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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

PUBLIC COPY

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DATE: JUL 25 2011 Office: CHICAGO, ILLINOIS 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 (1969)

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, Chicago, Illinois, 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 Canada on June 16, 1953, to married parents. The applicant was admitted to the United States as a lawful permanent resident on December 13, 1960. The applicant's mother became a naturalized U.S. citizen on October 7, 1969. A state court found that the applicant's father deserted the family on or about September 15, 1965, and the applicant's parents divorced on March 30, 1972. *See Decree for Divorce*, dated Mar. 30, 1972. The applicant seeks a Certificate of Citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (1969), claiming that he derived citizenship through his mother.

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 August 6, 2009. *Id.* On appeal, the applicant contends through counsel that he meets the requirements for derivative citizenship based on the naturalization the parent having legal custody when there has been a legal separation of the parents. *See Form I-290B, Notice of Appeal*, filed Aug. 19, 2009; *Brief in Support of Appeal*, dated Aug. 17, 2009.

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 mother's naturalization in 1969, 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." *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000) (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). U.S. Citizenship and Immigration Services interprets the term legal separation "to require that the separation be pursuant to 'proceedings . . . which terminate the marriage completely, as by absolute divorce, or which merely separate the parties without destroying the marital status.'" *Brissett v. Ashcroft*, 363 F.3d 130, 133 (2d Cir. 2004) (quoting INS Interp. 320.1(6)). Informal separation, "signify[ing] couples who decide to reside separately but do not invoke any legal or administrative process to formalize their decision," is insufficient to confer derivative citizenship. *Id.* at 133 n.2.

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 seven years old, and the applicant's mother became a naturalized U.S. citizen when the applicant was 16 years old.

However, 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. Specifically, the record reflects that an Illinois state court issued a divorce decree for the applicant's parents on March 30, 1972. *See Decree for Divorce, supra.* At the time of the divorce, the applicant was 18 years old. Accordingly, the applicant's parents' divorce does not satisfy the applicable legal separation requirements.

The applicant contends that his parents were legally separated before his eighteenth birthday because the divorce decree stated that his father deserted his mother on or about September 15, 1965, when he was 12 years old, and the court ordered child support to be paid in arrearages from that date. *Brief on Appeal.* The applicant states that desertion under Illinois law is more than mere separation because "it requires an actual abandonment and abnegation of all marital relationships with an intent not to return and without legal justification or consent of the other spouse." *Id.* (quoting the Illinois Supreme Court's decision in *Lemon v. Lemon*, 14 Ill. 2d 15, 21 (1958)) (internal quotation marks omitted).

In Illinois, dissolution of marriage may be granted on the grounds of desertion if one spouse:

> has wilfully deserted or absented himself or herself from the petitioner for the space of one year, including any period during which litigation may have pended between the spouses for dissolution of marriage or legal separation . . .

40 Ill. Comp. Stat. § 401(a)(1) (1972). In Illinois, a spouse also may bring an action for legal separation in state court. 40 Ill. Comp. Stat. § 402 (1965).

Here, the applicant's mother obtained a divorce in 1972 on the grounds of her husband's desertion in 1965. However, there is no evidence that the applicant's parents invoked any legal or administrative process to formalize the desertion prior to his eighteenth birthday. *See, e.g., Brissett*, 363 F.3d at 133 n.2. Also, the applicant has not shown that a finding of desertion is equivalent to a finding of legal separation under Illinois law or that the Illinois court's 1972 determination had a retroactive effect equivalent to a legal separation of the applicant's parents in 1965. *Cf. Minasyan v. Gonzales*, 401 F.3d 1069, 1078-79 (9th Cir. 2005) (holding under California law that a court-defined date of separation was a separation by virtue of law). Finally, there is no evidence that the applicant's parents obtained a legal separation under 750 Ill. Comp. Stat. § 5/402, before his eighteenth birthday. Consequently, the applicant did not derive citizenship through his mother under former section 321(a)(3) of the Act. *See e.g., 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 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.