

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

E2

Date: **SEP 19 2011**

Office: SACRAMENTO, 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for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (repealed) (1979)

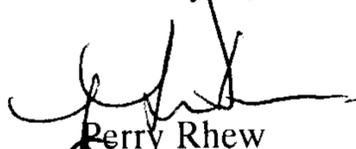
ON BEHALF OF PETITIONER:
[REDACTED]

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, Sacramento, 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 on [REDACTED] 1979 in Mexico. The applicant's parents are [REDACTED]. The applicant's parents were married in 1978 and divorced in 2008. The applicant's mother became a U.S. citizen upon her naturalization on September 9, 1996. The applicant was admitted to the United States as a lawful permanent resident on July 26, 1979. The applicant's eighteenth birthday was on [REDACTED] 1997. The applicant seeks a certificate of citizenship claiming that he derived U.S. citizenship upon his mother's naturalization pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (repealed).

The field office director denied the application upon finding that the applicant could not derive U.S. citizenship solely through his mother, noting that the applicant's parents were divorced in 2008. On appeal, the applicant, through counsel, maintains that his parents were separated in August 1996, after a domestic dispute that resulted in his father's conviction for domestic violence and restraining order. See Appeal Brief. The applicant claims that he remained in his mother's custody. *Id.*

The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). The Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), which took effect on February 27, 2001, amended sections 320 and 322 of the Act, 8 U.S.C. §§ 1431 and 1433, and repealed section 321 of the Act. The provisions of the CCA, however, are not retroactive, and apply only to persons who were not yet 18 years old as of February 27, 2001. Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Former section 321 of the Act is therefore applicable to 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 applicant can establish that he was admitted to the United States as a lawful permanent resident and that his mother naturalized before his eighteenth birthday. The applicant's father, however, did not naturalize as required by former section 321(a)(1), nor was he deceased such that the applicant could derive U.S. citizenship solely through his mother under former section 321(a)(2) of the Act. At issue in this case is whether the applicant can establish 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.

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). Legal separation "occurs only upon a formal governmental action, such as a decree issued by a court of competent jurisdiction that, under the laws of a state or nation having jurisdiction over the marriage, alters the marital relationship of the parties." *See Morgan v. Attorney General*, 432 F.3d 226 (3d Cir. 2005); *see also Nehme v. INS*, 252 F.3d 415, 426 (5th Cir. 2001) (holding that "the term legal separation is uniformly understood to mean judicial separation"). 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's parents were divorced in 2008. Their divorce judgment indicates that their marital status ended on March 19, 2008. *See* Divorce Judgment filed March 21, 2008. The applicant's parents were therefore not legally separated until after the applicant's eighteenth birthday. The applicant's parents' physical separation, and the restraining order, does not amount to a legal separation as they are not a judicial, formal action altering their marital relationship.

Having found that the applicant's parents were not legally separated prior to the applicant's eighteenth birthday as required by former section 321(a)(3) of the Act, the AAO need not address the issue of legal custody. The applicant did not automatically derive U.S. citizenship upon his mother's naturalization under former section 321 of the Act or any other provision of law.

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). The applicant has not met his burden of proof in this case and his appeal will therefore be dismissed.

ORDER: The appeal is dismissed.