U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-R-B-O-

DATE: NOV. 8, 2016

CERTIFICATION OF OAKLAND PARK, FLORIDA FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Venezuela, seeks a Certificate of Citizenship. *See* Immigration and Nationality Act (the Act) section 301(g), 8 U.S.C. § 1401(g), *amended by* Act of November 14, 1986, Pub. L. No. 99-653, 100 Stat. 3655, and section 321 of the Act, 8 U.S.C. § 1432, *repealed by* Sec. 103(a), title I, Child Citizenship Act of 2000, Pub.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.

To establish acquisition of U.S. citizenship at birth under former section 301(g) of the Act, an individual born to married parents between December 24, 1952, and November 14, 1986, must show that one of the parents was a U.S. citizen who was physically present in the United States for 10 years (with at least 5 years occurring after the age of 14) before the individual's birth.

To establish derivative citizenship under former section 321 of the Act, an individual who was born to foreign national parents between December 24, 1952, and February 27, 1983, must show that he or she was residing in the United States as a lawful permanent resident, and that both his or her parents became naturalized U.S. citizens before the individual turned 18. 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 are 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 Director, Oakland Park, Florida, denied the application, concluding that the Applicant did not acquire U.S. citizenship at birth from his mother under former section 301(g) of the Act, because the mother was not physically present in the United States for the requisite amount of time before the Applicant was born. The Director further determined that the Applicant did not derive U.S. citizenship from his mother after birth because he was not born to two foreign national parents, as required under former section 321 of the Act.

The matter is now before us on certification. The Director's decision will be affirmed and the application will be denied.

I. FACTS AND PROCEDURAL HISTORY

The Director initially denied the application finding that the Applicant did not acquire citizenship at birth because his mother was not physically present in the United States at any time before the Applicant's birth. The Director also considered whether the Applicant qualified for derivative citizenship pursuant to section 320 of the Act, 8 U.S.C. § 1431, but determined that the Applicant was not eligible because he was over 18 when the law went into effect on February 27, 2001. On appeal, the Applicant asserted that he derived U.S. citizenship under former section 321 of the Act, because his mother, who was divorced from his father, and who had legal custody of the Applicant, became a U.S. citizen through collective naturalization in Panama.

Upon review of the record, we concluded that the Applicant did not demonstrate acquisition of U.S. citizenship at birth as he did not present evidence that his mother was physically present in the United States before his birth, and he did not establish that the mother was exempt of the physical presence requirement. We further found that because the Applicant's mother was a U.S. citizen at the time of his birth, he did not meet the former section 321 of the Act requirement of being born to foreign national parents to derive U.S. citizenship after birth. However, because the record included a copy of the Applicant's U.S. passport, we remanded the matter to the Director to request the Department of State (DOS) to review the record and determine whether the Applicant's passport should be revoked. In July 2015, DOS revoked the Applicant's U.S. passport as issued in error. In its decision, DOS explained that the Applicant's passport application was mistakenly adjudicated under former section 321 of the Act, which did not apply to him, as he was born to a U.S. citizen parent. DOS further found that the Applicant was not eligible for the U.S. passport as an individual who acquired U.S. citizenship at birth, because his mother did not satisfy the physical presence requirements under former section 301(g) of the Act.

Following the passport revocation, the Director again denied the Applicant's Form N-600, Application for Certificate of Citizenship, finding that the Applicant did not acquire U.S. citizenship at birth, and that he did not derive U.S. citizenship after birth. The Director certified the matter to us for review. The certification notice advised the Applicant of his right to submit a brief or other written statement for us to consider. We received the Applicant's brief on certification.

