U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22722055

Date: SEPT. 22, 2022

Appeal of Kendall Field Office Decision

Form N-600, Application for a Certificate of Citizenship

The Applicant seeks a Certificate of Citizenship to reflect that he derived U.S. citizenship from his mother under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432.[1] Generally, to derive U.S. citizenship from a parent or parents an individual must satisfy certain statutory conditions before turning 18 years of age.

The Director of the Kendall Field Office in Miami, Florida denied the application, concluding that the Applicant was ineligible for a Certificate of Citizenship under former section 321 of the Act because he did not establish, as required that his parents were legally separated before he turned 18 years of age and his mother had legal custody.[2]

On appeal, the Applicant asserts that although his parents did not divorce, he nevertheless met his burden of proof to show that he was under the legal custody of his naturalized his U.S. citizen mother before he was 18 years old, and the Director's decision was therefore in error.

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

I. LAW

The Applicant was born in Cuba in 1976 to married noncitizen parents. In 1980, at the age of four years the Applicant and his mother were paroled into the United States. The Applicant's status was adjusted to that of a lawful permanent resident in 1985, retroactive to the date of his 1980 parole. The Applicant's mother became a U.S. citizen through naturalization in 1987, when the Applicant was 11 years old. The Applicant is claiming derivative citizenship solely through his mother, and there is no evidence that his father is or ever was a U.S. citizen.

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[1] Repealed by Sec. 103(a), title I, Child Citizenship Act of 2000 (CCA), Pub.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 Director also found the Applicant ineligible to derive citizenship under current section 320 of the Act, 8 U.S.C. § 1431, as amended by the CCA because he was over the age of 18 years when the amendment took effect. The Applicant does not dispute this finding on appeal. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001) (Current section 320 of the Act applies only to individuals who were not yet 18 years old as of February 27, 2001, its effective date. The Applicant was 25 years old by then.)

To determine whether the Applicant derived U.S. citizenship from his mother we apply "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales,* 401 F.3d 1069, 1075 (9th Cir. 2005). The last critical event before the Applicant turned 18 years of age is his mother's naturalization in 1987. At that time, former section 321 of the Act governed derivative citizenship, and 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 establishing his claim to U.S. citizenship by a preponderance of credible evidence. *Matter of Baires-Larios,* 24 I&N Dec. 467, 468 (BIA 2008). Under the preponderance of the evidence standard, the Applicant must demonstrate that his claim is "probably true," or "more likely than not." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

There is no dispute that the Applicant was under the age of 18 years when he began residing in the United States as a lawful permanent resident and when his mother naturalized as a U.S. citizen, as required in former sections 321(a)(4)-(5) of the Act. The remaining issues are: (1) whether the Applicant has shown that his parents were legally separated before he turned 18 years and, if so (2)

whether his mother had legal custody as required under the first clause of former section 321(a)(3) of the Act to derive U.S. citizenship solely from his mother.[3]

In support of his Form N-600, the Applicant submitted, in part a copy of his parents' marriage certificate, his birth record, documents pointing to his residence in the United States with the mother, and the mother's affidavit in which she attested that she separated from the Applicant's father in 1985 but did not divorce him because of her religious beliefs.

The Director determined that because the Applicant's parents did not divorce, he did not satisfy the requirement of the parents' "legal separation" for derivative citizenship under former section 321(a)(3) of the Act. We have reviewed the entire record, as supplemented on appeal and conclude that the Applicant has not overcome this determination.

The term "legal separation" in the context of derivative citizenship means either a limited or absolute divorce obtained through judicial proceedings. *See Matter of H*, 3 I&N Dec. 742 (BIA 1949). *See also*, *Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981) (a married couple that simply lives apart with no plans of reconciliation is not "legally separated.") Similarly, the U.S. Circuit Court of Appeals for the Eleventh Circuit, in whose jurisdiction these proceedings arise, held that for purposes of former section 321 of the Act, "[l]egal separation is a bright line marking the disunion of a married couple . . .." *Levy v. U.S. Attorney General*, 882 F.3d 1364, 1368 (11th Cir. 2018). Here, the Applicant does not contest that his parents did not divorce or obtain a legal separation through judicial proceedings before he turned 18 years of age in 1994. He therefore has not established that there was a "legal separation" of his parents, a threshold requirement for derivative citizenship under the first clause of former section 321(a)(3) of the Act.

We acknowledge the Applicant's statements on appeal that his parents' religious beliefs prevented them from divorcing, as well as additional evidence indicating that he resided with his mother when she naturalized as a U.S. citizen. We also recognize the Applicant's claim that even though his parents were not divorced U.S. Citizenship and Immigration Services (USCIS) may consider "other factual circumstances" in making a legal custody determination in his case. In support, he points to USCIS Policy Manual guidance concerning legal custody determinations in adjudicating derivative citizenship claims under current section 320 of the Act. 12 *USCIS Policy Manual*, H.4(B) (referencing corresponding regulations at 8 C.F.R. § 320.1). However, as explained in the Director's decision and noted above, the Applicant is not eligible for the benefits of the amended section 320 of the Act because he was already over the age of 18 years when that section went into effect on February 27, 2001. Consequently we may not apply the legal custody requirements under current section 320 of the Act, as explained in 8 C.F.R. § 320.1 and related sections of the Policy Manual, in his case. Rather, the Applicant must show that he satisfied the relevant conditions under former section 321 of the Act, which specifically requires him to establish, as an initial matter that his parents were "legally separated" to derive U.S. citizenship solely from his mother.

[3] The Applicant does not claim derivative citizenship under former section 321(a)(1) or (2) of the Act, and there is no evidence that his father became a naturalized U.S. citizen or died before the Applicant's 18th birthday, as required under those sections. Nor does the Applicant claim eligibility to derive citizenship under the second clause of former section 321(a)(3) of the Act as his mother's out of wedlock child whose paternity had not been established by legitimation.

As the Applicant concedes that his parents were not "legally separated" during the relevant period before his 18th birthday, he is ineligible to derive U.S. citizenship from his mother under the first clause of former section 321(a)(3) of the Act on that basis alone. Accordingly, we do not reach the issue of whether the Applicant has established that his mother met the "legal custody" requirement under the same section.[4]

ORDER: The appeal is dismissed.

[4] Instead, we reserve the issue. Our reservation is not a stipulation that the Applicant would meet the legal custody condition had he been able to establish legal separation of his parents, and should not be construed as such. Rather, as the Applicant has not established the prerequisite legal separation of parents there is no constructive purpose to addressing his mother's custody, because it would not change the outcome of the appeal.