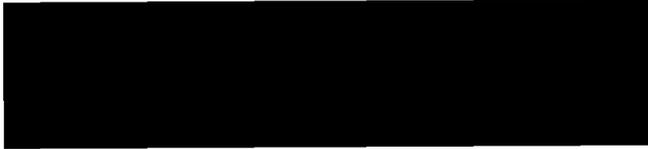


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



E₂

Date: **APR 12 2012** Office: EL PASO, 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 (1984)

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, El Paso, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born out-of-wedlock in Jalisco, Mexico on January 23, 1968.¹ The applicant's parents subsequently married each other on July 21, 1970 in Los Angeles, California. The applicant was admitted to the United States as a lawful permanent resident on October 2, 1972. The applicant's mother became a naturalized U.S. citizen on June 28, 1984. The applicant's father was born in Mexico and was not a U.S. citizen.² 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 March 31, 2011. On appeal, counsel contends that the applicant's parents were legally separated at the time the applicant's mother naturalized. *See Counsel's Brief*, dated May 2, 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 that 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 as in effect in 1984 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

¹ The applicant's birth certificate indicates that his parents were married at the time of his birth; however, he has failed to provide a copy of his parents' Mexican marriage certificate.

² A death certificate indicates that the applicant's father passed away on July 9, 1997. The death certificate indicates that the applicant's father was still married to the applicant's mother at the time of death.

(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 eighteenth 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).

On appeal, counsel contends that the applicant qualifies for derivative citizenship based on the naturalization of his mother, the parent having legal custody when his parents were legally separated under California law.

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 four years old, and the applicant's mother became a naturalized U.S. citizen when he 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.

The applicant's paternity was established by legitimation under Mexican law because, according to a March 2004 advisory opinion from the Library of Congress (LOC 2004-416), the Civil Code ("Code") of Jalisco provides that all children have equal rights regardless of whether they were born within a union not bound by marriage or within a marriage; however, children born within a union not bound by marriage need to have their parentage established in order to have their rights implemented. Parentage is established with respect to the father by voluntary acknowledgment which may be achieved through recognition on the birth record, before the Civil Registry Officer. The record contains a Birth Certificate indicating that the applicant was legitimated through acknowledgement by his father at the time his birth was registered. *See Certificate of Birth for [REDACTED]* Accordingly, the applicant's paternity was established by legitimation under Mexican law before he turned 21.

Counsel contends that the applicant's parents legally separated and his mother took legal custody, pursuant to California law, as of the parent's permanent separation in September 1974. Counsel contends that a "legal separation" took effect upon the date on which his mother permanently parted

ways with her then spouse with the firm intent of not resuming her marriage. Counsel contends that there was a legal separation pursuant to California law as of September 1974 despite the fact that there was no dissolution of and the marriage did not end until the applicant's father's death in 1997. Counsel asserts that income tax records, affidavits and other legal documents in the record establish that the applicant's parents legally separated in 1974.

In *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001), the Fifth Circuit Court of Appeals (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. *Also see Brissett v. Ashcroft*, 363 F.3d 130 (2nd Cir. 2004).

In *Minasyan*, the Ninth Circuit Court of Appeals (Ninth Circuit) held that there were three forms of separation under California law which constitute a legal separation for purposes of former section 321(a) of the Act. The court found that the California Family Code provides for both "legal separation" and "dissolution of marriage" and that California case law also recognizes that spouses are separated for legal purposes beginning on a court-defined "date of separation," which is considered to be a separation by virtue of law. *Minasyan*, 401 F. 3d at 1078-79. While the documents submitted to support counsel's contention that the applicant's parents became legally separated in 1974 establish that the applicant's parents were living separate and apart and there had been a final rupture of the marital relationship, there is no evidence that there has been a court-defined date of separation or that either party took any steps to have their separation legally recognized under California law. Consequently, the applicant did not derive citizenship through his mother under the first clause of 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. Because his father did not naturalize, he cannot derive citizenship under former section 321(a)(1) of the Act. The record does not indicate that the applicant's father was deceased prior to the applicant's eighteenth birthday and he is consequently ineligible to derive citizenship from his mother under former section 321(a)(2) of the Act. The applicant is also ineligible to derive citizenship through his mother under former section 321(a)(3) of the Act because he was legitimated and there was no legal separation of the applicant's parents.

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.