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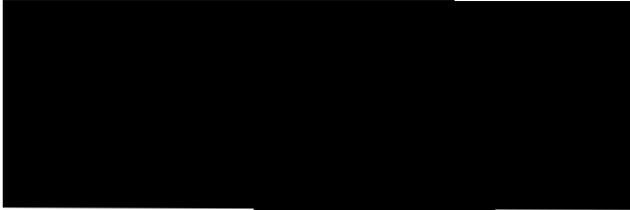
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEW YORK, NY

Date:

APR 24 2008

IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship pursuant to Section 321(a)(3) of the Nationality Act, 8 U.S.C. § 1432(a)(3), now repealed

ON BEHALF OF APPLICANT:



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 District Director, New York, New York and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on May 27, 1960 in Trinidad and Tobago. The individual identified by the applicant as his natural father, [REDACTED] became a U.S. citizen on March 20, 1974, when the applicant was 13 years of age. The applicant's mother, [REDACTED] was, at the time of his birth a citizen of Trinidad and Tobago, and the record offers no evidence to indicate that she has acquired another nationality. [REDACTED] and [REDACTED] married on March 23, 1968. On May 18, 1975, the 14-year-old applicant was admitted to the United States as a lawful permanent resident, based on an immigrant visa petition filed by [REDACTED]. The applicant seeks a certificate of citizenship pursuant to former section 321(a)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432(a), based on his claim that he acquired citizenship on the date that [REDACTED] naturalized.

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001. 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:

- (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's birth certificate indicates that he was born out of wedlock on May 27, 1960. To be defined as a child for the purposes of section 321(a) of the Act, section 101(c) of the Act, 8 U.S.C. § 1101(c), a child born out of wedlock must be:

an unmarried person under twenty-one years of age and . . . legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation.

The AAO notes that the Trinidad and Tobago Status of Children Act of 1981 eliminated the distinction between children born in and out of wedlock as of its March 1, 1983 effective date. However, as the applicant was born in 1960, he must prove that his birth was legitimated by the marriage of his natural parents, as required by the laws of Trinidad and Tobago in 1960. *Matter of Patrick*, 19 I&N Dec. 726 (BIA 1998); see also *Matter of Archer*, 10 I&N Dec. 92 (BIA 1962).

The applicant's birth certificate does not list [redacted] as his father and the record does not contain any statements from [redacted], who is now deceased, acknowledging his paternity or other documentation that would establish his blood relationship to the applicant. Counsel contends, however, that the approval of the Form I-130, Petition for Alien Relative, filed by [redacted] on behalf of the applicant in 1974 establishes that the legacy Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) previously found [redacted] to be the applicant's natural father. She asserts that the government cannot "claim that the alien is the actual child of a US citizen for one purpose (the Immigrant Visa) and now claim that he is not the child of a US citizen for another purpose (Derivative Citizenship).

While the AAO acknowledges that the applicant was admitted to the United States as [redacted]'s child in 1975, this admission did not establish the applicant's birth relationship to [redacted]. The definition of child in section 101(b) of the Act, which is used to award immigration benefits under Title II of the Act, differs from that used in the naturalization/citizenship context of Title III in that it includes a stepchild, i.e., a child acquired through marriage when that marriage takes place prior to the child's 18th birthday. Therefore, the prior approval of the Form I-130 on behalf of the applicant does not establish the applicant as Mr. [redacted]' natural son. Instead, the applicant immigrated to the United States as [redacted]'s stepson, based on [redacted]'s 1968 marriage to the applicant's mother.

To establish [redacted] as his natural father, the applicant submits affidavits sworn by his mother and the results of DNA testing of the applicant and his sibling [redacted] conducted by the GenQuest DNA Analysis Laboratory in Sparks, Nevada. In her affidavits, [redacted] attests that [redacted] is the applicant's natural father. However, the results from the genetic testing of the applicant and [redacted] do not support her claim. The GenQuest analysis reports a Combined Kinship Index for the applicant and [redacted] of "0.2," but fails to interpret this figure for the purposes of establishing the applicant and [redacted] as siblings born of the same parents. While the AAO notes that the GenQuest report states that the weight of genetic evidence is stronger the further away the combined kinship index is from 1 and that a Combined Kinship Index of 1 reveals no genetic evidence for or against kinship, it does not find this language to explain the report's findings. The DNA evaluation, therefore, offers insufficient proof that the applicant and Terrance are brothers.

