

07-3257-cv

To Be Argued By:
DOUGLAS P. MORABITO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-3257-cv

ERIK, WILKS, ONEIL MYRON WILKS,
Plaintiffs-Appellants,

-vs-

STEVEN J. FARQUHARSON, DISTRICT DIRECTOR
IMMIGRATION AND NATURALIZATION SERVICE,
TERRANCE M. O'REILLY, DIRECTOR OFFICE OF
ADMINISTRATIVE APPEALS UNIT, JANET RENO,
US ATTORNEY GENERAL, DORIS MEISSNER,
COMMISSIONER IMMIGRATION AND
NATURALIZATION SERVICE,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE GOVERNMENT

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Statement of Jurisdiction

On September 22, 2000, the plaintiff-appellants, Erik Wilks (“Erik”) and his son, Oneil Wilks (“Oneil”), filed a declaratory judgment action under 28 U.S.C. § 2201 and 8 U.S.C. § 1503, seeking a declaration that Oneil was a citizen of the United States. GA 3; PA 1-9.¹

On September 30, 2002, the United States District Court for the District of Connecticut (Stefan R. Underhill, J.) dismissed Oneil’s complaint for lack of subject matter jurisdiction pursuant to 8 U.S.C. § 1503(a). GA 4; PA 39-44. On July 18, 2007, the district court dismissed Erik’s complaint upon finding that Oneil’s claim of derivative citizenship under former § 321(a) of the INA failed. GA 5, 8-9. This decision disposed of all parties’ claims, and final judgment entered on July 20, 2007. GA 5.

On July 27, 2007, Erik and Oneil filed a timely notice of appeal under Fed. R. App. P. 4(a). GA 10. This Court has appellate jurisdiction over the district court’s final judgment under 28 U.S.C. § 1291.

¹ Citations beginning with “PA” refer to pages in the plaintiffs-appellants’ appendix. The government’s appendix is referred to as “GA.”

**Statement of Issues
Presented for Review**

I. Whether the district court lacked subject matter jurisdiction over Oneil’s complaint under 8 U.S.C. § 1503 when that complaint was filed when Oneil’s status as a national of the United States was “in issue in . . . [a] removal proceeding.”

II. (A) Whether the merits of Oneil’s claim to citizenship are properly before this Court when Oneil waived this argument and Erik lacked standing to raise the claim on behalf of his son.

(B) In any event, whether Oneil became a citizen under former INA § 321 when his parents were never legally separated as required by that statute.

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-vs-

STEVEN J. FARQUHARSON, DISTRICT DIRECTOR
IMMIGRATION AND NATURALIZATION SERVICE,
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BRIEF FOR THE GOVERNMENT

Preliminary Statement

Plaintiffs-Appellants Oneil Myron Wilks, a native and citizen of Jamaica, and his father, Erik Wilks, a naturalized United States citizen, appeal from a final judgment of the United States District Court for the District of Connecticut (Stefan R. Underhill, J.). The district court dismissed Oneil's claim for a declaration of derivative citizenship after finding that it lacked subject matter jurisdiction under 8 U.S.C. § 1503(a). On the merits, it dismissed Erik's claim that Oneil had derivative citizenship under former INA § 321, finding that Oneil did not meet the requirements of that section.

This Court should affirm the judgment below. The district court lacked subject matter jurisdiction over Oneil's action under 8 U.S.C. § 1503(a). That statute provides that an individual may not institute a declaratory judgment action to obtain a declaration that he is a national when the issue of such person's status as a national of the United States "is in issue in any . . . removal proceeding." Because Oneil's claim of derivative citizenship was in issue in removal proceedings at the time Oneil filed his declaratory judgment action, the district court properly dismissed Oneil's claim.

Similarly, the district court properly dismissed Erik's claim brought on behalf of his son. Even if Erik could establish third-party standing to bring this claim, it fails on the merits. Oneil did not derive citizenship through his

parents under § 321 because Oneil's parents were not legally separated as required by that section.

The district court's judgment should be affirmed.

Statement of the Case

Oneil Myron Wilks was born in Jamaica on March 2, 1979. PA 25. His parents never married. PA 25. Oneil's father became a United States citizen through naturalization on January 9, 1987, PA 25, and Oneil lived in his father's custody after being admitted to the United States as a lawful permanent resident on July 14, 1991, PA 3-4.

In 1998, the former Immigration and Naturalization Service ("INS")² initiated removal proceedings against Oneil alleging that he was removable as an alien who had been convicted of an aggravated felony. PA 23. Oneil sought termination of the removal proceedings, arguing that he had derived citizenship through his father pursuant to INA § 322. PA 25-34. In 2001, the immigration judge ("IJ") denied Oneil's motion to terminate the proceedings and ordered Oneil removable. PA 38. Oneil thereafter

² The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, eliminated the INS and reassigned its functions to subdivisions of the newly created Department of Homeland Security. *See Spina v. Dep't of Homeland Security*, 470 F.3d 116, 119 n.1 (2d Cir. 2006). However, because all of the relevant actions in this case were undertaken by the INS, this brief will uniformly refer to that entity.

sought review of the IJ's decision with the Board of Immigration Appeals ("BIA"). *Wilks v. Gonzales* ("*Wilks II*"), 218 Fed. Appx. 55, 56 (2d Cir. 2007). Following the BIA's affirmation of the IJ's decision in 2003, Oneil petitioned for review to this Court under 8 U.S.C. § 1252(a), which determined that Oneil's claim of derivative citizenship lacked merit. *See id.* at 58.

