[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10154
Non-Argument Calendar

Agency No. A042-502-158

DAVID PIERRE,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(May 8, 2020)

Before LUCK, LAGOA, and HULL, Circuit Judges.

PER CURIAM:

David Pierre, a native and citizen of Haiti, seeks review of the Board of Immigration Appeals' decision affirming an immigration judge's order finding him removable and ineligible for derivative citizenship. In his petition, Pierre claims that the immigration judge and board erred because he derived United States citizenship through the naturalization of his mother. Because we agree with the board's decision, we deny Pierre's petition.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Pierre was born in Haiti in 1974 to parents who, at the time, were married. His parents, however, physically separated in 1980 but did not formally divorce until 2004. In 1985, Pierre and his mother moved to the United States. In 1990, when Pierre was sixteen years old, his mother became a naturalized citizen. A year later, he became a lawful permanent resident.

Fast forward to 2009. Pierre was charged with and pleaded guilty to sex trafficking of a minor. He was sentenced to 120 months' imprisonment as a result. Because the crime was an aggravated felony, the Department of Homeland Security initiated removal proceedings in 2018.

At the removal proceedings, Pierre told the immigration judge that he believed he derived citizenship from his mother because she had naturalized before his eighteenth birthday. Pierre said that, at the time of his mother's naturalization, his parents were legally separated, and his mother had legal custody over him. Pierre

submitted the following documents in support of his claim: (1) his birth certificate showing that he was born in Haiti to his mother and father; (2) his mother's 1990 certificate of naturalization, which listed her under her married name "Pierre," said she was "married," and omitted her maiden name; (3) his father's 2015 certificate of naturalization; (4) his 1985 middle school records, which listed his mother under her maiden name and as his parent and guardian; (5) his parents' 2004 divorce decree signed in Florida; (6) a 2018 nunc pro tunc affidavit filed by Pierre's mother in state court in support of the 2004 divorce decree, stating that she had been legally separated from Pierre's father since 1980; (7) a 2018 declaration filed by Pierre's mother in a Haitian court, stating that she had separated from Pierre's father in 1974; and (8) a 2017 declaration by Pierre's father stating that he and Pierre's mother physically separated in 1980 and divorced in 2004.

After multiple proceedings, the immigration judge found that Pierre had not sufficiently proven that he derived citizenship from his mother, reasoning that his parents were not legally separated and that his mother did not have legal custody of him—both required elements to prove derivative citizenship. The immigration judge ordered Pierre to be removed.

The board agreed with the immigration judge's factual findings and conclusion and dismissed the appeal. The board, focusing on whether Pierre's mother was "legal[ly] separate[ed]" at the time she was naturalized, said Pierre had

to show that, before his mother's naturalization, some formal government action was undertaken that altered the marital status of his parents. Whether Pierre's parents were legally separated, according to the board, depended on the law of the state or country with jurisdiction over the parents' marriage, which was Haiti and Florida. But Pierre, the board noted, did not point to any evidence of a formal government action in either jurisdiction that proved his parents were legally separated before he turned eighteen. Pierre now petitions this court and seeks review of the board's decision.

STANDARD OF REVIEW

We review the board's decision as the final judgment. Gonzalez v. U.S. Att'y Gen., 820 F.3d 399, 403 (11th Cir. 2016). But, "where the [board] agrees with the [immigration judge]'s reasoning," we review the decisions of both the board and the immigration judge "to the extent of the agreement." Id.

"In a petition for review of a [board] decision, we review conclusions of law de novo and factual determinations under the substantial evidence test." Id. When the issue concerns the interpretation of a statute by an administering agency, we will apply the deferential two-step test announced in Chevron, U.S.A., Inc. v. Natural Resource Defense Council, 467 U.S. 837 (1984). De Sandoval v. U.S. Att'y Gen., 440 F.3d 1276, 1278 (11th Cir. 2006). Under Chevron, "if Congress has not directly addressed the issue, or the statute's language is ambiguous," id. at 1279, we will

defer to the agency's interpretation of the statute so long as it is reasonable. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

Also, a foreign birth—like Pierre's—creates a rebuttable presumption of alienage, see Matter of Cross, 26 I&N Dec. 485, 487 n.2 (BIA 2015), and any "doubts should be resolved in favor of the United States and against the [petitioner]." Berenyi v. Dist. Dir., INS, 385 U.S. 630, 637 (1967) (internal quotation marks omitted). To overcome this hurdle, a petitioner must present evidence "substantiat[ing] his claim to United States citizenship." Matter of Cross, 26 I&N Dec. at 487 n.2.

