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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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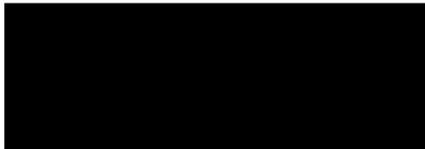
Date: **AUG 16 2012** Office: SAN JOSE, CA



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for Certificate of Citizenship under former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed)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

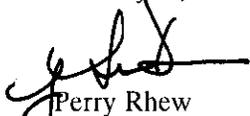


INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 was denied by the Acting Field Office Director, San Jose, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on April 11, 1975 in Vietnam. The applicant's parents are [REDACTED] and [REDACTED]. They were married in 1973, and divorced in 2001. The applicant's father became a U.S. citizen upon his naturalization on August 19, 1992, when the applicant was 17 years old. The applicant's mother naturalized on October 19, 2010. The applicant was admitted to the United States as a lawful permanent resident on August 25, 1981, when he was six years old. The applicant presently seeks a certificate of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (repealed).

The acting field office director determined that the applicant did not derive U.S. citizenship under former section 321 of the Act because he could not establish that his parents were "legally separated" prior to his eighteenth birthday. On appeal, the applicant, through counsel, maintains that his parents were "legally separated" in 1992, as evidenced by the date of separation shown on their petition for dissolution of marriage. In support of his claim, the applicant cites *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005).

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan, supra* at 1075. Former section 321 of the Act is therefore applicable in this case. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001) (holding that the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), which repealed former section 321 of the Act, applies only to persons who were not yet 18 years old as of February 27, 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 obtained lawful permanent residency and that his father naturalized prior to his eighteenth birthday. However, the applicant did not derive U.S. citizenship under former section 321(a)(1) of the Act, which requires the naturalization of both parents because his mother naturalized after his eighteenth birthday. The record also does not indicate that the applicant's mother was deceased prior to the applicant's eighteenth birthday and he is consequently ineligible to derive U.S. citizenship from his father alone 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" such that he could derive citizenship upon his father's naturalization under 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). 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).

Counsel cites *Minasyan, supra*, in support of his claim that his parents were legally separated in 1992, as indicated in their petition for dissolution of marriage. The Ninth Circuit Court of Appeals in *Minasyan* recognized that the term "legal separation" means a "separation recognized by law" or "by virtue of law." *Minasyan, supra* at 1078. In this case, unlike in *Minasyan*, the applicant's parents' judgment of dissolution of marriage does not list a 1992 date of separation. Indeed, the applicant's parents' judgment of dissolution of marriage indicates that the date their marital status ended was June 12, 2001. The 1992 separation date appears only in the applicant's parents' petition for dissolution of marriage, which is not endorsed, incorporated, or otherwise recognized by the State of California as the date of the applicant's parents' separation for legal purposes. Thus, the facts in this case are clearly distinguishable from those in *Minasyan* and counsel's reliance on that case is misplaced.

"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." *Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001) (emphasis in original) (recognizing that requiring the naturalization of both parents, when the parents were married, "was necessary to promote the child from being separated from an alien parent who has a legal right to custody"); *see also Wedderburn v. INS*, 215 F.3d 795, 800 (7th 2000) (explaining that "Congress rationally could conclude that as long as the marriage continues the citizenship of children should not change *automatically* with the citizenship of a single parent")(emphasis in

original); *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000)(stating that “both the language of [section 321(a)] and its apparent underlying rationale suggest that Congress was concerned with the legal custody status of the child *at the time* that the parent was naturalized and during the minority of the child”)(emphasis in original).

"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.