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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

E1

[redacted]

Date: JAN 03 2012 Office: MOUNT LAUREL, NJ File: [redacted]

IN RE: [redacted]

APPLICATION: Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The Application for Certificate of Citizenship (Form N-600) was denied by the Field Office Director, Mount Laurel, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Colombia on [redacted] The applicant's mother became a naturalized U.S. citizen on [redacted] The applicant's father was born in Colombia and is not a U.S. citizen. The applicant was admitted to the United States as a lawful permanent resident on [redacted]. The applicant seeks a Certificate of Citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432, claiming that he derived citizenship through his mother.

The director determined that the applicant failed to establish eligibility for derivative citizenship under former section 321 of the Act, and denied the application accordingly. *See Decision of the Field Office Director*, dated August 15, 2011. On appeal, counsel contends that the applicant's parents were unmarried, he was not legitimated while under the custody of his father and he can therefore derive citizenship through his mother. *See Form I-290B,* dated September 13, 2011.

Because the applicant was born abroad, he is presumed to be an alien and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. *See Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008). The applicable law for derivative citizenship purposes is that in effect at the time the critical events giving rise to eligibility occurred. *See Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005); *accord Jordon v. Attorney General*, 424 F.3d 320, 328 (3d Cir. 2005). Former section 321 of the Act is therefore applicable in this case.

Former section 321(a) of the Act provided, in pertinent part:

> A child born outside of the United States of alien parents . . . 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 unmarried and 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.

The order in which the requirements are fulfilled is irrelevant, as long as all requirements are satisfied before the applicant's 18th birthday. *Matter of Baires-Larios*, 24 I&N Dec. at 470.

The term legal separation means "either a limited or absolute divorce obtained through judicial proceedings." *Afeta v. Gonzales*, 467 F.3d 402, 406 (4th Cir. 2006) (affirming the Board of Immigration Appeals' construction of the term legal separation as set forth in *Matter of H*, 3 I&N Dec. 742, 744 (BIA 1949)) (internal quotation marks omitted); *see also Minasyan v. Gonzales*, 401 F.3d at 1076 (stating that the term legal separation refers to a separation recognized by law; considering the law of California, which had jurisdiction over the applicant's parents' marriage).

Here, the applicant satisfied several of the requirements for derivative citizenship set forth in former section 321(a) of the Act before his eighteenth birthday. Specifically, the applicant was admitted to the United States as a lawful permanent resident when he was twelve years old, and the applicant's mother became a naturalized U.S. citizen when he was [redacted] However, while the applicant was born out of wedlock, the applicant was legitimated under Colombian law, there was no legal separation of the applicant's parents and the applicant cannot derive citizenship under former section 321(a)(3) of the Act.

First, counsel contends that, while Colombian law eliminated all legal distinctions between legitimate and illegitimate children, there is no evidence that the applicant was ever in his biological father's custody in either Colombia or New York at the time at which derivation would have occurred and thus, the applicant derived U.S. citizenship through his mother. Counsel misinterprets the statute. Legitimation at the time of derivation of citizenship is not the issue. The question is whether the applicant was born out-of-wedlock and subsequently legitimated such that he did or did not derive U.S. citizenship through his mother.

Second, counsel contends that the applicant would have to have been legitimated under New York law since Colombian law does not establish paternity and, as such, the applicant is a child born out-of-wedlock whose paternity has not been established by legitimization. Counsel's contention is unpersuasive. The law provides that an applicant may be legitimated under the laws of the child's residence or domicile, or under the law of the father's residence or domicile. Section 101(c)(1) of the Act, 8 U.S.C. § 1101(c)(1). Under Colombian Law No. 29 of February 24, 1982, effective March 9, 1982, all children have the same rights and obligations, abolishing all legal distinctions between legitimate and illegitimate children. *See Matter of Hernandez*, 19 I&N Dec. 14 (BIA 1983), Int. Dec. 2953 (BIA 1983). According to a September 1994 advisory opinion the from the Library of Congress entitled "Children Born out of Wedlock in Colombia" under Colombian Law, a natural child may be acknowledged by recording and signing the birth record as the father or the mother of the child. The birth record should include as the child's family name, the father's last name followed by that of the mother, if the child is legitimate or legitimated either by acknowledgement or judicially. Otherwise, only the last name of the mother will be recorded as the last name of the newborn. The record contains a Colombian Birth Record indicating that the applicant was born to [redacted] with a notation stating that the applicant was officially recognized by his biological father according to a Colombian law relating to

minors. *See Registro de* [redacted]. The applicant's father, therefore, officially acknowledged the applicant as his child under Colombian law and the applicant was legitimated by his father at the time his birth was registered.

Finally, counsel contends that the applicant qualifies for derivative citizenship based on the naturalization of his mother because he does not meet the definition of a "child" under section 101(c) of the Act because he was not in the custody of his father at the time of legitimation. Counsel also contends that a prior AAO decision is squarely on point and dictates that the father never had legal custody of the applicant at the time of legitimation and paternity cannot therefore be established by legitimation. First, the AAO decision cited by counsel is an unpublished decision which is not precedent or binding. Second, the applicant meets the definition of child under section 101(c) of the Act, which states that "the term "child" . . . includes a child legitimated under the laws of the child's residence or domicile, or under the law of the father's residence or domicile. . . if such legitimation. . . takes place before the child reaches the age of 16 years. . . and the child is in the legal custody of the legitimating. . . parent or parents at the time of such legitimation . . ." Unless there is evidence to show that the father of a legitimate child has been deprived of his natural right to custody, the natural father of a child will be presumed to have had legal custody of the child at the time of legitimation. *Matter of Rivers,* 17 I&N Dec. 419 (BIA 1980). While the record reflects that the applicant's father did not have extensive contact with the applicant as a child, it also reflects that the applicant's father had not been deprived of his natural right to custody at the time he legitimated the applicant. Consequently, the applicant was legitimated and cannot derive citizenship through his mother under former section 321(a)(3) of the Act unless there was a legal separation of the applicant's parents. The record does not contain evidence that there was a legal separation of the applicant's parents.

The applicant is also ineligible to derive citizenship under any other subsection of former section 321(a) of the Act.

The applicant bears the burden of proof to establish his eligibility for citizenship under the Act. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c). Here, the applicant has not established that he met all of the conditions for the automatic derivation of U.S. citizenship pursuant to former section 321 of the Act before his eighteenth birthday. Accordingly, the appeal will be dismissed.

**ORDER**: The appeal is dismissed.