U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-D-

DATE: OCT. 31, 2018

APPEAL OF SAN ANTONIO, TEXAS FIELD OFFICE DECISION

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

The Applicant, who was born in Senegal in 1968, seeks a Certificate of Citizenship indicating he derived U.S. citizenship after birth through his father. Immigration and Nationality Act (the Act) section 321, 8 U.S.C. § 1432, *repealed by* Sec. 103(a), title I, Child Citizenship Act of 2000, Pub.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). 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 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 established his paternity by legitimation.

The Director of the San Antonio, Texas Field Office denied the application, concluding that only the Applicant's father became a naturalized U.S. citizen prior to his 18th birthday, and he did not establish his parents were legally separated, as required under former section 321 of the Act. [1]

On appeal, the Applicant claims that he has sufficiently established his parents were legally separated before he turned 18. [2]

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

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[1] The Director also determined that the Applicant was ineligible to derive citizenship pursuant to section 320 of the Act, 8 U.S.C. § 1431, because he was over the age of 18 when the provision went into effect. We agree, and the Applicant does not dispute this finding. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001) (section 320 of the Act applies only to individuals who were not yet 18 years old as of February 27, 2001. By then, the Applicant was already 32 years old.)

[2] The Applicant also claims that former section 321(a)(3) of the Act violates the Constitution by impermissibly discriminating on the basis of gender. We have no jurisdiction over constitutional equal protection claims. *See 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.) We shall therefore not address this issue.

I. LAW

The Applicant was born in Senegal on [redacted] 1968, to foreign national parents who never married, and he was admitted to the United States as a lawful permanent resident in February 1978. The record does not reflect that his mother became a U.S. citizen, and the Applicant is claiming derivative citizenship through his father, who became a naturalized U.S. citizen in October 1984.

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). Based on the Applicant's year of birth (1968), and the year that he turned 18 (1986), his derivative citizenship claim falls under former section 321 of the Act, which 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*[3] *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.

(Emphasis added). 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).

[3] The Applicant resides within the jurisdiction of the U.S. Fifth Circuit Court of Appeals, which requires the naturalized parent to have sole legal custody in order to satisfy former section 321(a)(3) of the Act requirements. *See Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006); *Kamara v. Lynch*, 786 F.3d 420 (5th Cir. 2015).

II. ANALYSIS

The Applicant has established that he meets some of the requirements for derivative citizenship under former section 321(a) of the Act. His father's naturalization certificate, for instance, demonstrates that his father became a naturalized U.S. citizen in 1984, when the Applicant was 16, as necessary under former section 321(a)(4) of the Act. The record also reflects that the Applicant was admitted into the country as a lawful permanent resident in 1978, when he was nine years old, and that he resided in the United States after his admission, as required under former section 321(a)(5) of the Act. The issue in this case is whether the Applicant has demonstrated that prior to his 18th birthday in 1986, he met the legal separation and custody conditions set forth in former section 321(a)(3) of the Act.[4] Upon review, we find he has not.

The Applicant asserts the Director impermissibly determined that parents must be married in order for a legal separation to occur for former section 321(a)(3) of the Act purposes, and that he satisfied this requirement when a Senegalese court severed his mother's joint custodial arrangement in 1977 by awarding full guardianship and custody over him to his father. The Applicant cites to articles 281, 283, and 287 of the Senegalese Family Act (which he provides copies of) to support his claim, and he indicates these provisions show the court's order constituted a legal separation under Senegalese law. These provisions, however, do not discuss legal separation. Instead they reflect that a child is considered legitimate once parentage is established, and that a judge may transfer paternal power to a father if it is in the child's best interest (article 281); that under these circumstances, a father has a duty to maintain and provide for the child's needs and education (article 283); and court procedures to be followed during this type of court hearing (article 287). The Senegalese Family Act provisions therefore do not establish the Applicant's claims.

Even if these provisions demonstrate the Applicant's parents were legally separated under Senegalese law, which they do not, without a valid marriage beforehand, the Applicant cannot meet the requirements under United States law for derivation of citizenship. The term "legal separation" in section 321(a)(3) of the Act, has been defined to presuppose a valid marriage. *See Matter of H*, 3 I&N Dec. 742, 744 (BIA 1949) ("[s]ince the subject's parents were not lawfully joined in wedlock, they could not have been legally separated"); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003) (father raised child alone but the child did not derive citizenship upon his father's naturalization because his parents never married and his mother did not naturalize.) The term "legal separation" has been further defined in the context of derivative citizenship to mean either a limited or absolute divorce obtained through judicial proceedings. *See Matter of H*, 3 I&N Dec. at 743. The U.S. Fifth Circuit Court of Appeals (the court with jurisdiction over the Applicant's case) has also

[4] The Applicant does not assert, and the record does not reflect, that his parents married; that his mother became a naturalized U.S. citizen; or that his mother became deceased prior to his 18th birthday. He therefore does not meet former section 321(a)(1) of the Act requirements that both married parents became naturalized U.S. citizens prior to his 18th birthday. He has also not satisfied former section 321(a)(2) of the Act deceased parent conditions.

clarified that for former section 321(a)(3) of the Act purposes, the naturalization of only one parent results in the automatic naturalization of a child only when there has been a formal, judicial alteration of the marital relationship. *See Nehme v. INS*, 252 F.3d 415,426 (5th Cir. 2001).

Here, the Applicant acknowledges that his parents never married, and that they did not obtain a legal separation through divorce, which would meet former section 321(a)(3) of the Act conditions. Accordingly, he has not satisfied former section 321(a)(3) of the Act requirements.

III. CONCLUSION

The Applicant has not satisfied the legal separation conditions set forth in former section 321(a)(3) of the Act. Accordingly, he has not established eligibility for derivative citizenship through his U.S. citizen father under former section 321(a) of the Act.

ORDER: The appeal is dismissed.

Cite as *Matter of F-D-*, ID# 2421171 (AAO Oct. 31, 2018)