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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: HOUSTON, TX

Date:

OCT 03 2006

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Application for Certificate of Citizenship pursuant to former Section 321(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1432(a)(3), now repealed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, Houston, Texas 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 February 14, 1974 in Managua, Nicaragua and legally recognized as his father's son in the same year. The applicant's father, [REDACTED] born in Nicaragua, became a naturalized U.S. citizen on July 6, 1990, when the applicant was sixteen years old. The applicant's alleged mother, [REDACTED] also born in Nicaragua, naturalized on April 14, 1994. The applicant's parents married on March 25, 1982. The applicant attained lawful permanent resident status as of May 27, 1983 when he was nine 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).

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001.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:

- (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 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 director denied the petition because he found that the evidence submitted by the applicant did not establish [REDACTED] the ex-wife of the applicant's father, as the applicant's mother. The director further determined that the record did not include sufficient evidence to demonstrate a legal separation between [REDACTED] and the applicant's father, [REDACTED]. He also found the naturalization of the applicant's father to have preceded rather than followed his alleged custody of the applicant, as required by former section 321(a)(3).

On appeal, counsel contends that the applicant is not required to establish that his parent's legal separation occurred prior to the father's naturalization in 1990. The AAO agrees. Guidance issued by the former Immigration and Naturalization Service on February 18, 1997 provides the following discussion of former section 321(a) requirements:

Section 321(a) of the Act provides for acquisition of citizenship of a minor upon the naturalization of both his/her parent(s) (or the surviving parent or the parent with legal custody) provided certain conditions are satisfied. There is no specific order in which the conditions of the law must be satisfied for citizenship as long as all conditions are satisfied before the child's 18th birthday.

A child who is given into the custody of a parent following that parent's naturalization (the other parent being an alien) would derive citizenship under Section 321(a)(3) of the Act on the date custody is awarded provided such date is prior to the child's 18th birthday and the child is residing in the United States pursuant to lawful permanent residence on that date. If the child is not residing in the United States on that date but enters the United States to begin lawful permanent residence before age 18, citizenship would be acquired on the date of such entry.

Therefore, to establish eligibility for citizenship under the language of former section 321(a)(3) of the Act, the applicant need only prove that prior to the date of his 18th birthday, February 14, 1992, his father had become a U.S. citizen, and that he was a lawful permanent resident in the custody of his father subsequent to the legal separation of his parents.

The applicant contends that he acquired U.S. citizenship through the naturalization of his father in 1990, which occurred when he was 16 years of age. He asserts that as a lawful permanent resident who was in his father's custody following his parents' separation in 1991, when he was 17 years of age, he has satisfied the requirements at section 321 (a)(3) of the Act.

The AAO has reviewed the record in its entirety, as well as counsel's assertions regarding the proof it provides in relation to the applicant's case. As noted above, the record documents that the applicant became a lawful permanent resident when he was 9 years of age and that his father naturalized when he was 16 years of age. Accordingly, the one issue before the AAO is whether prior to turning 18 years of age, the applicant was in his father's custody following the legal separation of his parents.

The AAO turns first to the question of whether the record establishes [REDACTED] as the applicant's mother. While the applicant has submitted a certificate issued by the Civil Registrar in Managua, Nicaragua to demonstrate that [REDACTED] is his father, he has provided no such primary evidence to establish [REDACTED] as his mother.

In his denial, the director noted that the record does not include the applicant's birth certificate, which would list his mother. On appeal, counsel asserts that the former Immigration and Naturalization Service previously

reviewed the applicant's birth certificate and submits as proof a copy of a list of exhibits submitted by the former U.S. Immigration and Naturalization Service (INS) in relation to the applicant's removal proceedings. He also submits a 1983 affidavit signed by the applicant's father identifying the applicant's mother as [REDACTED] and the applicant's Form I-485, Application for Status as a Permanent Resident, on which [REDACTED] is listed as his mother. Counsel notes that the issue of the applicant's maternity has not been previously questioned.

