**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**MOSCOL-BERNARD, ANTONIO**
**A035-047-966**
**SDC**
**146 CCA ROAD**
**LUMPKIN, GA 31815**

**DHS/ICE Office of Chief Counsel - SDC**
**146 CCA Road**
**Lumpkin, GA 31815**

**Name: MOSCOL-BERNARD, ANTONIO** **A 035-047-966**

**Date of this notice: 6/25/2013**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

TranC
Userteam: Docket

Immigrant & Refugee Appellate Center | www.irac.net

File: A035 047 966 - Lumpkin, GA

Date: JUN 25 2013

In re: ANTONIO MOSCOL-BERNARD

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Sarah Mazzie
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination of proceedings

The respondent appeals the Immigration Judge's January 25, 2013, decision denying his motion to terminate proceedings based on his claim of derivative citizenship through his mother's naturalization in 1984 under former section 321(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1432(a)(3). The appeal will be dismissed.

The only issue in this appeal is whether the respondent was legitimated by his father in Panama for purposes of his having derived United States citizenship through his mother's naturalization in 1984 (I.J. at 5-7). In her decision, the Immigration Judge concluded the respondent had not met his burden of proof under former section 321(a)(3) of the Act based on substantial evidence in the record showing that the delayed birth certificate, issued for the respondent in Panama in 1971 and containing both his mother's and father's names, is valid (I.J. at 5-7). *See Matter of Sinclair*, 13 I&N Dec. 613 (BIA 1970); *see also Matter of Maloney*, 16 I&N Dec. 650 (BIA 1978). In this regard, the Immigration Judge cited the evidence submitted by the government in the form of the respondent's Form FS-511, his father's Form N-550, and the records from the United States Citizenship and Immigration Services ("USCIS") regarding his father's immigration history (I.J. at 3 and 6). The Immigration Judge also found that the issues regarding the spelling of the last name of the respondent and his father contained in the evidence were technical issues rather than substantive and do not show the delayed birth certificate is not valid (I.J. at 6).

On appeal, the respondent makes numerous arguments regarding the Immigration Judge's conclusions and the evidence in the record. Notably, the majority of the arguments made by the respondent rely on his faulty premise that the Department of Homeland Security ("DHS") had the burden to prove by clear and convincing evidence to show that the respondent is *not* a United States citizen. *See* Respondent's Brief at 13-15, 18, 20-21. In this regard, we point out



Immigrant & Refugee Appellate Center | www.irac.net

that, where a case involves a claim of derivative citizenship, as here, a person born abroad, or outside of the United States, is presumed to be an alien. *See Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 330 (BIA 1969) (internal citations omitted). The respondent does not dispute his birth in Panama. Thus, he bears the burden of establishing his claim to derivative citizenship by a preponderance of credible evidence. *See id.*; *see also Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008). As such, the respondent's arguments that the Immigration Judge improperly shifted the burden of proof to him and that the DHS was required to prove he was not legitimated under section 321(a)(3) of the Act are without merit. *See* Respondent's Brief at 13-15. Likewise, the respondent's assertion that he was not required to provide any evidence is also without merit. *See* Respondent's Brief at 18.

We now turn to the evidence in the record. The DHS submitted the respondent's father's USCIS records; his father's Form N-550 (Application for Certificate of Citizenship); his own Form FS-511 which he used to enter the United States as a lawful permanent resident on April 13, 1975; and, a delayed birth certificate issued in Panama in 1971, 4 years after the respondent's birth, containing the name of the respondent's mother and the name of the respondent's father as "Antonio Moscol" (I.J. at 3). The respondent submitted a different Panama birth certificate showing his father's name as "Antonio Mascol," a copy of a birth certificate he claims is his brother's, and a high school identification card from New York (I.J. at 3). As found by the Immigration Judge, if the respondent's father's name appears on the birth certificate he has been legitimated according to the laws of Panama (I.J. at 5). *See Matter of Maloney*, *supra*. However, we have held that a delayed birth certificate does not necessarily provide conclusive proof of paternity. *See Matter of Bueno-Almonte*, 21 I&N Dec. 1029 (BIA 1997) Rather, a delayed birth certificate must be evaluated in light of other evidence in the record and the circumstances of the case (I.J. at 5-6). *See id.*