In 1999, while the removal proceedings were pending, Oneil filed a N-600 application for a certificate of citizenship with the INS on the basis that he had acquired derivative citizenship as a result of his father's naturalization. PA 5. In 2000, INS District Director Steven J. Farquharson denied Oneil's N-600 application and Oneil sought review by the Administrative Appeals Office ("AAO"). PA 5-6. On August 22, 2000, the AAO denied Oneil's appeal and affirmed the District Director's decision. PA 6.

In September 2000, Oneil and Erik brought this action in the United States District Court for the District of Connecticut, seeking declaratory and injunctive relief under 28 U.S.C. § 2201, 8 U.S.C. § 1329 and 8 U.S.C. § 1503. GA 3; PA 1-9. In an order dated September 30, 2002, the district court dismissed Oneil's claim for a declaratory judgment, finding that it lacked subject matter jurisdiction over the claim under 8 U.S.C. § 1503. PA 39-44. The court dismissed Oneil's case without prejudice to re-filing after the disposition of his removal proceedings. PA 44.

On July 18, 2007, after this Court's decision denying Oneil's petition for review, the district court dismissed Erik's still-pending claim of derivative citizenship on behalf of Oneil. GA 8-9. Final judgment entered on July 20, 2007. GA 5.

On July 27, 2007, Oneil and Erik appealed the district court's final judgment. GA 10.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. Oneil's arrival in the United States

Oneil was born in Jamaica on March 2, 1979. PA 25. Oneil's father, Erik, and mother, Beulah Cassie, were never married. PA 25. On January 9, 1987, when Oneil was eight years old, his father became a United States citizen through naturalization. PA 25. On or about July 14, 1991, Oneil entered the United States as a lawful permanent resident and lived in his father's custody. PA 25-26.

**B. Oneil's N-400 application for naturalization
and first N-600 application for a certificate of
citizenship**

On August 17, 1995, at the age of sixteen, Oneil filed a Form N-400 Application for Naturalization. PA 39. At Oneil's N-400 interview, the INS officer informed Oneil that he had to be eighteen years of age or older to become naturalized under Form N-400. PA 40. The officer

instructed him to instead file a Form N-600 Application for Certificate of Citizenship. PA 40.

On June 18, 1996, when Oneil was seventeen years old, Erik and Oneil filed a Form N-600. PA 4, 41. On August 1, 1996, the INS informed Oneil that a mistake had been made when he appeared at his interview for naturalization. GA 3. According to the INS, Oneil could not claim citizenship through his father because his father never married Oneil's mother. GA 3. Oneil was instructed to resubmit Form N-400 when he turned eighteen. GA 3.

In 1997, when Oneil was eighteen years old, he resubmitted Form N-400, Application for Naturalization. PA 41. Around the time that Oneil's N-400 application was adjudicated, Oneil was convicted in Connecticut Superior Court for the offense of credit card theft, in violation of Connecticut General Statutes § 53a-128c. PA 5, 22. The state court sentenced Oneil to a one-year term of imprisonment. *Wilks II*, 218 Fed. Appx. at 56. On the basis of his conviction, Oneil's N-400 application was denied in March 1998. PA 4-5.

C. Removal proceedings and petition for review under 8 U.S.C. § 1252(a)

On December 15, 1998, the INS initiated removal proceedings against Oneil under § 240 of the INA by serving him a notice to appear. PA 23. In that charging document, the INS alleged that Oneil was removable as an alien who had been convicted of an aggravated felony. PA 23.

Before the IJ in Hartford, Connecticut, Oneil sought termination of the removal proceedings, claiming that he had derived United States citizenship through his father. PA 11, 25-34. Specifically, Oneil argued that in August 1995, when he applied for a certificate of citizenship based on the naturalization of his father, Oneil was eligible for a certificate of citizenship under INA § 322.³ PA 28. Oneil argued that the INS should be barred from removing him from the United States because it improperly denied his application for a certificate of citizenship in violation of his due process rights. PA 27-32. On January 9, 2001, the IJ denied Oneil's motion to terminate the removal proceedings and ruled Oneil removable. PA 35-36.

Oneil filed an appeal from the IJ's decision with the BIA, claiming that the IJ erred in failing to terminate the removal proceedings. PA 35. Specifically, Oneil argued that the removal order violated the Eighth Amendment because it is unconstitutional to deport a U.S. citizen. PA 35. Oneil additionally argued that he was unlawfully denied his naturalization "by the fault of the INS in 1995 and 2000 based on an improper understanding and application of the law and its abuse of administrative discretion." PA 35.

³ Oneil's Motion to Terminate Proceedings only addressed Oneil's claim of derivative citizenship under § 322. Oneil did not raise an argument of automatic citizenship under INA § 321(a) during the course of removal proceedings.

