U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CA Date: JAN 12 2009

IN RE: [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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, San Francisco, California, 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 May 11, 1980 in El Salvador. The applicant was admitted as a lawful permanent resident of the United States as of March 30, 1989. The applicant's mother became a naturalized U.S. citizen on May 30, 1996, when the applicant was 16 years old. The applicant's parents were married in 1987, and divorced in 2006. The divorce petition indicates that the applicant's parents were separated on March 15, 2004. The applicant claims his parents were separated in 1992. 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 field office 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 eighteenth birthday. The director notes that the applicant's mother stated that she was married on her naturalization application. The director further notes, based on erroneous information provided by the applicant, that the applicant's mother petitioned for his father after her naturalization.

On appeal, the applicant, through counsel, maintains that his parents were separated in 1992, upon the applicant's father's deportation from the United States. Counsel states that a termination of marriage or a divorce decree is not required for a finding of "legal separation." Counsel submits a corrected affidavit by the applicant's mother indicating that she petitioned for the applicant's father after obtaining her lawful permanent residence.

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:
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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
>
> (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 eighteenth 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 Seventh Circuit in *Wedderburn v. INS*, 215 F.3d 795, 799 (7th 2000), stated that "domestic relations law in the United States treats 'legal separation' as the judicial suspension or dissolution of a marriage." *See also Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001).

In *Minasyan v. Gonzales*, 401 F.3d 1069, 1076 (9th Cir. 2005), the Ninth Circuit held that a "legal separation" was "a separation recognized by ... state law." The Ninth Circuit found that under California law "spouses are separated for legal purposes beginning on a court defined 'date of separation.'" *Id.* at 1078. In *Minasyan*, the parents' 2001 divorce order listed a 1993 date of separation. The Ninth Circuit concluded that the separation date indicated in the parents' divorce decree was a "separation recognized ... by state law" and therefore a "legal separation" for immigration purposes. The Ninth Circuit specifically did not address "whether in the absence of a judicial order, a complete and final break in a California marital relationship would constitute a legal separation." *Id.* at 1079 n.19.

The AAO notes that the applicant's parents' divorce petition lists March 15, 2004 as their date of separation. The AAO further notes that, despite the applicant's claim that his parents were separated in 1992, there is no evidence in the record (other than the applicant's father's deportation order) that they were physically separated or that the separation was in any way recognized by state law. The AAO notes that there is evidence in the record establishing that the applicant resided with his parents in 2002. *See e.g.* Probation Officer's Report (noting *inter alia* that the applicant's father was present at the family home). The AAO finally notes that the applicant's mother stated that she was married in her naturalization application.

The record reflects the applicant's parents' divorce occurred after the applicant's 18th birthday. The record further indicates that the date of separation claimed in the applicant's parents' divorce petition also occurred after the applicant's 18th birthday. There is no evidence that the applicant's parents' separation following the applicant's father's deportation disrupted the marital relationship or that it was recognized by state law as a separation. 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.