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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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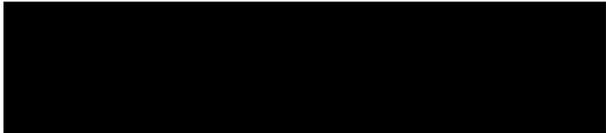
Date: **AUG 03 2011**

Office: SANTA ANA, CA

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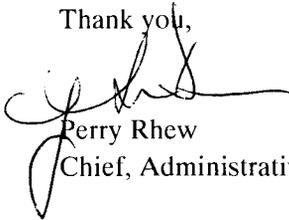
APPLICATION: Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (1977)

ON BEHALF OF PETITIONER:


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.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Application for Certificate of Citizenship (Form N-600) was denied by the Field Office Director, Santa Ana, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born in Vietnam on September 3, 1977. The applicant's parents, [REDACTED] were married in 1976, and divorced in 2009. The applicant was admitted to the United States as lawful permanent resident on March 19, 1989, when he was 11 years old. The applicant's father became a U.S. citizen upon his naturalization on July 30, 1987, when the applicant was nine years old. The applicant's mother naturalized in 2006, after the applicant's eighteenth birthday. The applicant seeks a Certificate of Citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432, claiming that he derived citizenship through his father.

The director determined that the applicant failed to establish eligibility for derivative citizenship because the applicant's parents were not legally separated until after the applicant's eighteenth birthday as required by former section 321(a)(3) of the Act. The director found that the note in the applicant's parents' divorce decree indicating that the applicant was in his father's custody since the parents' 1987 date of separation was factually impossible, since the applicant did not arrive in the United States until 1989. The director noted the applicant's father's statement in the course of his naturalization proceedings, where he indicated that the applicant was residing with his mother in Vietnam. The director further noted that the applicant's mother naturalized after the applicant's eighteenth birthday. The application was denied accordingly.

On appeal, the applicant, through counsel, contends that his parents separated on April 4, 1987, as indicated in their divorce decree. *See* Appeal Brief. The applicant maintains that he was in his father's legal custody upon his parents' separation. *Id.*

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 (3d Cir. 2005). Former section 321 of the Act, was in effect at the time of the applicant's father's naturalization and prior to the applicant's eighteenth birthday, and is therefore applicable in this case.

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

A child born outside of the United States of alien parents . . . 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 unmarried and under the age of eighteen 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 eighteen years.

The applicant has established that he was admitted to the United States as a lawful permanent resident when he was eleven years old, and his father became a naturalized U.S. citizen when he was nine years old. The applicant's mother did not naturalize prior to his eighteenth birthday. Therefore, the applicant did not derive U.S. citizenship under former section 321(a)(1) of the Act. The record also does not indicate that the applicant's mother was deceased such that the applicant could derive U.S. citizenship from his father alone under former section 321(a)(2) of the Act. The applicant is also ineligible to derive citizenship under the second clause of former section 321(a)(3) of the Act because he was born in wedlock and his mother naturalized after his eighteenth birthday. The only question that remains is whether the applicant derived U.S. citizenship under the first clause of section 321(a)(3) of the Act, upon his parents' legal separation.

The term legal separation means "either a limited or absolute divorce obtained through judicial proceedings." *Afeta v. Gonzales*, 467 F.3d 402, 406 (4th Cir. 2006) (affirming the Board of Immigration Appeals' construction of the term legal separation as set forth in *Matter of H*, 3 I&N Dec. 742, 744 (BIA 1949)) (internal quotation marks omitted). 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). Nevertheless, in the Ninth Circuit, under *Minasyan, Supra* at 1079, the date of separation listed on a California divorce judgment is the date of legal separation for immigration purposes. The divorce judgment in this case includes a note stating that the applicant was in his father's legal and physical custody since his parents' date of separation, April 4, 1987. The AAO is bound by *Minasyan* in this case, which also arises in the Ninth Circuit and involves a State of California divorce proceeding. Therefore, the applicant can establish that his parents were legally separated prior to his eighteenth birthday and that he derived citizenship through his custodial parent, his father, under former section 321(a)(3) of the Act.

The applicant bears the burden of proof to establish his eligibility for citizenship under the Act. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c). Here, the applicant met all of the

conditions for the automatic derivation of U.S. citizenship pursuant to former section 321 of the Act before his eighteenth birthday. Accordingly, the appeal will be sustained. The matter will be returned to the Santa Ana Field Office for issuance of a certificate of citizenship.

ORDER: The appeal is sustained. The matter is returned to the Santa Ana Field Office for issuance of a certificate of citizenship.