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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUL 24 2014 OFFICE: SAN DIEGO, CA FILE:

IN RE: Applicant:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the San Diego, California Field Office (the director) denied the Application for Certificate of Citizenship (Form N-600), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The application will remain denied.

Pertinent Facts and Procedural History

The applicant was born to married parents in Mexico on August 17, 1971, and he was admitted into the United States as a lawful permanent resident on April 7, 1972. The applicant's mother became a naturalized U.S. citizen on December 2, 1983, when the applicant was 12 years old. His father is not a U.S. citizen. The applicant presently seeks a certificate of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432, based on the claim that he derived U.S. citizenship through his mother.

In a decision dated May 17, 2013, the director determined that the applicant did not derive U.S. citizenship under former section 321 of the Act, because both of his parents failed to become naturalized U.S. citizens and because an October 1, 2010 California Superior Court Amended Stipulated Judgment (amended judgment) failed to establish, for immigration purposes, that the applicant's parents were legally separated prior to the applicant's eighteenth birthday. The application was denied accordingly.[1]

On appeal the applicant asserts, through counsel, that the 2010 amended judgment formalized and confirmed the actual marital relationship and child custody arrangement that his parents had from March 1986 until the applicant reached the age of majority; the amended judgment is legally binding under California State and federal immigration law; and the amended judgment establishes that his parents became legally separated on March 26, 1986, and that his mother had sole legal and physical custody over the applicant. The applicant indicates that additional evidence in the record also demonstrates that his parents began living separately in March 1986. In addition, the applicant asserts that cases referred to by the director are not controlling in his case, because they are not from the Ninth Circuit Court of Appeals (Ninth Circuit), within whose jurisdiction the applicant's case arises; and he asserts that Board of Immigration Appeals (Board) cases such as, *Matter of Cota-Vargas,* 23 I&N Dec. 849 (BIA 2005) and *Matter of Song,* 23 I&N Dec. 173 (BIA 2001), accorded full faith and credit to *nunc pro tunc* modifications of criminal sentences, and that similar reasoning should be applied to *nunc pro tunc* judgments in the context of derivative citizenship cases.

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[1] The applicant filed a prior Form N-600 on August 25, 2008. The Form N-600 was denied on December 8, 2008, and the matter was not appealed to the AAO. The regulation at 8 C.F.R. § 341.6 states that after an application for a certificate of citizenship has been denied and the appeal time has run, a second application submitted by the same individual shall be rejected, and the applicant shall be instructed to file a motion to reopen or reconsider the denial of the first application. In this case, the director appears to have treated the applicant's second Form N-600, filed on February 17, 2012, as a motion to reopen and reconsider.

Applicable Law

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ,* 381 F.3d 143, 145 (3rd Cir. 2004).

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). All persons who acquired citizenship automatically under former section 321 of the Act, as previously in force 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). The applicant was born in 1971, and he turned 18 in 1989. Former section 321 of the Act therefore applies to his citizenship claim.

Former section 321 of the Act provided, in pertinent part that:

> (a) A child born outside of the United States of alien parents . . . 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
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> (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.

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). *See also,* 8 C.F.R. § 341.2(c) (the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of

the evidence.) The "preponderance of the evidence" standard requires that the record demonstrate that an applicant's claim is "probably true," based on the specific facts of each case. *Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-,* 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

Analysis

The record reflects that the applicant was admitted into the United States as a lawful permanent resident on April 7, 1972, when he was under the age of one, and that the applicant's mother became a naturalized U.S. citizen on December 2, 1983, when the applicant was 16 years old. The applicant has therefore satisfied the requirements contained in former sections 321(a)(4) and (5) of the Act. The issue in this proceeding is whether the evidence demonstrates that the applicant was in his mother's sole custody pursuant to a legal separation of the applicant's parents prior to the applicant's eighteenth birthday, as required under former section 321(a)(3) of the Act, such that he could derive citizenship from his mother.

Here, the record contains a divorce judgment, reflecting that on April 7, 2009, the Superior Court of California, County of San Diego granted the applicant's parents a status-only, dissolution of marriage when the applicant was 37 years old, to take effect as of July 26, 2009. The divorce judgment does not indicate when the applicant's parents began living separate and apart.

