

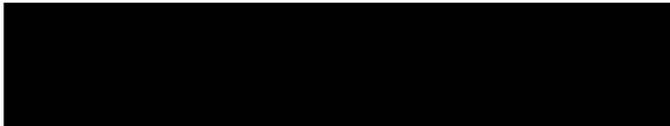


U.S. Citizenship  
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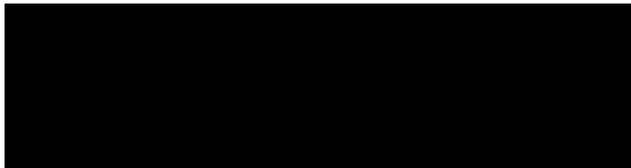


FILE: [REDACTED] Office: SAN ANTONIO, TX Date: **JUN 17 2008**

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:



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 Form N-600, Application for Certificate of Citizenship (Form N-600) was denied by the District Director, San Antonio, Texas. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application will be denied.

The record reflects that the applicant was born in Mexico on December 11, 1976. He turned eighteen on December 11, 1994. The applicant's mother was born in Mexico on January 25, 1954, and she became a naturalized U.S. citizen on June 20, 1979, when the applicant was two years old. The applicant's father was born in Mexico, and he is not a U.S. citizen. The applicant's parents were married in Mexico on January 31, 1976. The applicant was admitted into the United States as a lawful permanent resident on December 13, 1976, two days after his birth. He presently seeks a certificate of citizenship pursuant to section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432, based on the claim that he derived U.S. citizenship through his mother.

The district director determined the applicant had failed to establish that his parents were legally separated prior to his eighteenth birthday, or that his mother was awarded sole legal custody over the applicant, as required by section 321(a)(3) of the former Act. The district director concluded that the applicant therefore did not qualify for U.S. citizenship under section 321 of the former Act. The Form N-600 was denied accordingly.

On appeal the applicant asserts, through counsel, that his parents became legally separated in Mexico in May 1976, prior to the applicant's birth, and that they remained legally separated until sometime in 1980. The applicant asserts that subsequent to his parent's separation, the applicant's father lived in Mexico, and his mother lived permanently in the United States. The applicant asserts that after his birth, his mother had sole legal custody over him under Mexican law. The applicant indicates that the record contains an April 17, 2006, Mexican court order establishing that his parents were legally separated between May 1976 and 1980, and establishing that his mother had sole custody over the applicant during that time. The applicant asserts that the district director failed to give proper weight to the Mexican court order, and the applicant asserts that the evidence establishes by a preponderance of the evidence that he derived U.S. citizenship through his mother under section 321 of the former Act.

Section 321 of the former Act was repealed on February 27, 2001, however, all persons who became U.S. citizens automatically under section 321 of the former Act, as previously in force prior to February 27, 2001, may apply for a certificate of citizenship at any time. *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001.)

Section 321 of the former Act provided, 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.

In the present matter, the record reflects that the applicant's parents were married in Mexico on January 31, 1976. The evidence in the record fails to demonstrate that the applicant's father became a naturalized U.S. citizen prior to the applicant's eighteenth birthday, or that his father died prior to his eighteenth birthday. Accordingly, the applicant does not meet the requirements contained in section 321(a)(1) and (2) of the former Act. The applicant claims that his parents were legally separated between 1976 and 1980. His derivative citizenship claim will therefore be examined under the provisions contained in section 321(a)(3) of the former Act.

The applicant asserts that under Mexican law, his parents were legally separated between May 1976 and sometime in 1980. In support of his assertion, the applicant submits the following three documents:

An April 17, 2006, Perpetuity Memory Information Order from the Judge of First Instance on Civil and Family Matters of the Judicial District of Rio Grande, City of Allende, Coahuila, Mexico (Perpetuity Memory Information Order.)

