U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-D-

DATE: FEB. 1, 2017

APPEAL OF PHILADELPHIA, PENNSYLVANIA FIELD OFFICE DECISION

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

The Applicant, a native and citizen of France, 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 *See* Immigration and Nationality Act (the Act), section 321, 8 U.S.C. § 1432, *repealed by* Sec. 103(a), title I, Child Citizenship Act of 2000, Pub.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. 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 is 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 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, Philadelphia, Pennsylvania, denied the application.[1] The Director considered the Applicant's eligibility for issuance of a Certificate of Citizenship under current section 320 of the Act, 8 U.S.C. § 1431, but determined that the Applicant did not qualify because he was not a lawful permanent resident. The Director also concluded the Applicant was not eligible for a Certificate of Citizenship under current section 322 of the Act, 8 U.S.C. § 1433, because he was not residing outside of the United States with his U.S. citizen father.

The matter is now before us on appeal. In the appeal, the Applicant asserts the Director improperly denied the application on the grounds that the Applicant was not a lawful permanent resident at the time his father was naturalized as a U.S. citizen. The Applicant states he derived U.S. citizenship

[1] The application was denied in 2007. The Applicant filed a timely appeal, which our office did not receive until December 2016. While the appeal was pending, in 2010 the Applicant filed a second Form N-600, Application for Certificate of Citizenship. This second application should have been rejected pursuant to the regulation at 8 C.F.R. § 341.5(e); however, it was accepted for processing and denied on merits in 2011. The Applicant did not appeal the denial of that application. Because we review the entire record *de novo*, the incorrect acceptance does not affect our adjudication on appeal.

from his father because he lawfully entered the United States pursuant to a humanitarian parole and thereafter began to reside in the United States permanently in the custody of his father while he was under 18 years of age.

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

I. LAW

The record reflects the Applicant was born in France on [redacted] to foreign national parents. There is no claim or documentation reflecting that the parents were married to each other at any time. In 1991, the Applicant was paroled into the United States for an indefinite period of time, but there is no evidence he ever obtained status as a lawful permanent resident of the United States. His father became a U.S. citizen through naturalization in January 1998, when the Applicant was [redacted] years old. The Applicant's mother is not a U.S. citizen. The Applicant is seeking a Certificate of Citizenship indicating that he derived U.S. citizenship from his father.

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). At the time the Applicant turned 18 years of age in [redacted], former section 321 of the Act governed derivation of citizenship after birth. The Child Citizenship Act of 2000 (CCA), which took effect on February 27, 2001, repealed former section 321 of the Act and amended former sections 322 and 320 of the Act. Under the amended section 320 of the Act, a child now derives U.S. citizenship as long as the child has one U.S. citizen parent, the child is under 18, and the child is residing in the United States in that parent's legal and physical custody as a lawful permanent resident.[2]

The provisions of the CCA, however, are not retroactive. The amended section 320 of the Act applies only to individuals who were not yet 18 years old as of February 27, 2001. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Because the Applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended section 320 of the Act. Accordingly, his citizenship claim must be considered under the provisions of former section 321 of the Act.

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[2] The amended section 320 of the Act provides that:

(a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

(1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

(2) The child is under the age of eighteen years.

(3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

Former section 321 of the Act provided 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.

II. ANALYSIS

As a preliminary matter, we find the Director incorrectly applied current sections 320 and 322 of the Act[3] to the Applicant's citizenship claim. As explained above, because the amended sections 320 and 322 of the Act were not in effect until February 27, 2001, after the Applicant's 18th birthday, they do not apply to the Applicant's citizenship claim. Rather, his claim must be considered under the provisions of former section 321 of the Act, which was in effect before the Applicant turned 18 years of age in [redacted]

[3] Former section 322 of the Act allowed naturalization of a foreign-born child who did not automatically derive U.S. citizenship upon application by a U.S. citizen parent if the child was physically present in the United States pursuant to a lawful admission, and the child was under the age of 18 and in legal custody of the U.S. citizen parent. Such child was exempt from lawful permanent residence if the child's parent satisfied certain U.S. residence requirements. *See* section 322 of the Act (2000), as in effect prior to the CCA amendments. There is no evidence the Applicant's father applied for the Applicant's naturalization under former section 322 of the Act before his 18th birthday. Thus, we do not address whether the Applicant met the requirements of former section 322 of the Act to naturalize when he was a minor.