By order dated April 7, 2003, the BIA affirmed the IJ's order of removal without opinion. *See Wilks II*, 218 Fed. Appx. at 56. Oneil petitioned for review to this Court pursuant to 8 U.S.C. § 1252(a). *Id.*

At oral argument before this Court on May 17, 2006, the government acknowledged that the advice given by the INS to Oneil in connection with his application for naturalization was erroneous. GA 11-12. With the consent of the government, on June 19, 2006, this Court held the case in abeyance and stayed removal to give Oneil the opportunity to request a reduction of his sentence for credit card theft in state court, because a conviction for which the term of imprisonment is less than one year would not be considered an "aggravated felony." *See Wilks v. Gonzales ("Wilks I")*, 186 Fed. Appx. 93, 94 (2d Cir. 2006).

By letter dated September 11, 2006, Oneil's counsel informed this Court that he had decided not to make a motion for a *nunc pro tunc* modification of his state sentence because it was not in his client's best interests. *Wilks II*, 218 Fed. Appx. at 57. On September 27, 2006, this Court appointed *amicus* counsel for Oneil to consider, *inter alia*, whether Wilks had knowingly and voluntarily waived the relief potentially available to him through the filing of a *nunc pro tunc* modification motion in state court.⁴ *Id.*

⁴ This Court also directed *amicus* counsel to inquire into potential conflicts of interest between Oneil and his lawyer.

On February 26, 2007, after agreeing with *amicus* counsel that Oneil knowingly and voluntarily waived his rights to unconflicted counsel and to relief via a reduction in his state sentence, this Court issued an opinion rejecting Oneil's claim that he was a derivative beneficiary of his father's United States citizenship pursuant to § 322, and, alternatively, that on the facts of the case, he should be considered a national of the United States. *Id.* at 58. The Court found that, in the particular circumstances of the case, "neither of Oneil's contentions ha[d] merit." *Id.* Accordingly, the Court denied Oneil's petition for review and vacated the stays of removal. *Id.*

D. Denial of Oneil's second N-600 form for a certificate of citizenship

On May 20, 1999, while Oneil's removal proceedings were still pending, Oneil filed a second Form N-600 Application for Certificate of Citizenship, claiming that he should have been granted citizenship under § 322 at the time he filed the N-600 application in 1996. PA 41. In a decision dated April 7, 2000, INS District Director Steven Farquharson denied the N-600 application on two grounds. GA 4-5. He found that under § 321(a)(1), Oneil did not qualify to obtain United States citizenship through his father because both of his parents were not naturalized United States citizens. GA 5. Under § 322 of the INA, Oneil did not qualify for derivative citizenship because he was over the age of eighteen. *Id.*

On April 26, 2000, Oneil appealed the denial of the N-600 application to the Administrative Appeals Office

(“AAO”), arguing that the denial was based on an improper application of the law. PA 41. In a decision dated August 22, 2000, the AAO dismissed the appeal, finding that Oneil did not qualify for derivative citizenship under §§ 321 or 322. GA 6-10. The AAO found that, because § 321(a)(3) requires a legal separation of the parents for a child to qualify for citizenship and Oneil’s parents never married, Oneil’s father was not legally separated from Oneil’s mother. GA 8.

The AAO also found that, under 8 C.F.R. § 332.2(a), in order to be eligible for naturalization under § 322 of the INA, a child must “[b]e unmarried and under 18 years of age, both at the time of application and at the time of admission to citizenship.” GA 10. Because the record reflected that Oneil was over the age of eighteen, the AAO determined that Oneil was not eligible for the benefits of § 322. GA 10. The AAO stated that “[t]here is no provision under the law by which the applicant could have automatically acquired U.S. citizenship through his father’s naturalization.” GA 10. The AAO therefore affirmed the District Director’s decision and dismissed the appeal. GA 10.

E. Oneil’s initiation of the declaratory judgment action

In September 2000, while the removal proceedings were still pending, Oneil and Erik filed this action in the United States District Court for the District of Connecticut pursuant to 28 U.S.C. § 2201, 8 U.S.C. § 1329 and 8 U.S.C. § 1503, challenging the INS district director’s

denial of a certificate of citizenship in 1996 and the AAO's dismissal of his appeal to reopen the underlying denial of his application in 2000.⁵ PA 42. Oneil sought (1) an order directing the INS to show cause why Oneil was not a citizen; (2) an order enjoining the INS from removing Oneil from the United States pending adjudication of his complaint; and (3) a declaration that INS's denial of Oneil's application of citizenship was contrary to law.

The defendants moved to dismiss the action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and 8 U.S.C. § 1503(a), which prohibits the court from considering a citizenship claim that is in issue in removal proceedings. PA 42. By order dated September 30, 2002, the district court found that 8 U.S.C. § 1503(a)(2) divested the court of subject matter jurisdiction to hear Oneil's claim because Oneil's status as a United States national was "in issue" in removal proceedings.⁶ PA 43. The court dismissed Oneil's claim without prejudice to re-file "after disposition of the administrative proceedings." PA 44.

⁵ The original complaint, PA 1-9, named only Oneil as a plaintiff. The complaint was later amended to name both Oneil and Erik as plaintiffs. GA 4.

⁶ At the time of the district court's decision on September 30, 2002, Oneil's appeal of his order of removal was pending with the BIA.