II. LAW

The record reflects that the Applicant was born in Venezuela on [redacted] to married parents. The Applicant's mother was born in Panama in [redacted] The record contains a letter from the [redacted] of the U.S. Embassy in Panama, confirming that the Applicant's mother is a citizen of the United States pursuant to section 303(b) of the Act, 8 U.S.C. § 1403(b), and that she was issued a U.S. passport in 1992. The Applicant's father was born in Venezuela. There is no evidence that the father is, or was a U.S. citizen at any time. The Applicant's parents were divorced in 1994, and the mother was awarded custody of the Applicant, while his father was granted visitation rights. In 1992, the Applicant was admitted to the United States as a nonimmigrant. In 1997, his status was

adjusted to that of a lawful permanent resident, child of a U.S. citizen, based on an immigrant visa petition filed on his behalf by his mother.

We will consider the Applicant's eligibility for issuance of a Certificate of Citizenship under the statutory provisions pertaining to acquisition of U.S. citizenship at birth, as well as those which govern derivation of U.S. citizenship after birth.

A. Law Governing Acquisition of Citizenship at Birth

The Applicant has previously asserted that he acquired U.S. citizenship from his mother at birth. The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth. See *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 n.3 (9th Cir. 2001) (internal quotation marks and citation omitted).

The Applicant was born in to married parents, one of whom was a U.S. citizen and the other a foreign national. Section 301(g), as in effect at the time of the Applicant's birth, provided that the following shall be citizens of the United States at birth:

> [A] person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces, or periods of employment with the United States Government or with an international organizations that term is defined in section 1 of the International Organizations and Immunities Act (59 Stat. 669; 22 U.S.C. 228) by such citizen parent, or any periods during which such citizen parent is physically present abroad as a dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 1 of the International Organizations Immunities Act, may be included in order to satisfy the physical presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

B. Law Governing Derivation of U.S. Citizenship After Birth

In the alternative, the Applicant claims that he derived U.S. citizenship from his mother after birth. 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 Applicant turned in September 1999, when former section 321 of the Act was in

effect. 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, repealed section 321 of the Act and amended section 320 of the Act. Under the amended section 320 of the Act, a child who has a U.S. citizen parent, either by birth or naturalization, will automatically derive U.S. citizenship from that parent if the child is under the age of 18, and is residing in the parent's legal and physical custody pursuant to lawful admission to the United States for permanent residence. However, the provisions of the CCA are not retroactive, and the amended section 320 of the Act applies 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-
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> (4) Such naturalization takes place while such 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 (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.

Section 101(a)(3) of the Act, 8 U.S.C § 1101(a)(3), as in effect before the Applicant's [redacted] birthday in 1999 and currently, defines the term "alien" as any person not a citizen or national of the United States.

C. Law Governing the U.S. Citizenship of the Applicant's Mother

As stated above, the record reflects that DOS determined that the Applicant's mother was a U.S. citizen under section 303(b) of the Act. Section 303(b) of the Act provides that:

> Any person born in the Republic of Panama on or after February 26, 1904, and whether before or after the effective date of this Act, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States employed by the Government of the United States or by the Panama Railroad Company, or its successor in title, is declared to be a citizen of the United States.

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).

III. ANALYSIS

The Applicant is seeking a Certificate of Citizenship asserting that he derived U.S. citizenship from his mother pursuant to the first clause of former section 321(a)(3) of the Act. To establish such derivative citizenship, the Applicant must demonstrate that he was born to foreign national parents, and that before he reached the age of 18 his parents were legally separated, his mother naturalized, and he resided in the United States in the legal custody of his mother pursuant to lawful admission to the United States for permanent residence.

The Director concluded that because the Applicant's mother acquired U.S. citizenship at birth, he did not satisfy the requirement of former section 321 of the Act of being born to foreign national parents. Accordingly, with regard to the Applicant's derivative citizenship claim, the issue to be decided on certification is whether the Applicant was born to foreign national parents and, if so, whether his mother obtained U.S. citizenship through naturalization.

In the alternative, to establish that he acquired U.S. citizenship at birth from his mother, the Applicant must show that the mother was a U.S. citizen at the time he was born and that she was physically present in the United States for at least 10 years before the Applicant's birth, 5 of which were after her 14th birthday in

The Director determined that the Applicant did not acquire U.S. citizenship at birth because his mother was not present in the United States before his birth. Accordingly, the issue to be resolved regarding the acquisition of U.S. citizenship at birth is whether the Applicant's mother was a U.S. citizen at the time he was born and, if so, whether she was present in the United States for the requisite period before the Applicant's birth.

