U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-T-V-

DATE: JUNE 27, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Applicant, who was born in Vietnam to unmarried parents in 1975, seeks a Certificate of Citizenship indicating he derived U.S. citizenship upon his father's naturalization. *See* Immigration and Nationality Act (the Act), section 321, 8 U.S.C. § 1432, *repealed by* Sec. 103(a), title I, Child Citizenship Act of 2000, Pub.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 must meet certain conditions between December 24, 1952, and February 26, 2001. Those conditions include residence in the United States as a lawful permanent resident, and naturalization of both parents as U.S. citizens before the individual's 18th birthday.

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 only 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 individual's paternity had not been established by legitimation.

The Director of the Honolulu, Hawaii Field Office denied the application, concluding that the Applicant did not establish he derived U.S. citizenship under former section 321 of the Act because his mother did not naturalize and he did not satisfy any of the conditions to derive citizenship from his father. We dismissed the Applicant's appeal, as we also found the record insufficient to demonstrate he was eligible to derive U.S. citizenship solely from his father.

On motion to reconsider, the Applicant asserts that our decision was improper and that the different statutory requirements for derivative citizenship from unwed mothers and fathers violate the equal protection clause of the Fifth Amendment to the U.S. Constitution.

We will deny the motion because constitutional issues are not within our appellate jurisdiction. Furthermore, the Applicant has not shown that we incorrectly applied law to the facts and evidence in his case.

I. LAW

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).

In addition, a motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services or Department of Homeland Security policy.

II. ANALYSIS

The record reflects that the Applicant was born abroad in 1975 to foreign national parents who were never married to each other. In 1981, he and his father were admitted to the United States as refugees; however, his mother remained in Vietnam. The Applicant subsequently adjusted status to that of a lawful permanent resident. His father became a U.S. citizen through naturalization in 1990, when the Applicant was 14 years old.

In our previous decision, we analyzed the Applicant's citizenship claim under former section 321 of the Act, which was in effect before the Applicant turned 18 years of age. We separately addressed each of the three provisions under that section setting forth requirements for derivative citizenship from only one parent, and concluded that the Applicant did not derive citizenship from his father. Specifically, the record did not show that the Applicant was eligible to derive U.S. citizenship from his father under the first clause of former section 321(a)(3) of the Act based on legal separation of the parents because his mother and father were never married and, thus, they could not have been "legally separated" as this term is interpreted in relevant case law. Moreover, we found that the Applicant did not establish his mother was deceased prior to his 18th birthday and, thus, that his father was a surviving parent from whom he could derive citizenship pursuant to former section 321(a)(2) of the Act. Finally, we determined that the provision of the second clause of former section 321(a)(3) of the Act, which allows an out-of-wedlock child whose paternity had not been established by legitimation to derive citizenship upon naturalization of the mother, did not apply in the Applicant's case because his mother did not naturalize.

On motion, the Applicant argues that former section 321(a)(3) of the Act sets different requirements for U.S. citizen mothers and U.S. citizen fathers of children born out of wedlock, and that this practice constitutes gender discrimination against his father in violation of the equal protection guarantee of the U.S. Constitution.

In support of this argument, the Applicant references the decision of the U.S. Court of Appeals for the Second Circuit (Second Circuit), *Morales-Santana v. Lynch*, 804 F.3d 521 (2nd Cir. 2015), which held that the distinct physical presence requirements in former section 301(a)(7) of the Act, 8 U.S.C. § 1401(a)(7), and section 309(c) of the Act, 8 U.S.C. § 1409(a), unconstitutionally discriminate on the basis of the parent's gender. Specifically, under former section 301(a)(7) of the

Act, an unwed U.S. citizen father cannot transmit citizenship to his child unless he has been physically present in the United States for 10 years prior to the child's birth, while under section 309(c) of the Act an unwed U.S. citizen mother need only be present for one continuous year to convey citizenship to her child. The Second Circuit determined that the proper remedy in that case was to apply the shorter physical presence requirement to unwed citizen fathers and, thus, that the individual in *Morales-Santana* obtained derivative citizenship at birth from his father. In a recent decision, however, the U.S. Supreme Court disagreed with this determination, in part, and remanded the case for further proceedings. *See Sessions v. Morales-Santana*, No. 15-119, 2017 U.S. WL 2507339 (U.S. June 12, 2017). While the Court held that different physical presence requirements for U.S. citizen fathers and mothers seeking to transmit U.S. citizenship to their non-marital children born abroad did violate the equal protection clause of the U.S. Constitution, it declined to extend the section 309(c) continuous period of one year exception to the child of an unmarried U.S. citizen father. *Id.* at 18. The Court explained that doing so would abrogate the general rule under former section 301(a)(7) of the Act, which requires both married parents and unmarried fathers to be physically present in the United States for 10 years (or five years, if the child was born after November 14, 1986) before the child's birth to transmit U.S. citizenship to that child. *Id.* Thus, the Court stated that "[g]oing forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender," and that in the interim, the longer physical presence requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers. *Id.*