Regarding Erik's claim on behalf of Oneil, the district court concluded that § 1503(a) did not implicate him, as he made no claim of being denied a right or privilege as a U.S. national, nor was his status as a national in issue in any such removal proceeding. PA 44. However, the district court stayed Erik's case pending resolution of Oneil's appeal of his order of removal. PA 44.

F. District court's ruling on Erik's claim of derivative citizenship under § 321(a)

On April 13, 2007, after this Court denied Oneil's petition for review and thus ended the removal proceedings, the district court invited the parties to submit briefing on the resolution of the remaining claims. GA 5. Counsel for Oneil and Erik submitted briefing on behalf of Erik, arguing that Oneil had acquired derivative citizenship through him. GA 5. Specifically, asserting third-party standing, Erik requested a declaratory judgment that Oneil automatically received derivative citizenship pursuant to INA § 321(a), 8 U.S.C. § 1432(a),⁷ which provided in relevant part:

⁷ In 2000, Congress repealed 8 U.S.C. § 1432, but it applies in this case "because it was 'in effect when [Oneil] [allegedly] fulfilled the last requirement for derivative citizenship.'" *Lewis v. Gonzales*, 481 F.3d 125, 126 n.1 (2d Cir. 2007) (per curiam) (quoting *Ashton v. Gonzales*, 431 F.3d 95, 97 (2d Cir. 2005)). Moreover, the Child Citizenship Act of 2000, Pub. L. No. 106-395, § 103, 114 Stat. 1631, 1632, which repealed § 1432, does not apply retroactively. *Drakes v. Ashcroft*, 323 F.3d 189, 191 (2d Cir. 2003) (per curiam).

A child born outside of the United States of alien parents . . . becomes a citizen of the United States upon fulfillment of the following conditions . . .

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents

The district court assumed that Erik had standing to bring the claim but held that, because Erik had not shown that he was legally separated from Oneil's mother, Oneil could not achieve derivative citizenship. GA 2. On this basis, the district court dismissed Erik's complaint. GA 2.

Summary of the Argument

I. The district court lacked subject matter jurisdiction over Oneil's complaint under 8 U.S.C. § 1503(a) because removal proceedings were pending at the time Oneil initiated the declaratory judgment action. Oneil's status as a national was at issue in those removal proceedings because Oneil raised the argument of derivative citizenship as a defense. Thus the district court properly dismissed Oneil's claims for lack of jurisdiction.

Although the district court expressly granted Oneil leave to re-file his claims after the termination of his removal proceedings, Oneil did not do so and thus waived any further claims, including any claim that jurisdiction would have been proper under § 1503 after his removal proceedings were over.

II. The claim that Oneil derived citizenship through his father is not properly before this Court. Oneil waived any such claim by failing to re-file after his removal proceedings were over, and Erik lacked third-party standing to raise the claim on Oneil's behalf.

In any event, Oneil's claim to derivative citizenship under former INA § 321 is meritless. Oneil could not obtain derivative citizenship under that section because Oneil's father was not "legally separated" from his mother as required by the statute.

Argument

I. The district court lacked subject matter jurisdiction over Oneil’s complaint because removal proceedings were pending at the time Oneil initiated the declaratory judgment action.

A. Governing law and standard of review

1. Motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)

When presented with a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a court must analyze whether it has the subject matter jurisdiction necessary to consider the merits of the action. A motion made pursuant to Rule 12(b)(1) will be granted when the court “lacks the statutory or constitutional power to adjudicate” the action. *Lockett v. Bure*, 290 F.3d 493, 496 (2d Cir. 2002) (citation omitted). “A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.” *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

2. Pathways to derivative citizenship

A person generally may pursue a claim of derivative citizenship in two ways. First, a person may raise the claim of citizenship as a defense to removal proceedings before an IJ. *Anees v. Ashcroft*, No. 3:02CV1393 (DJS), 2004 WL 1498075, at *2 (D. Conn. July 2, 2004). If the IJ rejects the defense and orders removal, the person may, after properly

exhausting administrative channels, file a petition for review with the court of appeals for the judicial circuit in which the IJ completed the proceedings. *See* 8 U.S.C. § 1252(b)(5) (nationality claims may be considered in petition for review). If the court of appeals finds that a “genuine issue of material fact about the petitioner’s nationality is presented,” the court will “transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim.” *Id.*

Second, a person may proceed administratively by filing a Form N-600 Application for Certificate of Citizenship with the INS pursuant to 8 U.S.C. § 1452(a). *See* 8 C.F.R. § 341.1. If the application is denied, the applicant may file an appeal of the adverse decision with the AAO. *See* 8 C.F.R. § 341.6; 8 C.F.R. § 103.3 (explaining appeals process); *Henry v. Quarantillo*, 684 F. Supp. 2d 298, 302 (E.D.N.Y. 2010), *aff’d* 414 Fed. Appx. 363 (2d Cir. 2011). If the petitioner’s appeal is unsuccessful, the applicant may bring an action in federal district court under 8 U.S.C. § 1503(a) for a declaration of citizenship.

Section 1503, titled “Denial of rights and privileges as national,”⁸ provides in relevant part:

⁸ A claim to be a “national,” as used in the INA, includes a claim to citizenship. 8 U.S.C. § 1101(a)(22) (“The term ‘national’ of the United States means (A) a citizen of the United States, or (B) a person who, though not a citizen of the (continued...)”)

