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U.S. Citizenship
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Services

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FILE:

OFFICE: BUFFALO, NEW YORK

DATE: MAY 08 2006

IN RE:

APPLICANT:

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:

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Buffalo, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in the Dominican Republic on June 8, 1976. The applicant's father, [REDACTED] was born in the Dominican Republic, and he became a naturalized U.S. citizen on June 18, 1986, when the applicant was ten years old. The applicant's mother, [REDACTED] was born in the Dominican Republic. The record reflects that she died on April 24, 1997, when the applicant was twenty years old. She was not a U.S. citizen. The applicant's parents did not marry. The applicant was admitted into the United States (U.S.) as a lawful permanent resident on February 18, 1987, when the applicant was ten years old. He presently seeks a Certificate of Citizenship pursuant to 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 he was not legitimated by his father prior to his eighteenth birthday, and because his parents were not legally separated prior to his eighteenth birthday.

On appeal, counsel asserts that the evidence in the record establishes the applicant was legitimated by his father. Counsel asserts further that U.S. Citizenship and Immigration Services (CIS, formerly the Immigration and Naturalization Service, Service) is barred by the doctrine of "res judicata" from concluding that the applicant was not legitimated, because CIS determined in 1987, that the applicant was legitimated when he was admitted into the U.S. as a lawful permanent resident pursuant to a family based immigrant petition filed by his father. Counsel asserts that the applicant's father established that he had legal custody over the applicant prior to his eighteenth birthday, and counsel indicates that the "legal separation" requirement contained in section 321(a)(3) of the former Act is inapplicable in the present matter because it is irrational.

The AAO finds first, that decisions made in immigration administrative proceedings are not subject to the principle of *res judicata*. *Matter of Hinojosa-Pena*, 12 I&N Dec. 462, 465 (BIA 1967). The AAO finds further that the requirements for citizenship, as set forth in the present and former Acts, are statutorily mandated by Congress, and that CIS lacks statutory authority to rule upon the rationality of the provisions contained in the Act, or to issue a Certificate of Citizenship when an applicant fails to meet the statutory requirements set forth in the Act. *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002).

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.

Section 101(c) of the Act, 8 U.S.C. § 1101(c) provides that for citizenship purposes:

(1) The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 320, and 321 of title III, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(1)), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

In order to legitimate a child under New York state law, the parents of the child must marry one another. New York Domestic Relations Law, Section 24; *see also, Matter of Espinoza*, 17 I&N Dec. 522 (BIA 1980). Because the applicant's parents never married, the applicant was not legitimated under New York state law.

The applicant also failed to establish that he was legitimated pursuant to the law in the Dominican Republic. It is noted that prior to the January 1, 1995 enactment of the Dominican Republic, Code for the Protection of Children (CPC), the law in the Dominican Republic required the marriage of a child's natural parents for legitimation of a child born out of wedlock to occur. *Matter of Reyes*, 17 I&N Dec. 512 (1980). The passage of the CPC, "repealed all contradictory laws, decrees, or dispositions and made the rights of children born in wedlock identical to those of children born out of wedlock once parentage has been established according to the legal procedures of the Dominican Republic." *Matter of Cabrera*, 21 I&N Dec. 589, 590 (BIA 1996). Nevertheless, "[c]hildren who were acknowledged after their 18th birthday or who turned 18 prior to January 1, 1995 . . . and who were not legitimated under the former Dominican law" do not meet the definition of "child" for immigration purposes. *See generally, Matter of Martinez-Gonzalez*, 21 I&N Dec. 1035 (BIA 1997), Interim Decision (BIA) 3329, 1997 WL 602544 (BIA). The applicant was over the age of eighteen when the CDC was enacted, and his parents did not marry. The applicant therefore failed to establish that he was legitimated by his father in the Dominican Republic, or that he meets the definition of "child" as set forth in section 101(c) of the Act.

Moreover, the AAO notes that even if the applicant had established that he was legitimated by his father prior to his eighteenth birthday, the applicant would nevertheless fail to qualify for citizenship under section 321 of the former Act.

The record reflects that the applicant's mother died on April 24, 1997, after the applicant's eighteenth birthday, and the record contains no evidence to establish that the applicant's mother became a naturalized U.S. citizen prior to the applicant's eighteenth birthday. The applicant therefore failed to meet the requirements set forth in section 321(a)(1) and (2) of the former Act. Furthermore, the applicant failed to satisfy the "legal separation" requirements set forth in section 321(a)(3) of the former Act. "[L]egal separation of the parents . . . means either a limited or absolute divorce obtained through judicial proceedings . . . where the actual parents of the child were never married, there could be no legal separation of such parent." *Matter of H*, 3 I&N Dec. 742 (1949) (Quotations omitted). In the present matter the applicant's parents never married. Accordingly, there could be no legal separation between his parents.

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 in the present case has not met his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.