FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALEB FARES GIHA, AKA Caleb Fares Giha Hernandez, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent.*	No. 15-73085 Agency No. A042-794-367 OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted September 1, 2020
Seattle, Washington

Filed September 2, 2021

Before: Jay S. Bybee and Daniel P. Collins, Circuit Judges, and Richard G. Stearns,[*] District Judge.

Opinion by Judge Collins

[*] The Honorable Richard G. Stearns, United States District Judge for the District of Massachusetts, sitting by designation.

SUMMARY[**]

Immigration

Denying Caleb Fares Giha's petition for review of a decision of the Board of Immigration Appeals and affirming the district court's grant of summary judgment for the Government on Giha's United States citizenship claim, the panel concluded that Giha failed to present sufficient evidence to permit a rational trier of fact to find, by a preponderance of the evidence, that his parents obtained a "legal separation," as required for him to derive U.S. citizenship under former § 321(a) of the Immigration and Nationality Act ("INA").

In removal proceedings, Giha moved to terminate on the ground that, as a minor, he had acquired derivative U.S. citizenship upon his father's naturalization in 1999. The IJ and BIA rejected that claim, and Giha petitioned this court for review. Concluding that Giha's petition presented a genuine issue of material fact as to U.S. citizenship, a motions panel transferred his case to the district court for de novo review of that issue. The district court granted summary judgment for the Government, and the matter was restored to this court's docket.

Giha contended that the district court erred by applying a "preponderance of the evidence" standard to his citizenship claim. Under the burden-shifting framework set out in *Mondaca-Vega v. Lynch*, 808 F.3d 413 (9th Cir. 2015) (en

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

banc), if the Government satisfies its burden of showing evidence of foreign birth, a rebuttable presumption of alienage arises, and the burden shifts to the alleged citizen to present "substantial credible evidence" of citizenship. Giha argued that the "substantial credible evidence" standard imposes a burden that is lower than the preponderance standard. The panel disagreed, explaining that *Mondaca-Vega*'s use of "substantial credible evidence" is merely a shorthand way of saying that the alleged citizen must present sufficient evidence to carry his or her burden under the applicable standard of proof, and that the applicable standard here, as set out in the authority cited by *Mondaca-Vega*, is the preponderance standard.

As relevant here, under the applicable naturalization statute, former INA § 321(a), a child born outside the U.S. of alien parents becomes a U.S. citizen upon the naturalization of the parent having legal custody of the child when there has been "a legal separation" of the parents, the naturalization takes place while the child is unmarried and under the age of 18, and the child is residing in the U.S. pursuant to a lawful admission for permanent residence at the time of the naturalization. 8 U.S.C. § 1432(a) (1999). Here, Giha's claim turned on whether he proved that there was a legal separation of his parents. The panel explained that this court has held that parents cannot be said to have "legally separated" within the meaning of § 321(a) unless they had a validly recognized relationship in the first place.

The panel concluded that, even assuming *arguendo* that Giha's parents had a legitimate de facto union, Giha nonetheless failed to present sufficient evidence to establish that his parents were legally separated under Peruvian law. Giha alleged that his parents' legal separation occurred as a result of orders issued by a Peruvian court, the evidence

about which consisted of: (1) two orders issued by the court authorizing Giha and his sister to travel to the U.S. with the father; and (2) Giha's father's declarations and deposition testimony about those proceedings. The panel explained that the evidence supported a reasonable inference that the court found that Giha's mother had abandoned the home, that she lost some of her parental rights, and that the father obtained effective custody of the children. However, the panel explained that the statute required a showing "legal separation," and nothing in the evidence supported the conclusion that the Peruvian court took any action with respect to the de facto union, much less that the court recognized a formal termination of any such relationship. Accordingly, the panel concluded that Giha failed to present sufficient evidence to permit a rational trier of fact to find, by a preponderance of the evidence, that his parents obtained a "legal separation."

The panel thus affirmed the district court's grant of summary judgment and, because Giha's petition for review presented no other grounds for avoiding his removal to Peru, the panel denied the petition.

COUNSEL

Gregory J. Dubinsky (argued), Sarah Coco, and Evan H. Stein, Holwell Shuster & Goldberg LLP, New York, New York, for Petitioner.

Rebekah Nahas (argued), Trial Attorney; Matthew Connelly, Senior Litigation Counsel; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

COLLINS, Circuit Judge:

Caleb Fares Giha ("Giha") petitions this court for review of the decision of the Board of Immigration Appeals ("BIA") affirming the order of the Immigration Judge mandating his removal to Peru. Before the agency, Giha moved to terminate his removal proceedings on the ground that, as a minor, he had acquired derivative U.S. citizenship upon his father's naturalization in 1999. Concluding that Giha's petition presented a genuine issue of material fact as to whether he was a U.S. citizen, a motions panel of this court transferred his case to the U.S. District Court for the Eastern District of California for a de novo review of his citizenship claim. *See* 8 U.S.C. § 1252(b)(5)(B). The district court (Magistrate Judge Grosjean) granted summary judgment for the Government, concluding that Giha is not a U.S. citizen. With the matter now restored to our docket, Giha challenges the district court's rejection of his claim of derivative U.S. citizenship. Reviewing the district court's grant of summary judgment de novo, *see Sandoval v. County of Sonoma*, 912 F.3d 509, 515 (9th Cir. 2018), we affirm that decision. And because Giha's petition for review otherwise presents no issues that would provide grounds for setting aside his removal order, we deny that petition.