The Applicant has demonstrated he was born to foreign national parents, as required in former section 321(a) of the Act. To establish derivative U.S. citizenship, the Applicant must next show either that both his parents naturalized while he was under the age of 18, as required in former section 321(a)(1) of the Act, or that he meets the conditions in former sections 321(a)(2) or 321(a)(3) of the Act to derive citizenship from only one naturalized parent. In this case, only the Applicant's father naturalized. The Applicant is therefore not eligible to derive U.S. citizenship from both parents under former section 321(a)(1) of the Act.

The Applicant asserts, however, he meets eligibility criteria to derive U.S. citizenship solely from his father. To establish such derivative citizenship the Applicant must demonstrate either that his mother was deceased or, in the alternative, that his parents were legally separated, and he resided in the United States in the legal custody of the U.S. citizen father pursuant to a lawful admission to the United States for permanent residence before he reached 18 years of age.

The record shows the Applicant has satisfied the age requirement in former section 321(a)(4) of the Act, as he was under 18 years of age when his father naturalized. The issue to be decided on appeal, therefore, is whether the Applicant meets the remaining conditions to derive U.S. citizenship solely from his father under the provisions of either former section 321(a)(2) of the Act, or former section 321(a)(3) of the Act.

Upon review of the entire record, which contains the Applicant's birth certificate, the naturalization certificate of his father, and various immigration forms, we conclude the Applicant has not established he derived U.S. citizenship from his father because he has not submitted evidence that his mother was deceased, as required in former section 321(a)(2) of the Act, or that his parents were legally separated before the Applicant's 18th birthday, as required in former section 321(a)(3) of the Act. Moreover, the Applicant has not demonstrated he was residing in the United States as a lawful permanent resident, as required in former section 321(a)(5) of the Act. Because we find the Applicant is ineligible to derive U.S citizenship from his father for these reasons, we do not address whether the Applicant meets the former section 321(a)(3) legal custody requirement.

A. Eligibility to Derive U.S. Citizenship under Former Section 321(a)(2) of the Act

Former section 321(a)(2) of the Act provides that a child may derive citizenship from one naturalized parent if the other parent is deceased and all of the other conditions for derivative citizenship are also met. In this case, there is no evidence the Applicant's mother passed away while the Applicant was under 18 years of age. Therefore, the Applicant is not eligible to derive U.S. citizenship from his father on that basis.

B. Eligibility to Derive U.S. Citizenship under Former Section 321(a)(3) of the Act

The Applicant is also ineligible to derive U.S. citizenship from the father under former section 321(a)(3) of the Act, which allows a child permanently residing in the United States to derive citizenship from one naturalized parent who has legal custody of the child after the parents' legal

separation.[4] The record does not establish the Applicant satisfies these conditions, as there is no evidence the Applicant's parents were legally separated before his 18th birthday, or that he was residing in the United States as a permanent resident.

1. Legal Separation of Parents

The term "legal separation," as it is used in former section 321(a)(3) of the Act requires that the separation be pursuant to "proceedings . . . which terminate the marriage completely, as by absolute divorce, or which merely separate the parties without destroying the marital status." INS Interp. 320.1(6). However, if the parents were never lawfully married, there can be no "legal separation" as such, and an award of custody to a naturalized parent under such circumstances does not result in derivation even though other requisite conditions are satisfied. *Id.*[5] The Applicant's citizenship proceedings arise in the jurisdiction of the U.S. Court of Appeals for the Third Circuit (Third Circuit), which had also found a marriage requirement in the term "legal separation" in former section 321(a)(3) of the Act and held that legal separation "occurs only upon a formal governmental action, such as a decree issued by a court of competent jurisdiction that, under the laws of a state having jurisdiction over the marriage, alters the marital relationship of the parties." *Morgan v. Att'y Gen. of the U.S.*, 432 F.3d 226, 234 (3d Cir. 2005).

The Applicant has not offered evidence that his parents were married before his 18th birthday. Moreover, while the information on the Form I-130 the Applicant's mother filed on his behalf in 1988 indicates she was married in Vietnam in 1974, a review of the mother's immigration file shows this marriage was not to the Applicant's father. Similarly, the father's immigration documents indicate he was married twice, but neither marriage was to the Applicant's mother. Because there is nothing in the record to suggest the Applicant's parents were married to each other, they could not have been "legally separated," when the Applicant's father naturalized in 1998, or at any time before the Applicant's 18th birthday in

Thus, the Applicant has not established he meets the "legal separation" of parents requirement of former section 321(a)(3) of the Act to derive U.S. citizenship solely from his father.

