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U.S. Citizenship
and Immigration
Services

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[redacted]

MAR 0 2 2004

FILE: [redacted] Office: PHILADELPHIA, PA Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Section 321 of the former Immigration and Nationality Act, 8U.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 Interim 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 December 2, 1979, in Hong Kong, to Vietnamese parents. The record indicates that the applicant's mother, was born in Vietnam on May 14, 1948, and that she became a naturalized United States (U.S.) citizen on October 25, 1994. The applicant's father, was born in Vietnam on December 12, 1946, and became a U.S. citizen on September 9, 1999. The applicant was admitted into the United States as a lawful permanent resident on December 15, 1980. He 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 interim district director determined that the applicant was statutorily ineligible for citizenship pursuant to section 321 of the Act, because his parents did not obtain a legal separation or divorce prior to his 18th birthday, and because his mother was never awarded legal custody of the applicant.

On appeal, counsel asserts that the applicant resided with his mother at the time of her naturalization in 1994, and that his mother became a naturalized U.S. citizen before the applicant reached the age of 18. Counsel asserts further that the applicant's mother was legally separated from his father at the time of her naturalization, and that the applicant therefore qualifies for U.S. citizenship under section 321 of the Act. [1] The AAO notes that although counsel stated that additional evidence pertaining to the applicant's parent's separation would be submitted, no additional evidence was provided.

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

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[1] Counsel also asserts that the applicant could not have been living with his father when his father became a naturalized U.S. citizen in 1999, because the applicant was in jail at that time. The AAO notes that the applicant was over 18 years old in 1999. Where the applicant lived in 1999, is therefore not relevant to his U.S. citizenship claim and will not be addressed.

> 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 AAO notes that the applicant's mother's application for a certificate of naturalization states that she divorced in 1989, and that her 1994, certificate of naturalization states that her marital status is divorced. The AAO notes further that the applicant's father's 1999, certificate of naturalization states that his marital status is married. Moreover, information contained in his application for a certificate of naturalization indicates that he was married to and that he was in the process of divorcing, but had not finalized a divorce. The record does not contain a legal separation or divorce decree for the applicant's parents, nor does the record contain any evidence indicating that the applicant's mother was at any time awarded legal custody over the applicant. The AAO finds that the applicant failed to establish his parents obtained a legal separation or divorce prior to his 18th birthday, or that his mother obtained legal custody over the applicant prior to his 18th birthday. The applicant therefore does not qualify for consideration under former section 321 of the Act.

The AAO notes that the Child Citizenship Act of 2000 (CCA), which took effect on February 27, 2001, 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.

The provisions of the CCA are not retroactive and 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. The burden has not been met and the appeal will be dismissed.

ORDER: The appeal is dismissed.