I

The key facts underlying Giha's derivative citizenship claim were largely undisputed, but to the extent that they were, we recount them in the light most favorable to Giha. *See Rice v. Morehouse*, 989 F.3d 1112, 1116 (9th Cir. 2021).

A

Giha was born in Lima, Peru in 1982, and his birth certificate lists his parents as Walter Victor Giha Huarote ("Walter")[1] and Maria del Pilar Hernandez Marquez ("Hernandez"). At the time of Giha's birth, Walter and Hernandez were not formally married to one another, and both had previously been married to other persons. Walter had married a woman named Jesus Mansilla in Lima in 1959, and after having three children together, they divorced in 1970. Hernandez had married Gandolfo Salvador Mestre Saenz ("Mestre") in Lima in 1973. Hernandez and Mestre had a son together in March 1977, and his birth certificate lists their status as "Married." Giha does not dispute that the Peruvian National Registry of Identification and Civil Status (*Registro Nacional de Identificación y Estado Civil* or "RENIEC") contains no record of a divorce between Hernandez and Mestre, but he contends that this may have been because of their failure to submit the divorce record.

At some point between 1977 and 1980, Walter and Hernandez began a relationship with one another and eventually started living together.[2] They had two children,

[1] To avoid confusion, we will refer to Giha's father, Walter Giha, only as "Walter." References to "Giha," with no first name, refer only to Petitioner Caleb Giha.

[2] Walter's testimony and declarations were inconsistent on this point. In the immigration court, Walter submitted a declaration stating that he met Hernandez "in 1977," that they "began dating shortly after," and that they "moved in together in 1978." In the district court, Walter submitted a declaration stating that he had met Hernandez "at a gathering in 1980," that they "began dating shortly thereafter," and that Hernandez did not move in with him until 1982, when she was already pregnant with Giha. At his deposition, Walter first stated that he met Hernandez at a party in 1982, but when reminded that Giha was born in 1982, he stated

Giha in 1982 and a daughter in 1983. Giha does not dispute that his parents "never married at a courthouse, a municipality, or a church"; that they "never registered a civil union or had a civil union recognized by Peru or any Peruvian court"; and that RENIEC contains "no record of marriage" between Giha's parents. Giha claims, however, that his parents had the equivalent of a common-law marriage under Peruvian law, which expressly recognizes "de facto unions."

In early March 1987, Hernandez disappeared. Walter initially thought that she had left to visit family, as she had done on prior occasions, but he became concerned when she did not return within a few days. A week after her disappearance, he filed a report with the local police stating that she was missing and had abandoned the family. The report indicates that the police visited the house and saw that Hernandez's clothes were still in her closet. Neither her parents nor anyone else in her family knew where she was, and no one has heard from her since.

In May 1990, Walter sought and was granted permission by a Peruvian court to take his two children to the United States. In August of that same year, Walter, Giha, and Giha's sister were admitted to the U.S. as lawful permanent residents. On August 19, 1999, when Giha was 17 years old, Walter took the oath to become a naturalized U.S. citizen at a ceremony in Pomona, California.

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that they began dating around 1979 and that she moved in with him when she was pregnant with Giha.

B

1

After becoming an adult, Giha committed multiple criminal offenses that led to separate convictions in California state court in 2003, 2009, and 2010. In particular, in November 2010, Giha was convicted of possession of cocaine in violation of California Health and Safety Code § 11350(a). Three years later, the Department of Homeland Security initiated removal proceedings, alleging, *inter alia*, that Giha was removable under § 237(a)(2)(B)(i) of the Immigration and Nationality Act ("INA"), because he had been convicted of an offense "relating to a controlled substance." *See* 8 U.S.C. § 1227(a)(2)(B)(i). At a hearing in February 2014, the Immigration Judge ("IJ") sustained this ground for removal based on Giha's 2010 conviction under § 11350. *See Lazo v. Wilkinson*, 989 F.3d 705, 714 (9th Cir. 2021) (holding that, under the modified categorical approach, a conviction for possession of cocaine in violation of § 11350 is an offense "relating to a controlled substance" under § 237(a)(2)(B)(i)). The IJ, however, granted Giha additional time to seek relief from removal.

In July 2014, Giha moved to terminate the removal proceedings, asserting that, under the previously-applicable provisions of the INA, he had acquired derivative U.S. citizenship upon his father's naturalization in 1999. After receiving briefing and evidence on that issue, the IJ rejected Giha's claim to citizenship in December 2014. At a subsequent hearing in April 2015, Giha withdrew his previously filed application for asylum and withholding of removal, and the IJ ordered Giha's removal to Peru. Giha appealed to the BIA, arguing only that the IJ had erred in rejecting his claim of derivative citizenship. Finding no error, the BIA dismissed Giha's appeal.