2. Residence in the United States Pursuant to a Lawful Admission for Permanent Residence

Moreover, we find the Applicant has not established he was residing in the United States pursuant to lawful admission for permanent residence, as required in former section 321(a)(5) of the Act to derive citizenship.

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[4]Former section 321(a)(3) of the Act also provides that a child born out of wedlock, whose paternity has not been established by legitimation, may derive U.S. citizenship upon naturalization of the mother. As there is no evidence of the mother's naturalization, we do not address the Applicant's eligibility to derive citizenship from the mother.

[5] Referencing *Matter of H*, 3 I&N Dec. 742, 743-744 (BIA 1949) ("Since the subject's parents were not lawfully joined in wedlock, they could not have been legally separated.")

The record does not show the Applicant was a lawful permanent resident of the United States at any time before his 18th birthday. The Applicant applied for permanent resident status in the United States in 1990, based on the approved immigrant visa petition filed on his behalf by his mother. However, he withdrew the application in July 1990. While the Applicant has also provided a copy of an adjustment application he submitted in 1999, USCIS records indicate this application was rejected as it contained an incorrect fee.[6] The Applicant has not presented evidence, and USCIS records do not indicate the Applicant held the status of a lawful permanent resident in the United States at any time.

The Applicant asserts on appeal he "began to reside permanently in the United States while under the age of 18 years" as required in former section 321(a)(5) of the Act, because he lawfully entered the United States in 1989 pursuant to a grant of indefinite humanitarian parole, and he has been residing in the United States since that time. The Applicant claims he therefore meets the residence criteria recognized by the U.S. Court of Appeals for the Second Circuit (Second Circuit) in *Ashton v. Gonzalez*, 431 F.3d 95 (2d Cir. 2005). In that case, the Second Circuit held that while a child who acquired lawful permanent residency in the United States would satisfy the residence requirements of former section 321(a) of the Act, "some 'lesser objective manifestation' [of the child's permanent residence] might also be sufficient" to satisfy this requirement. *Id.* at 99.

We find the Applicant's reliance on the holding in *Ashton v. Gonzalez* misplaced. First, while the court expressed doubt whether the phrase: "begins to reside permanently" in former section 321(a)(5) of the Act necessarily required lawful permanent residence, it declined to interpret the provisions of former section 321(a) of the Act on that issue. *Id.* at 98-99. Thus, the Second Circuit did not specifically hold that the residence requirement in former section 321(a)(5) of the Act may be satisfied by something other than lawful permanent residence. Moreover, even if the Second Circuit decided the issue, its ruling would not be controlling in the Applicant's case. We are bound by the Act, agency regulations, precedent decisions of the agency and the Board of Immigration Appeals, and published decisions from the circuit court of appeals where the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987). The Applicant's proceedings fall within the jurisdiction of the Third Circuit, which has not found that the provisions of former section 321 of the Act may be applicable to individuals other than those residing in the United States as lawful permanent residents. Furthermore, the Board of Immigration Appeals has held that to obtain derivative citizenship under former section 321 of the Act, a child must acquire the status of a lawful permanent resident while he or she is under the age of 18 years. *See Matter of Nwozuzu*, 24 I&N Dec. 609, 616 (BIA 2008).[7]

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[6] *See* 8 C.F.R. 103.2(a) (1999) ("An application or petition which is not properly signed or is submitted with the wrong filing fee shall be rejected as improperly filed. Rejected applications and petitions, and ones in which the check or other financial instrument used to pay the filing fee is subsequently returned as non-payable will not retain a filing date.")

[7] We recognize that the Second Circuit subsequently reversed *Matter of Nwozuzu*, holding that a child did not necessarily have to be a lawful permanent resident to derive U.S. citizenship under former section 321 of the Act. *See Nwozuzu v. Holder*, 726 F.3d 323 (2nd Cir. 2013). However, as stated above, the Second Circuit holding is not controlling in the Third Circuit, where these proceedings arise.

The Applicant has not presented evidence that he was residing in the United States pursuant to a lawful admission for permanent residence, or that his parents were legally separated before the Applicant reached 18 years of age. Because the Applicant is ineligible to derive U.S. citizenship solely from his father under former section 321 of the Act for these reasons, we do not reach the issue of whether the father had legal custody of the Applicant.

III. 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). The Applicant has not met that burden because he has not demonstrated that he derived U.S. citizenship from his father under former section 321 of the Act.

ORDER: The appeal is dismissed.

Cite as *Matter of A-D-*, ID# 271139 (AAO Feb. 1, 2017)