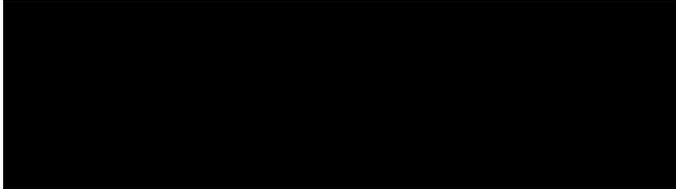




U.S. Citizenship
and Immigration
Services

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EB

FILE:



Office: PHOENIX, AZ

Date: **MAR 09 2006**

IN RE:

Applicant:



APPLICATION:

Application for Certificate of Citizenship pursuant to section 322 of the former Immigration and Nationality Act, 8 U.S.C. § 1433.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Phoenix, Arizona. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a Motion to Reconsider. The motion will be granted. The May 16, 2005, AAO Order dismissing the appeal will be affirmed.

The record reflects that the applicant was born on June 18, 1987, in Mexico. The applicant's father, [REDACTED] was born in Mexico on June 30, 1959. He acquired U.S. citizenship at birth through his U.S. citizen father. The applicant's mother, [REDACTED] was born on July 5, 1965. She is not a U.S. citizen. The applicant's parents married in Arizona on January 15, 1997, when the applicant was nine years old. The applicant seeks a Certificate of Citizenship pursuant to section 322 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1433.

The district director found that the applicant was ineligible for citizenship under section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433, because she failed to establish that she resided outside of the United States in the legal and physical custody of her U.S. citizen parent, or that she was temporarily present in the U.S. pursuant to a lawful admission and was maintaining such lawful status. The application was denied accordingly.

On appeal, the applicant asserted that she had filed her citizenship application before amendments to section 322 of the Act went into effect, and that her eligibility for citizenship should therefore be determined under section 322 of the former Immigration and Nationality Act (the former Act) provisions. The applicant additionally asserted that the U.S. Citizenship and Immigration Services district office in Phoenix, Arizona (CIS) had unreasonably delayed the processing of her application and violated her right to due process. The applicant indicated that she should not be penalized for CIS processing delays, and that she was entitled to citizenship under section 322 of the former Act.

In a decision dated, May 16, 2005, the AAO found that the applicant's entitlement to U.S. citizenship under section 322 provisions was not affected or changed by CIS processing delays, and that the applicant must fully meet the requirements for citizenship as set forth in the former and amended the Acts, in order to obtain a Certificate of Citizenship. The AAO found that the applicant did not qualify for citizenship under section 322 of the Act because she failed to establish that she resided outside of the United States in the legal and physical custody of her U.S. citizen parent, or that she was temporarily present in the U.S. pursuant to a lawful admission and was maintaining such lawful status. The AAO additionally found that the applicant did not qualify for citizenship under section 322 of the former Act, because she failed to establish that she met the section 322(a)(2) of the former Act requirement that she "is physically present in the U.S. pursuant to a lawful admission."

On Motion to Reconsider, the applicant asserts, through her father, that she entered the United States using a border crossing card and that she meets section 322(a)(2) of the former Act, "physically present in the U.S. pursuant to a lawful admission" requirements based on reasoning set forth in a February 13, 2003, AAO decision (submitted on motion by the applicant.) The applicant asserts that the February 12, 2003, AAO decision establishes that section 322(a)(2) of the former Act does not require an applicant to maintain an unexpired lawful status in order to be eligible for citizenship. The applicant concludes that she is therefore eligible for citizenship under section 322 of the former Act.

Section 322 of the former Act states, in pertinent part:

(a) Application of citizen parents; requirements

A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, "Secretary"] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [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.
- 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 [CIS] 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 Attorney General [Secretary] with a certificate of citizenship.

The AAO finds that the applicant has failed to establish that the AAO misapplied section 322(a)(2) of the former Act requirements, or that she is entitled to citizenship under section 322 of the former Act.

The AAO notes first that the applicant has referred to an unpublished administrative decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of the Secretary of Homeland Security or specific officials of the Department of Homeland Security designated by the Secretary, with concurrence of the Attorney General, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a). The decision referred to by the applicant has not been designated and published as a

precedent decision. The AAO is therefore not bound by the decision.

The AAO notes further that even if the unpublished decision referred to by the applicant was a precedent decision, the reasoning set forth in the decision nevertheless fails to establish that the applicant satisfied the section 322(a)(2) of the former Act requirement that she be “physically present in the U.S. pursuant to a lawful admission.” The unpublished decision referred to by the applicant states, in pertinent part, that section 322(a)(2) of the former Act requires an applicant to be physically present in the U.S. pursuant to a lawful admission, and that “[a] lawful admission includes a lawful admission for permanent residence or a lawful admission as a nonimmigrant visitor, and contemplates a lawful entry after inspection and authorization by an immigration officer.” The decision found that the applicant in that matter was present in the United States pursuant to the Family Unity Program, which the AAO considered to be proof of lawful admission.

The AAO notes that the unpublished decision referred to by the applicant did not indicate or state that an applicant under section 322 of the former Act is eligible for citizenship if his or her lawful admission status is expired. Moreover, the AAO notes that the applicant’s Family Unity Program status, discussed in the unpublished decision, was a pending immigration status which had not expired.¹ The applicant provided no other legal basis for her assertion that section 322 of the former Act allows an applicant who was lawfully admitted into the United States, but failed to maintain his or her lawful admission status, to obtain citizenship. Accordingly, based on the reasoning set forth in the May 16, 2005, AAO decision, the AAO finds that an applicant must be physically present in the U.S. pursuant to an unexpired lawful admission in order to satisfy section 322(a)(2) of the former Act requirements. The AAO finds that the applicant in the present matter has failed to establish that she meets section 322(a)(2) of the former Act requirements.

The AAO finds further that even if the applicant had met section 322(a)(2) of the former Act requirements, she would nevertheless remain ineligible for citizenship based on her failure to establish that she met the section 322(b) of the former Act requirements that her application be approved by the Service (CIS), and that she take an oath of allegiance prior to her eighteenth birthday.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. The AAO finds that the applicant has failed to meet her burden. The May 16, 2005, AAO decision dismissing the applicant’s appeal will therefore be affirmed.

ORDER: The previous AAO decision, dated May 16, 2005 is affirmed.²

¹ It appears the applicant applied for adjustment of status to that of a lawful permanent resident via the Family Unity Program set forth in the Immigration Act of 1990 (IMMACT 90). The Family Unity Program provided that certain illegal alien spouses and unmarried children of aliens who were legalized under the Immigration Reform and Control Act of 1986 (IRCA) could not be deported or required to depart the United States. Aliens approved under the Family Unity Program were additionally entitled to voluntary departure and worker’s authorization pending the adjudication of their adjustment of status applications. *See generally* www.USCIS.gov.

² The present decision is without prejudice to the applicant’s filing, if eligible, an N-400, Application for Naturalization pursuant to section 316 of the Act, 8 U.S.C. § 1427.