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U.S. Department of Justice  
Immigration and Naturalization Service

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



FILE [REDACTED]

Office: Houston

Date: MAY 09 2002

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Naturalization under Section 322 of the  
Immigration and Nationality Act, 8 U.S.C. 1433

IN BEHALF OF APPLICANT: [REDACTED]

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INSTRUCTIONS:

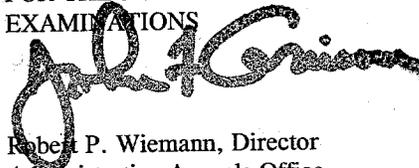
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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, Director  
Administrative Appeals Office

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

The applicant was born on May 5, 1979, in Liberia. The applicant submitted a delayed birth certificate dated March 1990 which lists the father as, [REDACTED] who was born in Liberia in May 1957 and became a naturalized U.S. citizen on June 18, 1993, when the applicant was 14 years old. The mother is listed as [REDACTED] whose place and date of birth are not specified. The [REDACTED] and [REDACTED] never married each other. The applicant is seeking a certificate of citizenship.

The district director reviewed the record and concluded that the applicant failed to establish he was eligible for a certificate of citizenship under section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1433, and denied the application accordingly.

A Service memorandum to the file states that the denial cited an incorrect section of law. The proper citation should have been section 320 of the Act, 8 U.S.C. 1431. Reference is made to the fact that the applicant's paternity was never fully determined and he was not baptized until 1994.

Sections 320 and 322 of the Act were amended by the Child Citizenship Act of 2000 (CCA), and took effect on February 27, 2001. The CCA benefits all persons who have not yet reached their 18th birthdays as of February 27, 2001. The applicant was 21 years old on February 27, 2001, and ineligible for the benefits of the CCA.

Former section 320 of the Act prior to its amendment provided that:

(a) A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such parent is naturalized, become a citizen of the United States, when

(1) such naturalization takes place while such child is under the age of 18 years; and

(2) such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of 18 years.

The applicant does not qualify for consideration under former section 320 of the Act because neither of his parent's was a U.S. citizen at the time of his birth.

The Associate Commissioner notes the references in the record to the applicant's immigrant visa petition and his lawful admission for permanent residence. The record fails to contain any such supporting evidence or the applicant's complete Service file.

In Matter of Duncan, 15 I&N Dec. 272, the Board made reference to documentation which would establish whether a citizen of Liberia was legitimated. The Board listed the following: (1) a certified copy of the court order of legitimation, (2) a certified copy of the registration of the alien's birth, and (3) a court order certifying petitioner as the natural father of the alien. Further, the Board noted that the alien's natural mother gave her consent for the alien to join his father in the United States. This documentation is not present in the record for review.

Section 322 of the Act prior to its amendment on February 27, 2001, provided, in part, that:

(a) 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)...

(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 five years, at least two of which were after attaining the age of fourteen 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 five years, at least two of which were after attaining the age of fourteen years.

(b) Upon approval of the application (which may be filed from abroad) and, except as provided in the last sentence of section 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.

8 C.F.R. 322.2(a) provides that to be eligible for "expeditious naturalization" under section 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;

The applicant is over the age of 18 years and ineligible for the benefits of former section 322 of the Act.

On appeal, counsel states that the applicant meets all the requirements for section 321 of the Act, 8 U.S.C. 1432. Counsel asserts that the applicant was lawfully admitted for permanent residence when he was 12 years old, his father became a naturalized citizen when the applicant was 14 years old, and the applicant was always in the custody of his father. Counsel asserts that when the petition for alien relative was approved and the applicant was granted lawful permanent residence based on his step mother's petition, the custody issue was settled.

The Associate Commissioner will respond to counsel's argument and point out why the applicant fails to qualify under former section 321 of the Act.

Section 321 of the Act previously in effect provided, in pertinent part, that:

(a) A child born outside of the United States of alien parents, or of an alien 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:

- (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 said child is under the age of 18 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 (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

Legal custody of a child as an element of derivation contained in the 1940 statute, and in the present law, may follow judicial proceedings which either terminate the marriage completely, as by absolute divorce, or which merely separate the parties without destroying the marital status. Generally, the question of legal custody may be determined by the law of a state or by the adjudication of a court, whether this be in proceedings relating to the termination of the marital relationship or in separate proceedings dealing solely with the question of the child's custody. In the absence of such determination, the parent having actual uncontested custody of the child is regarded as having the requisite "legal custody" for immigration purposes, provided that the required "legal separation" of the parents has taken place. See INTERP 320.1(a)(6).

Matter of H--, 3 I&N Dec. 742 (C.O. 1949), held that the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings.

In order for the applicant to receive the benefits of former section 321 of the Act, there must have been a legal separation of the parents obtained through judicial proceedings. Since the applicant's parents never married, they could not have obtained a limited or absolute divorce. Therefore, the applicant was never in the legal custody of his natural father pursuant to a legal separation.

Although the applicant does not qualify for benefits under former section 321 of the Act, he may have qualified for an immigrant visa based on being in the legal custody of his father. The definition of the term "child" in section 101(b) used in reference to a legitimated child requires only legal custody and not legal custody based on legal separation. The definition of the term "child" used in reference to a child born out of wedlock requires only a bona fide parent-child relationship. Therefore, the applicant could qualify for an immigrant visa as a stepchild based on those definitions of the term "child".



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.

**ORDER:** The appeal is dismissed.