The respondent contends the delayed birth certificate is not valid because the surname for his father is"M-O-S-C-O-L" whereas he claims his father's surname is "M-A-S-C-O-L." Indeed, these different spellings are reflected in the evidence presented (I.J. at 6). However, as found by the Immigration Judge, review of the evidence in its entirety supports the determination that the different spellings are the result of a technical, not substantive, issue (I.J. at 6). *See id.* For example, the USCIS records provided by the DHS show the respondent's father's surname as "M-O-S-C-O-L" but further show the use of the alias "M-A-S-C-O-L," and the respondent's own FS-511, which he used to enter the United States, indicates his own name as "M-O-S-C-O-L" while his high school identification card shows the name "M-A-S-C-O-L" (I.J. at 6). Further, while the respondent argues the delayed birth certificate was not properly "authenticated" under 8 C.F.R. § 1287.6(a) (2013), we note that the document, the copy of which is faint, appears to contain an official seal from the Panamanian government. This is sufficient. *See Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011). We also find it notable that the respondent's mother, who resides in New York, was subpoenaed by the Immigration Court but did not appear to substantiate the respondent's claims, and she did not provide any other evidence to bolster the respondent's claims (I.J. at 7).

Under these circumstances, we agree the respondent has not met his burden of proof in establishing he derived United States citizenship under former section 321(a)(3) of the Act through his mother's naturalization in 1984 because the evidence in the record indicates he was



Cite as: Antonio Moscol-Bernard, A035 047 966 (BIA June 25, 2013)

Immigrant & Refugee Appellate Center | www.irac.net

legitimated by his father in Panama in 1971, many years before his mother naturalized (I.J. at 6-7). The respondent, who bears the burden of proof for his claim, has not submitted evidence to show that he was not legitimated such that he qualifies under former section 321(a)(3) of the Act (I.J. at 6-7). Finally, we are unpersuaded by the respondent's contention that the DHS was obligated to turn over its files for both his mother and father. *See* Respondent's Brief at 25-27.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

Immigrant & Refugee Appellate Center | www.irac.net

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**LUMPKIN, GEORGIA**

| | | |
|---|---|---|
| **IN THE MATTER OF:** | ) | **In Removal Proceedings** |
| | ) | |
| **MOSCOL-BERNARD, Antonio** | ) | **File No. A 035 047 966** |
| | ) | |
| **Respondent** | ) | |
| | ) | |

**CHARGES:** Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("Act" or "INA"), as amended, in that, at any time after admission, Respondent has been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, an offense relating to the illicit trafficking in a controlled substance, as described in section 102 of the Controlled Substances Act, including a drug trafficking crime, as defined in section 924(c) of Title 18, United States Code.

**APPLICATION:** Section 321(a)(3) of the Act; Post-Conclusion Voluntary Departure

## APPEARANCES

**ON BEHALF OF THE RESPONDENT:**
*Pro Se*

**ON BEHALF OF THE GOVERNMENT:**
Assistant Chief Counsel
Department of Homeland Security
146 CCA Road
Lumpkin, Georgia 31815

## DECISION AND ORDER OF THE IMMIGRATION JUDGE

### I. PROCEDURAL HISTORY

Respondent is a male native and citizen of Panama. Respondent was admitted to the United States at New York, New York on April 13, 1975 as a lawful permanent resident. On November 19, 2007, Respondent was convicted in the United States District Court of North Carolina for the offense of Distribution of More than Five Grams of a Controlled Substance, to wit: Cocaine Base (Crack), in violation of section 841(a)(1) of Title 21 of the United States Code. *See* Exh. 1.

On June 8, 2012, the Department of Homeland Security ("Department" or "DHS") initiated removal proceedings against Respondent through its issuance of a Notice to Appear ("NTA"). The Department charged Respondent with removability pursuant to section 237(a)(2)(A)(iii), in that, at any time after admission, Respondent has been convicted of an



Immigrant & Refugee Appellate Center | www.irac.net

aggravated felony as defined in section 101(a)(43)(B) of the Act, an offense relating to the illicit trafficking in a controlled substance, as described in section 102 of the Controlled Substances Act, including a drug trafficking crime, as defined in section 924(c) of Title 18 of the United States Code.

On June 20, 2012, Respondent appeared before the Court, *pro se*, for his initial master calendar hearing. Respondent alleged he derived United States citizenship from his mother pursuant to her naturalization, and he informed the Court of his desire to seek relief accordingly. The Court adjourned the case to permit the Department time to evaluate Respondent's claim to United States citizenship, as well as to permit Respondent time to decide if he desired representation by counsel.