Giha timely petitioned this court for review. Because the petition raised a claim of U.S. citizenship, this court asked the parties to address whether the matter should be transferred to the appropriate district court pursuant to INA § 242(b)(5)(B). Under that statute, this court must undertake an initial preliminary review of any claim, in a petition for review, that the petitioner is actually a U.S. citizen. If we conclude that there is "no genuine issue of material fact about the petitioner's nationality," then the statute directs us to "decide the nationality claim" ourselves. 8 U.S.C. § 1252(b)(5)(A). But if we conclude that there is such a "genuine issue of material fact," then we must "transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim." *Id.* § 1252(b)(5)(B). Upon such a transfer, the district court must proceed as if the matter were an action under the declaratory relief statute, 28 U.S.C. § 2201, and it must render a decision on the disputed claim of U.S. citizenship. 8 U.S.C. § 1252(b)(5)(B). A motions panel of this court concluded that a genuine issue of material fact did exist as to Giha's citizenship claim, and we therefore transferred the proceeding to the U.S. District Court for the Eastern District of California, where Giha was then being detained. Pending the district court's decision, we held Giha's petition for review in abeyance.

2

After the matter was transferred to the district court, the parties conducted discovery on the relevant issues concerning Giha's citizenship claim, and the Government ultimately moved for summary judgment in September 2017. Giha opposed the motion, arguing that additional discovery was warranted or, in the alternative, that the record

already established his claim to derivative citizenship. The district court agreed that additional discovery was warranted, and it ordered the parties to file supplemental briefs after completing that discovery. In his supplemental brief, Giha argued that there were disputed issues of material fact precluding granting summary judgment to the Government or, in the alternative, that summary judgment could be granted to him on the existing record.

The district court granted the Government's motion. The court first noted that the *only* dispute was whether Giha satisfied the requirement, under the terms of the applicable derivative citizenship statute, that there must have "been a legal separation" of his parents at the time of his father's naturalization in August 1999. *See* 8 U.S.C. § 1432(a)(3) (1999) (since repealed).[3] The court held that Giha had the burden to prove the elements of his citizenship claim—including the existence of a legal separation of his parents—by a preponderance of the evidence and that he failed to carry that burden.

The district court reasoned that, under Ninth Circuit precedent, Giha could not show that his parents had *legally* separated without first showing that their alleged "de facto union" was *valid* under Peruvian law. The district court acknowledged that Peru recognizes "de facto unions," but it noted that, under Peruvian law, those who are already married "are absolutely impeded from entering into a subsequent marriage or de facto union." Because it was undisputed that Giha's mother (Hernandez) had been legally and formally married to another man (Mestre) before her relationship with Giha's father (Walter), the district court

[3] We discuss the various requirements of the applicable statute in greater detail below. *See infra* at 19–21.

concluded that Giha had to show that Hernandez and Mestre had divorced. The district court held that, in light of the Government's showing that Peru's RENIEC record system contained no divorce record for Hernandez and Mestre, the burden shifted to Giha to present sufficient evidence to establish a triable issue as to whether there had been such a divorce. Although Giha presented evidence showing that the RENIEC system was imperfect and incomplete, the court held that, at most, this raised a "theoretical question" as to whether Hernandez might have divorced Mestre without any record. Such speculation, the court concluded, was not enough to "raise a genuine dispute of fact" that would allow Giha to "meet his burden of establishing by a preponderance of the evidence that his biological parents were legally separated." As a result, the court held that Giha failed to "meet [his] burden to prove his derivative citizenship."

Because we did not relinquish jurisdiction when, holding the case in abeyance, we transferred the matter to the district court for a limited purpose, the matter automatically returned to this court upon the district court's entry of its decision. *See Demirchyan v. Holder*, 641 F.3d 1141, 1142–43 (9th Cir. 2011) (holding that a transfer under INA § 242(b)(5)(B) is equivalent to a limited remand and does not "relinquish[] jurisdiction"). We therefore have jurisdiction under INA § 242 by virtue of the original petition for review filed in 2015, *see* 8 U.S.C. § 1252, without the need for an additional notice of appeal from the district court's decision. *See Anderson v. Holder*, 673 F.3d 1089, 1093–94 (9th Cir.

2012); *see also Mujica v. AirScan, Inc.*, 771 F.3d 580, 590 (9th Cir. 2014).[4]

II

Giha initially contends that, by holding that Giha's burden at trial would be to prove his claimed citizenship "by a preponderance of the evidence," the district court applied the incorrect standard of proof in assessing the evidence at the summary judgment stage. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) (in resolving a summary judgment motion, "the judge must view the evidence presented through the prism" of the correct "substantive evidentiary burden"). We reject this contention.