(a) Proceedings for declaration of United States nationality

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that *no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding.*

8 U.S.C. § 1503(a) (emphasis added). Under this section, the court does not review agency action, but engages in a “*de novo*” judicial determination of the status of the plaintiff as a United States national.” *Richards v. Secretary of State*, 752 F.2d 1413, 1417 (9th Cir. 1985).

⁸ (...continued)

United States, owes permanent allegiance to the United States.”).

3. Standard of review

In reviewing the dismissal of a complaint for lack of subject matter jurisdiction, this Court “review[s] factual findings for clear error and legal conclusions *de novo*.” *Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996) (citation omitted).

B. Discussion

In this case, Oneil attempted to follow the second path to obtaining derivative citizenship, by seeking a declaratory judgment in response to the INS’s denial of his N-600 application for a certificate of citizenship. PA 6. Oneil claimed that the district court had jurisdiction to issue a declaration of citizenship under 28 U.S.C. § 2201, 28 U.S.C. § 1329 and 8 U.S.C. § 1503(a). PA 1.

Although § 1503(a) grants a district court the authority to declare that an individual is a national of the United States, that authority is subject to two exceptions. Specifically, that section provides that “no such action may be instituted in any case if the issue of such person’s status as a national of the United States (1) arose by reason of, or in connection with any removal proceedings under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding.” 8 U.S.C. § 1503(a).

The two exceptions set forth in section (a)(1) and (a)(2) “are designed to protect removal proceedings from judicial interference and to “preserve 8 U.S.C. § 1252 as the

exclusive means of challenging a final order of removal.” *Ortega v. Holder*, 592 F.3d 738, 743 (7th Cir. 2010). As the Seventh Circuit explained, an individual

may not frustrate the Government’s effort to remove him by instituting an action under 8 U.S.C. § 1503(a) while [removal] proceedings are ongoing. Similarly, a party may not use § 1503(a) to frustrate Congress’s effort to channel all appeals from removal proceedings – including those in which the alien raised claims of nationality – through 8 U.S.C. § 1252.

Id. at 743-44.

The district court properly concluded that § 1503(a)(2) divested it of jurisdiction over Oneil’s nationality claim because the issue of Oneil’s nationality was being litigated in removal proceedings at the time Oneil instituted the declaratory action. *See id.* at 743 (“[A]n individual may not institute a § 1503(a) action if nationality is ‘in issue,’ that is, being disputed, in an ongoing removal proceeding”); *Pessoa v. Holder*, No. 10 Civ. 1387(SHS), 2011 WL 2471206, at *3 (S.D.N.Y. June 21, 2011) (citing *Rios-Valenzuela v. Dep’t of Homeland Sec.*, 506 F.3d 393, 397 (5th Cir. 2007)) (finding lack of subject matter jurisdiction because the plaintiff was in removal proceedings and his citizenship was being disputed in those proceedings).

There is no question that Oneil’s citizenship was “in issue” in removal proceedings at the time Oneil instituted

the declaratory judgment action in 2000. The INS initiated removal proceedings against Oneil in 1998, and on October 22, 1999, Oneil moved to terminate those proceedings, claiming that he derived citizenship through his father's naturalization under INA § 322. *See* PA 25-34. The IJ rejected this argument in 2001, and Oneil appealed to the BIA, arguing, *inter alia*, that he was a United States citizen and thus protected from deportation by the Eighth Amendment. PA 35. Thus, when Oneil filed his declaratory judgment complaint in 2000, his motion to terminate the removal proceedings based on his claim of derivative citizenship was pending before the IJ. When the government moved to dismiss Oneil's declaratory judgment complaint in December 2001, and when the district court ordered the dismissal of the claims in 2002, Oneil's appeal was still pending with the BIA. Therefore, the issue of Oneil's citizenship was in issue in the removal proceedings and precluded jurisdiction in the district court under § 1503(a).

On this record, it is flatly incorrect for Oneil to argue that "the facts upon which the declaratory action is grounded are unconnected with the facts upon which the removal proceedings were predicated." Appellants' Br. at 9. The removal proceedings were triggered by Oneil's criminal conviction, but Oneil's motion to terminate demonstrates that he affirmatively raised his alleged nationality as a defense to removal. This defense placed the central question in this declaratory action – *i.e.*, Oneil's claim of derivative citizenship through his father's naturalization – squarely in dispute in the removal proceedings.

Moreover, it is irrelevant that the removal proceedings were initiated two years after Oneil filed his first N-600 application in 1996. Section 1503(a) plainly prohibits a person from initiating a new declaratory judgment action in district court while that person's nationality is at issue in *removal* proceedings. *See Rios-Valenzuela v. Dep't of Homeland Security*, 506 F.3d 393, 397 (5th Cir. 2007) (“[A] purported citizen may not initiate or begin a *declaratory judgment action* to establish his citizenship if it is already being litigated in a removal proceeding.”) (emphasis added). The key question, in other words, is not whether Oneil's status as a United States national is “in issue” in some administrative proceeding, but rather whether his status as a United States national is “in issue” in a *removal proceeding*. Here, although Oneil sought a certificate of citizenship before removal proceedings began, he did not commence this declaratory action until two years after the removal proceedings had begun. Accordingly, the action is foreclosed by § 1503.

