



U.S. Citizenship
and Immigration
Services

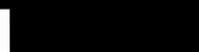
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FILE:



Office: ATLANTA, GA

Date: **MAY 07 2009**

IN RE:



APPLICATION: Application for Certificate of Citizenship under Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432(repealed)

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, 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, Atlanta, Georgia. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the field office director issued the decision on July 28, 2008. It is noted that the director properly gave notice to the applicant that he had 30 days to file the appeal (33 days if the decision was mailed). The director noted that the Notice of Appeal “shall be executed and filed with this office, together with the required fee.” *See* Decision of the Field Office Director. The Notice of Appeal (Form I-290B) in this case was dated August 22, 2008. It was mistakenly submitted to the AAO, and not the Atlanta USCIS office as required. The appeal was not received by the appropriate office until September 4, 2008, 38 days after the issuance of the director’s decision.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. The filing of a motion to reopen and reconsider does not toll the time limit for filing an appeal and the regulations do not provide for an appeal of the dismissal of such a motion. The AAO is therefore without jurisdiction to consider the appeal, and the appeal must be rejected.

The AAO notes that the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The applicant in this case is claiming that he derived U.S. citizenship upon his mother’s naturalization (in 1989). The applicant was born in 1973, therefore section 321(a) of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432 (repealed), applies to this case.¹ Section 321(a) of the former Act required, in relevant part, that both parents be naturalized unless one of the parents is deceased or where the naturalizing parent had legal custody of the applicant

¹ The applicant was over the age of 18 on the effective date of the Child Citizenship Act of 2000.

following a legal separation.² The AAO notes that the applicant's parents were married in 1962. The applicant claims that they were separated, but the record does not contain any evidence of a "legal separation." See *Matter of H*, 3 I&N Dec. 742 (1949) (holding that 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) (same).³

The applicant is therefore statutorily ineligible for citizenship as claimed. The applicant's appeal is not accompanied by any new evidence or arguments that would warrant reopening or reconsideration of his case. Therefore, the untimely appeal need not be treated as a motion and will be rejected.

ORDER: The appeal is rejected.

² 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.

³ A married couple, even when living apart with no plans of reconciliation, is not deemed to be "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).