In our en banc decision in *Mondaca-Vega v. Lynch*, 808 F.3d 413 (9th Cir. 2015), we reviewed the standards for resolving, under § 242(b)(5) of the INA, a claim of U.S. citizenship that is made during removal proceedings. We began by noting that the Government "'bears the ultimate burden of establishing all facts supporting [removability] by clear, unequivocal, and convincing evidence.'" *Id*. at 419 (citation omitted). While that of course includes the crucial fact that the deportee who is "the subject of the [removal] proceeding is an alien," *Iran v. INS*, 656 F.2d 469, 471 (9th Cir. 1981), we explained that the caselaw had developed a three-step burden-shifting framework for addressing that issue, *see Mondaca-Vega*, 808 F.3d at 419. First, the Government must "present clear, convincing, and unequivocal evidence of foreign birth." *Ramon-Sepulveda*

[4] In an abundance of caution, Giha had timely filed a notice of appeal from the district court's decision, but we dismissed that appeal as unnecessary.

v. INS, 743 F.2d 1307, 1308 n.2 (9th Cir. 1984) (citation and internal quotation marks omitted); *see also Mondaca-Vega*, 808 F.3d at 419. Second, if the Government satisfies that initial burden, then a "rebuttable presumption of alienage arises, shifting the burden to the alleged citizen to prove citizenship." *Mondaca-Vega*, 808 F.3d at 419 (simplified). This requires the deportee claiming citizenship to present "'substantial credible evidence' of the citizenship claim." *Id*. (quoting *Ayala-Villanueva v. Holder*, 572 F.3d 736, 737 n.3 (9th Cir. 2009)). Third, if the deportee carries that burden, then the presumption of alienage "bursts and the burden shifts back to the government to 'prov[e] the [deportee] removable by clear and convincing evidence.'" *Id*. (quoting *Ayala-Villanueva*, 572 F.3d at 737 n.3).

Here, there is no dispute that the Government carried its initial burden to establish Giha's foreign birth; indeed, the fact that Giha was born in Peru is uncontested. The burden thus shifted to Giha to "'prove citizenship,'" *Mondaca-Vega*, 808 F.3d at 419 (citation omitted), and the district court concluded that Giha had failed to carry that burden. Giha asserts that, in reaching this conclusion, the district court misapprehended Giha's burden of proof at step two by holding that he had to prove his U.S. citizenship by a "preponderance of the evidence." Giha notes that the preponderance standard is generally viewed as being stricter than the "substantial evidence" standard for reviewing evidentiary sufficiency, *see*, *e.g.*, *Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996), and he argues that, as a result, *Mondaca-Vega*'s statement that the alleged citizen must present "substantial credible evidence" of citizenship imposes only a modest burden of proof that is lower than a preponderance standard. We disagree.

Mondaca-Vega's statement that a deportee must present "substantial credible evidence" of citizenship is merely a shorthand way of saying that the deportee must present sufficient evidence to carry his or her burden under the applicable standard of proof, and it therefore does not itself say *what* that underlying standard is. As we have frequently noted, the "substantial evidence" standard refers to the lenient standard of evidentiary sufficiency that a reviewing court applies to the decision made by the ultimate trier of fact, be it a jury or an administrative agency. *See*, *e.g.*, *Ahearn v. Saul*, 988 F.3d 1111, 1115 (9th Cir. 2021) ("The phrase 'substantial evidence' is a 'term of art' used throughout administrative law to describe how courts are to review agency factfinding. . . . It means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (citation and further internal quotation marks omitted)); *Reese v. County of Sacramento*, 888 F.3d 1030, 1046–47 (9th Cir. 2018) ("A jury's verdict . . . must be upheld if supported by substantial evidence. Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." (citations and internal quotation marks omitted)); *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1118 (9th Cir. 2018) (describing the "substantial evidence" standard as "a mid- or post-trial analogue to the test applied at summary judgment"). Consequently, the oft-repeated statement that the "substantial evidence" standard is "'less than a preponderance,'" *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208 (9th Cir. 2021) (citation omitted), merely confirms that the *reviewing court* does not apply a preponderance standard in assessing the evidence, but that does not mean that the *trier of fact* does not do so. Thus, for example, while we review the sufficiency of the evidence to

support a jury verdict under the substantial evidence standard, the jury applies the relevant standard of proof—preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt—depending upon the requirements of the underlying substantive law. *See Mondaca-Vega*, 808 F.3d at 422 ("The Supreme Court has repeatedly emphasized that there are three burdens of proof . . . .").

The case authority cited by *Mondaca-Vega* confirms that its reference to the deportee's need to present "substantial credible evidence" does not define the underlying standard of proof that the district court, *as the trier of fact*, would apply to the citizenship question at a bench trial under § 242(b)(5)(B) of the INA. *Mondaca-Vega* drew that phrase from the earlier decisions in *Ayala-Villanueva*, 572 F.3d at 737 n.3, and *Chau v. INS*, 247 F.3d 1026, 1029 n.5 (9th Cir. 2001). *See Mondaca-Vega*, 808 F.3d at 419. *Chau*, in turn, based that phrase on our decision in *Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995), and *Murphy* squarely holds that a deportee whose case has been remanded for a "de novo district court hearing on citizenship" under the predecessor statute to § 242(b)(5) "bear[s] the burden of proving citizenship *by a preponderance of the evidence*." *Id*. at 610 (emphasis added).[5] *Mondaca-Vega* also cited *Lee Hon Lung*

