

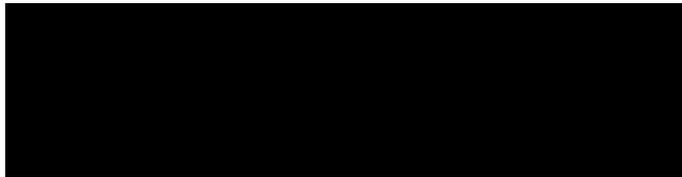
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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: BUFFALO, NY

Date:

MAY 18 2010

IN RE:

Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case 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, Buffalo, New York, 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 May 28, 1980 in Honduras. The applicant's parents are [REDACTED]. The applicant's parents were married in Honduras in February 1980. The applicant was admitted to the United States as a lawful permanent resident on February 25, 1989, when he was eight years old. The applicant's father became a U. S. citizen upon his naturalization on December 8, 1995, when the applicant was 15 years old. The applicant's mother became a U.S. citizen on July 10, 2008, after the applicant's eighteenth birthday. The applicant seeks a certificate of citizenship claiming that he derived U.S. citizenship through his father.

The field office director determined that the applicant's parents were not "legally separated" and that his father had "legal custody" of the applicant prior to his eighteenth birthday such that he could derive citizenship through his father under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (2000). The application was accordingly denied.

On appeal, the applicant, through counsel, maintains that his parents were legally separated in 1997 when they ceased to cohabitate, even though their Final Decree of Divorce was not entered until 2002. See Applicant's Appeal Brief. The applicant also resubmits a *nunc pro tunc* state court order indicating that his parents separation date was in 1997 when he was 17 years old

The applicable law for derivation of U.S. citizenship is "the law in effect at the time the critical events giving rise to eligibility occurred." See *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). The applicant in this case was born in 1980. His eighteenth birthday was on May 28, 1998. The Child Citizenship Act of 2000 (CCA), Pub. L. 106-395, 114 Stat. 1631 (Oct. 30, 2000), amended sections 320 and 322 of the Act and repealed section 321 of the Act. The provisions of the CCA took effect on February 27, 2001, are not retroactive, and apply only to persons who were not yet 18 years old as of February 27, 2001. See CCA § 104. 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 to this case.

Former section 321 of the Act 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 (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 establishes that the applicant's father naturalized, and that the applicant was admitted to the United States as a lawful permanent resident, prior to his eighteenth birthday. The question remains whether the applicant's parents were legally separated and his father had legal custody of the applicant prior to his eighteenth birthday.

Legal Separation

The record contains a Final Decree of Divorce entered on February 5, 2002 by the Circuit Court of Arlington County, Virginia. The divorce decree states that the applicant's parents "lived separate and apart for more than one year, that is, since February 01, 2000." On February 11, 2010, the applicant also submitted an Order Amending Final Decree of Divorce Nunc Pro Tunc, which the court entered on February 22, 2010. The amended order states that the 2002 divorce decree "did not include the correct date of the parties' Separation which occurred on January 8, 1997" and amends the divorce decree "Nunc Pro Tunc to show the true date of Separation to be January 8, 1997." On appeal, counsel claims that the amended order establishes that the applicant's parents were legally separated before he turned 18.

For derivative citizenship purposes, the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings. *Matter of H*, 3 I&N Dec. 742, 744 (Cent. Office 1949). The Second Circuit Court of Appeals, within whose jurisdiction this case arose, has 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.

Lewis v. Gonzales, 481 F.3d 125, 131 (2nd Cir. 2007). See *Brissett v. Ashcroft*, 363 F.3d 130, 134 (2nd Cir. 2004) (holding that former section 321(a)(3) of the Act requires "a formal act" that "alters the marital relationship," and that de facto separation coupled with a child support order and two

orders of protection against the father failed to satisfy this standard). *See also Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001) (“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.”) (emphasis in original).

Counsel maintains that the Second Circuit in *Brissett* held that it “would recognize forms of legal separation other than judicial orders.” *See* Applicant’s Appeal Brief at 6. However, if *Brissett* left any doubt regarding the requirement for a formal, legal act of separation, such doubt was extinguished by the Second Circuit’s decision in *Lewis, supra*. As noted above, *Lewis* holds that a “formal, legal act[]” is required to establish a “legal separation” under former section 321(a)(3) of the Act. The applicant’s parents in this case were not separated by a formal, legal act until 2002, when their Final Decree of Divorce was entered. Virginia law does not define the term legal separation or recognize a procedure to obtain a legal separation separate from a divorce. *See* Va. Code. Ann. § 20 (2002). *See also* Applicant’s Exhibit A: Letter from [REDACTED] (noting that Virginia domestic relations law requires a year of physical separation for a no-fault divorce, but does not require the filing of any formal separation agreement before obtaining a divorce). A married couple, even when living apart with no plans of reconciliation, is not legally separated. *Matter of Mowrer*, 17 I&N Dec. 613, 614-15 (BIA 1981); *see also Afeta v. Gonzales*, 467 F.3d 402, 407 (4th Cir. 2006) (holding that a privately-executed separation agreement made between an applicant’s parents does not qualify as a “legal separation” under former section 321(a)(3) of the Act). The applicant’s parents therefore did not obtain a legal separation prior to his eighteenth birthday.

The applicant, through counsel, also maintains that the *nunc pro tunc* order modifying his parent’s Final Decree of Divorce shows that his parents were legally separated in 1997. The date of separation indicated in the applicant’s parents’ Final Decree of Divorce, whether 1997 or 2000, is irrelevant to the question of when the applicant’s parents were legally separated. As previously noted, there was no formal, legal act of separation between the applicant’s parents until the entry of their Final Decree of Divorce in 2002. The applicant’s parents may have been physically separated in January 1997, and under Virginia law eligible for a no-fault divorce after January 1998, but they were not separated by any formal, legal act altering their marital relationship. Moreover, a state *nunc pro tunc* order does not establish that an applicant met the requirements for citizenship before the applicant’s eighteenth birthday. The issue is the applicant’s parents’ marital status prior to the applicant’s eighteenth birthday. When the applicant turned 18, and when his father naturalized, the applicant’s parents were still married and not “legally separated.”

As the applicant has failed to establish the legal separation of his parents prior to his eighteenth birthday, we do not reach the issue of whether or not he was in his father’s legal custody prior to his eighteenth birthday.

The requirements for citizenship, as set forth in the Act, are statutorily mandated by Congress, and U.S. 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).

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 has failed to establish the legal separation of his parents prior to his eighteenth birthday and is consequently ineligible to derive citizenship through his father under former section 321 of the Act. The appeal will be dismissed.

ORDER: The appeal is dismissed.