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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: CHICAGO, IL Date: DEC 20 2007

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Chicago, Illinois, 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 December 12, 1974 in Iraq. The applicant was admitted as a lawful permanent resident of the United States as of July 28, 1982, his date of admission as a refugee. The applicant's mother became a naturalized U.S. citizen on October 21, 1986, when the applicant was 12 years old. The applicant's parents were married in 1973, and divorced on August 4, 1996. The divorce decree indicates that the applicant's parents separated on November 22, 1992. A subsequent amended divorce decree clarifies that the applicant remained in the physical and legal custody of his mother. The applicant 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 18th birthday. The application was accordingly denied.

On appeal, counsel asserts that the separation date included in the applicant's parents divorce decree amounts to a "legal separation" in the State of Illinois 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 was deceased or that his father naturalized prior to the applicant's birthday 18th 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 reliance on *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005), to be misplaced. First, the AAO notes that *Minasyan* arose within the jurisdiction of the Ninth Circuit Court of Appeals, and that it has not been adopted or agreed upon by the Seventh Circuit Court of Appeals where this case arises. Further, as noted above, “legal separation” has been clearly defined for immigration purposes as a “limited or absolute divorce obtained through judicial proceedings.” *Matter of H*, *supra*; see also, *Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001). This definition of “legal separation” was adopted by the Seventh Circuit Court of Appeals in *Wedderburn v. INS*, 215 F.3d 795 (7th 2000). The Court in *Wedderburn* stated that “domestic relations law in the United States treats ‘legal separation’ as the judicial suspension or dissolution of a marriage.” 215 F.3d at 799.

The AAO notes that Illinois state law provides for an action for legal separation independent from divorce proceedings. See 750 ILCS 5/402. Thus, a “legal separation” may be formally, judicially recognized in Illinois. The applicant’s parents did not obtain a “legal separation,” a separation formally recognized by Illinois state law. The record reflects the applicant’s parents’ divorce occurred after the applicant’s 18th birthday. 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.

“Congress clearly intended that the naturalization of only one parent would result in the automatic naturalization of an alien child only when there has been a formal, *judicial* alteration of the marital relationship.” *Nehme*, 252 F.3d at 425-26 (emphasis in original) (recognizing that requiring the naturalization of both parents, when the parents were married, “was necessary to promote the child from being separated from an alien parent who has a legal right to custody”); see also *Wedderburn*, 215 F.3d at 800 (explaining that “Congress rationally could conclude that as long as the marriage continues the citizenship of children should not change *automatically* with the citizenship of a single parent”)(emphasis in original); *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000)(stating that “both the language of [section 321(a)] and its apparent underlying rationale suggest that Congress was concerned with the legal custody status of the child *at the time* that the parent was naturalized and during the minority of the child”)(emphasis in original).

The AAO notes “[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.” *Fedorenko v United States*, 449 U.S. 490, 506 (1981). 8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The AAO finds that the applicant has not met his burden of proof and the appeal will be dismissed.

ORDER: The appeal is dismissed.