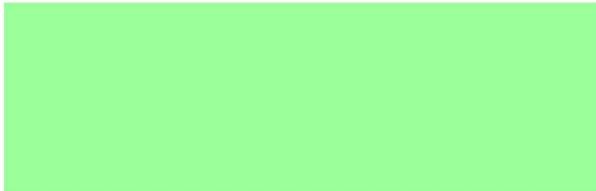




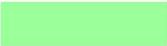
U.S. Citizenship
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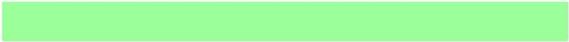


Date: **SEP 24 2013**

Office: SAN FRANCISCO, CA

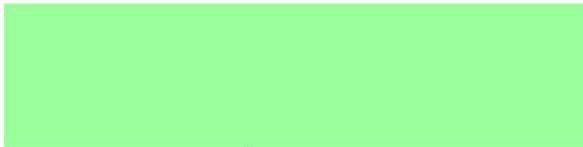
FILE: 

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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).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 (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 appeal was denied by the Field Office Director, San Francisco, California, 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 in Nicaragua on April 6, 1982. The applicant's parents, [REDACTED] and [REDACTED] were not formally married but claim to have been in a common-law relationship until 1991. The applicant was admitted to the United States as lawful permanent resident on July 29, 1992. The applicant's father became a U.S. citizen upon his naturalization on June 10, 1997. The applicant's eighteenth birthday was on April 6, 2000. 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 father.

The field office director determined that the applicant did not derive U.S. citizenship because he could not establish that his parents were legally separated as required by former section 321(a)(3) of the Act. The application was denied accordingly.

On appeal, the applicant, through counsel, contends that his parents were in a common-law marriage until 1991 and that he was in his father's sole custody since his immigration to the United States. See Appeal Brief at 4.

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 father'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 and his father became a naturalized U.S. citizen when he was under the age of 18. However, because the applicant's mother is not a U.S. citizen, he did not derive citizenship under former section 321(a)(1) of the Act. 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 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 father under the second clause of former section 321(a)(3) of the Act, because that provision only allows for derivation by an out of wedlock child through his mother. *See Lewis v. Gonzales*, 481 F.3d 125, 130 (2nd Cir. 2007). At issue in this case is whether the applicant's parents were "legally separated" when his father naturalized, such that he could derive U.S. citizenship solely upon his 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 never formally married. The applicant maintains that they were in a common law marriage until 1991. There is no indication, however, that the applicant's parents' common law marriage was formally dissolved such that it could be established that they were "legally" separated. Whether the applicant's parents are deemed to be unwed or in a common law relationship, the record contains no evidence of a legal separation. Consequently, the applicant did not derive citizenship upon his father's naturalization under former section 321(a)(3) of the Act.

The applicant, through counsel, maintains that his application should be approved because his sister was granted a certificate of naturalization under the same circumstances. The AAO, however, is required to determine the applicant's eligibility based on the evidence in the record before it, and not on the basis of another application. The AAO is not required to approve an application where eligibility has not been demonstrated, merely because of a prior approval that

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may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988).

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.