



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

Date: SEP 09 2013

Office: NEW YORK, 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. § 1432

ON BEHALF OF APPLICANT:

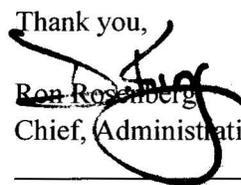
SELF-REPRESENTED¹

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

¹ Although the applicant's appeal was filed by attorney [REDACTED] it was not accompanied by the required new Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. See 8 C.F.R. § 292.4(a). On August 27, 2013, a request for a new Form G-28 was sent to attorney [REDACTED] via facsimile indicating that a new Form G-28 must be submitted within seven days. A new Form G-28 has not been submitted, the applicant will therefore be deemed to be self-represented.

DISCUSSION: The application was denied by the District Director (the director), New York, New York, and 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 December 31, 1965 in Jamaica. The applicant's parents were married on July 19, 1975, and divorced on August 1, 2000. The applicant's mother became a U.S. citizen upon her naturalization on June 8, 1977, when the applicant was 11 years old. The applicant became a lawful permanent resident of the United States in July 1971, when he was five years old. The applicant's eighteenth birthday was on December 31, 1983. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. §1432 (repealed).

The district director determined that the applicant failed to establish eligibility for 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 pursuant to former section 321(a) of the Act because he could not establish that his parents were divorced prior to his eighteenth birthday. The applicant's Form N-600, Application for Certificate of Citizenship, was denied accordingly. *See* Decision of the District Director dated December 27, 2012.

On appeal, the applicant, through counsel, maintains that his parents separated on November 5, 1977 when he was under the age of 18. *See* Appeal Brief at 1. The applicant further states that he was in his mother's custody since February 15, 1978. *Id.* (citing Applicant's Parents Judgment of Divorce). Thus, citing *Minasyan v. Gonzalez*, 401 F.3d 1069 (9th Cir. 2005), counsel maintains that the applicant's parents were legally separated prior to the applicant's eighteenth birthday such that he could derive U.S. citizenship solely through his mother. *Id.* at 2.

The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The applicable law for derivative citizenship purposes is that in effect at the time the critical events giving rise to eligibility occurred. *Minasyan, supra*, 401 F.3d at 1075; *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

- (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 1975. *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); *Matter of Levy*, 17 I & N Dec. 539 (BIA 1980) (marriage of the natural parents serves to legitimate a child under the laws of the State of New York). 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 1975 and remained married until 2000. The applicant contends that his parents separated in 1977, and that his mother was formally granted custody as of February 15, 1978, and that his parents' marriage was terminated on or about August 1975. *See* Appeal Brief at 2-3 (citing Referee's Findings of Fact and Conclusions of Law

entered August 1, 2000). He claims, citing *Minasyan, supra*, and *Brissett v. Ashcroft*, 363 F.3d 130 (2nd Cir. 2004), that his parents must be deemed to have been legally separated prior to his eighteenth birthday, either as of 1975 or 1978.

Unlike the divorce decree at issue in the *Minasyan* case, however, the applicant's parents' Judgment of Divorce does not list a date of separation. Rather, the applicant's parents' Judgment of Divorce and the accompanying Finding of Fact and Conclusions of Law indicate that the applicant's mother would be deemed to be the custodial parent as of February 15, 1978 and that the alleged grounds for seeking a divorce were adultery commencing on or about August 1975. There is no indication in the applicant's parents' Judgment of Divorce or elsewhere that they were legally separated prior to the applicant's eighteenth birthday or that the claimed 1975 or 1978 date when the separation occurred was officially recognized or judicially approved. Indeed, the fact that there are two possible separation dates indicates that neither could be officially recognized nor judicially approved. In *Brissett, supra* at 132, 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." 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 2000. Consequently, the applicant did not derive citizenship upon his mother's naturalization under former section 321(a)(3) of the Act.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.