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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: HOUSTON, TX Date: MAY 25 2004

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, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Interim District Director, Houston, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record indicates that the applicant was born on December 20, 1974, in Nigeria. The record indicates that the applicant's father, was born in Nigeria on August 4, 1952, and that he became a naturalized U.S. citizen on August 25, 1989. The applicant's mother, was born in Nigeria on an unknown date, and she is not a U.S. citizen. The applicant was admitted into the United States as a lawful permanent resident on August 9, 1992. 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 ineligible for citizenship under section 321 of the former Act because he failed to establish that his parents were legally married or separated prior to his eighteenth birthday.

On appeal, counsel asserts that the applicant's parents were married and divorced according to Islamic and tribal customary law, and that official records of the proceedings therefore do not exist. Counsel asserts that the applicant "should not be penalized because of his father's confusion about whether a tribal Islamic marriage and divorce were valid in a country that demanded documentary proof that he could not provide because it never existed." Counsel also asserts that the applicant is eligible for citizenship under section 321 of the former Act because he has established a biological relationship between himself and his father, and he has demonstrated that his father legitimated him and had legal custody over him under the Texas Family Code and Islamic customary law. Counsel asserts further that the applicant was additionally denied equal protection under the U.S. Constitution because "with the advent of paternity testing through DNA analysis, the primary reason for permitting citizenship through an unwed mother, but not an unwed father, no longer exists."

The AAO notes that it has no jurisdiction to rule upon the constitutionality of the Act and the Regulations. *See Matter of C-*, 20 I&N Dec. 29 (BIA 1992). The AAO will therefore not address counsel's assertion that provisions of section 321 violate the applicant's equal protection rights under the U.S. Constitution.

Section 321 of the former 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
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> (2) The naturalization of the surviving parent if one of the parents is deceased; or
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> (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 claim that his mother is deceased or that she became a naturalized U.S. citizen, and the record contains no evidence to indicate that either event occurred. The AAO therefore finds that the requirements set forth in sections 321(a)(1) and (a)(2) of the former Act have not been met.

The AAO additionally finds that the applicant has failed to establish he meets the legal separation requirements set forth in section 321(a)(3) of the former Act.

In the present case, counsel asserts that the applicant's parents were married and divorced pursuant to Islamic and customary tribal law in Nigeria, and that such proceedings should be recognized as legal and enforceable by the Immigration and Naturalization Service (Service, now Citizenship and Immigration Services, CIS). However, counsel provides no evidence, documentary or otherwise, to establish that a customary law marriage or divorce took place between the applicant's parents. Moreover, counsel provides no evidence to demonstrate that any such marriage or divorce between the applicant's parents is legally recognized by authorities in Nigeria.

The AAO notes further that the applicant's father states in several immigration petitions and applications submitted by him to the Service, that he was not previously married *See* N-600, Application for Naturalization, signed and filed in March 1988; *See also* I-485 Application for Status as a Permanent Resident, filed in July 1981, as well as father's G-325, Biographic Information form signed and filed in July 1981. The AAO finds that the simple statement by counsel the applicant's father was confused about whether a tribal Islamic marriage and divorce were valid in the U.S., fails to explain away the above discrepancies. Moreover, as noted in the interim district director's decision, precedent legal decisions have stated clearly that, "[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." *See* Interim District Director decision, dated October 29, 2003, *citing Matter of H,* 3 I&N Dec. 742 (1949) (Quotations omitted).

The present record does not contain a legal marriage certificate or a judicial separation or divorce decree for the applicant's parents. Nor does the record contain any evidence indicating that the applicant's father was at any time awarded legal custody over the applicant. Accordingly, the AAO finds that the applicant failed to establish that his parents were legally married or that they obtained a legal separation or divorce at any time. The applicant therefore does not qualify for consideration under former section 321 of the 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 burden has not been met and the appeal will be dismissed.

ORDER: The appeal is dismissed.