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

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[redacted]

FILE: [redacted] Office: BUFFALO, NY Date: MAY 07 2008

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship pursuant to Section 321(a)(3) of the Nationality Act, 8 U.S.C. § 1432(a)(3), now repealed

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 District Director, Buffalo, New York and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on February 22, 1981 in the Republic of Cape Verde. The applicant's mother, [redacted]), became a naturalized U.S. citizen on May 22, 1992, when the applicant was 11 years old. The applicant's father, J[redacted], was a citizen of Cape Verde at the time of the applicant's birth and the record does not indicate that he has acquired another nationality. The applicant's parents married on November 16, 1974 and divorced on December 28, 1992. The applicant was admitted to the United States as a lawful permanent resident on March 15, 1986, when he was five years old. The applicant seeks a certificate of citizenship pursuant to former section 321(a)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432(a)(3), based on his mother's naturalization.

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001. However, any person who would have acquired automatic citizenship under its provisions prior to February 27, 2001 may apply for a certificate of citizenship at any time. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Therefore, the issue before the AAO is whether the applicant has established that he acquired U.S. citizenship under the provisions of section 321(a)(3) of the Act prior to February 27, 2001.

Former section 321 of the Act, 8 U.S.C. § 1432, provided 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:
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> (1) The naturalization of both parents; or
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> (2) The naturalization of the surviving parent if one of the parents is deceased; or
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> (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.

On appeal, counsel contends that in denying the applicant's Form N-600, Application for Certificate of Citizenship, Citizenship and Immigration Services (CIS) went against the weight of the evidence, was arbitrary and capricious, erred in fact and law, abused its discretion and deprived the applicant of his constitutional right to the due process of law. Counsel asserts that prior to the applicant's 18th birthday, he

was in his naturalized mother's legal custody following his parents' legal separation and has, therefore, satisfied the requirements of section 321(a)(3) of the Act.

The record indicates that counsel has contended that the legal separation of the applicant's parents occurred as early as October 20, 1984, the date on which [redacted] stated she and [redacted] ceased living together in the complaint for divorce she filed on August 12, 1992. However, for immigration purposes, "legal separation" has been clearly defined as a "limited or absolute divorce obtained through judicial proceedings." *See Matter of H,* 3 I&N Dec. 742 (1949) (Quotations omitted). This definition of legal separation is supported by the findings of the 2nd Circuit Court of Appeals, in whose jurisdiction the present case arises, in *Brissett v. Ashcroft,* 363 F.3d 130 (2nd Cir. 2004). In *Brissett v. Ashcroft,* the court found the "legal separation" requirement in section 321(a)(3) of the Act to be a question of federal law and held that a legal separation "requires a formal act which, under the laws of the state or nation having jurisdiction of the marriage, alters the marital relationship either by terminating the marriage or by mandating or recognizing the separate existence of the marital parties. . . ." Therefore, neither the date on which the applicant's parents began living apart, nor the date on which [redacted] filed for divorce qualify as a legal separation in this matter. Based on the evidence of record, the date of legal separation of the applicant's parents is the date on which their divorce became final, December 28, 1992, when the applicant was 11 years old.

The AAO now turns to the remaining issue of whether the record demonstrates that the applicant was in Ms. [redacted] legal custody prior to his 18th birthday. It notes that legal custody vests "by virtue of either a natural right or a court decree." *See Matter of Harris,* 15 I&N Dec. 39 (BIA 1970). In the absence of a judicial determination or grant of custody in the case of a legal separation of the naturalized parent, the parent having actual, uncontested custody of the child is to be regarded as having "legal custody." *See Matter of M,* 3 I&N Dec. 850, 856 (BIA 1950).

The 1992 divorce decree ending the marriage of the applicant's parents does not address the issue of child custody and no other documents in the record establish that the applicant's custody was ever awarded to Ms. [redacted] by a Massachusetts court. Counsel contends that pursuant to the General Laws of Massachusetts (MGL), Chapter 208, sections 28 and 31, the parents of a minor child share legal custody of that child once a complaint for divorce is filed. Accordingly, he asserts that [redacted] **shared legal custody of the applicant with** [redacted] from the August 12, 1992 date on which she filed her complaint for divorce, until at least September 27, 1993, the date on which the applicant was committed to the care of the Massachusetts Department of Social Services (DSS) by the Boston Division, Juvenile Court Department of the Trial Court of the Commonwealth. Counsel contends that as the applicant was in [redacted]' legal custody on the date her divorce from [redacted] **became final, December 28, 1992, he has satisfied the requirements of section** 321(a)(3) of the Act.

While the AAO notes the sections of Massachusetts law cited by counsel, it does not find the record to demonstrate that the applicant was in [redacted] legal custody at the time of her divorce from [redacted] or thereafter. The record contains a series of court custody orders, beginning on October 13, 1992 and ending on September 27, 1993 with the commitment of the applicant to the Massachusetts DSS. Counsel claims that these orders did not abrogate [redacted]' right to legal custody, that none indicate that her legal custody of the applicant has been terminated. He contends that the six temporary orders in the record appear to be concerned with foster case for the applicant, a temporary living arrangement more akin to physical than legal custody.

The record does not support counsel's contentions. The six court orders in the record, although they are temporary in nature, do not address foster care. Instead, like the order of September 27, 1993, they commit the applicant into the custody of the Massachusetts DSS. Although counsel claims that there are many types of custody under Massachusetts law and that such orders did not terminate [redacted] legal custody of the applicant, the AAO notes that Chapter 119, section 26 of the MGL provides Massachusetts juvenile courts with the authority to allow a child who has been determined to be in need of care and protection to remain with his parents or transfer temporary *legal* custody of that child to other suitable entities, including the Massachusetts DSS. In the absence of any evidence to the contrary, the AAO concludes that when the juvenile court committed the applicant, a child who had been determined to be in need of care and protection, to the custody of DSS on October 13, 1992, it was transferring legal custody of the applicant to the DSS and that its subsequent orders extended that custody until a final hearing resulted in the applicant's commitment to the DDS on September 27, 1993. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in this proceeding. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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). The regulation at 8 C.F.R. § 341.2 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." See *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The applicant has not met his burden in this proceeding and has failed to satisfy the requirements of section 321(a)(3) of the Act. .

With regard to counsel's claim that CIS' denial of the Form N-600 deprived the applicant of his right to due process, the AAO finds that, as the applicant has not met his burden of proof and the denial of the Form N-600 was appropriate, counsel has failed to demonstrate that "substantial prejudice" to the applicant resulted from the application of the relevant statute to his case. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). Accordingly, the AAO finds counsel's assertion regarding the denial of due process to the applicant to be without merit. The appeal will be dismissed.

ORDER: The appeal is dismissed.