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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MIAMI, FL Date: MAY 06 2009

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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Miami, Florida, 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 April 4, 1958 in Cuba. The applicant's birth certificate indicates that his parents are and The applicant's parents were married to each other in 1955. The applicant's parents were divorced. The applicant's mother became a U.S. citizen upon her naturalization in 1974. The applicant was admitted to the United States as a lawful permanent resident in 1974. The applicant seeks a certificate of citizenship pursuant to section 321 of the former Immigration and Naturalization Act (the former Act), 8 U.S.C. § 1432 (repealed) claiming that he derived citizenship upon his mother's naturalization.

The field office director denied the applicant's citizenship claim upon finding, in relevant part, that the applicant's parents were divorced after his 18th birthday. The director noted that the applicant's parents' immigration records indicated that they were divorced in 1980, when the applicant was 22 years old. The applicant maintains, on appeal, that his parents were divorced in 1968. In support of his claim, the applicant has submitted a copy of a divorce decree entered in 1968.

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Chau v. Immigration and Naturalization Service,* 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The applicant in this case was born in 1958. The applicant was over 18 on the effective date of the Child Citizenship Act of 2000. Section 321 of the former Act, 8 U.S.C. § 1432, is therefore applicable to this case.

Section 321 of the former Act, 8 U.S.C. § 1432, provided, 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.

The applicant has established that he was admitted to the United States as a lawful permanent resident and that his mother had naturalized prior to his 18th birthday. The AAO notes, however, that the applicant has failed to establish that his parents were legally separated prior to his 18th birthday, in 1976.

The Board of Immigration Appeals (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).

The record in this case contains two divorce decrees, one purporting to evidence the applicant's parents' divorce in 1980 (and silent as to the issue of custody) and one purporting to evidence their divorce in 1968 (awarding custody of the applicant to his mother).[1] The applicant claims that his father divorced his mother without her knowledge while he was in prison. The AAO notes that the applicant's parents' immigration records suggest that they were divorced in 1980, and not 1968. In this regard, the AAO notes that the applicant's mother's naturalization application (filed in 1974) indicates that she is married. The applicant's father's immigration record includes an original 1980 divorce decree, whereas the applicant's instant application includes only a copy of a 1968 decree.

The AAO 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.)

In view of the applicant's and his parents' immigration records, and the lack of a plausible explanation as to the existence of two divorce decrees with different dates, the AAO cannot find that the applicant has established, by a preponderance of the evidence, that his parents were legally separated prior to his 18th birthday.

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[1] The record suggests that the applicant's mother had actual, uncontested custody of the applicant. 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 absence of a judicial determination or grant of custody following a divorce, the parent having actual, uncontested custody of the child is to be regarded as having legal custody. *See Matter of M*, 3 I&N Dec. 850, 856 (BIA 1950).

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

ORDER: The appeal is dismissed.