On certification, the Applicant does not make any claims regarding acquisition of U.S. citizenship at birth. He contends, however, that his mother acquired U.S. citizenship through collective

naturalization under section 303(b) of the Act and that he therefore satisfies the parent's naturalization requirement of former section 321 of the Act. He claims that because his mother was naturalized, and because he resided in the United States as a permanent resident in her legal custody while under the age of 18, he derived U.S. citizenship from his mother pursuant to the provisions of former section 321 of the Act. In support of the claim that his mother was naturalized, the Applicant points out that the mother's U.S. citizenship was determined under section 303 of the Act, entitled "Nationality at Birth and Collective Naturalization," while section 301 of the Act, which pertains to citizenship at birth, is entitled "Nationals and Citizens of the United States at Birth." The Applicant states that this clearly shows that his mother was not a "natural-born" U.S. citizen, but that she was naturalized. The Applicant does not specify when the claimed naturalization of the mother occurred. The Applicant further states that under the English common law, the term "natural-born," refers to birth within the country's territory, and that anyone born outside of the United States, including those who acquire U.S. citizenship at birth, are in fact "naturalized." The Applicant claims that his interpretation of the distinction between the terms "natural-born" and "naturalized" is consistent with the U.S. Constitution, which provides that only "natural-born" citizens are eligible for the Office of the President of the United States. Finally, the Applicant cites the U.S. Supreme Court's decision, *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1897), which holds that a person born out of jurisdiction of the United States can only become a citizen by being naturalized.

For the reasons explained below, we conclude that the Applicant did not derive U.S. citizenship from his mother under former section 321 of the Act because his mother was a U.S. citizen when the Applicant was born. Further, we affirm our finding on appeal that the Applicant did not acquire U.S. citizenship at birth under former section 301(g) of the Act, because his mother did not meet the requirement of physical presence in the United States required to transmit her citizenship to the Applicant.

A. Derivative Citizenship under Former Section 321 of the Act

In order to establish that he derived U.S. citizenship after birth pursuant to former section 321 of the Act, the Applicant must first show that he was born to foreign national parents.

1. Timing of U.S. Citizenship of the Applicant's Mother

There is no dispute that the Applicant's mother is a U.S. citizen. However, while the Director found that the mother acquired citizenship at the time of her birth in [redacted] the Applicant asserts that she was naturalized, although he does not specify the date of the naturalization.

The record reflects that the Applicant's mother was issued a U.S. passport in 1992 based on the Department of State's determination that she was a U.S citizen pursuant to section 303(b) of the Act. On August 4, 1937, Congress passed an act[1] declaring that children born to U.S. citizens on the Canal Zone on or after February 24, 1904, were U.S. citizens. However, while children born before

[1] Act of August 4, 1937, Pub. L. No. 755-242, 50 Stat. 558, codified in section 203(a) of the Nationality Act of 1940,

the passage of the act became U.S. citizens on August 4, 1937, U.S. citizenship vested at birth to children born after that date.[2] Further, a child born in the Republic of Panama to a U.S. citizen who was employed by the U.S. government, the Panama Railroad Company, or its successor, had the same rights as a child born in the Canal Zone.[3] The Applicant's mother was born in the Republic of Panama in [redacted] Therefore, according to the provisions of the Act of August 4, 1937, she was considered a U.S. citizen since her birth in [redacted] We acknowledge the Applicant's argument that pursuant to the Supreme Court's holding in *U.S. v. Wong Kim Ark*, "[a] person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts." *Id.* at 702-703. We agree that the Applicant's mother was not born in the United States and, thus, she did not acquire U.S. citizenship pursuant to the Fourteenth Amendment to the U.S. Constitution, which provides that all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States. Rather, U.S citizenship was conferred upon her at birth pursuant to the provisions of section 303(b) of the Act enacted by Congress. Therefore, while the mother was not born in the United States, she was nevertheless born a U.S. citizen pursuant to the provisions of section 303(b) of the Act. Accordingly, regardless of whether the mother's acquisition of U.S. citizenship can be characterized as "naturalization," she has been a U.S. citizen since her birth in [redacted]

