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: OAKLAND PARK, FL Date: MAY 18 2010

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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed)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

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 by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Oakland Park, 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 June 11, 1979 in the Dominican Republic. The applicant's parents, as indicated on his birth certificate, were and The applicant's parents were married in 1978 and divorced in 1992. The applicant's father became a U.S. citizen upon his naturalization on January 25, 1994, when the applicant was 14 years old. The applicant's mother is not a U.S. citizen. The applicant was admitted to the United States as a lawful permanent resident on September 3, 1985, when he was five years old. 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of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (repealed).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 field office director determined that the applicant could not derive U.S. citizenship through his father because, in relevant part, he was not in his father's legal custody. The director noted that the applicant's parents' divorce decree awarded primary physical residence to his mother. The application was accordingly denied.

On appeal, the applicant maintains that his parents continued to live together after their divorce and therefore shared legal custody. *See* Applicant's 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 (9th 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:

> (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 question remains whether the applicant was in his father's custody following his parents' legal separation.

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 (5th Cir. 2001) (finding that "in the United States, the term 'legal separation' is uniformly understood to mean *judicial* separation") (emphasis in original).

On appeal, the applicant asserts that his parents continued to live together after their divorce and at the time his father naturalized. The applicant claims that "[l]egal custody was therefore shared by" his parents. The applicant submits an affidavit of his mother dated July 1, 2008 in which she affirms that she lived with the applicant's father after their divorce in 1992 until August 1994 and that "therefore legal custody was shared." The applicant also submits a copy of a 1992 letter from his father submitted with his petition for naturalization in which he notes that he and his wife "have recently divorced but are living together with the hope that we may work out the differences and consider re-marrying again."

Despite these claims, the applicant's parents' divorce decree incorporates a marital settlement agreement which specifically provided that the "main physical residence" of the applicant will be with his mother and that the applicant's father would pay his mother monthly child support. It is thus established that the applicant's parents were legally separated in 1992 and that his mother was awarded primary custody of the applicant, regardless of whether his parents continued to reside together. Even if the applicant's parents had a private agreement to share custody, the record clearly shows that his mother had primary legal custody of the applicant pursuant to the divorce decree. The applicant has failed to establish that he was in his father's legal custody following his parents' divorce. *See Bustamante-Barrera v. Gonzales*, 447 F.3d 338 (5th Cir. 2006) (holding that only an award of sole legal custody satisfies the legal custody requirement of former section 321 of the Act).

Even if the applicant's parents had not been legally separated, the applicant would still be unable to derive U.S. citizenship solely through his father. Former section 321(a)(1) of the Act would have required that both parents naturalize had there not been a legal separation and the applicant's mother never naturalized. Former section 321(a)(3) of the Act, moreover, specifically requires that the applicant establish that he was in the custody of his U.S. citizen parent. The applicant has not so demonstrated. Therefore, the applicant did not derive U.S. citizenship upon his father's naturalization in 1994.

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 not met his burden of proof and his appeal will be dismissed.

ORDER: The appeal is dismissed.