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U.S. Citizenship
and Immigration
Services



Date: FEB 15 2013 Office: TUCSON, AZ

FILE:

IN RE:

APPLICATION: Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432

ON BEHALF OF PETITIONER:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Application for Certificate of Citizenship (Form N-600) was denied by the Field Office Director, Tucson, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Jamaica on December 3, 1970. The applicant's parents, [REDACTED], were married on October 26, 1974. The applicant was admitted to the United States as lawful permanent resident on August 22, 1986. The applicant's mother became a U.S. citizen upon her naturalization on February 9, 1988. The applicant's parents were divorced in New Jersey on July 8, 1991. The applicant's eighteenth birthday was on December 3, 1988. He 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 field office director determined that the applicant failed to establish eligibility for derivative citizenship finding that he did not acquire U.S. citizenship pursuant to the Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000). The CCA became effective on February 27, 2001 and applied only prospectively to individuals under the age of 18. The director further found that the applicant did not derive U.S. citizenship because he could not establish that both his parents had naturalized as required by former section 321(a)(3) of the Act. The application was denied accordingly.

On appeal, the applicant contends that his parents were formally separated in 1982 and that he therefore could derive U.S. citizenship upon the naturalization of his mother. *See* Appeal Brief at 3. Specifically, the applicant states that his parents were divorced in New Jersey and that under New Jersey law they had been separated for at least 18 months. *Id.*

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 of the Act was in effect at the time of the applicant's mother's naturalization and prior to the applicant's eighteenth birthday, and 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

(b)(6)

- (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.

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. He was admitted to the United States as a lawful permanent resident when he was under the age of 18, and his mother became a naturalized U.S. citizen when he was 17 years old. However, because the applicant has not shown that his father naturalized prior to his eighteenth birthday, he did not derive citizenship under former section 321(a)(1) of the Act. The record also 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 upon his mother's naturalization under former section 321(a)(2) of the Act. The applicant is also ineligible to derive citizenship through his mother under the second clause of former section 321(a)(3) of the Act because he was legitimated when his parents were married in 1974. See *Matter of Hines*, 24 I & N Dec. 544 (BIA 2008) (finding that a child is legitimated upon the marriage of the parents under Jamaican law). At issue in this case is whether the applicant's parents were "legally separated" when his mother naturalized, such that he could derive U.S. citizenship solely upon her naturalization under the first clause of 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); see also *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001). The record reflects that the applicant's parents were married in 1974 and remained married until 1991. The applicant contends that his parents were formally separated in 1982. He claims, citing *Minasyan, supra*, that his parents must be deemed to have been legally separated in 1982 under New Jersey law. Unlike the divorce decree at issue in the *Minasyan* case, however, the applicant's parents' divorce decree does not list a date of separation. Rather, the applicant's parents' divorce decree only indicates that a cause of action for divorce was established based on a minimum 18-month separation period. There is no

(b)(6)

indication in the applicant's parents' divorce decree or elsewhere that they were legally separated or that the claimed 1982 separation date was officially recognized or judicially approved. Contrary to the applicant's claim, his parents remained married and not "legally separated" for purposes of derivative citizenship under former section 321 of the Act until their divorce in 1991. Consequently, the applicant did not derive citizenship upon his mother's naturalization under former section 321(a)(3) of the Act.

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.