section 322(b) of the Act requires that an applicant for a certificate of citizenship take the oath of allegiance prior to attaining the age of 18. There is no documentation of record that the Applicant took the oath of allegiance prior to the Applicant's 18th birthday on [REDACTED].

As such, there is no indication in the record that the Applicant completed the requirements to become a U.S. citizen prior to his 18th birthday as prescribed by former section 322 of the Act.

Lastly, the Applicant, on appeal, contends that the decision to deny his N-600 on February 17, 2005, was in error, as the decision indicated that the Applicant did not establish his eligibility under former section 322 of the Act or any other section of law, and failed to consider whether the Applicant qualified for U.S. citizenship under former section 321 of the Act. The Applicant therefore contends that he is entitled to equitable tolling of the motion to reconsider, and thus the motion is timely. We have accepted this motion to reconsider as timely. However, as explained above, the Applicant still does not qualify for a certificate of citizenship under former section 321 of the Act as he has not demonstrated that he meets any of the first three conditions defined in former section 321(a)(1), 321(a)(2), or 321(a)(3) of the Act.

III. CONCLUSION

In view of the above, the Applicant has not demonstrated that he has satisfied the requirements to obtain a certificate of citizenship under either former section 321 of the Act or former section 322 of the Act. Accordingly, the Applicant has not established eligibility for derivative citizenship.

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. Accordingly, we deny the motion to reconsider.

ORDER: The motion to reconsider is denied.

Cite as *Matter of T-Q-H-*, ID# 18086 (AAO May 19, 2016)