This conclusion is not undermined by Oneil's claim that the district court had jurisdiction to consider his “legal” claim of citizenship. According to Oneil, under cases such as *Ashton v. Gonzales*, 431 F.3d 95(2d Cir. 2005), and *Poole v. Mukasey*, 522 F.3d 259 (2d Cir. 2008), when he asserted a claim of citizenship, an issue of law was immediately raised which invested the district court with an “obligation” to decide the issue “preliminarily.” Appellants' Br. at 7-9. Oneil's reliance on these cases is misplaced. In *Ashton* and *Poole*, this Court addressed its jurisdiction to review legal questions arising in petitions for review from final orders of removal notwithstanding

the jurisdictional provision of 8 U.S.C. § 1252(a)(2)(C), which purports to preclude review of orders directing the removal of certain criminal aliens. In those cases, this Court held that notwithstanding, § 1252(a)(2)(C), it had the authority to review certain legal questions, including claims of derivative citizenship. *Ashton*, 431 F.3d at 97; *Poole*, 522 F.3d at 262.

By Oneil's own admission, however, *Ashton* and *Poole* are distinguishable because they were petitions for review under 8 U.S.C. § 1252, and this case was a declaratory judgment action under 8 U.S.C. § 1503. *See* Appellants' Br. at 9. The jurisdictional limitations in § 1252, and this Court's interpretation of those limitations, are simply irrelevant to proceedings under § 1503. Section 1503 contains an express prohibition on district court jurisdiction over questions of nationality when those questions are at issue in removal proceedings. Accordingly, because Oneil's status as a national was "in issue" in his removal proceedings when he filed this declaratory judgment action, § 1503 precludes district court jurisdiction over the action. Thus, the district court properly dismissed the action pursuant to the restrictions of 8 U.S.C. § 1503(a), and this Court should affirm that dismissal.

Finally, the government notes that Oneil *might* have had an argument that the district court could consider his claims after the removal proceedings terminated in 2007, but the contours of this potential argument are not before this Court because Oneil never raised this argument before the district court, and does not brief it here. *In re Nortel*

Networks Corp. Securities Litigation, 539 F.3d 129, 132 (2d Cir. 2008) (per curiam); *Poupore v. Astrue*, 566 F.3d 303, 306 (2d Cir. 2009) (per curiam). Specifically, although the district court dismissed Oneil’s claims without prejudice to refile after the termination of the removal proceedings, Oneil never re-filed or renewed his claims. In any event, as explained in Part II, even if Oneil could establish jurisdiction under §1503(a), he would not be entitled to relief on the merits.

II. The district court properly rejected the claim that Oneil was a citizen under INA § 321.

A. Governing law and standard of review

1. Third-party standing

Ordinarily, a party “cannot rest his claim to relief on the legal rights or interests of third parties.” *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). A plaintiff seeking to assert the rights of a third party must satisfy several constitutional and prudential requirements to establish standing. “First, as is the case with any plaintiff, [he] must meet the constitutional prerequisites of standing: (1) injury-in-fact, (2) causation, and (3) redressability.” *Lewis v. Thompson*, 252 F.3d 567, 584 (2d Cir. 2001) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998)). Even if these are present, the plaintiff must also demonstrate “(1) a ‘close relation with the third party’ and (2) ‘some hindrance to the third party’s ability to protect his or her

own interests.” *Id.* (quoting *Lake v. Reno*, 226 F.3d 141, 148 (2d Cir. 2000)); *see also Powers v. Ohio*, 499 U.S. 400, 411 (1991).

2. Automatic citizenship under former INA § 321(a)

Section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (1994), which was repealed and replaced by the Child Citizenship Act of 2000 (“CCA”), Pub. L. No. 106-395, 101, 114 Stat. 1631 (Oct. 20, 2000) (effective February 27, 2001 and codified at 8 U.S.C. § 1431),⁹ provided for the acquisition of citizenship to children born outside the United States to non-citizen parents upon the fulfillment of certain prescribed conditions. Under this section, citizenship vested automatically once the prescribed conditions had been met. *See In re Fuentes-Martinez*, 21 I. & N. Dec. 893, 896 (BIA 1997) (“A child’s acquisition of citizenship on a derivative basis [under § 321] occurs by operation of law and not by adjudication.”).

In pertinent part, § 321(a) provided as follows:

⁹ The CCA is not retroactive and only applies to individuals who satisfy its requirements as of the CCA’s effective date of February 27, 2001. *See* CCA § 104 (providing that the CCA’s amendments shall take effect 120 days after the date of enactment of this Act and shall apply to individuals who satisfy the requirements of [8 U.S.C. § 1431] on such effective date”); *Smart v. Ashcroft*, 401 F.3d 119, 122 (2d Cir. 2005) (“[T]he CCA is not retroactive . . .”).

A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon 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.

8.U.S.C. § 1432(a) (1994) (emphasis added).

When an individual “seeks to obtain the privileges and benefits of citizenship, . . . the burden is on the [individual] to show his eligibility for citizenship in every respect.” *Berenyi v. District Director, INS*, 385 U.S. 630, 637 (1967). In a proceeding under § 1503, the plaintiff must establish his eligibility for citizenship by a preponderance of the evidence. *DeVargas v. Brownell*, 251 F.2d 869, 870 (5th Cir. 1958).