On July 2, 2012, Respondent appeared, *pro se*, for a master calendar hearing. The Department informed the Court that, pursuant to its review of Respondent's claim to citizenship, as well an evaluation of the matter by the Offices of Chief Counsel, it was determined that Respondent did not derive United States citizenship from his mother.

On July 3, 2012, the Department submitted a Position Statement Regarding the Respondent's Claim to United States Citizenship ("Position Statement") indicating Respondent did not derive citizenship from his mother, as Respondent was born out of wedlock and his paternity was established by legitimation prior to her naturalization in the United States, which renders him ineligible for relief under the applicable law – section 321(a)(3) of the Act. The Department also submitted a translated copy of Respondent's delayed birth certificate. The Court adjourned the case to review Respondent's claim, as well as to permit Respondent time to retain counsel.

Respondent appeared, *pro se*, for a master calendar hearing on July 31, 2012. The Court advised Respondent that, in order to attempt to substantiate his claim to United States citizenship, he might file with United States Citizenship and Immigration Services ("USCIS"), or try to obtain a United States passport. The Court adjourned the case to permit Respondent time to do so, as well as to retain counsel.

On October 1, 2012, Respondent appeared, *pro se*, for a master calendar hearing. Respondent informed the Court that he did not file a claim for United States citizenship with USCIS and he did not obtain a United States passport. Respondent argued he met his burden to show he is a citizen, and he need not submit the aforementioned as a result. Respondent did provide the Court with his mother's address, as his mother lives in New York, and could potentially assist Respondent with his claim, via testimony or evidence. The Court provided Respondent a Form N-660, Application for Certificate of Citizenship ("Form N-660"). The Court adjourned the case to permit Respondent time to complete the Form N-660 and to issue a subpoena to Respondent's mother.

On October 3, 2012, the Court issued a Subpoena to Respondent's mother – Merle Bernard – to appear before the Court on October 23, 2012 and present any evidence relating to Respondent's claim to United States citizenship.



Immigrant & Refugee Appellate Center | www.irac.net

The Department submitted an additional Position Statement on October 16, 2012, again opining Respondent is not entitled to derivative citizenship in the United States based on the applicable laws in Panama.

On October 23, 2012, Respondent filed a Motion for Termination of Removal Proceedings ("Motion for Termination"), wherein he claimed that he acquired citizenship pursuant to former section 321(a)(3) of the Act, based on the naturalization of his mother in 1984. Respondent submitted no evidence to this effect. The Court denied Respondent's motion.

Also on October 23, 2012, Respondent's mother failed to appear before the Court as directed by the Subpoena. On November 6, 2012, the envelope containing the Subpoena was returned to the Court marked "Unclaimed" and "ATTEMPTED NOT KNOWN."

On November 8, 2012, Respondent submitted an Objection to the Admission of D.H.S. Position Statement ("Objection to Admission"), wherein Respondent contended he was not given an opportunity to respond to the Position Statement. Respondent's case was again reset.

On November 15, 2012, Respondent appeared, *pro se*, for a master calendar hearing. Respondent submitted his Response to DHS Position Statement Regarding the Respondent's United States Citizenship Claim ("Response to Position Statement"), again alleging he acquired citizenship under former section 321(a)(3) of the Act. Yet again, Respondent submitted no evidence. In addition, Respondent's mother neither appeared before the Court nor submitted any documents or letters on Respondent's behalf. Pursuant to Respondent's Objection to Admission, the Court adjourned the case to permit Respondent time to review the Position Statement submitted by the Department.

On January 16, 2013, Respondent appeared, *pro se*, for his individual merits hearing. Respondent informed the Court that, despite the Court's repeat requests, he failed to file either a claim for citizenship with USCIS or apply for a United States passport. Respondent submitted to the Court the following: a copy of his apparent birth certificate from Panama, which is not translated; a copy of a document purported to be his brother's birth certificate from Brooklyn, New York; and, a copy of a high school identification card from Brooklyn, New York, which bears an unclear picture and signature, ostensibly Respondent's likeness and signature. The Department also submitted the following in evidence: a USCIS Central Index System record regarding Respondent's father; Respondent's father's Form N-550, Certificate of Naturalization; and, Respondent's Form FS-511, Immigrant Visa and Alien Registration ("FS-511"). Following the submission of evidence, Respondent argued the inaccuracy of his father's name on the birth certificate submitted by the Department. Respondent also claimed his father was in the United States in 1971, and, as a result, he could not have established Respondent's paternity by legitimation in Panama.

