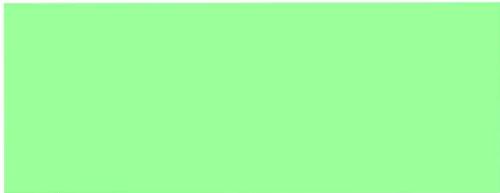




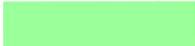
U.S. Citizenship
and Immigration
Services

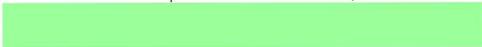
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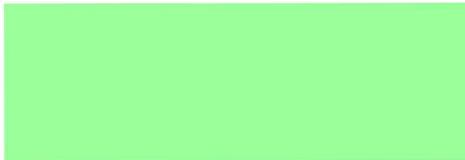
OFFICE: HOUSTON, TX

FILE: 

IN RE: 

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

ON BEHALF OF APPLICANT:



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

DISCUSSION: The Form N-600, Application for Certificate of Citizenship (Form N-600) was denied by the Field Office Director, Houston, Texas (the director) on February 2, 2009. An appeal to the Administrative Appeals Office (AAO) was dismissed on May 13, 2009. A subsequent Motion to Reopen and Reconsider was dismissed by the director on December 2, 2009. The dismissal of the motion is now on appeal before the AAO.¹ The appeal will be dismissed.

The record reflects that the applicant was born in Guatemala on August 14, 1979 in wedlock. His father was born in Guatemala, and became a naturalized U.S. citizen on August 10, 1995, when the applicant was 15 years old. His mother was born in Guatemala, and became a naturalized U.S. citizen on June 6, 2007, when the applicant was 27 years old. The applicant was admitted into the United States as a lawful permanent resident on October 20, 1989, when he was 10 years old. His parents divorced on February 9, 2000, when the applicant was 20 years old. The applicant presently seeks a certificate of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432, based on the claim that he derived U.S. citizenship through his father.

The director denied the applicant's Form N-600 on February 2, 2009, on the basis that the applicant was over the age of 18 when his parents divorced, and at the time of his mother's naturalization. The applicant therefore failed to meet age requirements for U.S. citizenship, as set forth in section 321 of the former Act. The AAO agreed with the director in a decision dated May 13, 2009, and an appeal filed by the applicant was dismissed. In a decision dated, December 2, 2009, the director dismissed a motion to reopen and reconsider filed by the applicant, based on the determination that a *nunc pro tunc* declaratory judgment failed to establish that the applicant met the legal separation and custody requirements set forth in section 321(a)(3) of the former Act.

Through counsel, the applicant asserts on appeal that *nunc pro tunc* judicial evidence contained in the record establishes that his parents legally separated in March 1997, and that the applicant was in his father's legal custody prior to his 18th birthday. To support these assertions, counsel submits a September 2009, Texas district court declaratory judgment and an affidavit from the applicant's mother.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

Section 321 of the former Act provided 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

¹ The Form I-290B appeal was filed on December 30, 2009; however, it was not received by the AAO until May 2013.

(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 (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 fails to establish that the applicant's mother is deceased, or that she became a naturalized U.S. citizen prior to the applicant's 18th birthday. The requirements contained in section 321(a)(1) and (2) of the former Act have therefore not been met.

For immigration purposes, the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings. *Matter of H*, 3 I&N Dec. 742, 744 (Cent. Office 1949).

The United States Fifth Circuit Court of Appeals, under whose jurisdiction the present case falls, stated further, in *Nehme v. INS*, 252 F. 3d 415, *supra*, that for section 321(a)(3) of the former Act purposes:

[C]ongress 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."

Id. at 425-426. Consensual separation between spouses, or voluntarily living apart, without a judicial decree of separation, did not meet the legal separation requirement contained in section 321 of the former Act.

In the present matter, the record contains divorce decree evidence reflecting that the applicant's parents obtained a divorce in February 2000, when the applicant was 20 years old. The record also contains, however, a September 23, 2009, *nunc pro tunc*, Declaratory Judgment from the Brazoria County, Texas district court, in which a judge specifically finds that the applicant's parents were:

[L]egally separated on March 14, 1997, prior to Plaintiff's [applicant's] eighteenth (18th) birthday. Plaintiff was in the primary care, custody, and control of his father from the time Plaintiff's parents legally separated until several years after Plaintiff's parents were divorced on February 09, 2000.