3. Standard of review

The question of standing is a question of law that this Court reviews *de novo*. *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011). This Court reviews conclusions of law *de novo* and findings of fact under a clearly erroneous standard. *Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 199 (2d Cir. 2003).

B. Discussion

1. Eric Wilks lacked third-party standing to bring a derivative citizenship claim on behalf of his son.

As described above, after Oneil’s removal proceedings concluded, he did not re-file his claim seeking a determination on his citizenship claim even though the

district court had left the option open to him. Accordingly, even though the appellants' opening brief describes the claim as one pursued by Oneil, he has waived that claim. *Poupore*, 566 F.3d at 306. Thus, the only claim before this Court is Erik's claim, on behalf of his son, that Oneil obtained derivative citizenship under § 321. As explained below, however, Erik cannot meet the standards for third-party standing to pursue this claim.

a. Erik cannot demonstrate the required injury in fact.

The Supreme Court has held that “generalized grievance[s] against allegedly illegal government conduct” are insufficient to establish standing. *United States v. Hayes*, 515 U.S. 737, 743 (1995). Erik's complaint in this case, is, at base, a generalized grievance. He cannot allege that he himself has suffered or will suffer any injury sufficient to justify third-party standing. The mistake by the INS in processing Oneil's N-600 form in 1996 resulted in the denial of Oneil's citizenship, not Erik's. Thus, any complaints on Erik's part about that process amount to no more than “generalized grievance[s].”

The only injury to his own interests that Erik can plausibly assert is a potential loss of familial association with Oneil. Courts have held, however, that such interests are insufficient to establish third-party standing. In *Movimiento Democracia, Inc. v. Chertoff*, 417 F. Supp. 2d 1350, 1352-54 (S.D. Fla. 2006), the Southern District of Florida considered and rejected an argument from the relatives of repatriated Cubans that the loss of family

relationships with, and financial support from, the repatriated individuals could be an injury in fact. The court held that “there is no statutory or constitutional right to familial association with a person trying to immigrate to the United States.” *Id.* at 1353. It noted that the D.C. Circuit had previously held that a wife’s due process rights were not violated by the deportation of her husband, despite the burdens on the marriage. *See id.* (citing *Swartz v. Rogers*, 254 F.2d 338 (D.C. Cir. 1958)). It also cited to an opinion of this Court holding that “wives as resident aliens have no constitutional right to keep [their husbands] here [in the United States] on the theory that the integrity of the family is protected by equal protection principles.” *Id.* (quoting *Noel v. Chapman*, 508 F.2d 1023, 1027 (2d Cir. 1975)). The court concluded that “[i]f a wife cannot intervene in the deportation of her husband, she certainly would not have standing to intervene in the interdiction and repatriation of her husband, son, or daughter.” *Id.*

There is no doubt that an adverse decision regarding Oneil’s citizenship will have an impact on Erik. Nevertheless, this impact is not the type of injury that the law recognizes as relevant to standing determinations. Erik has no statutory or constitutional right to his relationship with Oneil in the United States, and thus faces no injury that would make his claim a permissible vehicle for intervention in Oneil’s deportation.

This conclusion is confirmed by an examination of the statutory language itself. Section 1503 authorizes “a person” who claims a right or privilege as a national of the United States and who is denied such rights or privileges

to institute an action for a “judgment declaring him to be a national of the United States” 8 U.S.C. § 1503. Erik is not a person who has been denied rights or privileges on the ground that he is not a national, and he is not seeking a declaration that he is a national through this suit. He is seeking, rather, a declaration that his son is a national, but that is not authorized by the plain language of the statute. In short, the interest that Erik seeks to vindicate is not within the “zone of interests” of the statute he seeks to invoke. *See Bennett v. Spear*, 520 U.S. 154, 162-63 (1997).

b. Erik has not shown that there was some hindrance to Oneil’s ability to protect his own interests.

In addition to Erik’s inability to identify a cognizable injury-in-fact, Erik’s claim also suffers from a prudential standing defect: he cannot point to any obstacle preventing Oneil from asserting his own legal interests. As discussed in Part I *supra*, the district court properly dismissed Oneil’s complaint in 2000 because his citizenship was at issue in removal proceedings. This did not, however, prevent Oneil from asserting his citizenship claim, because he was able to pursue that claim – and in fact, did pursue that claim – both in this case and in the removal proceeding itself, from the IJ through the BIA and up to this Court in his petition for review. This Court only lifted its stay of removal after considering Oneil’s claim to derivative citizenship. *See Wilks II*, 218 Fed. Appx. at 58. Oneil’s claim to citizenship is now properly exhausted, but he was able to fully pursue the issues that Erik now seeks

to raise, a fact that normally indicates that third-party standing is unwarranted. *See, e.g., Benjamin v. Aroostook Medical Ctr.*, 57 F.3d 101, 106 (1st Cir. 1995) (finding no third-party standing for patients in part because doctor denied staff privileges had already pursued action himself).

In light of the constitutional and prudential considerations counseling against third-party standing in this case, this court should dismiss Erik’s claim on behalf of Oneil.

