

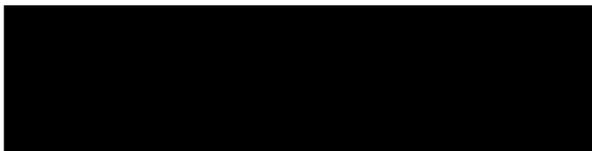
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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Date: **NOV 03 2011** Office: SAN ANTONIO, TX

File: 

IN RE: 

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

ON BEHALF OF APPLICANT:



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 Antonio, Texas, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The application will remain denied.

The record reflects that the applicant was born in wedlock in Jalisco, Mexico on November 26, 1980. The applicant's mother became a naturalized U.S. citizen on February 14, 1997. The applicant's father is not a U.S. citizen. The applicant was admitted to the United States as a lawful permanent resident on June 24, 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, 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. *See Decision of the Field Office Director*, dated May 12, 2011. On appeal, counsel contends that even though the applicant's parents were legally married but not legally divorced while the applicant was under the age of eighteen years, the applicant's mother had legal custody of the applicant after a "legal separation." *See Counsel's Brief*, dated July 12, 2011.

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 the law in effect at the time the critical events giving rise to eligibility occurred. *See 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 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 order in which the requirements are fulfilled is irrelevant, as long as all requirements are satisfied before the applicant's 18th birthday. *Matter of Baires-Larios*, 24 I&N Dec. at 470.

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 Minasyan v. Gonzales*, 401 F.3d at 1076 (stating that term legal separation refers to a separation recognized by law; considering the law of California, which had jurisdiction over the applicant's parents' marriage).

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 seventeen years old, and the applicant's mother became a naturalized U.S. citizen when he was sixteen 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 former section 321(a)(3) of the Act.

On appeal, counsel contends that the applicant qualifies for derivative citizenship based on the naturalization of his mother, the parent having legal custody when there has been a legal separation of the parents. While counsel admits that the applicant's parents are not divorced and have never filed for "legal separation" in the United States or Mexico, counsel contends that the applicant's parents' marital relationship was severed as a result of the applicant's father's order of removal and subsequent deportation to Mexico. Counsel contends that under Fifth Circuit and Second Circuit case law the applicant's father's deportation in 1992 constituted a "legal separation" without the destruction of the marital status because the couple was separated by a physical border imposed by a U.S. court.

Counsel's assertions on appeal fail to establish the applicant's parents' legal separation. The case law to which counsel cites neither holds nor infers that a deportation order is a "legal separation," whether the separation is viewed as consensual or otherwise. In *Nehme v. INS*, 252 F.3d 415 (5<sup>th</sup> Cir. 2001), the Fifth Circuit found that Congress clearly intended that the naturalization of only one parent would result in the automatic naturalization of an alien child only when there has been a formal, *judicial* alteration of the marital relationship and that, where there is no federal standard by which to interpret the term "legal separation," such as in the United States, one must look to state domestic laws. *Nehme* clearly contemplates that the only type of formal, judicial alteration of the marital relationship that constitutes a "legal separation" is one which is either a limited or absolute divorce obtained through judicial proceedings under family law and not one that is constructed out of a deportation order. A deportation order, while effectively separating the applicant's parents, does not terminate or alter the applicant's parents' marital status or formally or legally recognize that the applicant's parents were living separate lives. *See Brissett v. Ashcroft*, 363 F.3d 130 (2<sup>nd</sup> Cir. 2004).

The applicant has failed to provide evidence of either a limited or absolute divorce obtained through judicial proceedings in either the United States or Mexico for his parents. The record therefore

reflects that the applicant's parents were married in 1970 but that the marriage was not legally dissolved. Consequently, the applicant did not derive citizenship through his mother under former section 321(a)(3) of the Act.

The applicant is also ineligible to derive citizenship under any other subsection of former section 321(a) 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 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.