Further, the record does not establish [redacted] as the natural son of [redacted] and [redacted]. Even if the GenQuest evaluation established a sibling relationship between the applicant and [redacted], it still would not prove that [redacted] is the applicant's birth father since the record fails to

establish him as [REDACTED]'s birth father. While the AAO notes [REDACTED]'s sworn statements regarding the blood relationship between the applicant and [REDACTED] they are not, in the absence of any supporting documentary evidence, sufficient to establish that relationship. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal, counsel contends that the findings in *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), in which the 9th Circuit Court of Appeals determined that an individual could acquire U.S. citizenship through his father without a blood relationship, apply in the present matter. Counsel is not persuasive. In *Scales v. INS*, the petitioner was born to a noncitizen mother who, at the time of his birth, was married to a U.S. citizen who was not established as the petitioner's natural father. The 9th Circuit held that, in such a case, a straightforward reading of immigration law did not require a blood relationship between father and son for the son to acquire U.S. citizenship. In that the circumstances of the petitioner's birth in *Scales v. INS* are in no way comparable to those of the applicant in the present matter, the AAO does not find *Scales v. INS* to be relevant for the purposes of this proceeding.

The evidence of record does not establish [REDACTED] as the applicant's natural father. Therefore, the applicant cannot prove that he was legitimated under the law of Trinidad and Tobago by the 1968 marriage of [REDACTED] and [REDACTED] and qualify as a child under the definition set forth in section 101(c) of the Act. Accordingly, he has not established eligibility for a certificate of citizenship under section 321(a)(3) of the Act.

The AAO also notes that, even if the record had established [REDACTED] as the applicant's natural father, the applicant has failed to submit the evidence necessary to satisfy the requirements of section 321(a)(3) of the Act, which state that, prior to his 18th birthday, the applicant must have been in the legal custody of Mr. [REDACTED] following [REDACTED]'s legal separation from the applicant's mother.

The record contains information on matrimonial and custody law in Trinidad provided by the firms of [REDACTED] and [REDACTED] of Follonais, [REDACTED] indicates that at the time that [REDACTED] states she and her husband separated, such separations could be effected by private deeds of separation that did not need to be registered, notices published in the press, a local magistrate's court order or a high court order. [REDACTED] notes that it is difficult to determine what legal weight would have been accorded a deed of separation and that a notice in the press would have likely been insufficient to establish a legal separation. She further reports that a magistrate's non-cohabitation order required a woman to prove that her husband had been convicted of assault against her, had deserted her, had been guilty of persistent cruelty or had willfully neglected to maintain her or her children, that he had insisted on intercourse when he knew himself to have a venereal disease or had compelled her to submit to prostitution, and that she thinks it unlikely that [REDACTED] pursued such an order. [REDACTED] concludes that a separation order from a high court, where jurisdiction would have been based on [REDACTED]'s domicile, would have been unlikely since [REDACTED]'s domicile was in the United States. She indicates further that it is unlikely that any evidence of a legal separation between [REDACTED] and [REDACTED] can be found, except in the form of a high court order and, even then, notes that she is not aware how accessible such a record would be. [REDACTED] reports that at the time that [REDACTED] and [REDACTED] separated, there were no official custody applications made by either

party to the courts and no legal impediments to their separation. He indicates that there were no existing laws in Trinidad and Tobago that would have prevented their separation or have created any encumbrances.

Based on the above evidence, counsel contends that, as the laws of Trinidad prior to the 1973 Matrimonial Proceedings and Property Act did not require official court determinations of custody, separation or divorce, [REDACTED] separation from her husband constituted a legal separation as it ended the family relationship. Based on this same reasoning, counsel also concludes that as [REDACTED] left the applicant with her husband in the United States, [REDACTED] acquired legal custody of the applicant as he had actual uncontested custody of him. Again, counsel's reasoning is unpersuasive.

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 its decision, the 5th Circuit rejected the premise that any voluntary separation under legal circumstances would suffice and concluded that "Congress clearly intended that the naturalization of only one parent would result in the automatic naturalization of an alien child only when there has been a formal judicial alteration of the marital relationship." In the present matter, the record provides no proof that the applicant's parents ever sought or received the judicial separation required to satisfy the requirements of section 321(a)(3) of the Act. The AAO notes the statement provided by [REDACTED] attesting that she and the applicant's father, although they never divorced, separated in 1968 in Trinidad and Tobago, and that the applicant was in the custodial custody of her husband after he came to the United States. However, for the reasons just discussed, [REDACTED]'s testimony does not establish that she and [REDACTED] were legally separated prior to the applicant's 18th birthday or that the applicant was in [REDACTED] legal custody, as required by section 321(a)(3) of the Act.

As the record contains no evidence that establishes that the applicant's parents sought and received a legal separation under any of avenues available to them in Trinidad and Tobago in 1968 or that [REDACTED] subsequently acquired legal custody of the applicant, the applicant has not demonstrated that prior to his 18th birthday, he was in [REDACTED]'s legal custody following his legal separation from [REDACTED]. For this reason as well, the applicant has not established eligibility for a certificate of citizenship under section 321(a)(3) of the Act.

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). 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 and the appeal will be dismissed.

ORDER: The appeal is dismissed.