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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**

E2



Date: **APR 11 2012**

Office: ATLANTA, GA



IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Acting Field Office Director, Atlanta, Georgia. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The applicant filed a new application, which was denied by the Field Office Director and is now before the AAO on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on September 1, 1974 in Vietnam. The applicant's father, [REDACTED] became a U.S. citizen upon his naturalization on September 16, 1987. The applicant was admitted to the United States as a refugee on January 13, 1981 and later adjusted his immigration status to lawful permanent residence in 1984. The applicant's immigration records indicate that his mother is [REDACTED]. DNA evidence reflects that [REDACTED] is not the applicant's biological mother. The applicant claims that his biological mother is [REDACTED] that his biological parents were divorced and that his father was awarded his legal custody. The applicant seeks a certificate of citizenship claiming that he derived U.S. citizenship upon his father's naturalization.

The application was initially denied upon finding that the applicant could not establish that both of his parents were naturalized prior to his eighteenth birthday as is required by former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (repealed). The AAO dismissed the applicant's appeal because he had failed to establish that [REDACTED] was not his biological mother. The applicant filed a new Form N-600, Application for Certificate of Citizenship, accompanied by DNA evidence establishing that [REDACTED] is not his biological mother.

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). Former section 321 of the Act, as in effect prior to the Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), is applicable to this case because the applicant was over the age of 18 years on the CCA's effective date. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

Former section 321 of the Act, stated, in pertinent part, that:

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, 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 said child is under the age
of 18 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
18 years.

The record indicates that the applicant's U.S. citizen father naturalized and that he was admitted to the United States as a lawful permanent resident prior to his eighteenth birthday. At issue in this case is whether the applicant can establish that his mother is [REDACTED] such that he could derive U.S. citizenship through his father under former section 321(a)(3) of the Act.

As noted in the AAO's previous decision, the applicant's immigration record indicates that his mother is [REDACTED]. The applicant now submits DNA evidence that [REDACTED] is not the applicant's biological mother. The record does not contain DNA evidence to establish that the applicant's mother is [REDACTED]. The Field Office Director, however, assumed for purposes of his decision that [REDACTED] was the applicant's biological mother, and nevertheless found that the applicant did not derive U.S. citizenship upon the naturalization of his father because he could not establish that his parents were legally separated.

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). On appeal, the applicant cites *Morgan v. Attorney Gen. of U.S.*, 432 F.3d 226 (3d Cir. 2005). The applicant's reliance on *Morgan* is misplaced. According to the court in *Morgan*, "a legal separation for purposes of [former section] 321(a)(3) 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." *Id.* at 234. In *Brissett v. Ashcroft*, 363 F.3d 130, 132 (2d Cir. 2004), the court explained that the "requirement of a "legal separation" is satisfied only by 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."

The applicant submits a "Verification of Lost Divorce [sic] Certificate" in support of his claim that his parents were divorced. This document, which appears to be an affidavit executed by the applicant's father, was not issued or certified by the Vietnamese government, nor does it

evidence that the applicant's parents were married and obtained a "legal separation" through judicial proceedings or otherwise formally separated. The applicant's own affidavit, or the other sworn statements submitted in support of his application, also do not evidence that his parents were married and later "legally separated." The applicant therefore did not derive U.S. citizenship upon his father's naturalization under former section 321(a)(3) of the Act.

“There must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.” *Fedorenko v United States*, 449 U.S. 490, 506 (1981). The burden of proof in citizenship cases is on the claimant to establish the claimed citizenship by a preponderance of the evidence. *See* Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant has not met his burden of proof, and his appeal will be dismissed.

ORDER: The appeal is dismissed.