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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  
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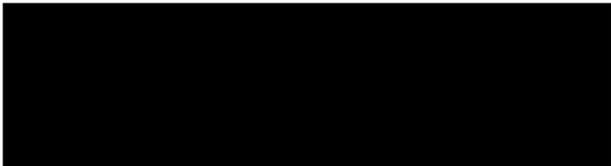
Date: **MAY 26 2011** Office: NEW YORK, NY

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IN RE:

APPLICATION: Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (1978)

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 District Director, New York, New York, 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 Trinidad and Tobago on October 18, 1978. The applicant was admitted to the United States as a lawful permanent resident in 1990, when he was 11 years old. The applicant's mother, [REDACTED], became a U.S. citizen upon her naturalization on September 12, 1996, when the applicant was 17 years old. The applicant's parents were divorced in 1998. 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 upon his mother's naturalization.

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. *See Decision of the Director*, dated December 23, 2010. On appeal, the applicant contends through counsel that he meets the requirements for derivative citizenship based on his mother's naturalization. *See Brief in Support of Appeal*. Specifically, the applicant maintains that he was in his mother's legal custody following his parents 1982 separation.

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, in effect on the applicant's eighteenth birthday, 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
- (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 mother became a naturalized U.S. citizen when the applicant was 17 years old, and the applicant was admitted to the United States as a lawful permanent resident when he was 11 years old. However, because the applicant’s parents’ divorce judgment was not entered until 1998, when the applicant was over 18 years old, he cannot meet the requirements for derivation based on the naturalization of his mother alone. *See* 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, through counsel, maintains that his parents were separated in 1982 because they “lived separate and apart and never resumed cohabitation.” *See Brief in Support of Appeal* at 11. The applicant further states that his parents’ 1982 physical separation was recognized by the court in their divorce proceedings. *Id.* at 11-13. 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). Legal separation means either a limited or absolute divorce obtained through judicial proceedings. *See Matter of H, Supra*; *see also, Nehme v. INS*, 252 F.3d 415, 425-26 (5<sup>th</sup> Cir. 2001).

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.