[5] *Murphy* referred to a hearing under the 1995 version of "8 U.S.C. § 1105a(a)(5)," which was the former § 106(a)(5) of the INA. That statute provided that, whenever a petition for review presented a non-frivolous claim of citizenship that the court of appeals determined involved a "genuine issue of material fact," the court must "transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28." 8 U.S.C. § 1105a(a)(5) (1995 ed.). In 1996, Congress repealed § 106 and replaced

v. Dulles, 261 F.2d 719 (9th Cir. 1958), on this point, *see* 808 F.3d at 419, and that decision—which involved a declaratory relief action brought by a putative citizen—likewise affirms that the applicable burden of proof in the district court requires the person "to establish his citizenship by a fair preponderance of the evidence." *Lee Hon Lung*, 261 F.2d at 720. The authority cited by *Mondaca-Vega* thus holds that a deportee carries his burden to present substantial credible evidence of citizenship by proving to the trier of fact, by a preponderance of the evidence, that the deportee is a citizen. Notably, a separate opinion joined by two judges in *Mondaca-Vega*—who concurred in the relevant section of the majority opinion—read the majority opinion in exactly that way. *See* 808 F.3d at 442 (Murguia, J., concurring in part and dissenting in part) ("All agree that the district court correctly determined that Petitioner carried his initial burden of proving *by a preponderance of evidence* that he is an American citizen by the name of Reynaldo Mondaca-Carlon." (emphasis added)).

Two additional points further confirm the correctness of this reading of the caselaw. First, § 242(b)(5) of the INA—like former § 106(a)(5) of the INA—expressly states that, when this court transfers a citizenship claim to the district court, the latter court shall proceed to adjudicate "that claim as if an action had been brought in the district court under section 2201 of title 28," *viz*., the declaratory relief statute. *See* 8 U.S.C. § 1252(b)(5)(B); 8 U.S.C. § 1105a(a)(5) (1995 ed.) (similar). As we explained in *Lee Hon Lung*, which was a declaratory relief action brought by an alleged citizen, the plaintiff in such an action must bear "the ordinary burden of proof resting on plaintiffs in civil actions" and is therefore

it with § 242. *See* Pub. L. No. 104-208, div. C, § 306, 110 Stat. 3009, 3009-607–3009-612 (1996).

"required to establish his citizenship by a fair preponderance of the evidence." 261 F.2d at 720; *see also Berenyi v. District Director, INS*, 385 U.S. 630, 636–37 (1967) (stating that, when a presumptive alien "seeks to obtain the privileges and benefits of citizenship," the "burden is on the alien applicant to show his eligibility for citizenship in every respect"). Because the statute squarely states that the district court must proceed to decide the claim as if it had been brought as a declaratory relief action, it necessarily follows that the same standards set forth in *Lee Hon Lung* apply to citizenship claims resolved in proceedings under § 242(b)(5). *See Mondaca-Vega*, 808 F.3d at 419 (citing *Lee Hon Lung*).

That conclusion also makes perfect sense. A presumptive alien who succeeds in asserting a claim of U.S. citizenship during transferred removal proceedings under § 242(b)(5)(B) will not merely defeat his or her removal. Rather, by obtaining a declaratory judgment establishing U.S. citizenship during such proceedings, that person will both defeat removal *and* be entitled thereafter to all the benefits of U.S. citizenship. There is no reason in law or logic why a presumptive alien who has landed in removal proceedings should, solely by virtue of that fact, be granted a *more lenient* burden of proof in establishing a claim to U.S. citizenship than if that person had instead filed an affirmative action for declaratory relief. The statute sensibly recognizes that the two situations must be treated the same on this point, and that confirms that the relevant burden of proof is a preponderance of the evidence.

Second, the weakness of Giha's argument is apparent when one confronts, as we do in this case, a question of summary judgment. Under Giha's view, had his citizenship claim proceeded to a bench trial, his burden at that trial

would merely have been to present sufficient evidence from which one could reasonably conclude that he was a citizen. Thus, in his view, the district court at the trial would be required to hold that he had met his burden of proof at step two if any reasonable trier of fact *could* conclude that he was a citizen, even if the district court—who *is* the trier of fact—did not itself believe that he was a citizen. And in deciding whether summary judgment could be granted to the Government at step two, the district court would presumably be required to decide recursively whether any reasonable trier of fact could conclude that a reasonable trier of fact could conclude that Giha was a citizen. *Cf. Anderson*, 477 U.S. at 254–55 (in addressing a summary judgment motion, district court must ask whether a reasonable trier of fact could find that the burden of proof that would apply at trial was met). None of this makes any sense.

