

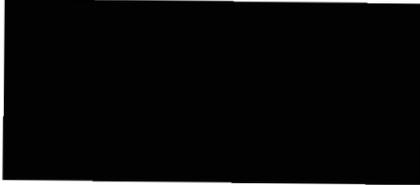
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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FILE: [REDACTED] Office: PHILADELPHIA, PA Date: **MAY 11 2010**

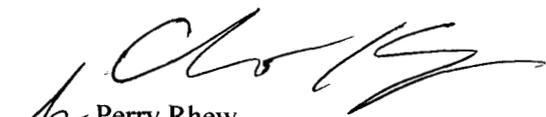
IN RE: Applicant: [REDACTED]

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Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).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

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the District Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on January 4, 1951 in Hungary. The applicant's parents, as indicated on his birth certificate, were [REDACTED] and [REDACTED]. The applicant's parents were married in 1942, and divorced on March 9, 1968. The applicant's father became a U.S. citizen upon his naturalization on May 17, 1968, when the applicant was 17 years old.<sup>1</sup> The applicant's mother was not a U.S. citizen. The applicant was admitted to the United States as a refugee in 1956 and adjusted his status to that of a lawful permanent resident in 1959. The applicant presently seeks a certificate of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (repealed).

The district director determined that the applicant could not derive U.S. citizenship through his father because, in relevant part, his parents' Hungarian divorce decree was not recognized under Ohio law. The director thus found that the applicant's parents had not obtained a "legal separation" as required by former section 321(a)(3) of the Act and that the applicant consequently did not derive U.S. citizenship upon his father's naturalization. The application was accordingly denied.

On appeal, the applicant, through counsel, maintains that his parents' Hungarian divorce decree was recognized by the State of Ohio when his mother was issued a marriage license allowing her to remarry in Ohio subsequent to her divorce. *See Applicant's Appeal Brief and Statement on the Form I-290B, Notice of Appeal to the AAO.*

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9<sup>th</sup> Cir. 2005); *accord Jordan v. Attorney General*, 424 F.3d 320, 328 (3<sup>rd</sup> Cir. 2005). The Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), 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. Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Former section 321 of the Act is therefore applicable in this case.

Former section 321 of the Act, stated, in pertinent part, that:

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<sup>1</sup> The applicant's father changed his name to [REDACTED] during the naturalization process.

(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 such 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 (1) of this subsection, or the parent 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 indicates that the applicant obtained lawful permanent residency and that his father naturalized prior to the applicant's eighteenth birthday. The first issue in this case is whether the applicant's parents' Hungarian divorce decree is a "legal separation" for purposes of derivative citizenship under former section 321(a)(3) of the Act, 8 U.S.C. § 1432(a)(3) (repealed). The AAO finds that it is.

The term "legal separation" in the context of derivative citizenship means either a limited or absolute divorce obtained through judicial proceedings. *Matter of H*, 3 I&N Dec. 742, 743-44 (Cent. Office 1949). See *Morgan v. Attorney General*, 432 F.3d 226, 233 (3d Cir. 2005) (finding no legal separation absent a judicial decree); *Nehme v. INS*, 252 F.3d 415, 426 (5<sup>th</sup> Cir. 2001) (finding that "in the United States, the term 'legal separation' is uniformly understood to mean *judicial* separation") (emphasis in original).

In this case, the applicant submitted a copy of his parents' Hungarian divorce decree. The district director determined that the Hungarian divorce decree was not recognized under Ohio law and cited *Matter of Hosseinian*, 19 I&N Dec. 453 (BIA 1987) in support of his position. The district director's reliance on *Hosseinian* was misguided. In *Hosseinian*, the Board found that a Hungarian divorce, where the parties were residents of California at the time the judgment was entered, was not recognized under California law and therefore a subsequent marriage was held to be invalid for immigration purposes. 19 I&N Dec. at 456. Unlike *Hosseinian*, however, the issue in this case is not the validity of the applicant's mother's subsequent marriage in Ohio. Rather, at issue in this case

is whether the applicant's parents were "legally separated" at the time of the applicant's father's naturalization.

A legal separation decree is valid for derivative citizenship purposes if entered 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." *Morgan v. Attorney General*, 432 F.3d at 234. In this case, the record shows that the Hungarian Court had jurisdiction over the applicant's parents' marriage at the time their divorce decree was issued. According to a legal opinion provided by the Library of Congress, a divorce decree such as the applicant's parents' is valid in Hungary. See Opinion of the Library of Congress, LOC 2007-03666. The record also shows that the State of Ohio recognized the validity of the Hungarian divorce decree when it was recorded on the applicant's mother's subsequent marriage license issued prior to her second marriage in 1969. Accordingly, the applicant's parents' Hungarian divorce was a "legal separation" for purposes of derivative citizenship under former section 321(a)(3) of the Act.

The question remains whether the applicant was in his father's legal custody. The Third Circuit Court of Appeals, within whose jurisdiction this case arose, has held that in derivative citizenship cases where the parents have legally separated but there is no formal, judicial custody order, the parent having "actual, uncontested custody" will be regarded as having "legal custody" of the child. *Bagot v. Ashcroft*, 398 F.3d 252, 266-67 (3d Cir. 2005) (citing *Matter of M-*, 3 I&N Dec. 850, 856 (Cent. Office 1950)). In this case, the applicant's parents' divorce decree does not contain a custody award, but it specifically states that the applicant was "in the custody of the plaintiff [his father]" and that his younger brother, [REDACTED] was "in the custody of the defendant [his mother]." In addition, the applicant's youngest brother, [REDACTED] who was born in the United States, attested that the applicant's parents separated when he was a young child and that after the separation, he lived with their mother and the applicant lived with their father. The applicant's parents are deceased and the record contains no indication that the applicant's mother ever contested his father's actual custody. Accordingly, the applicant has established by a preponderance of the evidence that he was in his father's actual, uncontested custody at the time of his father's naturalization.

The applicant has demonstrated that he was in the legal custody of his father when his father naturalized and that he was under the age of 18 and residing in the United States as a lawful permanent resident at the time. Therefore, the applicant derived U.S. citizenship through his father pursuant to former section 321(a)(3) of the Act.

The applicant bears the burden of proof in these proceedings to establish the claimed citizenship by a preponderance of the evidence. Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant here has met his burden of proof and his appeal will be sustained.

**ORDER:** The appeal is sustained.