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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

[redacted]

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Date: SEP 2 4 2012 Office: BUFFALO, NY FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1431 (1969).

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 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 for Certificate of Citizenship (Form N-600) was denied by the Buffalo, New York Field Office Director (the director), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The application will remain denied.

Pertinent Facts and Procedural History

The applicant was born in Cape Verde on July 9, 1959. The applicant's parents were not married at the time of his birth and have never married. The applicant's father became a U.S. citizen on November 7, 1968. The applicant's mother is not a U.S. citizen. The applicant was admitted to the United States as a lawful permanent resident on March 13, 1969, when he was nine years old. 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 father.

The director determined that the applicant failed to establish eligibility for derivative citizenship because, among other things, the applicant failed to submit evidence that he was in his father's legal custody pursuant to a legal separation at the time of his father's naturalization. On appeal, the applicant contends that he had been in his father's sole custody since he was eight days old, as his mother had disappeared.

Applicable Law

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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. *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(a) of the Act, in effect at the time the applicant entered the United States as a lawful permanent resident in 1969, is 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.

Analysis

Here, the applicant satisfied two 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 and his father became a naturalized U.S. citizen when he was nine years old. However, the applicant has not shown that his father had legal custody of him pursuant to a legal separation while he was under the age of eighteen, as required by section 321(a)(3) of the Act.

The applicant has not met the requirements of former section 321(a)(3) of Act because his parents were never married,[1] and therefore never legally separated. The term "legal separation," as used in section 321(a)(3) of the former Act, means either a limited or absolute divorce obtained through judicial proceedings. *Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001); *Matter of H,* 3 I&N Dec. 742, 743-44 (1949). If an applicant's parents were never married to each other, they could not have obtained a legal separation. *Matter of H*, 3 I&N Dec. at 744. *See Lewis v. Gonzales*, 481 F.3d 125, 130 (2nd Cir. 2007) (listing cases and noting that "every other court confronted with the question has held that the first clause of § [321](a)(3) requires a legal separation even if the child's parents never married").

Even if the applicant were able to show that his parents legally separated, he would still not have derived citizenship through his father because he has not established that his father had legal custody of him. U.S. Citizenship and Immigration Services (USCIS) has reviewed the immigration record of the applicant's father, who immigrated to the United States in 1965 based upon his marriage to a U.S. citizen. The applicant's father's U.S. citizen spouse is not the applicant's biological mother and never adopted him. On his application for an immigrant visa, which was executed when the applicant was six years old, the applicant's father indicated "None" when responding to the question about the names and addresses of his children under the age of twenty-one. Although the applicant

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[1] The applicant's birth certificate states that he was the "illegitimate son" of his father and mother, whose marital statuses are listed as "single." The applicant's father listed no prior marriages on his Form G-326A Biographic Information Form, which he signed on April 1, 1968. In a sworn statement executed on May 31, 2012, the applicant affirmed that his biological parents never married each other.

states on appeal that his father had custody of him shortly after his birth, his father's declaration on his immigrant visa application that he had no children belies the applicant's claims. Other than his own statements, the applicant has submitted no evidence, such as school records or affidavits from individuals who can attest to the applicant's custody by his father, to demonstrate that he was in his father's legal custody while he was under the age of eighteen.

Accordingly, the applicant's claim to having derived U.S. citizenship under former section 321(a)(3) of the Act fails on two accounts; the lack of a legal separation between his parents; and the lack of evidence relating to his father's custody over him while he was under the age of eighteen.

The applicant is also ineligible to derive citizenship under any other subsection of former section 321(a) of the Act. Because his mother did not naturalize and his stepmother did not adopt him, he cannot derive citizenship under former section 321(a)(1) of the Act. The record does not indicate that the applicant's mother was deceased prior to the applicant's eighteenth birthday and he is consequently ineligible to derive citizenship from his father under former section 321(a)(2) of the Act. Finally, the second clause of section 321(a)(3) of the Act is inapplicable because the applicant is not claiming that he derived U.S. citizenship through his mother.

While the director discussed the applicant's ineligibility under former section 322 of the Act, 8 U.S.C. § 1432 (1977), that provision is inapplicable to this case. The records of the applicant and his father contain no evidence that his father filed an application with the legacy Immigration and Naturalization Service (INS) to obtain a certificate of citizenship on the applicant's behalf and that the applicant took the requisite oath of allegiance prior to his eighteenth birthday

Conclusion

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. The application remains denied.