Additionally, at the individual merits hearing, Respondent admitted allegations three and four. The Court sustained the allegations of fact and the charge of removability sustained by clear and convincing evidence. The Court designated Panama as the country of removal, and found Respondent removable to Panama based on the charge contained in the NTA. Of note,

Immigrant & Refugee Appellate Center | www.irac.net

Respondent's mother never appeared before the Court to validate Respondent's claims, nor did she submit any evidence on Respondent's behalf.

At the close of evidence, the Court reserved written decision. The Court has now considered the arguments of both parties and the entire record carefully. All evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court will deny Respondent's claim of derivative United States citizenship.

## II. DISCUSSION

### A. Section 321(a)(3) of the Act

The Department carries the burden of proof to establish alienage by clear and convincing evidence. *See Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969); *see also* 8 C.F.R. § 1240.8(a). Section 101(a)(3) of the Act defines an "alien" as "any person not a citizen or national of the United States." Citizenship and nationality are acquired only by birth or naturalization. *See Matter of Navas-Acosta*, 23 I&N Dec. 586 (BIA 2003). There is a presumption of alienage for persons born abroad. *See Matter of Tijerina-Villarreal*, 13 I&N Dec. at 330 (citing *Matter of A.M.*, 7 I&N Dec. 332, 336 (BIA 1956) and *United States ex rel. Rongetti v. Neelly*, 207 F.2d 281–284 (7th Cir. 1953)). Upon proof of alienage by the Department, if there is a claim of derivative citizenship, then the burden shifts to the respondent to go forward with evidence to substantiate his or her claim. *See id.*; *see also Matter of Cantu*, 17 I&N Dec. 190, 194 (A.G. 1978). To determine if an individual derived citizenship through a parent's naturalization, the law in effect when the last material condition was met generally controls. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001); *see also Matter of L-*, 7 I&N Dec. 512 (R.C. 1957). Thus, in the instant matter, Respondent claims derivative citizenship under former section 321(a) of the Act pursuant to his mother's naturalization in the United States.

Though repealed, former section 321(a) of the Act states that "a child born outside of the United States" of alien parents "becomes a citizen" upon the fulfillment of the following conditions: (1) the naturalization of both parents; or (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 eighteen 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 eighteen years. *See* INA § 321(a)(1)–(3) (2000); *see also Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006).

Here, Respondent admits, and his birth certificate corroborates, the fact he was born in Panama on August 13, 1967. There is no indication in the evidence of record that Respondent's parents were married when he was born; Respondent's birth certificate is silent in this respect; and, Respondent indicated his parents were never married. *See* Response to DHS Position



Immigrant & Refugee Appellate Center | www.irac.net

Statement. In addition, Respondent's FS-511 indicates his mother was not married prior to her entry into the United States. Thus, it appears to the Court that Respondent was born out of wedlock. In addition, the evidence of record indicates Respondent was granted lawful permanent residence status when he entered the United States on April 13, 1975. And, Respondent's mother naturalized in the United States on February 14, 1984, when Respondent was sixteen years old. Accordingly, Respondent was under eighteen years old when his mother naturalized, and he was residing in the United States pursuant to a lawful admission for permanent residence when his mother naturalized. *See* INA § 321(a)(4)–(5) (2000). Thus, in light of the fact Respondent was born out of wedlock, he must derive citizenship from his mother under former section 321(a)(3) of the Act. Accordingly, the remaining inquiry is whether Respondent's paternity was established by legitimation prior to his mother's naturalization. *See* INA § 321(a)(3) (2000).

