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U.S. Department of Homeland Security
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Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

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FILE:

Office: PHILADELPHIA, PA Date: APR 28 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for Certificate of Citizenship pursuant to Section 321(a)(3) of the Nationality Act, 8 U.S.C. § 1432(a)(2), now repealed

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The record reflects that the applicant was born on September 16, 1978 in Jamaica. The applicant's mother, [REDACTED], became a naturalized U.S. citizen on March 15, 1995, when the applicant was 16 years old. The applicant's father, [REDACTED] is a citizen of Jamaica. The applicant's parents married on September 16, 1987. The applicant was admitted to the United States as a lawful permanent resident on April 4, 1987, when he was eight years old. The applicant seeks a certificate of citizenship pursuant to former section 321(a)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432(a)(3), based on his mother's naturalization.

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001.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)(2) of the Act prior to February 27, 2001.

The AAO notes that the applicant is no longer represented by his counsel of record, but has obtained new counsel. In that the record contains no Form G-28, Notice of Appearance as Attorney or Representative, filed by the applicant's new counsel or representative, the applicant will be considered as self-represented. All previous representations will be considered in reaching a decision in this matter.

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.

On appeal, prior counsel contends that, pursuant to section 321(a)(3), the applicant acquired U.S. citizenship through the naturalization of his mother when he was 16 years old. Counsel further asserts that the applicant's parents were legally separated at the time [REDACTED] naturalized even though that separation was not imposed by a judicial act, and that the applicant should, therefore, be considered to have been in Ms. [REDACTED]'s uncontested and legal custody at the time of her naturalization.

To establish that he qualifies as a child for the purposes of former section 321(a) of the Act, the applicant submits his parents' 1987 marriage certificate to demonstrate the legitimation of his out of wedlock birth. While the AAO acknowledges the marriage of the applicant's parents subsequent to his birth, it notes that, as of November 1, 1976, the Jamaican Status of Children Act of 1976 removed the distinction between Jamaican children born in and out of wedlock, regardless of whether they were born before or after its enactment. In *Matter of Clahar*, 18 I&N Dec. 1 (BIA 1981), the Board of Immigration Appeals held that a child within the scope of the 1976 Jamaican Status of Children Act (SCA) may be included within the definition of a legitimate or legitimated child set forth in section 101(b)(1) of the Act, so long as familial ties are established by the requisite degree of proof and the status arose within the time requirements set forth in that section. In the instant case, the evidence of record indicates that, prior to his 16th birthday, the applicant was given his father's surname, his birth certificate was amended to reflect [REDACTED] as his natural father and he entered the United States as the child of [REDACTED]. Accordingly, the AAO finds the record to establish the familial ties referenced in *Matter of Clahar* and that the applicant may be considered a child under former section 321(a) of the Act.¹

The AAO now turns to a consideration of the applicant's eligibility for citizenship under former section 321(a)(3) of the Act, based on the naturalization of his mother on March 15, 1995.

The record establishes that the applicant was admitted to the United States as a lawful permanent resident on April 4, 1987 at the age of eight years and that his mother became a U.S. citizen when he was 16 years of age. The only remaining issues to be considered by the AAO are whether prior to the applicant's 18th birthday, he was in the legal custody of [REDACTED] following her separation from his father.

As previously noted, prior counsel for the applicant states that the applicant's parents have never divorced, although [REDACTED] has initiated unsuccessful divorce proceedings on several occasions. Counsel reports that [REDACTED] abandoned his family shortly after his 1987 marriage to [REDACTED] and that this *de facto* separation is sufficient to establish the legal separation required by section 321(a)(3) of the Act. Counsel also asserts that in view of [REDACTED] abandonment, [REDACTED]'s actual uncontested custody of the applicant at the time of her naturalization should be viewed as legal custody. Counsel's reasoning is not persuasive.

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

¹ Although *Matter of Clahar* references the definition of legitimated child in section 101(b) of the Act, the AAO notes that its findings may also be applied to the definition of legitimated child set forth in section 101(c) of the Act, which requires legitimation prior to a child's 16th birthday.

alien child only when there has been a formal judicial alteration of the marital relationship.” In the present matter, the marital relationship of the applicant’s parents has not been altered as a result of a judicial proceeding. While the AAO notes counsel’s contention that [REDACTED] abandoned his family and thereby precluded the type of legal separation required to satisfy section 321(a) of the Act, the applicant’s circumstances do not remove the burden of proof placed upon him in this proceeding. In that the applicant cannot submit evidence that prior to his 18th birthday, he was in [REDACTED]’s legal custody following her legal separation from [REDACTED] 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.