



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] OFFICE: CALIFORNIA SERVICE CENTER Date: MAY 04 2007

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, Chief
Administrative Appeals Office

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

The record reflects that the applicant was born in Cuba on November 8, 1962. The applicant became a permanent resident of the United States on December 20, 1973. In February 1979, his father, [REDACTED] was incarcerated for three years for a criminal conviction. The applicant does not assert, and the record does not support, that his father became a United States citizen. On August 5, 1980, the applicant's mother, [REDACTED] became a naturalized U.S. citizen. On February 24, 1984, the applicant's parents divorced, when the applicant was 21 years old. The applicant seeks a certificate of citizenship pursuant to section 321 of the former Act, under the claim that he acquired U.S. citizenship through his mother when she became a naturalized U.S. citizen.

The director concluded that the applicant was ineligible for a certificate of citizenship, as he did not show that both of his parents became naturalized U.S. citizens, as required by section 321(a)(1) of the former Act. *Decision of the Director*, dated June 15, 2006.

On appeal, counsel for the applicant asserts that the applicant is not required to show that both of his parents became naturalized citizens, as his parents were legally separated at the time the applicant's mother naturalized, as contemplated by section 321(a)(3) of the former Act. *Brief in Support of Appeal*, submitted July 14, 2006. Counsel contends that the applicant meets all requirements of section 321 of the former Act, and thus the present application should be approved. *Id.*

The record contains a brief from counsel; a copy of the applicant's birth certificate; a copy of the applicant's mother's naturalization certificate; a copy of the applicant's permanent resident card; a copy of the applicant's social security card; a copy of the applicant's parents' divorce certificate, and; copies of documents in connection with the applicant's father's criminal proceedings and conviction. The entire record was reviewed and considered in rendering this decision.

Sections 320 and 322 of the former Act were amended by the Child Citizenship Act of 2000 (CCA), which took effect on February 27, 2001, and section 321 of the former Act, 8 U.S.C. § 1432, was repealed. Section 320 of the Act, as amended, permits a child born outside of the U.S. to automatically become a citizen of the United States upon fulfillment of the following conditions:

- (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
- (2) The child is under the age of eighteen years.
- (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

The AAO notes that legal precedent decisions have clearly stated that the provisions of the CCA are not retroactive and that the amended provisions of the Act apply only to persons who were not yet eighteen years old as of February 27, 2001. Because the applicant was over the age of eighteen on February 27, 2001, the AAO finds that he is not eligible for the benefits of section 320 of the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

Section 321 of the former Act provided, in pertinent part:

(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.

Upon review, the applicant has not shown that he met the requirements of section 321 of the former Act. As observed by the director, the applicant has not established that both of his parents became naturalized U.S. citizens, as required by section 321(a)(1) of the former Act. Nor has the applicant shown that his father is deceased, such that he may potentially meet the requirements of section 321(a)(2) of the former Act.

Counsel asserts that the applicant's parents were legally separated at the time the applicant's mother naturalized, thus the applicant's mother's naturalization constituted the "naturalization of the parent having legal custody of the child when there has been a legal separation of the parents," as contemplated by section 321(a)(3) of the former Act. Specifically, counsel asserts that the applicant's father's incarceration in February 1979 effectively resulted in the legal separation of the applicant's parents. However, counsel has cited no legal authority to support her contention.

The Board of Immigration Appeals (BIA) stated in *Matter of H*, 3 I&N Dec. 742 (1949), that "legal separation" means either a limited or absolute divorce obtained through judicial proceedings. The BIA provided that "the term 'legal separation,' can refer only to a situation where there has been a termination of the marital status." *Id.* at 744. The record reflects that the applicant's parents obtained a divorce on February 24, 1984 in the State of Florida. However, the applicant has not submitted any evidence to show that, prior to February 24, 1984, his parents sought legal measures to be separated, or that they considered themselves no longer husband and wife.

In *Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003), the Ninth Circuit indicated that incarceration of one parent does not result in a legal separation as contemplated by section 321(a)(3) of the former Act. Specifically, the Ninth Circuit stated the following:

[T]he legal separation requirement is not superfluous in preserving parental rights. Suppose that, because of a mental condition or incarceration, one parent is denied custody of the child. However, both parents remain married. As the Seventh Circuit observed: “Often these conditions will pass, and the parents will resume living together with joint custody of the child. Congress rationally could conclude that as long as the marriage continues the citizenship of the children should not change automatically with the citizenship of a single parent.”

Barthelemy v. Ashcroft at FN4, 329 F.3d 1062 (9th Cir. 2003)(quoting *Wedderburn v. I.N.S.*, 215 F.3d 795, 800 (7th Cir. 2000). While the present matter does not arise within the jurisdiction of the Ninth or Seventh Circuits, the reasoning in *Barthelemy v. Ashcroft* is instructive, and supports that the applicant’s father’s incarceration did not result in the legal separation of the applicant’s parents.

Thus, the applicant has not shown that his father’s incarceration constituted a legal separation of his parents. The applicant has not shown that his parents were otherwise legally separated prior to their divorce on February 24, 1984. As the applicant’s parents were divorced after the applicant reached age eighteen, he has not established that he met the requirements of section 321(a)(3) of the former Act, such that he derived U.S. citizenship based solely on the naturalization of his mother. Accordingly, the applicant must show that both of his parents became U.S. citizens prior to his eighteenth birthday in order to establish eligibility for a certificate of citizenship under section 321(a) of the former Act. As noted above, the record does not show that the applicant’s father became a U.S. citizen at any time, and thus the present application may not be approved.

Based on the foregoing, the applicant has not shown that he derived citizenship from his mother by operation of law, such that he is eligible for a certificate of citizenship pursuant to the present application.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the applicant to establish his or her claimed citizenship by a preponderance of the evidence. The applicant has not met his burden in the present matter. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.