2. In any event, Oneil did not obtain automatic citizenship under § 321(a) because his parents were not legally separated.

The district court properly concluded that Oneil did not obtain automatic citizenship § 321 because Oneil did not meet the conditions set forth in that section by his eighteenth birthday. Under § 321(a)(3), automatic citizenship can be achieved upon “[t]he naturalization of the parent having legal custody of the child when there has been a *legal separation* of the parents” 8 U.S.C. §1432(a) (1994) (emphasis added).

The government does not dispute that Erik became a naturalized citizen of the United States and had legal custody of Oneil since his infancy. *See* § 321(a). However, as the district court correctly noted, § 321(a)(3) also requires that the plaintiff’s parents have been legally separated before the child may qualify for citizenship. This

Court has held that § 321(a)(3) requires a “legal separation” even if the plaintiff’s parents were never actually married. *Lewis v. Gonzales*, 481 F.3d 125, 130 (2d Cir. 2007) (per curiam) (finding that a Jamaican child of unmarried parents did not meet requirements for derivative citizenship because parents could not have been legally separated as required by § 1432(a)(3), and citing other cases to reach the same conclusion); *Brissett v. Ashcroft*, 363 F.3d 130, 133-34 (2d Cir. 2004) (holding that § 1432(a)(3) “requires a formal act which, under the laws of the state or nation having jurisdiction of the marriage, alters the marital relationship either by terminating the marriage . . . or by mandating or recognizing the separate existence of the marital parties.”). The fact that a child’s parents were never married “does not alter [the] analysis”; a court may not “obviate [the] literal requirement” of a separation in the statute. *Lewis*, 481 F.3d at 130.

Here, Oneil has provided no evidence that his parents were legally married, much less any evidence that they were legally separated. *See* PA 3 (acknowledging that Oneil’s parents were never married). Indeed, consistent with this lack of evidence, the appellants make no claim that there has been a legal separation of Oneil’s parents. Instead, they ignore the clear language of the statute and argue that only legal custody is required, Appellants’ Br. at 14-15, a proposition that is unsupported by the statute or precedent. Their argument that the AAO did not address Oneil’s claim under § 321(a)(3), PA 14, is likewise incorrect; while the opinion of District Director Farquharson did not address § 321(a)(3), the AAO clearly

considered the claim based on that subsection and rejected it on the grounds stated above. GA 8.

To be sure, it is true that an applicant acquires citizenship by operation of law upon meeting all of the statutory conditions of § 321(a), regardless of when he applies for a certificate of citizenship. Appellants' Br. at 14. In other words, an individual can apply for a certificate of citizenship based on § 321(a)(3) past the age of eighteen, so long as he met its conditions prior to his eighteenth birthday. *See In re Fuentes-Martinez*, 21 I. & N. Dec. at 896. But this does not help Oneil. Because Oneil's parents were never legally separated, Oneil *never met* the conditions of § 321(a). It was this fact, and not his age, that made him ineligible for citizenship under § 321(a)(3) at the time of his second application for a certificate of citizenship, and it is this fact that continues to make him ineligible under that provision.

Finally, the government notes that Oneil cannot rely upon § 101 of the CCA, which repealed § 321 and replaced it with § 320, 8 U.S.C. § 1431 (2000). Although § 320 provides that a lawful permanent resident under the age of eighteen is automatically naturalized when either of his parents becomes a United States citizen, so long as he is in legal custody of the citizen parent, the CCA is not retroactive and only applies to individuals who satisfy its requirements after the CCA's effective date of February 27, 2001. *See* CCA § 104 (providing that the CCA's amendments "shall take effect 120 days after the date of enactment of this Act and shall not apply to individuals who satisfy the requirements of [8 U.S.C. § 1431] on such

effective date”); *Drakes v. Ashcroft*, 323 F.3d 189, 191 (2d Cir. 2003) (per curiam) (“[T]he CCA does not confer citizenship retrospectively.”). Because Oneil had already turned eighteen by the time the CCA became effective, Oneil cannot claim the benefit of the CCA.

In sum, the district court properly found that Oneil did not qualify for automatic citizenship under § 321(a) as there is no evidence that Oneil’s parents were legally separated. Therefore, this Court should affirm the district court’s decision.

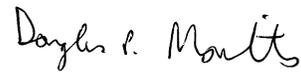
Conclusion

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: August 19, 2011

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in cursive script that reads "Douglas P. Morabito".

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CERTIFICATION PER FED. R. APP. P. 32(a)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,767 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

Douglas P. Morabito

DOUGLAS P. MORABITO
ASSISTANT U.S. ATTORNEY

ADDENDUM

8 U.S.C. § 1503. Denial of rights and privileges as national

(a) Proceedings for declaration of United States nationality--

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

8 U.S.C. § 1432. Children born outside of United States of alien parents; conditions for automatic citizenship

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon 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.

(b) Subsection (a) of this section shall apply to an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent or parents, in the custody of his adoptive parent or parents, pursuant to a lawful admission for permanent residence.

ANTI-VIRUS CERTIFICATION

Case Name: Wilks v. Farquharson

Docket Number: 07-3257-cv

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **agencycases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/19/2011) and found to be VIRUS FREE.

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August 19, 2011

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