U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21581614

Date: MAY 19, 2022

Motion on Administrative Appeals Office Decision

Form N-600, Application for Certificate of Citizenship

The Applicant was born abroad in 1977 to unmarried parents and seeks a Certificate of Citizenship to reflect that he derived U.S. citizenship after birth from his naturalized U.S. citizen father under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432.[1] An individual who is claiming derivative citizenship through only one naturalized parent must show, among other possibilities, that there has been legal separation of the parents and the naturalized parent had legal custody of the individual.

The Director of the New York, New York District Office denied the Form N-600, concluding, in pertinent part, that the Applicant did not establish derivative citizenship under former section 321 of the Act because only his father had naturalized prior to the Applicant's eighteenth birthday, and the Applicant did not show that his parents were legally separated and his father had legal custody of the Applicant at that time.[2] The Applicant appealed the adverse decision to our office, and we remanded the matter because the record reflected that the U.S. Department of State (DOS) issued him a U.S. passport. After DOS revoked the Applicant's passport, the Director again denied the Form N-600 on the grounds stated above and we subsequently affirmed the adverse decision on certification. The Applicant filed a combined motion to reopen and reconsider our decision, and we subsequently dismissed the motions.

The matter is now before us on a second combined motion to reopen and reconsider. The Applicant submits additional evidence and reasserts that he derived U.S. citizenship from his father pursuant to former section 321 of the Act, because his parents were married and divorced before he was born, and his father thereafter had legal custody. He also asserts that he was not properly served by his prior attorneys of record and therefore asks that the matter be reopened and reconsidered.

Upon review, we will dismiss the motion to reopen and reconsider.

[1] Repealed by Sec. 103(a), title I, Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat. 1631 (2000).
[2] The Applicant did not contest the Director's additional conclusion that the Applicant was over 18 years old in February 2001, and that he therefore cannot benefit from the provisions of current section 320 of the Act.

I. LAW

A motion to reopen is based on documentary evidence of new facts, and a motion to reconsider must show that our decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy to the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(2)-(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit; however, a motion that does not meet the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

As previously discussed, to establish derivative citizenship the Applicant must show that he satisfied certain conditions prior to his eighteenth birthday, and in adjudicating his citizenship claim we apply "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). Here, the applicable law is former section 321 of the Act, which governed derivative citizenship in 1995 when the Applicant's father naturalized, and when the Applicant turned 18 years of age.

Former section 321 of the Act provided in pertinent part that:

> (a) A child born outside of the United States of alien parents . . . 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
>
> (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-
>
> (4) Such naturalization takes place while such child is under the age of 18 years; and
>
> (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 noncitizen and bears the burden of proof to establish his claim to citizenship by a preponderance of credible evidence. *Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008).

II. ANALYSIS

A. Claims Regarding Prior Attorneys

As an initial matter, the Applicant has provided a separate statement on motion asking that the matter be reopened and reconsidered because his prior attorneys had not properly represented his claims to U.S. citizenship before USCIS or otherwise neglected to give him advice about required evidence or statutory deadlines. If the Applicant is seeking reopening and reconsideration based on claims to have had ineffective assistance of counsel, then his statement does not satisfy the three prongs set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Regardless, we have considered the Applicant's second combined motion and related evidence below.

B. Former Section 321 of the Act

The record reflects that the Applicant was born in the Dominican Republic in [redacted] 1977 to noncitizen parents who were previously married to each other; however, the parents had divorced in 1976, over a year before his birth. The Applicant's birth certificate shows that his father registered the birth in the Dominican Republic, acknowledging the Applicant as his child.[3] The Applicant's mother subsequently filed an immigrant visa petition on the Applicant's behalf, and in 1985 he was admitted to the United States as a lawful permanent resident. In July 1995, when the Applicant was 17 years old, his father became a U.S. citizen through naturalization. The Applicant's mother naturalized in 1996, after the Applicant had turned 18 years of age. The Applicant filed the instant Form N-600 asserting that he derived U.S. citizenship under the first clause of former section 321(a)(3) of the Act upon his father's naturalization.

