Comment on Form N-600K under OMB Control No: 1615-0087
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Submitted to: **USCISFRComment@dhs.gov**

I. Introduction: Filing On-Time, Eligibility Deadline, Danger of Age-Out.

USCIS has added a New Heading on the form instructions: "**Processing Information"**. This is a good move but could use just a little more information. The eligibility for benefits under INA § 322 are limited and do have a finite end. A "child" can **age-out of eligibility** for this expedited naturalization process. This is made clear in the statute and evident in the implementing regulations. The form has a new place to designate a USCIS Office (*see section* **V.** *below*) but it is not emphasized or accompanied by any explanation about the importance of why one must be chosen or any of the very real consequences of inadvertent delays.

II. Implementing Regulations.

8 CFR PART 322—CHILD BORN OUTSIDE THE UNITED STATES; REQUIREMENTS FOR APPLICATION FOR CERTIFICATE OF CITIZENSHIP

§ 322.5 What happens if the application is approved or denied by the Service?

(a) *Approval of application.* If the application for certificate of citizenship is approved, after the applicant takes the oath of allegiance prescribed in 8 CFR part 337, unless the oath is waived, the Service will issue a certificate of citizenship. **The child is a citizen as of the date of approval and administration of the oath of allegiance. [Emphasis added.]**

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§ 322.3 How, where, and what forms and other documents should the United States citizen parent(s) file?

(a) *Application.* An application for a certificate of citizenship under this section on behalf of a biological child shall be submitted on Form N–600, Application for Certificate of Citizenship, by the U.S. citizen parent(s). An application for a certificate of citizenship under this section on behalf of an adopted child shall be submitted on Form N–643, Application for Certificate of Citizenship in Behalf of An Adopted Child by U.S. citizen adoptive parent(s). The application must be filed with the filing fee required in §103.7(b)(1) of this chapter. **The U.S. citizen parent should include a request with the** N–600 or N–643**, noting preferred interview dates, and should allow sufficient time (at least ninety days) to enable the Service office to preliminarily adjudicate the application, schedule the interview, and send the appointment notice to the foreign address. [Emphasis added.]**

III. The Controlling Statute.

A. INA § 322 [8 USC § 1433] Children born and residing outside the United States; conditions for acquiring certificate of citizenship.

[NOTE: Substitute Secretary of Homeland Security for Attorney General and, in this case, USCIS is the delegated agency within DHS.]

(a) A **parent** who is a citizen of the United States (*or, if the citizen parent has died during the preceding 5 years, a citizen grandparent or citizen legal guardian*) **may apply for naturalization on behalf of a child** born outside of the United States who has not acquired citizenship automatically under section 320. The Attorney General **shall issue a certificate of citizenship to such applicant upon proof, to the satisfaction** of the Attorney General, **that the following conditions have been fulfilled:**

(1) At least one parent (or, at the time of his or her death, was) is a citizen of the United States, whether by birth or naturalization.

(2) The United States citizen parent--

(A) has (or, at the time of his or her death, had) 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; or

(B) has (or, at the time of his or her death, had) a citizen parent who 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.

(3) The child is under the age of eighteen years.

(4) The child is residing outside of the United States in the legal and physical custody of the applicant (or, if the citizen parent is deceased, an individual who does not object to the application).

(5) The child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

(b) Upon **approval of the application** (which may be filed from abroad) and, except as provided in the last sentence of section 337(a) , **upon taking and subscribing before an**

officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the **child shall become a citizen** of the United States and **shall be furnished** by the Attorney General **with a certificate of citizenship**. **[Emphases added.]**

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B. It is noted that paragraph (c) of INA § 322 makes qualified **adopted** children eligible and paragraph (d) allows **U.S. Military dependents** to be administered the oath abroad.

In keeping with the above authorities, the form instructions should at least provide the same "warning" language contained in 8 CFR § 322.3(a) as to allowing "at least ninety days" *for processing* and the source of that warning. **Simply put, an eligible child must be sworn-in as a citizen while under the age of 18 years whether within the U.S. or abroad *if eligible for that option*.** If "Expedited Processing" were requested in order to avoid the "age-out" of the benefit due to the parent's lack of due diligence **or** naturalization close to the child's 18th birthday, USCIS *could* charge an additional surcharge. That is something to consider for the future.

IV. Pertinent Case-Law.

A. Derivative Citizenship Claim through Parents' Naturalization:

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan* ***v.*** *Gonzales*, 401 F.3d 1069, 1075 (91h Cir. 2005); accord Jordon **v.** Attorney General, 424 F.3d 320, 328 (31d Cir. 2005).

B. N-600 & N-600K Evidentiary Burden and Burden of Proof:

"There must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v. United States*, 449 U.S. 490, 506 (1981). 8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77,79-80 (Comm. 1989).

A person may only obtain citizenship in strict compliance with the statutory requirements imposed by Congress. *INS v. Pangilinan*, 486 *U.S.* 875, 884 (1988). Moreover, "it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect" and that any doubts concerning citizenship are to be resolved in favor of the United States. *Berenyi v. District Director, INS*, 385 U. S. 630, 637 (1 967). The applicant must meet this burden by establishing the claimed citizenship by a preponderance of the evidence. 8 C.F.R. § 341.2(c).

C. Powers Beyond USCIS' and AAO's Authority:

"Even if the applicant's assertions regarding the delays in his father's naturalization and his own application were true, the AAO is without authority to apply the doctrine of *equitable estoppel* to approve an application for derivative citizenship *nunc pro tunc.*"[1]

"The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of *equitable estoppel* so as to preclude a component part of USCIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (*BIA 1991). Res judicata* and *estoppel* are equitable forms of relief that are available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 103.1 (f)(3)(E)(iii) (as in effect on February 28, 2003) [and subsequent amendments, this includes N-600's]. Accordingly, the AAO has no authority to address the petitioner's *equitable estoppel* and *res judicata* claims."[2]

V. Filing and Interview Locations:

This form was previously filed at a "local" USCIS District or Sub-Office in the U.S. where the interview and processing was desired. This form is now being moved to a more centralized filing location at either a Lockbox or Nebraska Service Center (for U.S. Military dependents). The new form instructions do not emphasize and explain why the applicant must indicate a desired local USCIS Office location. However the N-600K form itself has been changed to provide a place to indicate this information under the signature in part 7 as shown in the table of changes associated with the form and on the new version that is posted at www.reginfo.gov:

> **1. Preferred Interview Location** *(City, State or USCIS office)*
> [text box]
> **2. Preferred Date** *(mm/dd/yyyy).*
> **NOTE: At least 90 days <u>after</u> filing this application and before your 18th birthday.**

There was previously no need to ask for this information because it was filed at a local field office where it would be processed from start to finish. This single line seems wholly inadequate for the purpose. A more substantial warning should be included in the form instructions. In addition, the form instructions *could* also direct the parents to the appropriate area of the agency website to figure out the USCIS Office location desired either domestically or abroad.

Thank you for the opportunity to comment.

Joseph P. Whalen

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[1] From a t recent non-precedent AAO Decision on an N-600 at: May192010_01E2309.pdf on www.uscis.gov

[2] A non-precedent AAO Administrative Decision pertaining to an *I-140, Immigrant Petition for Alien Worker*, as a Member of the Professions Holding an advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C.§ 1153(b)(2). *See:* Apr282009_01B5203.pdf on www.uscis.gov