The AAO has reviewed the evidence referenced by counsel. The birth certificate noted in the exhibits prepared by the former INS is the recognition document noted above and not a birth certificate. While the 1983 affidavit signed by the applicant's father and the Form I-485 both indicate that [REDACTED] is the applicant's mother, they are not sufficient proof of the applicant's maternity in the absence of any primary evidence to establish the relationship.

The regulation at 8 C.F.R. § 103.2(b)(2)(i) requires the following when evidence does not exist or is unavailable:

If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The applicant has not submitted a copy of his birth certificate or other primary evidence to establish the identity of his mother. Neither does he indicate or offer proof that his birth certificate does not exist or is not available. In response to a direct AAO request for a copy of the applicant's birth certificate, counsel contends that the existing record offers sufficient proof to establish [REDACTED] as the applicant's mother. He asserts that significant weight should be given to the fact that in the course of six years of removal proceedings involving the applicant, his maternity was not questioned, that the applicant's maternity is clearly indicated by the name on his Nicaraguan passport – [REDACTED], and that [REDACTED] and the applicant have always listed each other as mother and son. Counsel further points to the court documents issued by the Harris County family court in which the applicant is listed as one of five children from the marriage of [REDACTED] and [REDACTED] in accordance with the Texas Family Code. Counsel's reasoning is not persuasive.

The record fails to provide any primary documentation of the applicant's birth to [REDACTED] and neither the petitioner nor his counsel have indicated or demonstrated that such primary documentation does not exist or is otherwise unavailable. The applicant has failed to comply with the requirements at 8 C.F.R. § 103.2(b)(2)(i). Moreover, the AAO notes that the Nicaraguan recognition certificate submitted by the applicant, the only primary document in the record related to the applicant's birth, lists his name as [REDACTED], not [REDACTED]. Accordingly, the record does not establish that [REDACTED] is the applicant's mother and, therefore, that her separation from [REDACTED] represents the legal separation of the applicant's parents.

The AAO notes, however, that even if the applicant were able to prove that [REDACTED] is his mother, the application could not be approved as the evidence of record does not establish that prior to his 18th birthday the applicant was in his father's custody.

As proof that his parents legally separated in 1991 and that he subsequently lived with his U.S. citizen father, **the applicant has submitted the following documentation: copies of a December 17, 1991 temporary restraining order, issued by the family district court in Harris County, Texas, preventing the applicant's father from threatening, harassing or harming the applicant's alleged mother; a January 7, 1992 master's report from the district court of Harris County, Texas establishing child support for the applicant and his four siblings; a January 17, 1992 order establishing that the applicant's parents would share custody of him and his siblings; a January 27, 1992 order withholding income from his father's earnings for child support for the applicant's siblings; a March 27, 1992 court order establishing shared custody of the applicant's siblings; a second child support order, dated July 17, 1992, for the applicant's three youngest siblings; and a July 17, 1992 divorce decree, establishing shared custody for the applicant's siblings and child support for the three youngest.**

In assessing the December 17, 1991 temporary restraining order issued against the applicant's father, the director relied on the holdings in *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001), which found legal separation under former section 321(a)(3) of the Act to be "uniformly understood to mean *judicial* separation." He noted the 5th Circuit's rejection of the premise that any voluntary separation under legal circumstances would suffice and that the court had specifically concluded that "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." The director also quoted from a decision issued by the Second Circuit Court of Appeals, *Brissett v. Ashcroft*, 363 F.3d 130 (2d Cir. 2004), stating that a restraining order that "prevents spouses from assaulting each other, but neither mandates nor recognizes separate existence merely enforces a marital duty and does not constitute a legal separation." Accordingly, the director found the **restraining order submitted by the applicant failed to qualify as proof of a judicial alteration of the relationship between [REDACTED] and [REDACTED]**

In that the instant case arises within the 5th Circuit, the director correctly relied on the holdings in *Nehme* to assess the applicant's evidence of a legal separation. However, the director appears to have limited his consideration of the applicant's evidence to the December 17, 1991 restraining order, when the record includes copies of three other court orders, each issued prior to the applicant's 18th birthday and each relevant to the question of legal separation – the January 7, 1992 master's report from the Harris County family court establishing child support for the applicant and his four siblings; the January 17, 1992 court order establishing custody of the applicant and his siblings, and child support payments by the applicant's father; and the January 27, 1992 order withholding income from the father's earnings for child support for the applicant's siblings. The director also failed to consider the restraining order in its entirety or in the context of the proceedings that ultimately resulted in the July 17, 1992 divorce decree documented in the record.