To prevail on his derivative citizenship claim through his father, the Applicant must establish that: (1) his parents legally separated; and (2) his naturalized U.S. citizen father had legal custody of the Applicant during the relevant period prior to his eighteenth birthday.

1. Legal Separation

In our previous appeal, certification, and combined motion decisions, which we incorporate here by reference, we concluded that the Applicant did not satisfy the legal separation condition at former section 321(a)(3) of the Act because he was born out of wedlock, and he did not show that his parents later married and legally separated.

The term "legal separation" in the context of derivative citizenship means either a limited or absolute divorce obtained through judicial proceedings. *Matter of H*, 3 I&N Dec. 742, 743 (BIA 1949). *See also Morgan v. Attorney General*, 432 F.3d 226, 233 (3d Cir. 2005) (finding no legal separation absent a judicial decree); *Nehme v. INS*, 252 F.3d 415, 426 (5th Cir. 2001) (finding that "in the United States, the term 'legal separation' is uniformly understood to mean ***judicial*** separation") (emphasis in original). Further, the term "legal separation" in former section 321(a)(3) of the Act presupposes a

[3] We previously concluded that that the Applicant was legitimated by his father under Dominican law. *See Matter of Cabrera*, 21 I&N Dec. 589 (BIA 1996) (holding that the act of acknowledging paternity in accordance with Dominican law constitutes legitimation for immigration purposes).

valid marriage. *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003) (child did not derive citizenship upon his father's naturalization because his parents never married and his mother did not naturalize; father raised the child alone); *Matter of H,* 3 I&N Dec. at 744 ("[s]ince the subject's parents were not lawfully joined in wedlock, they could not have been legally separated.") Moreover, legal custody vests by virtue of "either a natural right or a court decree." *See Matter of Harris,* 15 I&N Dec. 39, 41 (BIA 1970).

On motion, the Applicant claims that the plain language of the statute at former section 321(a)(3) requires only that the Applicant's parents have been legally separated and does not state that any legal separation must take place after the birth of the child. We agree that the legal separation condition at former section 321(a)(3) of the Act may permit the Applicant to derive U.S. citizenship. However, to do so the Applicant must show that he was in his U.S. citizen parent's legal custody, which, as we discuss below, he has not done.

2. Legal Custody of the Naturalized Parent Not Established

Because the Applicant's parents divorced before he was born, their divorce decree did not address custody and he did not show that his father had "actual uncontested custody," because, as we discussed in our prior decision, the record shows that the Applicant immigrated to the United States to reunite with his mother after she petitioned for him, and he resided with her following his admission for permanent residence until at least her naturalization in 1996.

The first step in deciding whether a naturalizing parent has "legal custody" of a child for purposes of derivative citizenship under former section 321(a)(3) of the Act is to determine whether a judicial decree or statutory grant awards custody to the naturalizing parent. *Garcia v. USICE*, 669 F.3d 91, 95 (2d Cir. 2011) (citing *Bagot v. Ashcroft*, 398 F.3d 252, 268-69 (3d Cir. 2005)); *Matter of M-*, 3 I&N Dec. 850 (BIA 1950). Here, because the Applicants' parents divorced before he was born, the divorce decree does not contain any provisions regarding his custody. Furthermore, the Applicant does not claim, and the record does not show, that a court in either the Dominican Republic or the United States granted his father legal custody of the Applicant at any time.

Where, as in this case, there is no "judicial determination or judicial or statutory grant of custody in the case of legal separation of the parent of a person claiming citizenship under section [321(a)(3) of the Act], the parent having actual uncontested custody is to be regarded as having 'legal custody'. . . ." *Matter of M-*, 3 I&N Dec. at 856. "Two predominant indicators of 'actual uncontested custody' are (i) the child's physical residence, and (ii) consent to custody by the non-custodial parent." *Garcia v. USICE*, 669 F.3d at 97.

