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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: PHILADELPHIA, PA Date: FEB 17 2004

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under sections 320 and 322 of the Immigration and Nationality Act, 8 U.S.C. §§ 1431 and 1433.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED[1]

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

[1] The AAO notes that although the present appeal was filed on behalf of the applicant by attorney, Kenneth John Elwood, the record does not contain a properly executed G-28, Notice of Appearance, signed by the applicant. The AAO is therefore unable to recognize attorney Elwood as counsel of record, and the AAO will consider the applicant self-represented for purposes of the present appeal.

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 applicant was born on May 21, 1972, in Jamaica. The record indicates that the applicant's father, was born in Jamaica on February 11, 1948, and that he became a naturalized U.S. citizen on May 27, 1987, when the applicant was 15 years old. The applicant's mother, is a Jamaican citizen with no claim to U.S. citizenship. The applicant's parents never married. The applicant was, however, legitimated by his father at birth, pursuant to the Jamaican Status of Children Act of 1976. *See Matter of Clahar,* 18 I&N Dec. 1 (BIA 1981). The applicant was admitted into the United States as a lawful permanent resident on April 27, 1989, when he was 17 years old. The applicant seeks a certificate of citizenship pursuant to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431, and pursuant to sections 321 and 322 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. §§ 1432 and 1433.

The district director determined that the applicant was statutorily ineligible for citizenship pursuant to section 321 of the Act because his parents never married or became legally separated or divorced, and because his father was therefore never awarded legal custody of the applicant.

On appeal, the applicant asserts that in 1989, he would have qualified for U.S. citizenship pursuant to section 320 of the present Act, and that the benefits of the present section 320 should be applied to him retroactively.[2] The applicant additionally asserts that section 321 of the former Act violates the equal protection clause of the U.S. Constitution because it treats fathers and mothers of children born out of wedlock differently. The applicant subsequently asserts that the provisions of section 321 of the former Act should be applied to him in a sex-neutral manner, and that he should obtain citizenship accordingly. The applicant also asserts, without explanation, that provisions contained in section 322 of the former Act, requiring that a U.S. citizen parent file a certificate of citizenship application on behalf of their child, and requiring that final adjudication of such an application take place prior to the child's 18th birthday, should be overlooked, and that he should qualify for citizenship pursuant to section 322 of the former Act.

Section 322 of the former Act provides, in pertinent part, that:

> A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, "Secretary"] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [Secretary] that the following conditions have been fulfilled:
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> 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.
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> . . . .
>
> b) Attainment of citizenship status; receipt of certificate

[2] *See* Footnote 1.

> Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service [CIS] within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

The AAO finds that the requirements set forth in section 322 of the former Act are patently clear, and that the applicant does not meet the requirements for citizenship pursuant to section 322 of the former Act. The applicant failed to demonstrate that he was in the legal custody of his father prior to his 18th birthday, or that his father filed an application for citizenship on his behalf at any time prior to his 18th birthday.

The AAO finds further that the applicant does not qualify for citizenship pursuant to section 321 of the former Act.

Former section 321 of the Act 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.

The applicant does not qualify for consideration under former section 321 of the Act. The applicant's parents did not marry, and the applicant failed to establish that section 321(a) or (b) were satisfied in this case. Moreover, the AAO rejects the applicant's assertion that the provision is unconstitutional and should therefore be applied favorably to the applicant. The AAO finds, and the applicant himself concedes on appeal, that legal precedent decisions have addressed his constitutionality assertions and determined that section 321 provisions were legally justified and constitutional, as written. *See Nehme v. INS,* 252 F.3d 415 (5th Cir., 2001). *See also U.S. v. Arbelo,* 288 F.3d 1262 (11th Cir. 2002).

The AAO notes that the Child Citizenship Act of 2000 (CCA), which took effect on February 27, 2001, amended section 320 of the Act, and presently allows 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.

Contrary to the applicant's assertions, however, legal precedent decisions clearly reflect that the provisions of the CCA are not retroactive, and that the amended provisions of section 320 apply only to persons who were not yet 18-years-old as of February 27, 2001. Because the applicant was over the age of 18, on February 27, 2001, 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).

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. In this case, the burden has not been met. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.