A translation of Article 1150 of the Procedural Civil Code for the State of Coahuila, Mexico, stating in pertinent part that:

The information to perpetual memory could be decreed when there is no person with interest therewith other than the Plaintiff and when is about:

- I. Justifying an action or to prove an existing legal right;
- II. When it is intended to justify the possession of reality as a way to accredit the total control of a track of land or a property; and
- III. When it is intended to prove the possession of real right.

A translation of Article 521 of the Procedural Civil Code for the State of Coahuila, Mexico, stating that:

If the parents that live together get separated when doing the recognition, they will arrange which one of both will be in charge of the child, and if there is not an agreement regarding this matter, it will be commended to the progenitor that the judge designates to keep the child [sic.]

The U.S. Supreme Court held in *Wedderburn v. INS*, 532 U.S. 904 (U.S. 2001) that:

“Legal custody” and “legal separation of the parents”, as words in a federal statute, must take their meaning from federal law . . . . But federal law may point to state (or foreign) law as a rule of decision, and this is how the INS (now U.S. Citizenship and Immigration Services, CIS) has consistently understood these terms. *Matter of H*, 3 I&N Dec. 742, 1949 WL 6533 (1949) concludes that the term “legal separation” means either a limited or absolute divorce obtained through judicial proceedings. It is thus apparent that the term “legal separation” can refer only to a situation where there has been a termination of the marital status. . . .

It is noted that the present matter is raised within the jurisdiction of the Fifth U.S. Circuit Court of Appeals (the 5<sup>th</sup> Circuit.) The 5<sup>th</sup> Circuit held in *Nehme v. INS*, 252 F.3d 415, 423-27 (5<sup>th</sup> Cir. 2001) that the question of legal separation is one of federal law and interpretation. Although the 5<sup>th</sup> Circuit held that the formulation of a federal standard by which to interpret the term may be informed by State law, the 5<sup>th</sup> Circuit made clear in its decision that, “in the United States, the term “legal separation” is uniformly understood to mean *judicial separation*.”

The 5<sup>th</sup> Circuit held further in *Bustamante-Barrera v. Gonzalez*, 447 F.3d 388, 395-402 (5<sup>th</sup> Cir. 2006) that an informal separation of a married couple does not satisfy the legal separation requirement contained in section 321(a)(3) of the former Act, and that a formal alteration of the marital relationship is required.

The AAO finds that in the present matter, the Perpetuity Memory Information Order and the State of Coahuila Civil Code evidence submitted by the applicant fail to establish that the applicant’s parents obtained a court ordered legal separation in Mexico prior to the applicant’s eighteenth birthday.

The record contains no evidence to establish that the applicant’s parents, at any time obtained a court order relating to their marital separation. Rather, the Perpetuity Memory Information Order reflects that the applicant’s mother appeared before the court on March 31, 2006:

[T]o promote in the non contentious procedure (In Perpetuity Memory Information)” and having as purpose to justify the facts regarding to the applicant’s mother’s her family”[sic.] These are the facts founded on the following information: I.-As it was validated by the Married Certificate . . . the undersigned and [REDACTED], got married . . . on January 31, 1976 . . . II- Since the month of January, 1976, the undersigned and [REDACTED] lived in the domicile located in . . . Acuna, Coahuila. . . III – [testimonial proof from two witnesses] IV- . . . [O]n the month of May 1976, we decided to get separated for a period of time due to mutual incompatibility, having the undersigned the legal custody over

[REDACTED], who was the only child we had on that time. [REDACTED] and I moved to the city of Del Rio, Texas. Some time later, in the month of November, 1979, we decided to live together again, as we currently do. . . . [T]he application was accepted in the proposed procedure, only for Administrative purposes. . . .