The record also contains an amended judgment from the Superior Court in San Diego, California, which amends the applicant's parents' dissolution of marriage judgment to include a court finding that the applicant's parents had been physically separated since March 26, 1986 and that the applicant's mother had sole legal and physical custody over the applicant from March 26, 1986, until he reached the age of majority.

The applicant asserts, on appeal, that reasoning set forth in *Matter of Cota-Vargas, supra,* and *Matter of Song, supra,* which gave full faith and credit to retroactive *(nunc pro tunc)* reduced criminal sentence orders, should be applied in the context of his case. The applicant also asserts that *Fierro v. Reno*, 217 F.3d 1 (1st Cir. 2000) (in which the court did not accord strong evidentiary value to a *nunc pro tunc* judgment) cited by the director does not apply to him because his case arises within the jurisdiction of the Ninth Circuit Court of Appeals (Ninth Circuit).

In *Minasyan v. Gonzales, supra*, the Ninth Circuit determined, in pertinent part, that the term *legal separation* refers to a separation recognized by state law and that a California court's dissolution of marriage judgment issued in 2001 established, for purposes of California state law, that Minasyan's parents were legally separated, effective October 1993. Although *Minasyan's* parents had also obtained a *nunc pro tunc* judgment, confirming their October 1993 separation date, the Ninth Circuit ruled that this order: "[r]eiterates the original judicial determination that *Minasyan's* parents separated, as a matter of law, in October 1993. It clarifies that the separation constituted a legal separation under California law. It does not, however, change in any way the

parties' prior status." The Ninth Circuit clarified that the *Minasyan* case was "unlike those in which petitioners have sought to change relationships retroactively," citing to *Fierro v. Reno, supra.* The courts in both *Fierro v. Reno* and *Bustamante-Barrera v. Gonzales,* 447 F.3d 388, 400 (5th Cir. 2006) rejected the contention that a *nunc pro tunc* amended custody order expressly obtained to affect an immigration outcome satisfies the legal custody requirement of former section 321(a)(3) of the Act.

In the present matter, the applicant's parents' original divorce judgment does not contain a date of separation or indicate when the parents began living separate and apart. The applicant's mother filed for the amended judgment two days after the April 2009 divorce became final on July 26, 2009. According to the attorney who handled the 2010 amended judgment, because it was a stipulated agreement no evidence to support the facts contained therein, such as the date of separation, was presented to the San Diego, California Superior Court, and the court did not require any other evidence. Accordingly, unlike *Minasyan*, the facts of the applicant's parents' separation are contested.

To establish that the applicant's parents lived separately, with no intention of resuming marital relations from 1986, until the applicant turned 18, the record contains affidavits from family members, friends, and the applicant's mother's priest; a letter from the Internal Revenue Service (IRS); and home ownership documents.[2]

The applicant's father states, in pertinent part, in an affidavit dated June 7, 2009, that he permanently moved out of his family home on [redacted] California around March 26, 1986, due to irreconcilable differences with the applicant's mother. He states in an affidavit dated July 2, 2012, that he left his family home in May 1986; he had no intentions of reconciliation and remained separated from the applicant's mother; he relinquished sole legal and physical custody over the applicant to the applicant's mother; and he asked the applicant's mother for a legal divorce on many occasions, but she would not grant him a divorce due to her religious beliefs.

The applicant's mother states, in pertinent part, in an affidavit dated June 7, 2009, that the applicant's father left their family home at [redacted] California on March 26, 1986; she had sole legal and physical custody over the applicant and his siblings after March 1986; she relied on her income and that of her children to pay their bills and for their home; and she did not file for divorce sooner because she "did not have the money or the time needed to enter into a legal battle," and she feared the applicant's father would sell their home if she asked for a divorce. She adds, in pertinent part, in an affidavit dated July 2, 2012, that she received one half of her ex-husband's pension distribution after he left their home; and she states that she did not formally file for divorce until January 2009, due to her "strong religious beliefs," her desire

[2] The record also contains a copy of a U.S. passport issued to the applicant on May 26, 2010. In *Matter of Villanueva,* 19 I&N Dec. 101 (BIA 1984), the Board held that a valid U.S. passport is conclusive proof of U.S. citizenship. A letter from the Department of State Passport Office reflects, however, that on June 27, 2013, the passport was revoked on the basis that it was erroneously issued.

to "uphold [the] holy sacrament of marriage," and because she does "not agree with divorce." An affidavit from the applicant's mother's priest, also indicates that the reason the applicant's mother waited so long to divorce her husband was due to her religious beliefs.

