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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: **JUL 12 2011** Office: SAN FRANCISCO, CA

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (1967)

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.

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, San Francisco, California, 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 Cambodia on February 27, 1967. The applicant's parents, [REDACTED] and [REDACTED] were divorced on January 30, 1986. The applicant's eighteenth birthday was on February 27, 1985. The applicant was admitted to the United States as a lawful permanent resident as of October 9, 1975. The applicant's father became a U.S. citizen upon his naturalization on May 1, 1983. The applicant's mother naturalized in 1994, 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 field office director determined that the applicant failed to establish eligibility for derivative citizenship because he was not in his father's custody following his parents' separation. The application was denied accordingly.

On appeal, the applicant, through counsel, contends, in relevant part, that his parents were separated in October 1984 and that he was in his father's sole custody following the separation. *See* Appeal Brief. Counsel, citing *Matter of M*, 3 I&N Dec. 850 (BIA 1950), claims that the applicant was in his father's actual, uncontested custody.

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). 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.

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 was admitted to the United States as a lawful permanent resident when he was under the age of eighteen, and the applicant's father became a naturalized U.S. citizen when the applicant was sixteen years old. However, the applicant has not shown that his mother naturalized prior to his eighteenth birthday; he therefore cannot derive citizenship under former section 321(a)(1) of the Act. The record also indicates that the applicant's mother was not deceased prior to the applicant's eighteenth birthday, such that he could derive U.S. citizenship solely through his father under former section 321(a)(2) of the Act.

The applicant is also ineligible to derive citizenship under former section 321(a)(3) of the Act because his parents were not legally separated before his eighteenth birthday.¹ 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).

The applicant maintains that his parents were separated in October 1984. The record, however, contains their Decree of Dissolution of Marriage, which specifically states that the applicant's parents' marriage terminated on January 30, 1986. The applicant was over the age of 18 on that date. Thus, even if his parents were living apart prior to their divorce date, they were not "legally separated" as required by section 321(a)(3) of the Act. Consequently, the applicant did not derive citizenship upon his mother's naturalization under former section 321(a) of the Act.²

¹ The second clause of former section 321(a)(3) of the Act provides for derivation of U.S. citizenship by an out of wedlock child upon the mother's naturalization and is therefore inapplicable in this case.

² Having found that the applicant's parents were not "legally separated" prior to his eighteenth birthday, there is no need to address the issue of legal custody.

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.