Accordingly, the district court correctly held that Giha's burden of proof at step two of the three-step *Mondaca-Vega* test is to prove his claim of U.S. citizenship by a preponderance of the evidence.[6] Therefore, in resolving the

[6] In his appellate brief, Giha relies on a cherry-picked selection of unpublished decisions that he claims support his position, while overlooking other unpublished decisions that squarely reject his view and instead apply the preponderance standard. *See*, *e.g.*, *Gastelum Chavez v. Barr*, 773 F. App'x 427, 427 (9th Cir. 2019) ("The district court did not clearly err in finding that . . . Gastelum had 'shown "substantial credible evidence" of his citizenship claim by the preponderance of the evidence.'"); *Valadez Aguilar v. Lynch*, 633 F. App'x 384, 385 (9th Cir. 2016) (if Government satisfies its burden to prove foreign birth, the burden shifts to the presumptive alien "to establish derivative United States citizenship by a preponderance of the evidence"); *see also Tiznado-Reyna v. Barr*, 753 F. App'x 431, 432 (9th Cir. 2019) (expressly rejecting the view that *Mondaca-Vega*'s reference to "substantial credible evidence" requires application of a summary-judgment-type standard at the actual trial of the citizenship

Government's summary judgment motion, the question before the district court was whether, crediting Giha's evidence and drawing all reasonable inferences in his favor, a reasonable trier of fact could find that he had established the elements of his citizenship claim by a preponderance of the evidence. As we explain in the next section, the district court correctly concluded that Giha failed to meet that burden, although our reasoning differs somewhat from that of the district court.

III

A

The elements of Giha's claim to U.S. citizenship turn on the statute that was in effect "at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). Here, the critical event on which Giha relied is his father's naturalization in 1999, and the relevant naturalization statute at the time was former § 321(a) of the INA. That statute, which was repealed in 2000, provided in relevant part as follows:

> 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

claim). In any event, all of these unpublished decisions, including those cited by Giha, are nonprecedential. *See* NINTH CIR. R. 36-3(a).

> (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.

8 U.S.C. § 1432(a) (1999 ed.), *repealed by* Pub. L. No. 106-395, § 103(a), 114 Stat. 1631, 1632 (2000). Because the first three clauses are linked by the word "or," the alleged citizen only needs to meet one of the three alternative conditions in clauses (1)–(3). *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1064–65 (9th Cir. 2003), *overruled on other grounds as recognized in United States v. Mayea-Pulido*, 946 F.3d 1055, 1062 (9th Cir. 2020). However, because the last two clauses are preceded by "and," the putative citizen must in all cases satisfy both of those conditions. *Barthelemy*, 329 F.3d at 1064–65. In the proceedings below, Giha relied only on the theory that he satisfied clause (3), and that is the only theory

he presses on appeal.[7] To prove his citizenship, Giha therefore had to show that clauses (3), (4), and (5) were met.

The undisputed evidence establishes that clauses (4) and (5) are satisfied here because, at the time of his father's naturalization, Giha was 17 years old and unmarried, and he was residing in the United States as a lawful permanent resident. *See Cheneau v. Garland*, 997 F.3d 916, 920 (9th Cir. 2021) (en banc) ("residing in the United States pursuant to a lawful admission for permanent residence" in former § 321(a)(5) refers to "'the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed'" (quoting 8 U.S.C. § 1101(a)(20) (1999 ed.)). As to clause (3), Giha did not rely on the second portion of that clause (concerning a person "born out of wedlock"), so the only question is whether he established that "there has been a legal separation of [his] parents" and that his father had "legal custody" of him. The Government does not dispute that Giha's father had the requisite sole "legal custody" of him. *Mayea-Pulido*, 946 F.3d at 1065 (holding that § 321(a)(3) requires a showing of "sole" legal custody after the separation). Consequently, Giha's claim to U.S. citizenship turns dispositively on a single issue—namely, whether he proved that there was a "legal separation of [his] parents" at the time of his father's naturalization in 1999.

[7] Accordingly, we do not address whether Giha presented sufficient evidence to show that his mother was deceased at the time of his father's naturalization. *See* 8 U.S.C. § 1432(a)(2) (1999 ed.). Any such claim has been forfeited. *See Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018).

B

We held in *Barthelemy* that parents cannot be said to have "*legally* separate[d]" within the meaning of § 321(a)(3) unless they had a validly recognized "'marital relationship'" in the first place. 329 F.3d at 1065 (citation omitted); *see also Johnson v. Whitehead*, 647 F.3d 120, 125–26 (4th Cir. 2011). Thus, while the *second* portion of § 321(a)(3) covers children born out of wedlock, the first portion "presupposes a valid marriage" or other comparable relationship under the relevant law, followed by a "legal separation." *Barthelemy*, 329 F.3d at 1065 & n.2. We have further held that, in determining whether the requisite marital relationship and legal separation existed, the relevant law would be supplied by the "state or foreign law" under which that underlying "legal relationship" was created or separated. *Minasyan*, 401 F.3d at 1076; *see also Wedderburn v. INS,* 215 F.3d 795, 799 (7th Cir. 2000). Here, any claimed relationship or separation between Giha's parents occurred in Peru, and so Peruvian law governs both (1) whether Giha's parents had the requisite marital relationship and (2) whether there was a legal separation that severed that relationship.

The Government contends that Giha failed to show either element. According to the Government, although Peruvian law recognizes "de facto unions" (roughly comparable to the concept of common law marriage), Giha's parents could have had no such union under Peruvian law because there is no evidence that his mother (Hernandez) ever divorced her *prior* husband (Mestre). Alternatively, the Government argues that there was no legal separation of Giha's parents' alleged de facto union because there was no formal act under Peruvian law that legally terminated their relationship. We find it unnecessary to address the Government's first argument and to decide whether Giha adequately showed

that Hernandez and Mestre were divorced. We agree that, even assuming *arguendo* that they did divorce and that Giha's parents (Hernandez and Walter) thereafter had a legitimate de facto union that would be recognized under Peruvian law, Giha nonetheless failed to present sufficient evidence to establish that his parents were legally separated under Peruvian law.

