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

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FILE:

Office: PHILADELPHIA, PA

Date: AUG 16 2007

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Philadelphia, Pennsylvania, 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 [REDACTED] in Kingston, Jamaica. The applicant's birth certificate reflects that his parents were [REDACTED] and [REDACTED]. The applicant's parents were never married to each other. The applicant's father married [REDACTED], a U.S. citizen, in 1986. The applicant was admitted to the United States as a lawful permanent resident on September 12, 1993, at the age of 12, on the basis of an immigrant petition filed on his behalf by his step-mother. The applicant's father became a naturalized U.S. citizen on February 3, 1998, when the applicant was 17 years old. The applicant seeks a certificate of citizenship under section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432, claiming that he derived citizenship through his father.

The director determined that the applicant did not qualify for citizenship under section 321 of the former Act, 8 U.S.C. § 1432, because his parents were never "legally separated," and because he was never adopted by his step-mother.

On appeal, the applicant contends that section 321 of the former Act, 8 U.S.C. § 1432, does not require him to show that his parents were married. *See Applicant's Appeal Brief.* The applicant further maintains that he was legitimated and acknowledged by his father, with whom he resided since arriving in the United States in 1993. *Id.* The applicant claims his father had "legal custody" of him since 1993. *Id.* The appeal is accompanied by a copy of the applicant's birth certificate, identification card and permanent resident card. Also, the applicant submits school and tax records from 1993 purporting to establish that he was in his father's custody. Finally, the applicant submits letters from his siblings, his father's Certificate of Naturalization, driver license and marriage certificate.

Section 321 of the former Act, 8 U.S.C. § 1432, 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 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 (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

The record indicates that the applicant's mother is alive and is not a U.S. citizen. The AAO finds that the requirements set forth in sections 321(a)(1) and (2) of the former Act, 8 U.S.C. § 1432(a)(1) and (2) are therefore not met. The AAO further finds that the requirements set forth in section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3), have not been met. The applicant's parents were never married, and therefore never legally separated. Because the AAO finds that the applicant's parents were not legally separated, the AAO does not address the issue of "legal custody."

Section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3), requires the applicant to establish that his U.S. citizen parent has legal custody of him "when there has been a legal separation of the parents." The AAO notes that the Board stated clearly in *Matter of H*, 3 I&N Dec. 742 (1949), that "legal separation" means either a limited or absolute divorce obtained through judicial proceedings. *See also, Morgan v. Attorney General*, 432 F.3d 226 (3d Cir. 2005); *Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001). A limited or absolute divorce, or other formal separation decree, cannot be obtained by a couple who was never married. *See Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003)(holding that the child of a U.S. citizen father could not derive U.S. citizen, despite the fact that the father's naturalization and the child's immigrant admission took place before the child's 18th birthday and that the child was residing with the father, because the child's parents were never married and therefore never legally separated); *see also Lewis v. Gonzales*, 481 F.3d 125 (2nd Cir. 2007) (stating that "because the second clause of § 321(a)(3) explicitly provides for the circumstance in which "the child is born out of wedlock," we cannot interpret the first clause to silently recognize the same circumstance, and moreover, to do so by excusing the express requirement of a legal separation").

The AAO finds that the applicant has failed to establish his parents "legal separation" as required by section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3). The applicant therefore does not qualify for citizenship under section 321 of the former Act.

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. The applicant in the present case has not met his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.