identifying data deleted to prevent clearly unwarranted invasion of personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

E2

[redacted]

FILE: [redacted] Office: PHILADELPHIA Date: NOV 17 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 (1998).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. 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 Philadelphia Field Office Director and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant seeks a certificate of citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (1998), claiming that he derived citizenship through his mother.

The field office director determined that the applicant did not qualify for citizenship under former section 321 of the Act because there was no evidence that his father was a U.S. citizen or that his parents legally separated prior to his eighteenth birthday.

On appeal, the applicant submits a brief statement, a copy of his mother's 1998 federal income tax return and duplicates of other documents previously submitted. The applicant's claims and the evidence submitted on appeal fail to establish his eligibility for citizenship.

The applicable law for derivative citizenship purposes is that "in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005); *accord Jordon v. Attorney General*, 424 F.3d 320, 328 (3rd Cir. 2005). Former section 321 of the Act, as in effect in 1998 when the applicant's mother naturalized, is therefore applicable to this case.[1]

Former section 321(a) of the Act provided, in pertinent part, that:

> 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 eighteen years; and

[1] The Child Citizenship Act of 2000 (the CCA), Pub. L. No. 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 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 on the CCA's effective date of February 27, 2001. Because the applicant was over the age of 18 on February 27, 2001, he is ineligible for the benefits of the amended Act. *See Matter of Rodriguez-Tejedor,* 23 I&N Dec. 153 (BIA 2001).

> (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 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 eighteen years.

The record in this case shows that the applicant was born out of wedlock on February 12, 1981 in the Dominican Republic. The applicant's parents, as listed on his birth certificate, are [redacted] and [redacted]. The applicant's parents married in the Dominican Republic in 1990 and began living apart in 1993, but did not obtain a legal separation until 2010. The applicant was admitted to the United States as a lawful permanent resident on November 2, 1993 (when he was 12 years old) and his mother naturalized on April 6, 1998 (when he was 17 years old).

The record contains no indication that the applicant's father is a U.S. citizen or deceased. Accordingly, the applicant did not derive citizenship under former section 321(a)(1) or (2) of the Act. The applicant has also failed to demonstrate that he derived citizenship through his mother under former section 321(a)(3) of the Act.

Citizenship may derive from a single parent under the first clause of former section 321(a)(3) of the Act only upon the "naturalization of the parent having legal custody of the child when there has been a legal separation of the parents." The Third Circuit Court of Appeals, within whose jurisdiction this case arose, has held that a "legal separation" as stated in former section 321(a)(3) of the Act requires a formal action altering the marital relationship under the law of the state or foreign country with jurisdiction over the parents' marriage. *Morgan v. Attorney General*, 432 F.3d 226, 231-34 (3d Cir. 2005). The Third Circuit has further held that to derive citizenship through a single parent under this section, the parents' legal separation must occur prior to the U.S. citizen parent's naturalization. *Bagot v. Ashcroft*, 398 F.3d 252, 257 (3d Cir. 2005), *but cf. Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008) (legal separation may occur after naturalization, as long as it is before the child turns 18). The record in this case contains a September 29, 2010 judgment from the Providence, Rhode Island Family Court dissolving the marriage of the applicant's parents.[2] Although the court order is a legal separation, it was entered 12 years after the applicant's mother naturalized and 11 years after the applicant turned 18. Consequently, his parent's 2010 legal separation does not render the applicant eligible to derive citizenship through his mother under the first clause of former section 321(a)(3) of the Act.

The applicant has also not derived citizenship through his mother under the second clause of former section 321(a)(3) of the Act, which permits derivation through the mother for a child born out of wedlock only if the child's paternity was *not* established by legitimation. Here, the applicant's father formally acknowledged his paternity and legitimated the applicant. For individuals born in the Dominican Republic, a father's acknowledgment of paternity in accordance with Dominican law constitutes legitimation under the Act. *Matter of Martinez,* 21 I&N Dec. 1035, 1038 (BIA 1997) (citing *Matter of Cabrera*, 21 I&N Dec. 589 (BIA 1996)). The applicant's father is named on his

[2] The dissolution judgment was issued after the field office director's decision.

birth certificate and his parents formally legitimated him in their marriage certificate when he was nine years old. On appeal, the applicant claims that the field office director did not consider that his mother was a single parent when he was born out of wedlock. The record shows, however, that the applicant did not derive citizenship through his mother even though he was born out of wedlock because his paternity was established by legitimation, a fact rendering him ineligible for citizenship under the second clause of 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(c). The applicant has failed to establish that he derived citizenship through his mother under the applicable law, former section 321(a) of the Act. The applicant has not met his burden of proof and the appeal will be dismissed.

ORDER: The appeal is dismissed.