As we explained in *Minasyan*, a "legal separation" within the meaning of § 321(a)(3) is not limited "to orders expressly so titled," but "encompasses other forms of court-ordered recognition of the final break up of a marriage." 401 F.3d at 1078. We reserved, however, the question of whether the term could also include a termination of the marital relationship by operation of law "in the absence of a judicial order." *Id*. at 1079 n.19. *Compare Nehme v. INS*, 252 F.3d 415, 425–26 (5th Cir. 2001) (holding that § 321(a)(3) requires "a formal, *judicial* alteration of the marital relationship"), *with Brissett v. Ashcroft*, 363 F.3d 130, 134 & n.3 (2d Cir. 2004) (expressly rejecting *Nehme* and holding that § 321(a)(3) requires only 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"). We need not resolve that question here because Giha's claim of citizenship rests entirely on Peruvian *judicial* proceedings in which his father sought permission to bring Giha to the United States.

Specifically, Giha alleges that his parents' legal separation occurred as a result of orders issued by the Fourth Court of Minors of Lima, Superior Court of Justice. The only evidence in the record concerning those proceedings consists of (1) the two orders issued by that court and

(2) Walter's declarations and deposition testimony concerning what transpired in those proceedings. Neither is sufficient to permit a reasonable trier of fact to conclude that there was a "court-ordered recognition of the final break up" of a putative de facto union between Hernandez and Walter. *Minasyan*, 401 F.3d at 1078.[8]

The two orders consist of travel authorizations issued by the Peruvian court, one for Giha and one for his sister. The orders are on fill-in-the-blank pre-printed forms, and they are therefore identically worded, except for the differing names and ages of the two children. The order authorizing Giha's travel to the United States, translated into English,[9] reads as follows:

[8] Neither Giha nor the Government has contended that, by granting summary judgment, the district court acted inconsistently with our prior determination that, on the record then before us, there was a "genuine issue of material fact about the petitioner's nationality" that warranted a transfer under § 242(b)(5)(B). *See* 8 U.S.C. § 1252(b)(5)(B). We likewise perceive no inconsistency, especially when, as here, the parties conducted additional discovery and clarified the issues in dispute after the proceedings were transferred to the district court.

[9] Although the two authorizations have identical Spanish texts, the translations into English in the record are inexplicably worded very differently, although the ultimate import is the same. In rendering the pre-printed language that is common to both orders, we have generally used the translation provided for the sister's order, which is more intelligibly worded. We also note that both translations render the Spanish phrase <el artículo 66 inciso "D"> as simply "Article D." The phrase actually refers to "article 66, subsection D." *See Inciso*, COLLINS SPANISH DICTIONARY 542 (8th ed. 2005) (translating this word, in legal usage, as "subsection").

TRAVEL AUTHORIZATION

> Madam Judge of the 4th Court of Minors of Lima, the undersigned, grants the travel authorization so that the 7-year-old minor: CALEB FARES GIHA HERNANDEZ can travel to the United States of America under the responsibility of his father Mr. Victor Walter Giha Huarote. Authorization is granted according to Article 66 subsection D of the Code of Minors.

Nothing in the text of this order says anything at all about Walter's relationship with Hernandez, much less a legal separation of the two; indeed, Hernandez is never even mentioned in the order. Absent some additional evidence about the meaning of the court's order, the proceedings that led up to it, or the framework of Peruvian law under which it was entered, no reasonable trier of fact could conclude that this mere authorization to bring Giha to the United States constituted a "court-ordered recognition of the final break up of a marriage." *Minasyan*, 401 F.3d at 1078. Giha contends, however, that the declarations and testimony of Walter are sufficient to establish that the travel authorization proceedings entailed a formal termination of the asserted de facto union between Walter and Hernandez. We reject this argument.

In his deposition, Walter asserted that the travel authorization amounted to a finding that Hernandez had "abandoned the home" because he claimed that that was the predicate for granting him permission to bring the children to the United States. Walter stated that he was told both by the police and by the Court of Minors judge that he had to publicize his claim of Hernandez's abandonment of the

home in the newspaper *El Peruano* for three days and that, if no one came forward, then the finding of abandonment would be made and he would be allowed to take the children to the U.S. In one of his declarations, Walter further claimed that the judge had orally stated at a hearing that, if no one appeared in response to the newspaper notice, then "he would annul the relationship between me and the children and [Hernandez]." In that same declaration, Walter also asserted that, after no one responded to the notice, "[t]he judge declared the end of any relationship between me and the children and [Hernandez] and issued the authorization for us to travel." According to Walter, the judge thereby "recognized that [Hernandez] had separated herself from us and that she had no parental rights over the children," and the judge "officially ended the pretense that [Hernandez] would return to co-parent with me and that she would be my life partner." In another declaration, Walter stated that he thereby "obtain[ed] full legally [*sic*] custody" of the children and had it "recorded that [Hernandez] abandoned our marriage, our two beautiful children and our home."