Although the Applicant requests us to follow the then-prospective Supreme Court's holding in *Morales-Santana* in his case, we find it does not apply here.

First, the law and issues in the Applicant's citizenship proceedings are different from those in the *Morales-Santana* decision issued by the U.S. Supreme Court. In *Morales-Santana*, the Court addressed acquisition of U.S. citizenship *at birth* under the provisions of sections 301(a)(7) and 309(c) of the Act; here, the Applicant claims he derived U.S. citizenship from his father *after birth* under former section 321 of the Act. Furthermore, the issue in *Morales-Santana* was the constitutionality of distinct physical presence provisions for transmission of U.S. citizenship at birth by unmarried U.S. citizen mothers and fathers. The Applicant does not explain on motion how this issue relates to the requirement of legal separation of parents under former section 321(a)(3) of the Act, or how the U.S. Supreme Court's holding might support a different outcome in his case.

In addition to U.S. Supreme Court decisions, we are bound by the Act, agency regulations, precedent decisions of the agency, 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 U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), which held that the distinction in former section 321(a)(3) of the Act based on parents' marital status was supported by a facially legitimate and bona fide reason, and the statute does not discriminate on the basis of gender. *See Barthelemy v. Ashcroft*, 329 F.3d 1062, 1067-68 (9th Cir. 2003). In that case, an individual, who was born out of wedlock, claimed derivative citizenship through his father asserting that former section 321(a)(3) irrationally classified children

seeking citizenship based on the prior marital status of their parents, and that it also impermissibly discriminated on the basis of gender. In rejecting the first argument, the Ninth Circuit explained that the legal separation requirement in the first clause helps protect the parental rights of the foreign national parent, and is therefore consistent with the statutory scheme. *Barthelemy v. Ashcroft*, 329 F.3d at 1066. The court also rejected the equal protection challenge to the second clause of former section 321(a)(3) of the Act, which provides for derivative citizenship upon "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." The court found that although this provision accords differential treatment to children of unmarried fathers as opposed to unmarried mothers, it does not discriminate based on gender because a child who has been legitimated may not derive U.S. citizenship under that section from either parent. *Id.* at 1067-68. While the court recognized that a child born out of wedlock who had never been legitimated might have a gender-based equal protection claim under the second clause of former section 321(a)(3) of the Act, it concluded that such claim would fail in light of the U.S. Supreme Court's holding in *Nguyen v. INS*, 533 U.S. 53 (2001).[1] *Id.* Accordingly, we find no basis for reconsideration of our conclusion that the Applicant did not derive U.S. citizenship from his father because his parents were not legally separated.

Moreover, we lack jurisdiction to independently rule on the constitutional issue the Applicant raises in the instant motion. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997) (like the Board of Immigration Appeals, we do not have appellate jurisdiction over constitutional issues.) Rather, our review is limited to determination of whether the Applicant has established that he meets the conditions to derive U.S. citizenship set forth in former section 321 of the Act. In this regard, we affirm that the record does not demonstrate that the Applicant satisfies any of that section's conditions to derive U.S. citizenship solely from his naturalized U.S. citizen father. The Applicant has not submitted evidence that would warrant a departure from this finding.

III. CONCLUSION

Based on the foregoing, we do not disturb our previous determination that the Applicant did not establish he derived U.S. citizenship from his father and that he is, therefore, ineligible for a Certificate of Citizenship.

ORDER: The motion to reconsider is denied.

Cite as *Matter of L-T-V-*, ID# 368359 (AAO June 27, 2017)

[1] The U.S. Supreme Court held in that case that "Congress' decision to impose requirements on unmarried fathers that differ from those on unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time of birth," and that the government has an important interest in requiring the father to prove paternity before citizenship attaches to the child. 533 U.S. at 62-68.