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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[REDACTED]

Public Copy

FILE: [REDACTED] Office: New York Date: MAR 17 2001

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under § 341(a) of the
Immigration and Nationality Act, 8 U.S.C. 1452(a)

IN BEHALF OF APPLICANT:
[REDACTED]

Identification data deleted to
prevent clearly unwarranted
invasion of personal privacy.

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, New York, New York, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant was born on February 20, 1982, in Jamaica. The applicant's father, [REDACTED] was born in Jamaica in 1953 and became a naturalized U.S. citizen on November 13, 1996. The applicant's mother, [REDACTED] was born in Jamaica in July 1963 and never had a claim to United States citizenship. The applicant's parents never married each other. The applicant was lawfully admitted for permanent residence on August 5, 1997 based on her classification as the child of a United States citizen. The applicant is seeking a certificate of citizenship under § 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1433.

The district director reviewed the record and concluded, based on Jamaican law that the applicant had two legal parents at birth, that the applicant failed to establish that both legal parents were United States citizens and denied the application accordingly.

On appeal, counsel asserts that the applicant is the legitimate child of a parent through whom a certificate of citizenship is sought. Counsel states that neither § 322 of the Act nor the regulations promulgated thereunder, impose a requirement that the custodial parent obtain a judicial declaration of custody provided that, as in the case at bar, such parent submits sufficient evidence that he or she is the child's "legal" custodian. Counsel discusses the applicable law in Jamaica and in the State of New York.

Section 322. CHILD BORN OUTSIDE THE UNITED STATES; APPLICATION FOR CERTIFICATE OF CITIZENSHIP REQUIREMENTS

(a) APPLICATION OF CITIZEN PARENTS: REQUIREMENTS.-A parent who is a citizen of the United States may apply to the Attorney General for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General that the following conditions have been fulfilled:

- (1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- (2) The child is physically present in the United States pursuant to a lawful admission.
- (3) The child is under the age of 18 years and in the legal custody of the citizen parent.
- (4) If the citizen parent is an adoptive parent of the child, the child was adopted by the citizen parent before the child reached the age of 16 years

and the child meets the requirements for being a child under subparagraph (E) or (F) of § 101(b)(1).

(5) If the citizen parent has not been physically present in the United States or its outlying possessions for a period or periods totaling not less than 5 years, at least 2 of which were after attaining the age of 14 years-

(A) The child is residing permanently in the United States with the citizen parent, pursuant to a lawful admission for permanent residence, or

(B) A citizen parent of the citizen parent has been physically present in the United States or its outlying possessions for a period or periods totaling not less than 5 years, at least 2 of which were after attaining the age of 14 years.

(b) ATTAINMENT OF CITIZENSHIP STATUS; RECEIPT OF CERTIFICATE.-Upon approval of the application (which may be filed abroad) and, except as provided in the last sentence of § 337(a), upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

Congress introduced provisions for the naturalization of minor children in § 315 of the Nationality Act of 1940 (NA 1940). Congress continued those provisions without substantial change in § 322 of the Act of 1952. The term "child" was the subject of precise definition in NA 1940 as it is in the current statute. By virtue of both definitions, the legitimated, as well as the legitimate, child was and is eligible to naturalization pursuant to a citizen parent's petition. Further, marital separation of the parents by itself does not adversely affect a child's eligibility to naturalize. See Matter of R-M-, 2 I&N Dec. 536 (C.O. 1946), where it was held that § 315 of NA 1940 does not require that the parents of the child be living together in marital union. Unlike § 321 of the Act, where citizenship is acquired at birth and the parent having legal custody is required to show there has been a legal separation when the parents are separated, § 322 has no such requirement.

In 1994, § 322 of the Act was amended to provide for expedited naturalization of certain children born outside the United States. See Immigration and Technical Corrections Act of 1994 (INTCA), § 102, Pub.L. 103-416, 108 Stat. 4307. Unlike children who acquire citizenship through a citizen parent as of a date of their birth, children who are expeditiously naturalized under § 322 of the Act based on their parent's/grandparent's residence, become citizens

upon approval of the application and subscribing to the oath of allegiance (if applicable).

Pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, division C, § 671(b)(2), 110 Stat. 3009-546, 3009-721 (1996), the U.S. citizen (grand)parent must demonstrate that he or she has been physically present in the United States or its outlying territory for 5 years, at least two of which were after attaining the age of 14. The record reflects that the applicant's father has satisfied the physical presence requirement.

The "Legitimation Act of Jamaica" eliminated the distinction between legitimate and illegitimate children. A child within the scope of the Jamaican Status of Children's Act of 1976 (enacted on October 19, 1976) is included within the definition of a legitimate or legitimated "child" as set forth in § 101(b)(1) of the Act, so long as the familial tie or ties are established by the requisite degree of proof and the status arose within the time requirements of § 101(b)(1). See Matter of Clahar, 18 I&N Dec. 1 (BIA 1981). See Matter of Clahar, 16 I&N Dec. 484 (BIA 1978), for complete printing of §§ 3 and 4 of that Act. Clahar, 18-1 states that to meet the definitional requirements of "child" in § 101(b)(1) of the Act, the person must be under 21 years of age and any legitimation must have taken place before the child reached the age of 18 years. It is noted in Clahar, 18-1 that the applicant was born in 1956 and was too old to qualify under the status of Children's Act of 76.

8 C.F.R. 322.2(a) provides that to be eligible for "expeditious naturalization" under § 322 of the Act, a child on whose behalf an application for naturalization has been filed by a parent who is, at the time of filing, a citizen of the United States, must:

- (1) Be unmarried and under 18 years of age, both at the time of application and at the time of admission to citizenship;
- (2) Reside permanently in the United States, in the physical and legal custody of the applying citizen parent, pursuant to a lawful admission to citizenship;
- (3) Comply with other requirements for naturalization as provided in the Act....

The record reflects that the applicant was classified as the daughter of a lawful permanent resident when the petition for alien relative (filed in her behalf by her father) was approved in December 1994 classifying her as a second preference immigrant. As a child legitimated under the law of her residence or domicile, it was established that she was in the legal custody of the legitimating parent. On June 30, 1997, the applicant was issued an immigrant visa at the American Embassy in Kingston as the child of a United States citizen based on her father's subsequent naturalization. The visa application reflects that she was a 15

year old student coming to reside with her father. According to the record, she still resides at the same address.

In Matter of Rivers, 17 I&N Dec. 419 (BIA 1980), the Board held that, unless local law otherwise dictates (i.e. through statutory or case law giving greater rights to one parent than to the other), a father's natural right to the custody of a child he has lawfully legitimated is equal to the natural rights of the mother to the child's custody. Based on the prior actions of the Service and the American Embassy, it is clear that the applicant's father had at least equal rights to the applicant's custody.

However, the record shows that the applicant has reached the age of 18 years. Neither § 322 of the Act nor Pub.L. 105-38 permit approval of an application for children who have already reached the age of 18 years.

8 C.F.R. 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. Therefore, the appeal will be dismissed.

This decision is without prejudice to the applicant's seeking U.S. citizenship through normal naturalization procedures by filing an Application for Naturalization on Form N-400 with a Service office having jurisdiction over her residence.

ORDER: The appeal is dismissed.