**1. Respondent is not Eligible for Derivative Citizenship Because His Paternity was Established by Legitimation.**

Respondent does not satisfy the requisites of former section 321(a)(3) of the Act, as his paternity was established by legitimation prior to his mother's naturalization in the United States. The evidence of record contains a translated copy of Respondent's delayed birth certificate, issued July 27, 1971, three years after Respondent's birth. *See* Position Statement, Exh. A. The birth certificate names Respondent's mother: Merle Amelia Bernard. *See id.* The birth certificate also names Respondent's father: Antonio Moscol. *See id.* And, according to the Board of Immigration Appeals ("Board" or "BIA"), a Panamanian birth certificate that lists the father's name, but makes no mention of the marital status of the parents, is sufficient to establish legitimation of a child. *See Matter of Sinclair*, 13 I&N Dec. 613, 614 (BIA 1970) (citing an opinion of the Attorney General of Panama for the proposition that at the moment the putative father acknowledges his paternity before the civil authorities, his status of father of the child becomes legally determined along with the obligations inherent in that status); *see also Matter of Maloney*, 16 I&N Dec. 650, 651 (BIA 1978) (indicating Panama abrogated the distinction between legitimate, natural, and illegitimate children). Thus, Respondent's paternity was established by legitimation in 1971, four years prior to his mother's naturalization in the United States. As such, Respondent is not eligible to derive citizenship from his mother in accordance with former section 321(a)(3) of the Act.

Respondent argues his paternity was not established by legitimation, as pursuant to *Matter of Bueno-Almonte*, 21 I&N Dec. 1029 (BIA 1997), a delayed birth certificate does not offer conclusive evidence of paternity. *See* Motion for Termination. In addition, Respondent contends his father was not in Panama at the time the birth certificate was issued, so he could not have acknowledged paternity, and the name on the delayed birth certificate is not his father's name. *See id.* Each argument will be addressed in turn.

First, with respect to Respondent's claim that a delayed birth certificate does not offer conclusive evidence of paternity, Respondent's argument is without merit. Respondent hinged his argument on *Matter of Bueno-Almonte*; Respondent's reliance is not entirely misplaced, as that case does indicate that a delayed birth certificate does not necessarily offer conclusive evidence of paternity. *See Matter of Bueno-Almonte*, 21 I&N Dec. 1029, 1033 (BIA 1997).



Immigrant & Refugee Appellate Center | www.irac.net

However, Respondent overlooks the fact the Board explicitly indicated that a delayed birth certificate must be evaluated "in light of the other evidence of record and the circumstances of the case[,]" and, in the case at bar, there exists substantial evidence affirming the validity of the delayed birth certificate. *See id.* In the instant matter, the Department of State utilized the delayed birth certificate to establish Respondent's relationship to his mother and to grant him lawful permanent residence status. Moreover, the FS-511 submitted to the Department of State in conjunction with the delayed birth certificate indicates Respondent's father's name is Antonio Moscol, the same name listed on the delayed birth certificate. Additionally, the FS-511 indicates Antonio Moscol resided at Calle 19 Rio Abajo # 12 in Colón, Panama, and Respondent resided at the same address. Taken together, the evidence is sufficient to validate the delayed birth certificate, as well as to conclude Respondent's paternity was established by legitimation.

Second, with regard to Respondent's claim that his father was in the United States in 1971 when the delayed birth certificate was issued and could not have acknowledged paternity as a result, the evidence indicates otherwise. According to the USCIS Central Index System, Antonio Moscol did not enter the United States until March 7, 1977, which was six years subsequent to the issuance of the delayed birth certificate. Additionally, as stated prior, Respondent's FS-511 indicates Antonio Moscol's address was Calle 19 Rio Abajo # 12 in Colón, Panama. The FS-511 is dated April 13, 1975, thus Respondent's father still resided in Panama at least four years after the issuance of the delayed birth certificate. As such, it is clear from the abovementioned that Respondent's father was in Panama at the time the delayed birth certificate was issued, and would have been able to acknowledge paternity thereof.

