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U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529



U.S. Citizenship  
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FILE:

Office: PHILADELPHIA, PA Date:

JUL 17 2009

IN RE:

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:

SELF-REPRESENTED

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.

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Field Office Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director for action consistent with this decision.

The record reflects that the applicant was born on July 29, 1965 in Panama. The applicant's parents are [REDACTED] and [REDACTED]. The applicant's parents were married in 1965 and divorced in 1985. The applicant's father became a U.S. citizen upon his naturalization on September 12, 1984. The applicant's mother was naturalized on December 21, 1982. The applicant was admitted to the United States as a lawful permanent resident on August 24, 1977. The applicant's 18<sup>th</sup> birthday was on July 29, 1983. The applicant presently seeks a Certificate of Citizenship pursuant to section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432 (repealed).

The field office director determined that the applicant could not derive U.S. citizenship solely through his mother because his parents were not legally separated prior to his 18<sup>th</sup> birthday. The director thus found that the applicant did not derive U.S. citizenship under section 321 of the former Act. The application was accordingly denied.

On appeal, the applicant cites *Minasyan v. Gonzalez*, 401 F.3d 1069 (9<sup>th</sup> Cir. 2005). The applicant claims that, although his parents were not divorced until 1984, they were legally separated under New York law.

The Child Citizenship Act of 2000 (the CCA), which took effect on February 27, 2001, amended sections 320 and 322 of the Act, and repealed section 321 of the Act. The provisions of the CCA are not retroactive, and the amended provisions of section 320 and 322 of the Act apply only to persons who were not yet 18 years old as of February 27, 2001. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. Section 321 of the former Act, 8 U.S.C. § 1432, is therefore applicable in this case.

Section 321 of the former Act, stated, 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 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. (Emphasis added).

8 U.S.C. § 1431 (emphasis added).

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. The Board of Immigration Appeals (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*, *Morgan v. Attorney General*, 432 F.3d 226 (3d Cir. 2005) (holding that a legal separation ... occurs only upon a formal governmental action, such as a decree issued by a court of competent jurisdiction that, under the laws of a state or nation having jurisdiction over the marriage, alters the marital relationship of the parties); *Nehme v. INS*, 252 F.3d 415, 425-26 (5<sup>th</sup> Cir. 2001)(same). 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).

There is no evidence in the record indicating that that applicant’s parents obtained a “legal separation” until their divorce in 1985. The AAO is not bound by the Ninth Circuit’s decision in *Minasyan v. Gonzalez*, *supra*, as this matter arises within the jurisdiction of the Third Circuit Court of Appeals. As noted above, the Third Circuit in *Morgan v. Attorney General*, *supra*, upheld the Board’s definition of “legal separation” requiring “a formal governmental action.” The AAO notes, in any event, that this case is distinguishable from *Minasyan*. In *Minasyan*, the divorce decree specifically listed a separation date whereas the applicant’s parents’ divorce decree does not. The AAO further notes that New York Domestic Relations Law specifically provides for an action for separation (Article 11, sections 201-203), independent from actions for divorce.

The AAO notes the Second Circuit’s decision in *Lewis v. Gonzales*, 481 F.3d 125 (2<sup>nd</sup> Cir. 2007) where the court emphasized that “because derivative citizenship is automatic, and because the legal consequences of citizenship can be significant, the statute is not satisfied by an informal expression, direct or indirect. In all cases besides death, the statute requires formal, legal acts indicating either

that both parents wish to raise the child as a U.S. citizen or that one parent has ceded control over the child such that his objection to the child's naturalization no longer controls.” 481 F.3d at 131.

“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.” *Nehme*, 252 F.3d at 425-26 (emphasis in original) (recognizing that requiring the naturalization of both parents, when the parents were married, “was necessary to promote the child from being separated from an alien parent who has a legal right to custody”); *see also Fierro v. Reno*, 217 F.3d 1, 6 (1<sup>st</sup> Cir. 2000)(stating that “both the language of [section 321(a)] and its apparent underlying rationale suggest that Congress was concerned with the legal custody status of the child *at the time* that the parent was naturalized and during the minority of the child”)(emphasis in original).

The AAO notes “[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.” *Fedorenko v United States*, 449 U.S. 490, 506 (1981). 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. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is “probably true” or “more likely than not.” *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The AAO finds that the applicant has not met his burden of proof.

The AAO nevertheless notes that the record contains a copy of the applicant’s U.S. passport. 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. Specifically, the Board held in *Matter of Villanueva* that:

unless void on its face, a valid United States passport issued to an individual as a citizen of the United States is not subject to collateral attack in administrative immigration proceedings but constitutes conclusive proof of such person’s United States citizenship.

Where, as here, the applicant has failed to establish statutory eligibility for U.S. citizenship, a Certificate of Citizenship cannot be issued. The USCIS Adjudicator’s Field Manual at § 71.1 instructs that

An unexpired United States passport issued for 5 or 10 years is now considered *prima facie* evidence of U.S. citizenship. Because it does not provide the actual basis upon which citizenship was acquired or derived, the submission of additional documentation may be required or the passport file may be requested. If after review there are differences or discrepancies between the USCIS information and the Passport Office records which would indicate that the application should not be approved, no action should be taken until the Passport Office has an opportunity to review and decide whether to revoke the passport.

The AAO notes that on May 29, 2009 the Assistant Field Office Director, Allenwood, Pennsylvania notified the U.S. Department of State that the applicant did not derive U.S. Citizenship from his

mother, however, there is no indication in the record that the USCIS and Passport Office records have been compared or that the Passport Office has taken any action. The matter must therefore be remanded to the director to await Passport Office review and determination as to whether to revoke the applicant's passport. The director shall determine the matter once the Passport Office's review is completed and issue a new decision accordingly.

**ORDER:** The matter is remanded to the field office director for action consistent with this decision.