The United States Fifth Circuit Court of Appeals analyzed the evidentiary effect of a *nunc pro tunc* order in, *Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006). The court agreed with the United States First Circuit Court of Appeals decision in, *Fierro v. Reno*, 217 F.3d 1 (1st Cir. 2000), which:

[r]ejected the assertion that a *nunc pro tunc* amended custody decree obtained for the express purpose of affecting the legal outcome of federal immigration proceedings satisfied [section 321(a)(3) of the former Act's] 'legal custody' requirement.

Bustamante-Barrera v. Gonzales at 400. The First Circuit reasoned, in *Fierro*, that, "[r]eliance on such an order would open the floodgates for abuse, 'allow[ing] . . . state court[s] to create loopholes in the immigration laws on grounds of perceived equity or fairness.'" *Id.* at 401. In *Bustamante-Barrera*, the Fifth Circuit agreed that, "[r]elying on such a *nunc pro tunc* order to recognize derivative citizenship would create the potential for significant abuse and manipulation of federal immigration and naturalization law." *Id.*

The Fifth Circuit found further in *U.S. v. Esparza*, 678 F. 3d 389 (5th 2012), that the court, "[m]ust look beyond the facial validity of such [*nunc pro tunc*] decrees in order to determine their actual legal effect, if any, in federal cases." The *nunc pro tunc* order at issue in *Esparza* did not specifically state that it was based on immigration or equity grounds; however, upon examination, the Fifth Circuit found that there was no reliable evidence in the record to support the correctness of the stated *nunc pro tunc* order custody arrangement. The court noted further that the timing of the *nunc pro tunc* order was suspect, in that the order was sought over 16 years after the parent's divorce decree was issued, was not sought until after the alien had been placed into immigration removal proceedings, and was not sought prior to the alien's 18th birthday. In addition, the judge who signed the *nunc pro tunc* order was not personally familiar with the alien's case, and the amended custody arrangement was a moot point for purposes of Texas State law because the alien was already an adult. Based on its review of the record, the Fifth Circuit found that the *nunc pro tunc* order failed to reliably establish that the alien met section 321 of the former Act requirements.

In the present matter, the applicant's *nunc pro tunc* declaratory judgment also does not expressly state that it was issued for immigration or equity purposes; however, upon review of the record, it appears that the order was issued on that basis.

In ascertaining the evidentiary weight of affidavits, the Service must determine the basis for the affiant's knowledge of the information to which he is attesting; and whether the statement is plausible, credible, and consistent both internally and with the other evidence of record. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). In the present matter, a March 27, 2009, affidavit from the applicant's mother, stating that the applicant's father had full custody over the applicant before and after their separation, has diminished evidentiary value, in that it lacks material detail and is uncorroborated by other documentary evidence. Moreover, the applicant's parents' February 2000 divorce decree makes no reference to a prior separation or custody arrangement between the applicant's parents.

It is further noted that the declaratory judgment in the applicant's case was not sought until after the applicant was denied citizenship status by the director and on appeal. Moreover, the record lacks evidence reflecting the basis upon which the district court issued a judgment declaring separation and custody arrangements, 12 years after the applicant became an adult and his parents divorced. In addition, the judge who signed the *nunc pro tunc* declaratory judgment was not personally involved in the applicant's parent's divorce case, and the declaratory judgment appears to be a moot point for purposes of Texas State law because the applicant has been an adult since August 1997.

Upon review of the record, the AAO finds that the *nunc pro tunc* judgment fails to reliably establish that the applicant's parents were legally separated prior to the applicant's 18th birthday. Moreover, because the applicant failed to establish that his parents were legally separated before he turned 18, no purpose would be served in addressing the legal custody requirement set forth in section 321(a)(3) of the former Act.

8 C.F.R. § 341.2(c) states that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. In the present matter, the applicant has failed to meet his burden of proof. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.