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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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[redacted]

FILE: [redacted] Office: ORLANDO, FL Date: AUG 11 2008

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Sections 301, 309 or 321 of the Immigration and Nationality Act; 8 U.S.C. §§ 1401, 1409 or 1421.

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting Field Office Director, Orlando, Florida, 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 April 11, 1966 in Jamaica. The applicant's father, [redacted] became a U.S. citizen upon his naturalization in November 1982, when the applicant was 16 years old. The applicant's mother, [redacted], is not a U.S. citizen. The applicant's parents were never married to each other. The applicant was admitted to the United States as a lawful permanent resident in 1979, when she was 12 years old. The applicant seeks a certificate of U.S. citizenship under section 321 of the former Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (repealed).

The acting field office director denied the application finding that the applicant had failed to demonstrate that she was legitimated (in order to acquire U.S. citizenship under section 309 of the Act, 8 U.S.C. § 1409) or that her parents had been legally separated (in order to derive U.S. citizenship under section 321 of the former Act, 8 U.S.C. § 1432 (repealed)).

On appeal, the applicant submits two sworn statements signed by her father purporting to acknowledge her as his child and providing background information. The appeal is also accompanied by a recently issued birth certificate pertaining to the applicant (listing the applicant's father's name), a copy of the applicant's father's naturalization application listing the applicant as a child, and a copy of the applicant's father's immigrant visa documentation listing the applicant's name (stamped "unable to verify relationship").

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The applicant in the present matter was born in 1966. The applicant was over 18 on the effective date of the Child Citizenship Act of 2000 (CCA).[1] Section 321 of the former Act, 8 U.S.C. § 1432 (repealed), is therefore applicable to this case.[2]

Section 321 of the former Act, 8 U.S.C. § 1432, 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

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[1] The CCA repealed section 321, and amended sections 320 and 322 of the Act. The provisions of the Act amended by the CCA apply only to persons who were not yet 18 years old as of February 27, 2001. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

[2] The AAO notes that sections 301 and 309 of the Act, 8 U.S.C. §§ 1401 and 1409, are inapplicable to this case because the applicant's father was not a U.S. citizen at the time of the applicant's birth. Therefore, the applicant did not acquire U.S. citizenship at birth under these sections.

> (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 has established that her father naturalized prior to her 18th birthday, and that she was admitted to the United States as a lawful permanent resident prior to her 18th birthday. The applicant cannot, however, establish that her parents were legally separated or that she was in her father's legal custody.

Section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3), requires the applicant to establish that her U.S. citizen parent had legal custody "*when there has been a legal separation of the parents.*" The AAO notes the well-established precedent, cited by the Board of Immigration Appeals in *Matter of H,* 3 I&N Dec. 742 (1949), that "legal separation" means either a limited or absolute divorce obtained through judicial proceedings. *See also, Brissett v. Ashcroft*, 363 F.3d 130 (2nd Cir. 2004); *Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001). A limited or absolute divorce, or other formal separation decree, cannot be obtained by a couple who was never married. *See Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003)(holding that the child of a U.S. citizen father could not derive U.S. citizenship, despite the fact that the father's naturalization and the child's immigrant admission took place before the child's 18th birthday and that the child was residing with the father, because the child's parents were never married and therefore never legally separated); *see also Lewis v. Gonzales*, 481 F.3d 125 (2nd Cir. 2007) (stating that "because the second clause of § 321(a)(3) explicitly provides for the circumstance in which "the child is born out of wedlock," we cannot interpret the first clause to silently recognize the same circumstance, and moreover, to do so by excusing the express requirement of a legal separation").

The AAO finds that the applicant has failed to establish her parents' "legal separation" as required by section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3). Having found that the applicant's parents were not "legally separated," the AAO need not determine the question of legal custody.[3]

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 applicant in the present case has not met her burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.

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[3] The AAO also does not address the issue of the applicant's acknowledgment or legitimation, given that she is ineligible for a certificate of citizenship on other grounds.