2. Requirement of Parents' Foreign Nationality under Former Section 321 of the Act

As stated above, former section 321 of the Act requires that a child must be 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" in order to derive citizenship upon naturalization of the parent or parents. Section 101(a)(3) of the Act defines the term "alien" as a person who is not a citizen or national of the United States. The Applicant's mother acquired U.S. citizenship at birth in [redacted] and there is no evidence that she subsequently lost the U.S. citizenship. The record reflects that in 1992, she was recognized as a U.S. citizen by the Department of State and issued a U.S. passport, and the Form I-130, Petition for Alien Relative, she subsequently filed on behalf of the Applicant was approved affording him classification as a child of a U.S. citizen. Accordingly, as the Applicant's mother was a U.S. citizen at the time of the Applicant's birth in [redacted] the Applicant was not born to "alien parents," or an "alien parent and a citizen parent who lost citizenship," as required under former section 321 of the Act. We find, therefore, that for this reason the Applicant is ineligible to derive citizenship from his mother under former section 321 of the Act.

B. Acquisition of U.S. Citizenship under Former Section 301(g) of the Act

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Pub. L. No. 76-853, 54 Stat. 1137 (October 14, 1940); section 303(a) of the Act 8 U.S.C.. § 303(a).

[2] *See* INS Interp. 303.1(a).

[3] Act of August 4, 1937; section 203(b) of the Nationality Act of 1940; section 303(b) of the Act.

While the Applicant does not raise claims of acquisition of U.S. citizenship at birth on certification, we will briefly address his eligibility in this regard pursuant to former section 301(g) of the Act, which was in effect at the time of his birth in The Applicant was born to a U.S. citizen mother, and a foreign national father, who were married. For the mother to transmit her citizenship to the Applicant pursuant to former section 301(g) of the Act, the mother had to be physically present in the United States for at least 10 years before the Applicant's birth, with 5 of these years occurring after her 14th birthday in

The Applicant represented on the Form N-600 that his mother's presence in the United States commenced in May 1992. The Applicant does not claim that his mother was present in the United States for any period of time before his birth in Section 301(g) of the Act provides that a U.S. citizen parent may satisfy the physical presence requirement if the parent was living outside of the United States as a dependent unmarried son or daughter of a person honorably serving with the Armed Forces of the United States, or employed by the United States Government or an international organization. To meet this requirement, however, the Applicant would have to show that his mother was living abroad as an unmarried dependent daughter of a qualifying individual for at least 10 years before his birth in The Applicant has submitted evidence that his maternal grandfather was employed with the in 1954 and 1956. However, because this employment was before the birth of the Applicant's mother, it may not be counted towards the physical presence requirement. The Applicant has not submitted any other evidence that would tend to establish that either of his grandparents was engaged in the qualifying employment abroad after the mother's birth in or that his mother was physically present in the United States at any time prior to his birth in We find, therefore, that the Applicant has not demonstrated that his mother satisfies the physical presence requirement of former section 301(g) of the Act. Accordingly, the Applicant has not established that he acquired U.S. citizenship at birth from his mother.

IV. CONCLUSION

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 because the Applicant has not established that acquired U.S. citizenship at birth from his mother under former section 301(g) of the Act, or that he derived U.S. citizenship after birth under former section 321 of the Act. The Applicant is therefore ineligible for issuance of a Certificate of Citizenship.

ORDER: The initial decision of the Field Office Director, Oakland Park, Florida, dated March 21, 2016, is affirmed, and the application is denied.

Cite as *Matter of J-R-B-O-*, ID# 115909 (AAO Nov. 8, 2016)