U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-M-H-

DATE: OCT. 23, 2019

APPEAL OF SAN DIEGO, CALIFORNIA FIELD OFFICE DECISION

APPLICATION: FORM N-600, APPLICATION FOR CERTIFICATE OF CITIZENSHIP

The Applicant seeks a Certificate of Citizenship to reflect that he derived U.S. citizenship from his father under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432.[1]

The Director of the San Diego, California Field Office denied the application, concluding that only the Applicant's father became a naturalized U.S. citizen before the Applicant turned 18, and the Applicant did not establish his parents were legally separated, as required under former section 321(a) of the Act.[2]

On appeal the Applicant asserts that his parents were legally separated under California law between 1979 and 1987, and that he therefore meets former section 321(a)(3) of the Act legal separation requirements.[3]

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The record reflects that the Applicant was born in Iraq on [redacted] 1975, to married foreign national parents. He was admitted into the United States as a lawful permanent resident in February 1978, and his father became a U.S. citizen through naturalization in May 1984, when the Applicant was eight

[1] Repealed by Sec. 103(a), title I, Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000).

[2] The Director also found the Applicant was ineligible to derive citizenship under section 320 of the Act, 8 U.S.C. § 1431. We agree, and the Applicant does not dispute this finding. *See Matter of Rodriguez-Tejedor,* 23 I&N Dec. 153 (BIA 2001) (Section 320 of the Act applies only to individuals who were not yet 18 years old as of February 27, 2001. By then, the Applicant was 25 years old.)

[3] The Applicant also indicates that his father had sole legal custody over him after his parents separated, and he therefore also meets former section 321(a)(3) of the Act legal custody conditions. We find it unnecessary to address this issue since as discussed, the Applicant did not establish that his parents were legally separated. We therefore reserve the issue. Our reservation is not a stipulation that the Applicant has overcome this additional ground for denial, and should not be construed as such. Rather, there is no constructive purpose to addressing the additional ground here, because it would not change the outcome of the appeal.

years old. There is no evidence to indicate that his mother became a U.S. citizen, and the Applicant is claiming derivative citizenship through his father.

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *See Minasyan v. Gonzales,* 401 F.3d 1069, 1075 (9th Cir. 2005). Based on the Applicant's year of birth in 1975, and the year when he turned 18 (1993), his derivative citizenship claim falls under the provisions of former section 321 of the Act.[4]

Former section 321 of the Act provided in pertinent part that:

> (a) A child born outside of the United States of [foreign national] parents, or of a [foreign national] 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:
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> (1) The naturalization of both parents; or
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> (2) The naturalization of the surviving parent if one of the parents is deceased; or
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> (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;[5] and if-
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> (4) Such naturalization takes place while such child is under the age of 18 years; and
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> (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 18 years.

(Emphasis added.) Because the Applicant was born abroad, he is presumed to be a foreign national 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).

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[4] The Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), which took effect on February 27, 2001, amended former sections 320 and 322 of the Act, and repealed former section 321 of the Act. The provisions of the CCA are not retroactive, and the amended provisions apply only to individuals who were not yet 18 years old as of February 27, 2001.

[5] The U.S. Ninth Circuit Court of Appeals (the Court with binding jurisdiction over the Applicant's case) requires the U.S. citizen parent to have sole legal custody over the child for former section 321(a)(3) of the Act legal separation purposes. *See U.S. v. Casasola*, 670 F.3d 1023, 1029-30 (9th Cir. 2012).

II. ANALYSIS

The Applicant meets some of the requirements under former section 321(a) of the Act. The record reflects, for instance, that the Applicant was under the age of 18 when his father became a naturalized U.S. citizen (in May 1984), and that he resided in the United States as a lawful permanent resident at that time, as required under former sections 321(a)(4) and (a)(5) of the Act. The Applicant does not claim that he derived citizenship under former sections 321(a)(1) and (a)(2) of the Act, and the record does not demonstrate eligibility under either section. The Applicant also does not claim he derived citizenship through his mother pursuant to the out of wedlock provisions contained in the second clause of former section 321(a)(3) of the Act, and the record does not demonstrate eligibility under this section.

