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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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EA

APR 11 2005

FILE:

[REDACTED]

Office: HONOLULU, HI

Date:

IN RE:

Applicant

[REDACTED]

APPLICATION:

Application for Certificate of Citizenship under Section 321 of the former Immigration and Nationality Act; 8 U.S.C. § 1432.

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Honolulu, Hawaii, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on June 24, 1962, in Tonga. The applicant's mother [REDACTED] was born on May 7, 1932 in Tonga, and she became a naturalized U.S. citizen in August 1971, when the applicant was nine years old. The applicant's father [REDACTED] was born on February 6, 1934, and he was not a U.S. citizen. The applicant's parents married in Tonga on September 17, 1953. The applicant was admitted into the U.S. as a lawful permanent resident on August 30, 1965, when he was three years old. He presently seeks a certificate of citizenship under section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432.

The district director determined that the applicant was ineligible for U.S. citizenship under section 321 of the former Act because his parents did not legally separate prior to the applicant's eighteenth birthday.

On appeal, counsel asserts that Tongan law does not allow for legal separation between married persons, and that it is thus impossible for the applicant's parents to meet the legal separation requirement set forth in section 321 of the former Act. Counsel asserts that the applicant complied with the citizenship requirements set forth in section 321 of the former Act as best he could, and that he is therefore entitled to citizenship under the former Act.

Section 321 of the former Act provides, 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.

The record reflects that the applicant's father did not become a naturalized U.S. citizen, and that he died in December 2000, when the applicant was thirty-eight years old. The applicant therefore does not meet the requirements for citizenship as set forth in subsections 321(a)(1) and (2) of the former Act.

The AAO finds that the applicant has also failed to establish that he qualifies for citizenship under section 321(a)(3) of the former Act. The Board of Immigration Appeals (Board) defined "legal separation" in *Matter of H*, 3 I&N Dec. 742 (1949), as either a limited or absolute divorce obtained through judicial proceedings. The AAO notes that divorce is legal and judicially obtainable in Tonga. See Tongan Divorce Act, Cap.29. Counsel's assertion that it is impossible to obtain a "legal separation" in Tonga is therefore found to be without merit. Moreover, the AAO finds that the requirements for citizenship, as set forth in the Immigration and Nationality Act (the Act), are statutorily mandated by Congress, and that U.S. Citizenship and Immigration Services (CIS) lacks statutory authority to issue a certificate of citizenship when an applicant fails to meet the relevant statutory provisions set forth in the Act. See generally, *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002).

8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. The applicant has failed to meet his burden of establishing that his parents obtained a "legal separation", as required under section 321(a)(3) of the former Act. Accordingly, the applicant does not qualify for citizenship under section 321 of the Act and the appeal will be dismissed.

ORDER: The appeal is dismissed.