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U.S. Citizenship
and Immigration
Services

LE 2

[Redacted]

FILE:

[Redacted]

Office: PHILADELPHIA, PA

Date: SEP 16 2004

IN RE:

Applicant:

[Redacted]

APPLICATION:

Application for Certificate of Citizenship under Section 321 of the former Immigration and Nationality Act; 8 U.S.C. § 1432.

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Interim District Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on April 15, 1982, in South Korea. The applicant's mother became a naturalized U.S. citizen on February 9, 2000, when the applicant was seventeen years old. The applicant's father became a naturalized U.S. citizen on May 9, 2001, when the applicant was nineteen years old. The applicant's parents married in South Korea on February 19, 1976, and they separated in Pennsylvania, per agreement, on February 27, 1999, when the applicant was sixteen years old. The applicant remained in the physical and legal custody of his mother at that time. The applicant was admitted into the United States as a lawful permanent resident on February 26, 1989, at the age of six. He presently seeks a certificate of citizenship under section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432.

The director determined that the applicant did not qualify for citizenship under section 321 of the former Act because his parents did not obtain a "legal separation" prior to the applicant's eighteenth birthday.

On appeal, counsel asserts that the written separation and custody agreement signed by the applicant's parents in February 1999, qualifies as a "legal separation" in the State of Pennsylvania, and that the applicant therefore meets the requirements for citizenship under section 321 of the Act.

Section 321 of the former Act provides, in pertinent part, that:

(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 said child is under the age of 18 years;
and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

The applicant does not claim that his father is deceased or that his father became a naturalized U.S. citizen prior to the applicant's birthday eighteenth birthday, nor does the record contain any evidence to indicate that either event occurred. The AAO therefore finds that the requirements set forth in section 321(a)(1) and 321(a)(2) of the former Act have not been met. The AAO additionally finds that the applicant has failed to

establish he meets the "legal separation" requirements set forth in section 321(a)(3) of the former Act. The Board of Immigration Appeals (Board) stated clearly in *Matter of H*, 3 I&N Dec. 742 (1949), that "legal separation" means either a limited or absolute divorce obtained through judicial proceedings.

The AAO finds counsel's assertion that a privately-executed separation agreement made between the applicant's parents qualifies as a "legal separation" under section 321(a)(3) of the former Act to be unconvincing. Counsel attempts to support his argument by referring to the federal court cases, *Fierro v. Reno*, 217 F.3d 1 (C.A. Mass., 2000), *Batista v. Ashcroft*, 270 F.3d 8 (C.A. 1, RI, 2001) and *Bucknor v. Zemski*, 2002 U.S. Dist. LEXIS 2192 (E.D. Pa. 2002). The AAO notes that the definition of what constitutes a "legal separation" for immigration purposes was not at issue in any of the court cases referred to by counsel. Rather, all of the cases referred to involved parents who had obtained final divorces through judicial proceedings, and the issues addressed by the courts related to requirements for establishing "legal custody" for immigration purposes.

The AAO finds that for immigration purposes, "legal separation" has been clearly defined as a "limited or absolute divorce obtained through judicial proceedings" *See Matter of H, supra*. The AAO notes that in the present matter, the record reflects the applicant's father's acknowledgement that he and his wife did not obtain a divorce. *See Affidavit of Paul Kyung Kim*. The AAO notes further that the record contains no evidence to indicate that the applicant's parents attempted, at any time, to obtain a limited or absolute divorce through judicial proceedings. Accordingly, the AAO finds the applicant has failed to establish that his parents obtained a "legal separation", as required by section 321(a)(3) of the former Act. The applicant therefore does not qualify for citizenship under section 321 of the Act.

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. The applicant in the present case has not met his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.