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



U.S. Citizenship
and Immigration
Services

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FILE:

Office: BUFFALO, NY

Date:

JUL 20 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).



John F. Grissom/Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Buffalo, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on October 25, 1972 in Haiti. The applicant's parents are [REDACTED] and [REDACTED]. The applicant's parents were married in 1974. The applicant's father became a U.S. citizen upon his naturalization on October 4, 1984. The applicant's mother never naturalized. The applicant was admitted to the United States as a lawful permanent resident on November 8, 1985. The applicant's 18th birthday was on October 25, 1990. 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of Citizenship pursuant to section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432 (repealed) claiming he derived U.S. citizenship through his father.

The field office director determined that the applicant could not derive U.S. citizenship solely through his father because his parents were not legally separated prior to his 18th 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 claims, in relevant part, that his parents were separated in 1985 or 1986, and that he was brought to the United States by his father when he was 11 years old.

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 applicant’s parents were married in 1974. There is no evidence in the record indicating that they divorced or otherwise “legally separated.”

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 (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).

There is no evidence in the record indicating that that applicant’s parents obtained a “legal separation.” The Second Circuit in *Lewis v. Gonzales*, 481 F.3d 125 (2nd Cir. 2007) 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 (1st 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 applicant is statutorily ineligible for U.S. citizenship. His untimely appeal will therefore be dismissed

ORDER: The appeal is dismissed.