DISCUSSION

In his petition, Pierre challenges the board's conclusion that he did not receive derivative citizenship through his mother's naturalization in 1990 because his parents were not legally separated at the time. To determine whether Pierre sufficiently proved the requirements of derivative citizenship, we must look at the law in effect when the last material condition of citizenship was or was not met. Levy v. U.S. Att'y Gen., 882 F.3d 1364, 1366 n.1 (11th Cir. 2018). That is, we must look at the law at the time of Pierre's mother's naturalization. In 1990, claims of derivative citizenship were governed by former section 321(a) of the Immigration and Nationality Act, 8 U.S.C. § 1432(a) (repealed in 2000). Former section 321(a)(3) provided that a child—under the age of eighteen, born outside of the

United States to alien parents, and who then resided in the United States as a lawful permanent resident—automatically became a citizen of the United States upon the "[t]he naturalization of the parent having legal custody of the child when there has been a legal separation of the parents." Id. (emphasis added).[1]

First, Pierre contends that the board erred by solely looking to divorce decrees in Haiti and Florida in determining if Pierre's parents were legally separated before he turned eighteen. Pierre contends that the board should have looked beyond judicial decrees to other types of formal action. In its decision, the board referenced two methods—one narrow and one broad—of proving "legal separation" that the board and circuit courts of appeals have historically applied. Under the narrower definition, the board noted, "a legal separation means either a limited or absolute divorce through judicial proceedings and can refer only to a situation where there has been a termination of the marital status." See Matter of H-, 3 I&N Dec. 742 (BIA 1949); see also Afeta v. Gonzales, 467 F.3d 402, 408 (4th Cir. 2006) (applying this narrower definition of "legal separation"); Nehme v. INS, 252 F.3d 415, 426–27 (5th Cir. 2001) (same); Wedderburn v. INS, 215 F.3d 795, 799 (7th Cir. 2000) (same). And under the broader definition, "legal separation" requires some formal

[1] Pierre also contends that only his mother had "legal custody" of him for purposes of former section 321(a). Because this issue was not decided by the board and Pierre cannot meet the "legal separation" requirement of former section 321(a), we do not decide the "legal custody" issue.

government action to dissolve or alter the marital relationship by operation of law. See Morgan v. Att'y Gen., 432 F.3d 226, 231–32 (3d Cir. 2005) (holding that a "legal separation" is "a formal governmental action, such as a decree issued by a court of competent jurisdiction that, under the laws of a state or nation having jurisdiction over the marriage, alters the marital relationship of the parties"); Brissett v. Ashcroft, 363 F.3d 130, 133–34 (2d Cir. 2004) (same). Looking at both methods, every circuit and the board have agreed that legal separation requires some degree of formal government action—whether a divorce decree or some other government action short of divorce. The board concluded from this that, under either the narrow or broad interpretation of a "legal separation," Pierre had not pointed to any formal government action establishing that his parents were legally separated in 1990. See Claver v. U.S. Att'y Gen., 245 F. App'x 904, 906 (11th Cir. 2007) (unpublished) (declining to adopt, "resolve—or to add to—this disagreement among the circuits" a method of proving "legal separation" because the petitioner could not "satisfy even [the] more lenient interpretation of 'legal separation'"). We agree with the board that, regardless of which approach was used, Pierre had not shown any evidence of a formal government action that would substantiate his claim that his parents legally separated in 1990.

As evidence of his parents' "legal separation," Pierre points to his middle school records, the declarations his mother and father filed in Haiti and Florida, the

nunc pro tunc affidavit filed by his mother in Florida, and the fact that his mother had a child with another man before her naturalization. But none of these documents or facts are formal government actions evidencing a separation between Pierre's parents before he turned eighteen and his mother was naturalized. At most, they show that Pierre's parents were informally separated, but, considering the definition of "legal separation," that is not enough. See Brissett, 363 F.3d at 133 n.2 (noting that an "informal separation" occurs when "couples . . . decide to reside separately but do not invoke any legal or administrative process to formalize their decision"). Because Pierre has not pointed to any evidence of a formal government action showing that his parents were legally separated before he turned eighteen, he cannot satisfy the "legal separation" requirement of former section 321(a) and, therefore, has not properly rebutted the presumption of alienage that arose by virtue of his foreign birth.

Second, Pierre contends that the board's choice-of-law analysis was flawed because it should have relied only on federal law rather than both state and foreign law when it defined the term "legal separation." By not defining "legal separation" based on federal law, Pierre continues, the board's decision contravened Congress's power of naturalization and created a lack of uniformity. While normally immigration law is "construed according to a federal, rather than a state, standard[,] . . . [w]here, as here, there is no extant body of federal common law in the area of

law implicated by the statute, we may use state law to inform our interpretation of the statutory language." Brissett, 363 F.3d at 133 (internal quotation marks and citation omitted). Given the absence of federal common law defining "legal separation," and given that only state or foreign law possesses the power to modify the marital status of parties, we must look to the law of the state and country when deciding whether a married couple has been legally separated. See De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) ("The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." (citations omitted)); see also Minasyan v. Gonzales, 401 F.3d 1069, 1076 (9th Cir. 2005) ("Although uniformity is an important concern in federal statutory interpretation, . . . where the term in question involves a legal relationship that is created by state or foreign law, the court must begin its analysis by looking to that law." (citation omitted)); Wedderburn, 215 F.3d at 799 (noting that "the INS determines the existence, validity, and dissolution of wedlock using the legal rules of the place where the marriage was performed (or dissolved)"). Here, the applicable law to determine if a "legal separation" had occurred is Haiti, as the place of marriage, and Florida, as the place where the

divorce decree took place and the place where Pierre's mother lived after she emigrated to the U.S.

CONCLUSION

We agree with the board's determination that Pierre's parents were not legally separated before he turned eighteen and his mother was naturalized. For that reason, Pierre has not met his burden to prove that he derived U.S. citizenship through his mother's U.S. citizenship.

PETITION DENIED.