We previously concluded that the record did not support the Applicant's claim that he was residing with his father and was in his "actual uncontested custody" at the time the father naturalized or thereafter, but before he turned 18 years old, as the historical contents of the Applicant's immigration file pointed to his residence with the mother during this period. Specifically, at the time of filing his Form N-400 in October 1994 and his naturalization interview in May 1995, the Applicant's father claimed that the Applicant resided in the Dominican Republic. Moreover, when the Applicant's mother submitted her own Form N-400 in June 1995, a month before the father's naturalization, she

represented that the Applicant resided with her at [redacted] Place in the Bronx and confirmed this representation at her naturalization interview in March 1996.

On motion, the Applicant provides a 2015 letter from a clinic that claims that "[s]ince March 12, 1985 to 1990," the Applicant's father "became" the Applicant's legal guardian, and that they resided at an address on [redacted] Avenue in the Bronx. The Applicant includes a 2022 letter from a dentist, who stated that the Applicant and his father were patients "since 1995 to 1998," that the Applicant's father was the Applicant's "legal guardian," and that the father and the Applicant had resided at an address on [redacted] Avenue in the Bronx while they were patients. Another 2022 letter from a physician states that the Applicant had been a patient "[s]ince 1993 to 1997," that the Applicant's father was the Applicant's "legal guardian," and that "they" had resided at an address on [redacted] Avenue in the Bronx. The letters do not include additional details, including a specific date when the Applicant became a patient, or describe how they were aware that the Applicant's father was a *legal* guardian.

With respect to discrepancies between the record and claims on each of his parents' Form N-400 applications about where the Applicant had been residing when his father naturalized in 1995, the Applicant claims his father had accurately stated that the Applicant was residing in the Dominican Republic. According to the Applicant, when he was a teenager his father had decided that the Applicant should finish his secondary school in the Dominican Republic. He provided a letter from the president of Secondary Schoo [redacted] who stated that the Applicant had finalized his secondary studies there in the 1994-1995 school period. However, the letter does not include transcripts or any other evidence, to show that the Applicant had attended school and the actual dates of attendance, including the final day of attendance in 1995. The record does not contain evidence that the Applicant traveled to the school in 1994 or back to the United States when his claimed education abroad was completed in 1995. Moreover, if the Applicant was residing in the Dominican Republic from 1994 to 1995, as the Applicant now asserts on motion, then the record does not show that he was residing in the actual uncontested custody of his father, as claimed, because his father was residing in the United States during this same period. Finally, the new evidence does not resolve the contradictory information in the mother's Form N-400, which reflected that she had claimed that the Applicant was in fact residing with her from 1985 to 1996. The Applicant must resolve these discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the above, we conclude that the new evidence does not resolve inconsistencies and overcome our previous determination that the Applicant did not establish that he resided with his naturalized U.S. citizen father and was therefore in the father's "actual uncontested custody" during the relevant time period of July 1995 to December 1995. Accordingly, we need not address whether the Applicant has satisfied the second element of actual uncontested custody, which requires him to show that his mother agreed to his residence with the father, and in his father's care.[4]

[4] Instead, we reserve the issue. Our reservation of the issue is not a stipulation that the Applicant has satisfied this requirement. Rather, as the Applicant has not established that his parents were legally separated and that he resided with his father, he is ineligible for derivative citizenship under former section 321(a)(3) of the Act on these grounds alone and our determination concerning the mother's consent would not change the outcome.

III. CONCLUSION

We previously concluded that the Applicant, who was born out of wedlock, did not establish derivative citizenship through his naturalized U.S. citizen father under former section 321(a)(3) of the Act, because he did not show that his parents married after his birth and that they legally separated before he turned 18 years old. We further determined that the Applicant also did not demonstrate that his father met the legal custody condition under the same section. The Applicant has not identified legal or USCIS policy errors in our previous decision, and the new evidence he provided with in the context of the motion before us insufficient to establish that he met the legal custody conditions at former section 321(a)(3) of the Act for derivative citizenship. Consequently, reopening of these proceedings and reconsideration of our prior adverse decision is not warranted. The Applicant's request for a Certificate of Citizenship therefore remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.