The AAO finds that the contents of the Perpetuity Memory Information Order fail to establish that the applicant's parents previously obtained a judicially ordered separation. Rather, the AAO finds that the Perpetuity Memory Information Order submitted by the applicant simply recorded statements made by the applicant's mother and two witnesses regarding her separation from the applicant's father. The provisions contained in Article 1150 of the Procedural Civil Code for the State of Coahuila, Mexico reflect that the information for perpetual memory can be decreed when there is no person with interest therewith other than the plaintiff, and when it is about justifying an action or proving an existing legal right. Moreover, the Perpetuity Memory Order itself indicates that its purpose is to record facts stated by the applicant's mother for administrative purposes. Accordingly, the AAO finds that the applicant failed to establish that his parents obtained a legal separation prior the applicant's eighteenth birthday.

The AAO finds that the applicant has also failed to establish that his mother was awarded sole legal custody over the applicant pursuant to a judicial order, prior to the applicant's eighteenth birthday.

The Board of Immigration Appeals (Board) found in *Matter of Harris*, 15 I&N Dec. 39 (BIA 1970), that legal custody vests by virtue of either a natural right or a court decree. The 5<sup>th</sup> Circuit determined in *Bustamante-Barrera, supra*, that only an award of sole legal custody satisfies the legal custody requirement contained in section 321(a)(3) of the former Act. The AAO notes further that Article 521 of the Procedural Civil Code for the State of Coahuila, Mexico, indicates that a judge must recognize legal custody over a child of separated parents.

The April 21, 2006, Perpetuity Memory Information Order contained in the record contains no reference to, or acknowledgment of, the existence of a prior judicial child custody order for the applicant, and the record contains no evidence to indicate or establish that the applicant's mother was at any time awarded sole legal custody over the applicant pursuant to judicial proceedings. The applicant therefore failed to establish that his mother obtained legal custody over the applicant by virtue of a court decree.

Because the applicant failed to establish that he meets the requirements contained in section 321(a)(3) of the former Act, he does not qualify for derivative citizenship through his mother.

It is noted that the record contains a Board of Immigration Appeals (Board) decision, dated March 16, 2007, sustaining the applicant's appeal to terminate cancellation of removal proceedings against him. The Board indicates that its decision that the applicant met requirements for U.S. citizenship under section 321 of the former Act. Specifically, the Board finds that the Perpetuity Memory Order is probative because:

The document was apparently issued by a judge after a civil proceeding during which evidence was taken. Further, the document indicates that the respondent's parents were separated from May of 1976 until November of 1979. . . . In addition, the separation

document indicates that the respondent's mother had "the legal custody" of him, which we interpret to be sole legal custody."

The AAO notes that CIS is not bound by the Board's finding regarding the applicant's U.S. citizenship status. The regulation at 8 C.F.R. § 1003.1(b) vests the Board with appellate jurisdiction over immigration judge decisions in deportation (removal) cases. An immigration judge does not have authority to declare that an alien is a citizen of the United States, and 8 C.F.R. § 1003.1(b) does not provide the Board with appellate jurisdiction over certificate of citizenship claims. The Board's finding in the applicant's case was thus a determination that the government had failed to meet its burden of proving the applicant's alienage and deportability by clear, convincing and unequivocal evidence. *See Murphy v. INS*, 54 F.3d 605 (9<sup>th</sup> Cir. 1995) (holding that in deportation proceedings, the government must prove alienage by clear, unequivocal and convincing evidence.) Jurisdiction over certificate of citizenship claims rests with the CIS and with the federal courts. *See Minasyan v. Gonzalez*, 401 F.3d 1069 (9<sup>th</sup> Cir. 2005.) Regulations specify further that the burden of proof is on the alien to establish his or her claim to U.S. citizenship by a preponderance of the evidence.

Based on the analysis provided above, the AAO finds that the applicant failed to establish that he meets the requirements for derivative citizenship under section 321 of the former Act.

Under 8 C.F.R. § 341.2(c), the burden of proof is on the applicant to establish his claimed citizenship by a preponderance of the evidence. The applicant has failed to meet his burden of proof in the present matter. The appeal will therefore be dismissed and the application will be denied.

**ORDER:** The appeal is dismissed. The application is denied.