Affidavits from the applicant's siblings, and brother-in-law, state, in pertinent part, that the applicant's father permanently left their family home at California on March 26, 1986; their parents remained separated since that time; and their mother had sole physical and legal custody over the children after her separation from their father. Affidavits from family friends, , attest that they have lived near the applicant's family between 20 to 45 years and that they have personal knowledge of the applicant's father's permanent separation from the applicant's mother in March 1986.[3]

In ascertaining the evidentiary weight of affidavits, the Service must determine the basis for the affiant's knowledge of the information to which he is attesting; and whether the statement is plausible, credible, and consistent both internally and with the other evidence of record. *See Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The affidavits fail to demonstrate the applicant's parents' separation in 1986.

First, the May 1986 date of separation discussed in applicant's father's July 2012 affidavit, conflicts materially with the March 26, 1986 date of separation attested to in his June 2009 affidavit. The May 1986 separation claim also conflicts materially with the other affidavits contained in the record, and with the date of separation contained in the 2010 amended judgment. The applicant's parents' affidavits also contain conflicting and material discrepancies regarding who sought a divorce as well as the timing and the reasons that they did not file for divorce earlier than 2009. Second, the March 26, 1986 claimed date of separation also conflicts materially with information contained the applicant's father's Applications to Replace Permanent Resident Card (Form I-90), which reflect that the applicant's father stated on July 9, 1996, and September 6, 2006, that his address was: California, which is the applicant's mother's address and the family home.

The record also lacks documentary evidence to corroborate the claim that the applicant's parents lived separately, with no intention of resuming marital relations from 1986, until the applicant turned 18. Internal Revenue Service evidence indicates that there is no taxpayer information for the applicant's mother, and the record lacks corroborative employment evidence for the applicant's mother. The record also fails to contain any testimonial and documentary evidence to establish that the applicant's father, as claimed, maintained a home separate and apart from the 1256 Vine Street address upon the couple's separation. In his July 2, 2012 affidavit, the applicant's father attested that he "would take care of the monthly payments of the family home

[3] Affidavits from the applicant's father's co-worker, and from the applicant's three nieces are also contained in the record; however, these affiants have no personal knowledge of the applicant's parent's alleged separation between March 1986 until the applicant's eighteenth birthday in 1989.

including the insurance and tax payments," but he did not specify his own living arrangements once he allegedly left the family home.

More importantly, the term *legal custody* refers to "the authority to make significant decisions on a child's behalf, including decisions about education, religious training, and healthcare." CUSTODY, Black's Law Dictionary (9th ed. 2009). Even if the applicant's father left the marital home in March 1986 as claimed, the applicant has not shown that he was no longer under his father's legal custody pursuant to California law.

The Service must look beyond the facial validity of *nunc pro tunc* decrees to determine their legal effect, if any, in federal cases. *See U.S. v. Esparza,* 678 F. 3d 389 (5th Cir. 2012). In the present matter, the applicant's parent's amended judgment fails to establish, for derivative citizenship purposes, that the applicant's parents were legally separated prior to the applicant's eighteenth birthday. Simply relying on a "*[n]unc pro tunc* order to recognize derivative citizenship would create the potential for significant abuse and manipulation of federal immigration and naturalization law." *See Bustamante-Barrera v. Gonzales, supra* at 400. In addition, retroactively changing the legal relationship status between the applicant's parents would create a legal fiction and would not serve the purpose of the statute. *See Minasyan v. Gonzales, supra* at 1080 n.20.

Conclusion

Here, as noted by the attorney who handled the amended judgment, the applicant's parents obtained the judgment based solely on their uncorroborated testimony simply because it was a stipulated agreement. Based upon the lack of evidence to establish that his parents were legally separated from March 26, 1986, until the applicant turned 18, the applicant's case can be distinguished from *Minasyan*. Accordingly, the applicant has failed to establish that he derived U.S. citizenship from his mother under former section 321(a)(3) of the Act.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. Here, the applicant has not met his burden. Where, as here, an applicant has failed to establish statutory eligibility for U.S. citizenship, a certificate of citizenship cannot be issued. *See Fedorenko v. U.S.,* 449 U.S. 490, 506 (1981) (strict compliance with statutory prerequisites is required to acquire citizenship.)

ORDER: The appeal is dismissed. The application remains denied.