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

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[redacted]

FILE: [redacted] Office: HOUSTON, TX Date: MAY 13 2009

IN RE: Applicant: [redacted]

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of Citizenship pursuant to former Section 321(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1432(a)(3), now repealed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

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, Houston, Texas 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 August 14, 1979 in Guatemala. The applicant's father, [redacted], born in Guatemala, became a naturalized U.S. citizen on August 10, 1995, when the applicant was 15 years old. The applicant's mother, [redacted], also born in Guatemala, naturalized on June 6, 2007, when the applicant was 27 years of age. The applicant's parents were married at the time of the applicant's birth and divorced on February 22, 2000. The applicant attained lawful permanent resident status as of October 20, 1989, when he was 10 years old. 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 the 1995 naturalization of his father.

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001.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).

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 field office director denied the application because she found the applicant to have been over the age of 18 years on February 27, 2001 and, therefore, ineligible for consideration under the CCA. She further determined that, as the applicant was also over 18 years of age on the dates of his

mother's naturalization and his parents' divorce, he was ineligible for a certificate of citizenship under section 321(a) of the Act.

On appeal, counsel contends that the applicant's parents were legally separated prior to his 18th birthday and that as he, thereafter, resided solely with his father, the applicant is eligible for a certificate of citizenship under section 321(a)(3) of the Act.

In *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008), the Board of Immigration Appeals (BIA) found that a child who has satisfied the statutory conditions of former section 321(a) before the age of 18 years has acquired U.S. citizenship, regardless of the order in which those requirements have been met. Therefore, the applicant in this matter must prove that prior to his 18th birthday, August 14, 1997, his father had become a U.S. citizen, and that he was a lawful permanent resident in the legal custody of his father following the legal separation of his parents. The record documents that the applicant became a lawful permanent resident when he was 10 years of age and that his father naturalized when he was 15 years of age. Accordingly, the only issue before the AAO is whether the applicant was in his father's custody following the legal separation of his parents prior to his 18th birthday.

For immigration purposes, "[l]egal separation of the parents . . . means either a limited or absolute divorce obtained through judicial proceedings." *Matter of H,* 3 I&N Dec. 742 (1949) (Quotations omitted). The AAO also notes that in *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001), the court found legal separation under former section 321(a)(3) of the Act to be "uniformly understood to mean *judicial* separation" and rejected the premise that any voluntary separation under legal circumstances would suffice. It further found that "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."

Counsel claims that, although the applicant's parents were not divorced until February 22, 2000, they were legally separated prior to his 18th birthday. The record, however, does not support counsel's assertion as it contains only the divorce decree issued by the District Court of Brazoria County, Texas. Moreover, the AAO is unaware that Texas state law provides for legal separation prior to divorce. As the record contains no documentary evidence to support counsel's claim regarding the legal separation of the applicant's parents, the applicant has not established that, prior to his 18th birthday, he was in the legal custody of his father following his parents' legal separation. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the applicant has failed to satisfy the requirements of former section 321(a)(3) of the Act.

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). The regulation at 8 C.F.R. § 341.2 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." See *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). Here the applicant has not met his burden of proof and the appeal will be dismissed.

ORDER: The appeal is dismissed.