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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: BUFFALO, NY Date: FEB 02 2009

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Buffalo, New York and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant was born on May 8, 1961 in Panama. The applicant's mother, [redacted] became a naturalized U.S. citizen on January 4, 1972, when the applicant was ten years old. The record does not indicate the citizenship held by the applicant's father, [redacted] The applicant's natural parents never married. The applicant was admitted to the United States as a lawful permanent resident on April 1, 1970 at eight years of age. The applicant seeks a certificate of citizenship under section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432, based on his mother's naturalization.

The district director found that the applicant had failed to establish that his father had naturalized or that his parents had legally separated prior to his 18th birthday as required by the requirements of section 321 of the Act. She denied the application accordingly. *Decision of the District Director*, dated November 18, 2008.

On appeal, the applicant submits a brief in support of his claim that he has satisfied the requirements for a certificate of citizenship under the Act. *Applicant's brief,* dated December 5, 2008.

The section of law under which the applicant seeks to establish U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001.[1] However, any person who would have acquired automatic citizenship under its provisions prior to February 27, 2001 may apply for a certificate of citizenship at any time. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Therefore, the issue before the AAO is whether the applicant has established that he acquired U.S. citizenship under the provisions of section 321(a)(3) of the Act prior to February 27, 2001.

Former section 321 of the Act, 8 U.S.C. § 1432, provided 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:
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> (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

[1] The CCA benefits all persons who had not yet reached their eighteenth birthdays as of February 27, 2001. As the applicant was 39 years old on February 27, 2001, he is not eligible for CCA consideration.

> (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 bases his eligibility for citizenship under section 321(a)(3) of the Act on the naturalization of his mother. Therefore, to demonstrate eligibility for a certificate of citizenship under section 321(a)(3), he must prove that, prior to his 18th birthday, he was either in the legal custody of his mother following her legal separation from his father or that, as a child born out of wedlock, his paternity had not been established through legitimation. The AAO turns first to a consideration of whether the record establishes that the applicant's eligibility for citizenship under the first prong of section 321(a) of the Act – a child in the legal custody of the naturalizing parent following a legal separation of the child's parents.

The record contains a sworn statement from the applicant's mother, dated May 30, 2006, which indicates that she was never married to the applicant's natural father and stopped living with him in June 1961. She asserts that she had legal custody of the applicant on the date she became a citizen of the United States.

The AAO notes that, for immigration purposes, "legal separation" has been clearly defined as a "limited or absolute divorce obtained through judicial proceedings." *See Matter of H,* 3 I&N Dec. 742 (1949) (Quotations omitted). In *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001), the court found legal separation under former section 321(a)(3) of the Act to be "uniformly understood to mean *judicial* separation." In the present case, however, the applicant's parents never married. Accordingly, the applicant is unable to establish the parting of his parents in June 1961 as a legal separation for the purposes of section 321(a)(3) of the Act.

The AAO further finds that, although the applicant was born out of wedlock and his parents never married, he is also ineligible for a certificate of citizenship under the second prong of section 321(a)(3) of the Act – naturalization of the mother if the child was born out of wedlock and paternity has not been established by legitimation. The enactment of the Panamanian Constitution of 1946, effective September 30, 1946, abolished the distinction between children born in and out of wedlock. Children born out of wedlock after this date are considered legitimate if recognized by their natural fathers. *Matter of Sinclair*, 13 I&N Dec. 613 (BIA 1970); *Matter of Maloney*, 16 I&N Dec. 650 (BIA 1978). The record includes a birth certificate for the applicant, issued by the Panamanian Civil Registry and listing the names of both his mother and his father. The AAO, therefore, finds the applicant to have been recognized by his natural father and to have been legitimated at the time of his birth. Accordingly, the applicant has not established a claim to U.S. citizenship under the second prong of section 321(a) of the Act based on his out of wedlock birth.

The AAO notes "[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v United States*, 449 U.S. 490, 506 (1981). As previously noted, the regulation at 8 C.F.R. § 341.2 provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the

claim is "probably true" or "more likely than not." See *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The applicant has not met his burden in this proceeding. The appeal will, therefore, be dismissed.

ORDER: The appeal is dismissed.