

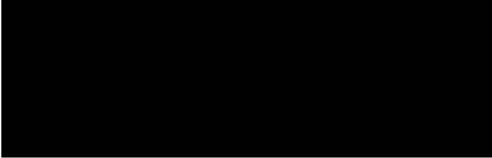


U.S. Citizenship
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FILE: [REDACTED] Office: LOS ANGELES, CA (SANTA ANA) Date: **SEP 09 2008**

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 application was denied by the Field Office Director, Los Angeles, California (Santa Ana), 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 August 10, 1979 in India. The applicant's parents were married on August 7, 1978, divorced in November 16, 1990, remarried on November 17, 1993, and divorced again on May 5, 2000. The applicant's mother, [REDACTED] became a U.S. citizen upon her naturalization on September 15, 1994, when the applicant was 15 years old. The applicant's father, [REDACTED], became a U.S. citizen upon his naturalization on August 18, 2006, when the applicant was 27 years old. The applicant was admitted to the United States as a lawful permanent resident on February 21, 1988, when the applicant was 8 years old. The applicant seeks a certificate of citizenship under section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432, claiming that he derived citizenship upon his mother's naturalization.

The director determined that the applicant did not qualify for citizenship under section 321 of the former Act, 8 U.S.C. § 1432, because the record did not establish that both his parents were naturalized or that his parents had obtained a "legal separation" prior to the applicant's 18th birthday.

On appeal, the applicant maintains that his mother had sole custody of him and that his parents were separated in 1994, when his mother naturalized. In support of his appeal, the applicant submits, in relevant part, affidavits executed by his parents and his mother's income tax return.

The AAO first notes that the Child Citizenship Act of 2000 (the CCA), which took effect on February 27, 2001, amended sections 320 and 322 of the Act, and repealed section 321 of the Act. The provisions of the CCA are not retroactive, and the amended provisions of section 320 and 322 of the Act apply only to persons who were not yet 18 years old as of February 27, 2001. Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Section 321 of the former Act, 8 U.S.C. § 1432, is therefore applicable in this case.

Section 321 of the former Act, 8 U.S.C. § 1432, 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 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 (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

The AAO finds that the requirements set forth in section 321(a) of the former Act, 8 U.S.C. § 1432(a), have not been met. Specifically, the AAO finds that the applicant has failed to establish the “legal separation” requirement set forth in section 321(a)(3) of the former Act, 8 U.S.C. § 1432. The record contains a copy of the applicant’s parents’ marriage certificate dated November 17, 1993. The Board of Immigration Appeals 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. *See also, Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001). A married couple, even when living apart with no plans of reconciliation, is not legally separated. *Matter of Mowrer*, 17 I&N Dec. 613, 615 (BIA 1981). A privately-executed separation agreement made between the applicant’s parents does not qualify as a “legal separation” under section 321(a)(3) of the former Act. *Afeta v. Gonzales*, 467 F.3d 402, 407 (4th Cir. 2006). The applicant’s parents were remarried in 1993, and there is no evidence in the record indicating that that applicant’s parents obtained a “legal separation” until May 5, 2000 (after the applicant’s 18th birthday). Accordingly, the AAO finds the applicant has failed to establish that he derived citizenship pursuant to section 321(a) of the former Act, 8 U.S.C. § 1432(a).

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. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is “probably true” or “more likely than not.” *Matter of E-M*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The AAO finds that the applicant has not met his burden of proof and the appeal will be dismissed.

ORDER: The appeal is dismissed.