

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

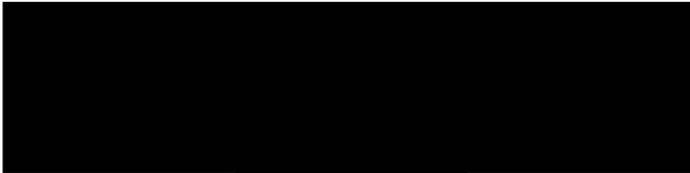


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

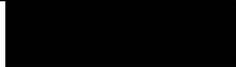
**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

E2



FILE:



Office: ATLANTA, GA

Date:

NOV 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 (1977).

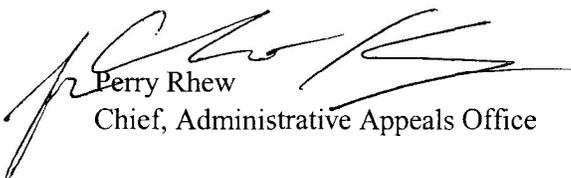
ON BEHALF OF APPLICANT:



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).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Atlanta, Georgia, 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 September 16, 1977 in Jamaica. He attained the age of 18 on September 16, 1995. The applicant's parents, [REDACTED] and [REDACTED] were married in 1973, separated in 1992 and divorced in 2005. The applicant's father passed away in 2008. The applicant's mother became a U.S. citizen upon her naturalization on April 23, 1993, when the applicant was 15 years old. The applicant's father became a U.S. citizen upon his naturalization on June 7, 1996, when the applicant was 18 years old. The applicant was admitted as a lawful permanent resident in the United States on August 28, 1984, when he was seven years old. He seeks a certificate of citizenship claiming that he derived U.S. citizenship upon his mother's naturalization.

The field office director denied the applicant's citizenship claim citing to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431, as amended by the Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000). Specifically, the director noted that the applicant's parents were not both naturalized before the applicant's 18th birthday or, alternatively, were not divorced until after his 18th birthday.

On appeal, the applicant, through counsel, maintains that the director erroneously cited to the Act, as amended by the CCA. *See Applicant's Appeal Brief.* Further, the applicant states that his parents were separated in 1992 and that he therefore may derive U.S. citizenship under section 321 of the former Act, 8 U.S.C. § 1432 (1977), solely from his mother. *Id.* The applicant notes that the record contains a copy of a court order issued in 2008 amending his parents divorce judgment to indicate that their separation date was in 1992. *Id.*

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. *See Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The applicant was born in 1977. He was over 18 years old when the CCA went into effect on February 27, 2001. *See CCA § 104; Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001) (holding that the CCA applies only to persons who were not yet 18 years old as of February 27, 2001). Section 321 of the former Act, 8 U.S.C. § 1432 (1977), is therefore applicable to this case.

Section 321 of the former Act, 8 U.S.C. § 1432 (1977), 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 record reflects that the applicant was over the age of 18 when his father naturalized. At issue in this case is whether the applicant derived U.S. citizenship upon the naturalization of his mother in 1993, given that his parents were still married at the time and until their divorce in 2005. The AAO finds that he did not.

The requirements set forth in section 321(a) of the former Act, 8 U.S.C. § 1432(a), have not been met because the applicant cannot establish that his parents were legally separated as required by section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3).

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 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) (same); *see also Brissett v. Ashcroft*, 363 F.3d 130, 134 (2d Cir. 2004) (noting that “[a] contrary interpretation would render superfluous the provision's specification that the separation must be ‘legal’”). 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 reflects that the applicant’s parents were divorced in 2005. There is no evidence in the record indicating that that a formal, judicial proceeding ensued previous to the applicant’s parents’ divorce. “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 prevent 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 Second Circuit Court of Appeals, 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.

The AAO notes that the record contains a copy of an order, dated in 2008, amending the applicant’s parents’ 2005 divorce judgment to indicate that they were separated in 1992. The applicant maintains that this after-the-fact amendment establishes that his parents were separated before his 18th birthday. The AAO disagrees. The after-the-fact amended order does not establish that the applicant’s parents were “legally separated” as required by section 321(a)(3) of the former Act. *See Fierro*, 217 F.3d at 6 (holding that “recognizing the *nunc pro tunc* order . . . would in substance allow the state court to create loopholes in the immigration laws on grounds of perceived equity or fairness... [and that] a state court has no more power to modify them on equitable grounds than does a federal court or agency”).

As noted above, a legal separation occurs as a result of a formal, judicial proceeding that alters the marital relationship, not merely a physical separation. In addition, the motion to amend the divorce judgment was filed after the applicant’s father’s death, and without his participation. Moreover, the AAO notes that the applicant’s mother’s naturalization certificate lists her as married. In determining whether the applicant derived U.S. citizenship, the AAO must find that the applicant met the requirements of section 321 of the former Act before his 18th birthday. The record in this case does not establish that the applicant met the requirements prior to his 18th birthday. The applicant did not derive U.S. citizenship pursuant to section 321(a) of the former Act, 8 U.S.C. § 1432(a), because he cannot establish that his parents obtained a “legal separation” prior to his 18th birthday.

It is well established that the requirements for citizenship, as set forth in the Act, are statutorily mandated by Congress, and United States Citizenship and Immigration Services (USCIS) lacks statutory authority to issue a Certificate of Citizenship when an applicant fails to meet the relevant statutory provisions set forth in the Act. A person may only obtain citizenship in strict compliance with the statutory requirements imposed by Congress. *INS v. Pangilinan*, 486 U.S. 875, 885 (1988). Even courts may not use their equitable powers to grant citizenship, and any doubts concerning citizenship are to be resolved in favor of the United States. *Id.* at 883-84; *see also United States v. Manzi*, 276 U.S. 463, 467 (1928) (stating that “citizenship is a high privilege, and when doubts exist concerning a grant of it . . . they should be resolved in favor of the United States and against the claimant”). Moreover, “it has been universally accepted that the burden is on the alien applicant to

show his eligibility for citizenship in every respect." *Berenyi v. District Director, INS*, 385 U.S. 630, 637 (1967). The AAO has no authority to grant a citizenship claim *nunc pro tunc*, on the basis of an after-the-fact amendment by a state court. As noted above, the AAO must determine whether the applicant can establish that he fulfilled the requirements of section 321(a) of the former Act prior to his 18th birthday.

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 was over the age of 18 when his father naturalized, and has failed to establish that his parents were legally separated before his 18th birthday (such that he could derive citizenship solely from his mother). The applicant is statutorily ineligible to derive U.S. citizenship and his appeal will therefore be dismissed.

ORDER: The appeal is dismissed.