Finally, Respondent's assertion that the name on the delayed birth certificate is not his father's name is contrary to the great weight of the evidence. Respondent presented a copy of another birth certificate to this effect, which identifies his father as Antonio Mascol and Respondent as Antonio Aurelio Mascol Bernard. However, it appears from other evidence of record that the spelling of Respondent's father's surname, and in turn Respondent's surname, is consistently problematic. Respondent signed his FS-511 as Antonio Mascol, while the remainder of the FS-511 indicates his name is Antonio Moscol. The student identification card provided by Respondent states his name is Antonio Mascol, and he signed the same. The entirety of Respondent's A-file identifies him as Antonio Moscol-Bernard. The heading of Respondent's Response to Position Statement reads Antonio Mascol Bernard, while the signature page reads Antonio Moscol Bernard, and it appears he signed Antonio Moscol Bernard. Respondent's Motion for Termination and Objection to Admission are consistent, insofar as they read Antonio Moscol Bernard throughout. As reflected by the aforementioned, it is clear to the Court that any inaccuracy on Respondent's Panamanian birth certificate is a mere technicality, and nothing more. As such, the birth certificate submitted by Respondent serves only to bolster the fact that Respondent's paternity was established by legitimation in Panama, as it clearly states his father's name. Moreover, Respondent never claimed that the man listed on the delayed birth certificate is not his father, or that anyone else is his father for that matter. And, Respondent clearly adopted his father's surname, as reflected by the totality of his A-file. Consequently, absent any evidence that Respondent's father did not place his name on the birth certificate, or that the birth certificate was procured by fraudulent means, the delayed birth certificate is sufficient to evince the fact paternity was established by legitimation in Panama.

Immigrant & Refugee Appellate Center | www.irac.net

While it is possible to prove paternity was not established by legitimation under the laws of Panama, Respondent has submitted no such evidence. Respondent must show that no legal mechanism existed in Panama through which his father could have asserted his parental rights, or that such legal mechanism existed in Panama, but was not employed by his father. The Court gave Respondent numerous opportunities to submit evidence to this effect, and Respondent refused to do so, continuously alleging it unnecessary. The Court also issued a Subpoena to Respondent's mother, as she could have undoubtedly shed light on the veracity of any claim maintained by Respondent. The Court finds it very telling that Respondent's mother failed to appear or submit anything, as she resides in New York, and she is likely the only person with knowledge of the situation sufficient to provide information on Respondent's behalf.

Accordingly, because Respondent submitted no evidence to negate the existence of paternity by legitimation, Respondent has not shown paternity was not established by legitimation. Therefore, the Court finds Respondent has not met his burden to show he is entitled to derivative citizenship through his mother. *See Matter of Tijerina-Villarreal*, 13 I&N Dec. at 330 (citing *Matter of A.M.*, 7 I&N Dec. 332, 336 (BIA 1956) and *United States ex rel. Rongetti v. Neelly*, 207 F.2d 281–284 (7th Cir. 1953)).

**B. Relief from Removal**

Having established that Respondent is not a United States citizen, the Court will turn to the question of Respondent's removability and any available relief thereof.

**1. Respondent Was Convicted of an Aggravated Felony Under Section 101(a)(43)(B) of the Act and is Removable as Charged Under Section 237(a)(2)(A)(iii) of the Act.**

Respondent was convicted of the offense of Distribution of More than Five Grams of a Controlled Substance, to wit: Cocaine Base (Crack), in violation of section 841(a)(1) of Title 21 of the United States Code. The Department charged him with removability pursuant to section 237(a)(2)(A)(iii) as having committed an aggravated felony under section 101(a)(43)(B) of the Act.

Pursuant to section 101(a)(43)(B) of the Act, the term "aggravated felony" encompasses illicit trafficking in a controlled substance, including a "drug trafficking crime," as defined in section 924(c) of Title 18 of the United States Code. A drug trafficking crime is defined as "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 *et seq.*)." 18 U.S.C. § 924(c)(2). "The Controlled Substances Act . . . prohibits the manufacture and distribution of various drugs, including marijuana . . . [and] provides that . . . it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." *See United States v. Oakland Cannabis Buyers' Cooperative and Jeffrey Jones*, 532 U.S. 483, 486, 489 (2001). For a person to be found removable illicit trafficking in a controlled substance, the drug must be listed as a controlled substance on the federal schedules, which are found at section 802 of Title 21 of the United States Code.



Immigrant & Refugee Appellate Center | www.irac.net

Here, the Court finds Respondent was convicted of a drug trafficking crime. Respondent was convicted of Distribution of More than Five Grams of a Controlled Substance, to wit: Cocaine Base (Crack), in violation of section 841(a)(1) of Title 21 of the United States Code. *See* Exh. 1. Cocaine Base (Crack) is a Schedule II controlled substance according to the federal schedules. *See* 21 C.F.R. § 1308.12. Thus, the remaining inquiry is whether Respondent's crime amounts to a felony punishable under the Controlled Substances Act. And, as noted above, distribution of drugs is a felony punishable under the Controlled Substances Act. *See* 21 U.S.C. § 841(a)(1). Accordingly, the Court finds Respondent was convicted of a drug trafficking crime, which amounts to an aggravated felony under section 101(a)(43)(B) of the Act, and Respondent is removable as charged under section 237(a)(2)(A)(iii) of the Act.

