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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 04 2007

IN RE: Applicant: [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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director of the California Service Center 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 8, 1964 in the Dominican Republic. The applicant's father [redacted], became a naturalized U.S. citizen on September 21, 1976, when the applicant was 12 years old. The applicant's mother, [redacted], became a naturalized U.S. citizen on July 14, 1996, when the applicant was 32 years old. The applicant's parents married in the Dominican Republic on November 29, 1958, and they divorced in Dade County, Florida on February 9, 2000. The applicant asserts that his parents entered into a separation and custody agreement on November 28, 1964 (the 1964 agreement). In 1967, the applicant immigrated to the United States to reside with his father. His mother immigrated to the United States on July 6, 1966 with the stated purpose of residing permanently with her husband, Fabio Pena. The applicant claims that he resided in the United States with his father and paternal grandmother. His mother resided with them sporadically. The applicant seeks a certificate of citizenship under section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432, claiming that he derived citizenship through his father.

The director determined that the applicant did not qualify for citizenship under section 321 of the former Act, 8 U.S.C. § 1432, because his parents did not obtain a "legal separation" prior to the applicant's 18th birthday. The director noted the unavailability of the original or a copy of the 1964 agreement. The director found that without the benefit of the document, it was impossible to determine the nature or effect of the parents' agreement. The director considered the evidence presented, but found it unpersuasive in light of CIS's records reflecting that the parents remained married at the time of both the father's and mother's naturalization.

Section 321 of the former Act, 8 U.S.C. § 1432, 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:
>
> (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 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 (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

The AAO finds that the requirements set forth in section 321(a) of the former Act, 8 U.S.C. § 1432(a), have not been met. Specifically, the AAO finds that the applicant has failed to establish the "legal separation" requirement set forth in section 321(a)(3) of the former Act, 8 U.S.C. § 1432. Because the AAO finds that the applicant's parents were not legally separated, the AAO does not address the issue of "legal custody."

On appeal, the applicant, through counsel, maintains that his parents executed and filed a separation and custody agreement in November 1964, and that this agreement qualifies as a "legal separation." The applicant claims that the original or a copy of the 1964 agreement is unavailable. In support of his claim, the applicant submits an Incident Report dated June 21, 1999 to establish that his father's copy of the 1964 agreement was destroyed in a fire at the family residence. The applicant also submits his own affidavit, three notarized statements, a copy of his father's passport, a copy of his immigrant visa, his birth certificate, and his parents' marriage certificate and divorce decree. The notarized statements consist of one executed by his mother (and six witnesses) attesting to the existence of the 1964 agreement, another by a Mr[redacted] (who assisted in the preparation of the 1964 agreement), and one from the clerk of the local court in the Dominican Republic (stating that the court records were lost when the court moved).

Counsel claims that secondary evidence in the form of affidavits must be given dispositive weight in the absence of the original document. In support of this claim, counsel cites (and attaches) the non-precedent decisions in *Kajtazi v. INS*, 2005 U.S. Dist LEXIS 24173 (D.N.J. October 14, 2005), and *Matter of Kwe*, 28 Immig. Rptr. B1-26 (BIA Dec. 17, 2003).

Counsel's reliance on the cited cases is misplaced. The AAO is not bound by the unpublished, non-precedent decisions cited, nor was the issue in either case whether a "legal separation" could be established absent a formal, judicial decree. In *Kajtazi*, the issue was whether "legal separation" could be established by submission of documentation establishing that the parents were divorced where the original or a certified copy of the document was unavailable. Albeit uncertified, it was clear to the Court in *Kajtazi*, that the marital relationship between the parents had been altered by a judicial decree. *Matter of Kwe* is similarly inapposite. In *Matter of Kwe*, the Board of Immigration Appeals (Board) considered affidavits as proof that the naturalizing parent had "actual, uncontested custody" of the applicant based on the holding in *Matter of M-*, 3 I&N Dec. 850, 856 (BIA 1950), that allows for proof of "actual, uncontested custody" where there is no formal, judicial custody order. *Matter of Kwe* does not, as counsel suggests, hold that affidavits can be sufficient proof to establish "legal separation." In fact, the applicant provided a copy of his parents' divorce decree in *Matter of Kwe* so "legal separation" was not at issue in that case.

The AAO notes that the 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. *See also, Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001). 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). A privately-executed separation agreement made between the applicant's parents does not qualify as a "legal separation" under section 321(a)(3) of the former Act. *Afeta v. Gonzales*, 467 F.3d 402, 407 (4th Cir. 2006). Even considering the affidavit and notarized statements submitted, none establish by a preponderance of the evidence that a formal, judicial

proceeding ensued subsequent to the filing of the separation agreement such that the parents' marital relationship was altered by a formal, judicial decree.

The AAO further notes the Board's finding in *Matter of Tijerina-Villarreal,* 13 I&N Dec. 327, 331 (BIA 1969), that:

> [W]here a claim of derivative citizenship has reasonable support, it cannot be rejected arbitrarily. However, when good reasons appear for rejecting such a claim such as the interest of witnesses and important discrepancies, then the special inquiry officer need not accept the evidence proffered by the claimant. (Citations omitted.)

The applicant in the present matter acknowledges, and the record confirms, that his parents remained married and living together, albeit sporadically, until their divorce in 2000. *See* Affidavit of [redacted] at ¶¶ 12, 17; *see also* 1999 Incident Report, *supra* (reflecting applicants' mother as the owner of the family residence), Applicant's mother's Visa Application and Application for Naturalization (reflecting marital status as "married" and indicating the family residence as her address); Affidavit of Support executed by [redacted] immigrant visa application (same). Additionally, the certified copy of the parents' marriage certificate, issued in 1971, does not contain any notation or otherwise reflect that the parents were legally separated. Even if the parents entered into a separation and custody agreement in 1964, and even if it was filed with the local court in the Dominican Republic, there is no evidence to establish that the filing of the agreement resulted in an alteration of the marital relationship through judicial proceedings. Indeed, the notarized statement by Mr. [redacted] suggests that the applicant's parents sought to formalize their separation "until the President of the local Court pronounced the judgment in that sense." *See* Notarized Statement of Mr. [redacted] at ¶ *d.* There is no evidence in the record indicating that the local court issued any judgment with respect to the applicant's parents' 1964 agreement.

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, 8 U.S.C. § 1432(a)(3). The applicant therefore does not qualify for citizenship under section 321 of the Act.

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 applicant in the present case has not met his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.