We agree that Walter's statements, together with the orders, support a reasonable inference that the Peruvian court found that Hernandez had abandoned the home, that she thereby lost her parental rights (at least insofar as she would have had a right to object to the children's emigration), and that Walter thereby obtained effective custody of the children. On its face, however, the statute requires more than a showing that Walter obtained "legal custody" of Giha; it *also* requires Giha to show that there was a "legal separation" of his parents. 8 U.S.C. § 1432(a)(3) (1999 ed.). Although Walter opined in conclusory terms that the Peruvian court's actions amounted to a "record[ing] that [Hernandez] abandoned [the] marriage," Walter is not qualified to render an opinion

concerning the import of the court's travel authorization under Peruvian law, and he cites no underlying Peruvian law to support that opinion. Although opinion testimony concerning foreign law "may" be considered by the court even if it is not "admissible under the Federal Rules of Evidence," FED. R. CIV. P. 44.1, Walter's personal legal conclusions about the significance of the travel-authorization proceedings under Peruvian law are of no material value. *See id*. (noting that any issue of the substantive content of foreign law involves a "question of law" for the court).

There are portions of Walter's statements that could be generously construed as testifying to the content of court orders that were orally rendered in Peru (as opposed to merely Walter's legal understanding of any such order). Even assuming that Walter's statements on this score were admissible to establish the content of an oral court order, those statements do not provide any basis for concluding that the Peruvian court actually issued an order that would amount to anything comparable to a "court-ordered recognition of the final break up of a marriage." *Minasyan*, 401 F.3d at 1078. Although Walter stated that he was told at a hearing that the judge would "annul the relationship between me *and the children* and [Hernandez]," and that, when he "returned to the court," the "judge declared the end of any relationship between me *and the children* and [Hernandez]" (emphasis added), these statements conspicuously refer—as any custody determination necessarily would—to the relationship between the *children* and the two parents. As such, Walter's statements do not provide any reasonable, non-speculative basis for inferring that the Peruvian court went beyond a custody determination and *also* made a determination about an alleged underlying marital relationship between Walter and Hernandez. Nor did

Giha attempt to show that, under the relevant provisions of Peruvian law that underlay the travel-authorization order, the Peruvian court necessarily would have made a determination concerning a purported marital relationship between Walter and Hernandez in the course of issuing the travel authorization. *Cf. G & G Prods. LLC v. Rusic*, 902 F.3d 940, 949 (9th Cir. 2018) ("[A] party relying on foreign law has an obligation to raise the specific legal issues and to provide the district court with the information needed to determine the meaning of the foreign law.").[10]

Accordingly, nothing in Walter's statements competently supports the conclusion that the Peruvian court, in authorizing Giha's travel to the United States, took any action with respect to any alleged de facto union or marital relationship between Walter and Hernandez, much less that the court recognized a formal termination of any such

[10] Although we are thus not obligated to undertake any research of our own concerning the relevant provisions of Peruvian law on which the travel-authorization was based, we note that the statute cited in the travel-authorization order appears to confirm that the court's grant of a travel authorization does not entail deciding matters of divorce, annulment, or termination of marital relationships. Article 66 of the Code of Minors in force in 1990 set forth certain actions that could fall within the jurisdiction of a judge of the Court of Minors, and subsection (d) does in fact allow such judges to issue "[a]uthorizations for the marriage, work, custody, and travel of minors inside and outside the national territory." CÓDIGO DE MENORES, art. 66(d) (1962) ("Las autorizaciones para el matrimonio, trabajo, guarda y viaje de menores dentro y fuera del territorio nacional"), *reprinted in* CÓDIGO DE MENORES, LEY 13968 (May 2, 1962), at 48 (F. Bonilla ed., 6th ed. 1975). Notably, subsection (b) also confers jurisdiction over "[d]isputes over parental rights or custody of minors, *except in judgments of divorce, physical separation, or annulment of the marriage*." *Id*., art. 66(b) (emphasis added) ("Las contiendas sobre patria potestad o guarda de menores, excepto en juicio de divorcio, separación de cuerpos o nulidad de matrimonio.").

relationship. For all that Giha has shown, the Peruvian court's travel authorization could have been entered in just the same way even if Giha had been the offspring of an out-of-wedlock birth to two parents whose relationship fell short of a de facto union. But as we have explained, the second phrase in § 321(a)(3) covers out-of-wedlock births, and the first phrase—the one on which Giha relies—requires a showing that there was a formal termination of a legally valid marital relationship. *See supra* at 22. Nothing about the Peruvian court's determination that Hernandez had abandoned the family and lost her parental rights says anything about the type of relationship that existed between her and Walter, much less that it had been formally terminated.

Giha thus failed to present sufficient evidence to permit a rational trier of fact to find, by a preponderance of the evidence, that his parents obtained a "legal separation" as defined by INA § 321(a)(3). We thus affirm the district court's grant of summary judgment. And because Giha's petition for review presents no other grounds for avoiding his removal to Peru, we therefore deny the petition.

Petition for review **DENIED**.