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U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

*Er*

[REDACTED]

FILE:

Office: NEW YORK, NY

Date: MAR 14 2008

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 October 22, 1959 in Jamaica. The applicant's father is [REDACTED]. The applicant's mother is [REDACTED]. The applicants' parents cohabited, but were not officially married. The applicant's father became a U.S. citizen upon his naturalization in 1972, when the applicant was 13 years old. The applicant's mother became a U.S. citizen after the applicant's 18<sup>th</sup> birthday. The applicant was admitted to the United States as a lawful permanent resident in 1970, when the applicant was 10 years old. The applicant presently seeks a certificate of citizenship under section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432, claiming that he derived U.S. citizenship upon his father's naturalization.

The director determined that the applicant did not qualify for citizenship under former section 321 of the Act because his parents were never married and therefore never "legally separated."

On appeal, counsel asserts that the director erred in not considering the February 2007 Order and Declaration Pursuant to the Maintenance Act of 2005 (the Order). The applicant, through counsel, claims that the Order establishes that his parents were married under common law and subsequently legally separated (in 1966). Therefore, the applicant maintains that he derived citizenship upon his father's naturalization under section 321 of the former Act.

Section 321 of the former Act provides, 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
- (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

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<sup>1</sup> The AAO notes that the birth certificate submitted in connection with the applicant's immigrant visa application, issued in 1968, does not list the applicant's father. The applicant's father's name is listed in the birth certificate submitted with the instant application, although it is unclear when or how the amendment took place.

(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 issue before the AAO is whether the applicant's parents were legally separated, such that the applicant could derive citizenship upon his father's naturalization under section 321(a)(3) of the former Act.

Section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3), requires the applicant to establish that his U.S. citizen parent has legal custody of him "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 (2<sup>nd</sup> Cir. 2004); *Nehme v. INS*, 252 F.3d 415, 425-26 (5<sup>th</sup> Cir. 2001). A limited or absolute divorce, or other formal separation decree cannot be obtained by a couple who were never married. See *Barthelemy v. Ashcroft*, 329 F.3d 1062 (9<sup>th</sup> 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 18<sup>th</sup> 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 (2<sup>nd</sup> 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 applicant claims in his Brief that, unlike the applicant in *Brissett*, his parents accomplished a legal separation despite never having been married. *Applicant's Appellate Brief* at 6. The applicant maintains that the Jamaican Family Property (Rights of Spouses) Act, 2003 deems his parents to have been married under common law. The applicant further contends that the 2007 Order establishes that his parents were married in 1953 and "legally separated" in 1966. The AAO disagrees. The AAO has carefully reviewed Jamaican law, including the Family Property (Rights of Spouses) Act, the Maintenance Act, the Marriage Act and the Matrimonial Causes Act, and has not found any support for the applicant's contention. Indeed, the Maintenance Act, 2005 (which forms the basis of the 2007 Order) refers to marriage independent from cohabitation, and to the termination of cohabitation as such (as opposed to "legal separation").<sup>2</sup>

The AAO finds that the 2007 Order does not establish that the applicant's parents were "legally separated" prior to the applicant's 18<sup>th</sup> birthday. See *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir.2000) (holding that a state *nunc pro tunc* order, which retroactively changed custody from the petitioner's non-citizen mother to his citizen father, did not establish that he met the requirements of section 321 because during the relevant time period he was *actually* in the custody of his mother). The concern here, as it was in *Fierro* with respect to custody, is the applicant's parents marital status at the time the applicant's father naturalized and prior to his 18<sup>th</sup> birthday, not a recently obtained order retroactively creating the required legal separation. *Id.* (stating that "both the language of [section 321(a)] and its apparent underlying rationale suggest that Congress was concerned with

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<sup>2</sup> The AAO is also not persuaded that the Maintenance Act, 2005 retroactively applies to the applicant's parents' cohabitation.

the legal custody status of the child *at the time* that the parent was naturalized and during the minority of the child”(emphasis in original).

The AAO finds that the applicant has failed to establish his parents “legal separation” as required by former section 321(a)(3) of the 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.

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 his burden and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.