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U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. 3000  
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U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE: [REDACTED] Office: PHILADELPHIA, PA Date: SEP 20 2007

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship pursuant to Section 321(a)(3) of the Nationality Act, 8 U.S.C. § 1432(a)(3), now repealed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*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the District Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record before the AAO reflects that the applicant was born on January 23, 1969 in Ecuador. The applicant's father, [REDACTED] became a U.S. citizen on June 20, 1983, when the applicant was 14 years of age. The applicant's mother, [REDACTED] was, at the time of his birth a citizen of Ecuador and there is no evidence in the record to indicate a change in her nationality. The applicant's parents never married. On September 3, 1983, the applicant was admitted to the United States as a lawful permanent resident, based on a petition filed by his U.S. citizen father. 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), based on his claim that he acquired citizenship upon his 1983 arrival in the United States.

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001.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 record establishes that the naturalization of the applicant's father and his admission to the United States as a lawful permanent resident occurred prior to his 18<sup>th</sup> birthday. Therefore to prove that he is eligible to acquire U.S. citizenship under former section 321(a)(3) of the Act, the applicant must demonstrate that, prior to his 18<sup>th</sup> birthday, he was in his father's legal custody following his father's legal separation from his mother, [REDACTED]

To establish the legal separation of the applicant's parents and to prove that he was placed in his father's custody, counsel provides an August 16, 1979 decision of the First Court of Minors of Guayas in Ecuador, which indicates that the court accepted an agreement reached by the applicant's parents and "concede[d] provisionally the care of the [applicant] to his father. Counsel contends that this decision not only allocates responsibility for the applicant but is also evidence of "a legal agreement between [the applicant's parents] constituting a separation."

The AAO notes that the BIA 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 (5<sup>th</sup> 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 (4<sup>th</sup> Cir. 2006).

*Lewis v. Gonzalez*, 481 F.3d 125 (2<sup>nd</sup> Cir. 2007), cited by counsel, found that:

Indeed, every other court confronted with the question has held that the first clause of § 1432(a)(3) requires a legal separation even if the child's parents never married. *Barthelemy*, 329 F.3d at 1065; *Wedderburn*, 215 F.3d at 799; *see also In the Matter of H-*, 3 I & N Dec. 742, 744 (BIA 1949); *Barton v. Ashcroft*, 171 F.Supp.2d 86, 88-89 (D.Conn.2001); *Charles v. Reno*, 117 F.Supp.2d 412, 418 (D.N.J.2000). As strange as it may at first appear, this feature of the statute is a principled one. The governing principle, as we shall explain, is respect for the rights of an alien parent who may not wish his child to become a U.S. Citizen.

While the AAO acknowledges the First Court of Minors' provisional transfer of the applicant's custody to his father in 1979, the document is not proof of a legal separation on the part of the applicant's parents. The applicant has stated that his parents did not enter into a formal marriage and there is no evidence in the record that their relationship was ever recognized in Ecuador as a common-law marriage. In that the applicant's parents were never legally married, he is unable to establish that prior to his 18<sup>th</sup> birthday, they obtained the divorce or other legal separation necessary to satisfy the requirements of section 321(a)(3) of the Act. Accordingly, the applicant has not demonstrated that he is eligible for derivative citizenship under section 321 of the Act

The AAO also finds that the applicant does not qualify for citizenship pursuant to former section 320 of the Act, 8 U.S.C. § 1431. Former section 320 of the Act provided that:

(a) A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such parent is naturalized, become a citizen of the United States, when

(1) such naturalization takes place while such child is under the age of 18 years; and

(2) such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of 18 years.

As neither of the applicant's parents were U.S. citizens at the time of his birth, the applicant does not qualify for U.S. citizenship under former section 320 of the Act.

The applicant also fails to qualify for U.S. citizenship under former section 322 of the Act, which provided that:

(a) A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, "Secretary"] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [Secretary] that the following conditions have been fulfilled:

(1) At least one parent is a citizen of the United States, whether by birth or naturalization.

(2) The child is physically present in the United States pursuant to a lawful admission.

(3) The child is under the age of 18 years and in the legal custody of the citizen parent.

(b) Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

Whether or not an applicant satisfies the requirements set forth in former section 322(a) of the Act, section 322(b) requires that an applicant also establish that his or her application for citizenship was approved by Citizenship and Immigration Service (CIS) prior to the applicant's eighteenth birthday, and that the applicant had taken an oath of allegiance prior to turning eighteen. The applicant in the instant case has not met the

requirements set forth in former section 322(b) of the Act. CIS did not approve his certificate of citizenship application before he turned eighteen, and he did not take an oath of allegiance prior to his eighteenth birthday.

The AAO notes that, on appeal, the applicant's father asserts that his son went before a judge in 1994 and was found to be a U.S. citizen. Although the applicant's father indicates that a brief and documentation will be submitted to prove the applicant's case, the brief and evidence provided by counsel do not address this claim.

For the reasons previously discussed, the applicant has not established that he acquired U.S. citizenship at the time of his 1983 admission to the United States. Accordingly, the AAO will not disturb the director's denial of the application.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met his burden.

**ORDER:** The appeal is dismissed.