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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**

[REDACTED]

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FILE:

[REDACTED]

Office:

[REDACTED]

Date:

FEB 14 2011

IN RE:

[REDACTED]

APPLICATION:

Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (1982)

ON BEHALF OF PETITIONER:

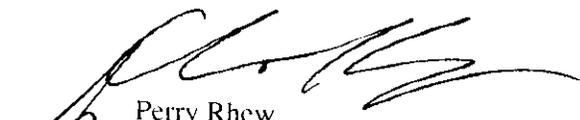
[REDACTED]

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 \$630. 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 for Certificate of Citizenship (Form N-600) was denied by the Field Office Director, [REDACTED] and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in [REDACTED] on April 2, 1966. The applicant's parents were not married at the time of his birth. The applicant's father became a naturalized U.S. citizen on May 9, 1979. On October 28, 1982, the applicant's father was granted legal custody over the applicant by a court in Ecuador. The applicant was admitted to the United States as a lawful permanent resident on November 4, 1982. The applicant's mother became a naturalized U.S. citizen on December 22, 2003. The applicant seeks a Certificate of Citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (1982), claiming that he derived citizenship through his parents.

The director determined that the applicant failed to establish eligibility for derivative citizenship under former section 321 of the Act, and denied the application accordingly.¹ See *Decision of the Director*, dated July 28, 2010. *Id.* On appeal, the applicant contends through counsel that he meets the requirements for derivative citizenship based on the naturalization of both parents, and based on the naturalization of the parent having legal custody when there has been a legal separation of the parents. See *Form I-290B, Notice of Appeal*, filed Aug. 26, 2010; *Brief in Support of Appeal*.

The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Because the applicant was born abroad, he is presumed to be an alien and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. See *Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008).

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, in effect at the time of his admission as a lawful permanent resident in 1982, is 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

¹ Because the instant application is the applicant's second Form N-600, the director should have rejected the application and instructed the applicant to submit a motion to reopen or reconsider pursuant to 8 C.F.R. § 341.6. For purposes of administrative efficiency, however, the AAO will adjudicate this pending appeal.

(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 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); *see also Bissett v. Ashcroft*, 363 F.3d 130, 132 (2d Cir. 2004) (holding that term legal separation refers to a “formal act which, under the laws of the state or nation having jurisdiction of the marriage, alters the marital relationship either by terminating the marriage (as by divorce), or by mandating or recognizing the separate existence of the marital parties.”).

Here, the applicant satisfied several of the requirements for derivative citizenship set forth in former section 321(a) of the Act before his eighteenth birthday. Specifically, the applicant’s father became a naturalized U.S. citizen when the applicant was 13 years old, and the applicant was admitted to the United States as a lawful permanent resident when he was 16 years old. However, because the applicant’s mother became a naturalized U.S. citizen in 2003, when the applicant was over 18 years old, he cannot meet the requirements for derivation based on the naturalization of both parents. *See* former section 321(a)(1) and (4) of the Act.

Additionally, the applicant has not shown that his parents were legally separated while he was under the age of 18 years, as required by section 321(a)(3) of the Act. Rather, the record reflects that his parents married on April 18, 1984, when the applicant was 18 years old, *see Certificate of Marriage Registration*, dated Apr. 30, 1984, and that they divorced on January 24, 1989, when the applicant was 22 years old, *see Divorce Judgment*, filed Jan. 24, 1989. Consequently, the applicant did not derive citizenship through his father under former section 321(a)(3) of the Act. *See Langhorne v. Ashcroft*, 377 F.3d 175, 179 (2d Cir. 2004) (holding that the legal separation of the parents must occur before the child turns 18).

The applicant correctly contends that he need not establish the statutory requirements in any particular order. *See Matter of Baires-Larios*, 24 I&N Dec. 467, 468-69 (BIA 2008). However, the statute requires that all of the requirements be met before the applicant’s eighteenth birthday. *See* former section 321(a)(4) of the Act; *Langhorne*, 377 F.3d at 179. Further, the applicant has not identified any statutory authority to support his alternative “request [for] a *nunc pro tunc* grant of

citizenship.” *Brief on Appeal* at 6. Finally, although the applicant correctly notes that former section 321 of the Act does not bar derivative citizenship for biological children born out of wedlock, *see id.* at 7-8, he has not shown that he meets the requirements for derivative citizenship for out-of-wedlock children under former section 321(a)(3) of the Act.

The AAO notes that an Immigration Judge terminated the applicant’s removal proceedings on August 26, 2005, finding that the applicant showed prima-facie eligibility for U.S. citizenship. *See Order of the Immigration Judge*, dated Aug. 26, 2005. However, the immigration judge’s finding regarding the applicant’s citizenship is not binding on these proceedings. Specifically, an immigration judge may credit an individual’s citizenship claim in the course of terminating removal proceedings for lack of jurisdiction because the government has not established the individual’s alienage by clear and convincing evidence. *See* 8 C.F.R. § 1240.8(a), (c) (prescribing that the government bears the burden of proof to establish alienage and removability or deportability by clear and convincing evidence). U.S. Citizenship and Immigration Services, on the other hand, retains sole jurisdiction to issue a certificate of citizenship, and the agency’s decision is reviewable only by the federal courts, not the immigration courts. Sections 341(a) and 360 of the Act, 8 U.S.C. §§ 1452(a), 1503; 8 C.F.R. 341.1. *See also Minasyan v. Gonzalez*, 401 F.3d at 1074 n.7 (noting that the immigration court had no jurisdiction to review the agency’s denial of Minasyan’s citizenship claim). Additionally, it appears that the Immigration Judge determined that the applicant derived U.S. citizenship under former section 322 of the Act, 8 U.S.C. § 1433. Because the applicant did not apply and take the naturalization oath before his eighteenth birthday, he does not meet the age limitation set forth in former section 322(a)(3) of the Act, and therefore did not derive U.S. citizenship under that provision.

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 has not established that he 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 dismissed.

ORDER: The appeal is dismissed.