**2. Respondent is Not Eligible for Asylum, Withholding of Removal, or Cancellation of Removal for Lawful Permanent Residents Because He was Convicted of a Drug Trafficking Crime, an Aggravated Felony Under Section 101(a)(43)(B) of the Act.**

Because of his conviction for an aggravated felony, Respondent is not eligible for asylum or for cancellation of removal for permanent residents. *See* INA §§ 208(b)(2)(B)(i) and 240A(a). Additionally, although Respondent has not expressed a fear of persecution or torture upon returning to Panama, he would nevertheless be ineligible for withholding of removal because his conviction for trafficking in controlled substances is presumptively a particularly serious crime. *See Matter of Y-L*, 23 I&N Dec. 270 (A.G. 2002). Respondent offers no proof of extraordinary or compelling circumstances to overcome this presumption. *See id.* As such, Respondent is ineligible for withholding of removal. *See* INA §241(b)(3)(B); *see also* 8 C.F.R. § 1208.16(d)(2). Respondent would only be eligible for deferral of removal under the Convention Against Torture. *See* 8 C.F.R. § 1208.17. However, Respondent has indicated that he does not have a fear of persecution or torture upon his return to Panama and has made no such application for relief.

**3. Respondent is Not Entitled to Post Conclusion-Voluntary Departure Because He was Convicted of a Drug Trafficking Crime, an Aggravated Felony Under Section 101(a)(43)(B) of the Act.**

At the conclusion of removal proceedings, the court may grant voluntary departure in lieu of removal. *See* INA § 240B(b). The alien bears the burden to establish both that he or she is eligible for relief, and that he or she merits a favorable exercise of discretion. *See Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972); *see also Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999). To establish eligibility, the alien must prove that he or she: (1) has been physically present in the United States for at least one year immediately preceding service of the NTA; (2) is, and has been, a person of good moral character for at least five years immediately preceding his or her application for voluntary departure; (3) is not removable under section 237(a)(2)(A)(iii) (aggravated felony) or section 237(a)(4) (security and related grounds) of the Act; and (4) has established by clear and convincing evidence that he or she has the means to depart the United States and intends to do so. *See* INA § 240B(b)(1). The alien must be in possession of a valid travel document. *See* 8 U.S.C. § 1240.26(c)(2). He or she must also post a



Immigrant & Refugee Appellate Center | www.irac.net

voluntary departure bond in an amount necessary to ensure that he will depart. *See* INA § 240B(b)(3); *see also* 8 U.S.C. § 1240.26(c)(3). Furthermore, an alien is ineligible for voluntary departure if he was previously granted voluntary departure after having been found inadmissible for entering the United States without inspection pursuant to section 212(a)(6)(A) of the Act. *See* INA § 240B(c).

To determine whether a favorable exercise of discretion is warranted to grant an application for voluntary departure, the court must weigh the relevant adverse and positive factors, including the alien's prior immigration history; his or her criminal history, if any; the length of his or her residence in the United States; and, the extent of his or her family, business, and societal ties in the United States. *See Matter of Gamboa*, 14 I&N Dec. at 248; *see also Matter of Arguelles*, 22 I&N Dec. at 817; *see also Matter of Thomas*, 21 I&N Dec. 20, 22 (BIA 1995). No court has jurisdiction to review a decision to deny a request for voluntary departure. *See* INA § 240B(f).

In light of Respondent's conviction under section 841 of Title 21 of the United States Code, which constitutes an aggravated felony for drug trafficking under section 101(a)(43)(B) of the Act, Respondent is ineligible for post-conclusion voluntary departure. *See* INA § 240B(b)(1).

Accordingly, the Court enters the following order:

**ORDER**

**IT IS ORDERED** that Respondent's claim of derivative citizenship is **DENIED;**

**IT IS FURTHER ORDERED** that Respondent is **REMOVED** to Panama based on the charge contained in the Notice to Appear.

1/25/2013
Date

Honorable Saundra Arrington
United States Immigration Judge
Lumpkin, Georgia

Appeal Due 2/25/2013



Immigrant & Refugee Appellate Center | www.irac.net