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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

[redacted]

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Date: AUG 0 9 2011 Office: CLEVELAND, OH 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for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (repealed)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Cleveland, Ohio, 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 Mexico on November 17, 1980. The applicant's parents, [redacted] were married on January 28, 1980. The applicant was admitted to the United States as lawful permanent resident on November 3, 1997, when he was 16 years old. The applicant's father was born in Mexico, but acquired U.S. citizenship at birth as of May 20, 1958. The applicant seeks a Certificate of Citizenship claiming that he derived citizenship through his father.

The field office director determined that the applicant failed to establish eligibility under former section 301(g) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401, or under former sections 321 and 322 of the Act, 8 U.S.C. §§ 1432 and 1433. The director noted that the applicant's father's residence in the United States began in 1973, and therefore the applicant's father was not physically present in the United States for ten years prior to the applicant's birth as required by former section 301 of the Act. The director further noted that the applicant could not establish that both his parents naturalized such that he could derive U.S. citizenship under former section 321 of the Act. With respect to former section 322 of the Act, the director noted that the applicant is over the age of 18 and therefore not eligible for benefits under that section. The application was denied accordingly.

On appeal, the applicant contends that he was in his father's sole custody following his parents' legal separation and that he therefore derived U.S. citizenship pursuant to former section 321(a)(3) of the Act. *See* Statement of the Applicant on Form I-290B, Notice of Appeal to the AAO.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The applicable law for derivative citizenship purposes is that in effect at the time the critical events giving rise to eligibility occurred. *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 was in effect prior to the applicant's eighteenth birthday, and 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.

Here, the applicant was admitted to the United States as a lawful permanent resident when he was under the age of eighteen. The applicant's father acquired U.S. citizenship at birth, as of May 20, 1958, and not through naturalization. The applicant's mother did not naturalize prior to the applicant's eighteenth birthday. The applicant's parents were married in 1980 and there is no evidence in the record to establish their legal separation.[1] The applicant therefore did not derive U.S. citizenship under former section 321(a)(1) of the Act which, as noted above, requires the naturalization of both parents prior to the applicant's eighteenth birthday or former section 321(a)(3) of the Act which requires, *inter alia*, the naturalization of the custodial parent following a legal separation.

The applicant's father acquired U.S. citizenship at birth, in 1958, and was therefore a U.S. citizen at the time of the applicant's birth in 1980. Nevertheless, the applicant did not acquire U.S. citizenship under former section 301(g) of the Act because his father was not present in the United States until 1973. Former section 301(g) of the Act requires, in relevant part, that the applicant establish that his father was physically present in the United States for ten years prior to his birth, five of which while over the age of 14 years.

Lastly, the AAO notes that the applicant also did not derive U.S. citizenship under former section 322 of the Act which, among other things, requires the adjudication and approval of the application, as well as taking of the Oath of Allegiance, prior to the applicant's eighteenth birthday. The applicant is over the age of 18.

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[1] 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). 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).

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). The applicant has not met his burden and his appeal will consequently be dismissed.

ORDER: The appeal is dismissed.