For immigration purposes, "[l]egal separation of the parents . . . means either a limited or absolute divorce obtained through judicial proceedings." *Matter of H*, 3 I&N Dec. 742 (1949) (Quotations omitted).

On December 16, 1991, [REDACTED] initiated divorce proceedings against [REDACTED] in Harris

County, Texas.¹ Therefore, all four subsequent temporary orders issued by the Harris County family district court in relation to this filing, must be viewed as recognizing the changed nature of the marital relationship between [REDACTED] and [REDACTED]. The January 17, 1992 temporary orders, which establish that [REDACTED] and her husband were residing separately as of that date, specifically refer to their pending divorce, indicating that orders would “continue in force until the signing of the final decree of divorce or until further order of this Court.” The December 17, 1991 order, which the director characterized as simply a restraining order, also notifies the applicant’s father of a January 1, 1992 hearing date to determine such issues as whether he will be required to pay child support “during the pendency of this suit” and whether the court will order him to file an inventory of all “separate and community property owned or claimed by the parties and all debts and liabilities owed by the parties.” In that Texas state law does not provide for legal separation prior to divorce, these orders appear to serve much the same purpose as legal separation agreements, settling issues of property, child support and custody, and establishing acceptable contact between a husband and wife prior to the issuance of a divorce decree. As issued by the Harris County family district court, the AAO finds them to constitute the “limited divorce” through judicial proceedings required by *Matter of H*, as well as the formal alteration of the marital relationship envisaged by *Nehme v. INS*. The applicant has therefore established that [REDACTED] and [REDACTED] were legally separated prior to his 18th birthday.

He has not, however, demonstrated that he resided in the legal custody of his U.S. citizen father following this separation. The AAO 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 instant case, the record contains temporary orders issued by the Harris County family district court on January 17, 1992 that assign custody of the applicant and his siblings to [REDACTED] who is designated as the sole temporary managing conservator or custodial parent. The applicant’s father is named as the sole possessory conservator or non-custodial parent. Although the orders clearly establish visitation rights for [REDACTED] visitation does not constitute custody. [REDACTED] is the parent given exclusive rights to decide such issues as the primary residence of the applicant and his siblings, whether invasive, non-emergency surgery may be performed or psychiatric and psychological care provided, and the type of education to be given the applicant and his siblings.² Although the Texas Family Code allows for the designation of joint managing conservators, i.e., joint custody, the court did not make such a designation in issuing the January 17, 1992 orders. Accordingly, the record demonstrates that prior to his 18th birthday, the applicant’s legal custody was awarded to [REDACTED].

While the AAO notes counsel’s assertions on appeal that the applicant was physically residing with his father following his father’s separation from [REDACTED] the record does not support counsel’s claims. Instead, the temporary orders issued on January 17, 1992, which identify the applicant and each of his siblings by name, indicate that [REDACTED] was enjoined from “hiding or secreting the children from [the] Petitioner [REDACTED] or changing the childrens’ [sic] current place of domicile at [REDACTED] Houston, Texas.” The address listed is that of [REDACTED] not [REDACTED]. Accordingly, the record also fails to prove that the applicant was in the physical custody of his father prior to his 18th birthday. On this basis as well, the applicant has failed to satisfy the requirements of former section 321(a)(3) of the Act. The appeal will be dismissed.

¹ Information provided by the Clerk’s office, Family District Court of Harris County, Texas.

² See Texas Family Code at § 153.071 through § 153.252 at <http://tlo2.tlc.state.tx.us/statutes/statutes/html> and *PRO SE DIVORCE HANDBOOK*, “Representing Yourself in Family Court,” The Texas Young Lawyers Association at www.texasbr.com.

For the reasons previously discussed, the applicant has not established that he is eligible for a certificate of citizenship under former section 321(a)(3) of the Act. Accordingly, the AAO will not disturb the director's denial of the application.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

ORDER: The appeal is dismissed.