The issue on appeal is whether the Applicant has demonstrated that he met the legal separation requirement for derivative citizenship under former section 321(a)(3) of the Act.[6] Upon review of the entire record, we find that the Applicant has provided insufficient evidence to establish that his parents were "legally separated," as required.

The term "legal separation" has been defined in the context of derivative citizenship to mean either a limited or absolute divorce obtained through judicial proceedings. *See Matter of H*, 3 I&N Dec. 742 (BIA 1949). *See also, Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981)(a married couple that simply lives apart with no plans of reconciliation is not "legally separated.") Here, it is undisputed that the Applicant's parents did not formally file for divorce or obtain a legal separation through judicial proceedings. The Applicant has therefore not demonstrated that his parents' obtained a "legal separation" as required under former section 321(a)(3) of the Act.

The Applicant claims, nevertheless, that affidavit statements by his parents and siblings show that his parents lived separately (on two different floors in their home) between 1979 and 1987, and the Applicant asserts that this constitutes a "legal separation" under California law. In support, he cites to the U.S. Ninth Circuit Court of Appeals decision, *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005).[7] He indicates that the Ninth Circuit found in *Minasyan* that a married couple became "legally separated" by operation of California law once they separated with no intention of resuming marital relations; and he asserts that his parents met this requirement between 1979 and 1987, and accordingly were "legally separated" under California law.

The *Minasyan* decision does not, however, establish that a legal separation (due to a couple separating with no intent of resuming their marital relations) is recognized in California without a judicial order formally confirming the separation and termination of the marital relationship. Rather, the Ninth Circuit found in *Minasyan* that California case law recognized spouses could be separated for legal purposes beginning on a *court-defined date of separation*, which would be considered to be a separation by virtue of law. *See Minasyan v. Gonzales* at 1078-79. The Ninth Circuit determined that a *judgment of dissolution of marriage* entered by a California court in that case recognized the

[6] If this is established a second issue is whether the Applicant demonstrated that he was in his U.S. citizen father's legal custody. However, as previously mentioned we find it unnecessary to address this matter, and we will reserve the issue.
[7] He also refers to several California state court cases that address legal separation factors.

individual's parents had separated on a date that was prior to the naturalization of his mother, and that the judgment established the date of legal separation for purposes of California law and for the purposes of the individual's derivative citizenship claim under former section 321(a)(3) of the Act. *Id.* at 1079. The legal separation determination in *Minasyan* was thus based on a judicial dissolution of marriage order which defined a specific date of separation.[8]

In conclusion, the Applicant has not shown that a married couple would be considered to be legally separated under California law without a judicial order recognizing them as such. Because the Applicant has not demonstrated that his parents obtained a legal separation through judicial proceedings, as required under former section 321(a)(3) of the Act, he has not established eligibility to derive citizenship through his U.S. citizen father under former section 321 of the Act.

ORDER: The appeal is dismissed.

Cite as *Matter of S-M-H-*, ID# 5401423 (AAO Oct. 23, 2019)

[8] Other federal courts of appeals have also concluded that a "legal separation" requires some formal action. *See Brissett v. Ashcroft,* 363 F.3d 130, 132 (2d Cir. 2004) (at a minimum, 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"); *Morgan v. Attorney General*, 432 F.3d 226, 234 (3d Cir. 2005) (a legal separation for purposes of former section 321(a) of the Act occurs only upon a formal governmental action, such as a decree issued by a court of competent jurisdiction that alters the marital relationship of the parties); *Johnson v. Whitehead*, 647 F.3d 120, 126 (4th Cir. 2011)(the term "legal separation" alone implies that there be some formal relationship, such as marriage, that can be ended only with legal action); *Nehme v. INS*, 252 F.3d 415, 426 (5th Cir. 2001) (the term "legal separation" is uniformly understood to mean judicial separation); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000) (adopting the Board of Immigration Appeals definition of legal separation as "a limited or absolute divorce obtained through judicial proceedings").