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U.S. Citizenship
and Immigration
Services

E₂



FILE:



Office: BOSTON, MA

Date:

NOV 13 2008

IN RE:

Applicant:



APPLICATION:

Application for Certificate of Citizenship under Section 321(a)(3) of the
Immigration and Nationality Act; 8 U.S.C. § 1432(a)(3), now repealed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 Field Office Director, Boston, Massachusetts 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 November 21, 1975 in the Dominican Republic. The applicant's natural father, [REDACTED], became a naturalized U.S. citizen on February 6, 1985, when the applicant was nine years of age. The applicant's mother, [REDACTED], became a U.S. citizen on July 7, 2003, when the applicant was 27 years old. The applicant's parents never married. The applicant was admitted to the United States as a lawful permanent resident on May 28, 1979, when he was three years of age. He seeks a certificate of citizenship based on the claim that he acquired U.S. citizenship through his father's naturalization.

The field office director considered the applicant's claim to citizenship under former sections 321 and 322 of the Act. She denied the Form N-600, Application for Certificate of Citizenship, because she found that the record did not establish that [REDACTED] had had legal custody of the applicant at the time of his naturalization, as required by former section 321 of the Act, and that he had not completed all of the eligibility requirements for citizenship prior to his 18th birthday, as required by former section 322. *Decision of the Field Office Director*, dated July 22, 2008.

On appeal, the applicant, through counsel, contends that his submission of a Dominican guardianship document, signed by [REDACTED] on April 30, 1978, establishes the separation of his parents and his transfer to his father's custody. *Counsel's brief*, dated August 8, 2008.

The section of law under which the applicant must establish his eligibility for a certificate of citizenship is former section 321 of the Act, repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001.¹ However, any person who would have automatically acquired citizenship under the provisions of section 321 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 demonstrated that he acquired U.S. citizenship under the provisions of section 321 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

¹ The CCA benefited all persons who had not yet reached their 18th birthdays as of February 27, 2001. Because the applicant was 25 years old on February 27, 2001, he does not meet the age requirement for benefits under the CCA.

(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.

Guidance issued by the former Immigration and Naturalization Service on February 18, 1997 states the following regarding former section 321(a) requirements:

Section 321(a) of the Act provides for acquisition of citizenship of a minor upon the naturalization of both his/her parent(s) (or the surviving parent or the parent with legal custody) provided certain conditions are satisfied. There is no specific order in which the conditions of the law must be satisfied for citizenship as long as all conditions are satisfied before the child's 18th birthday.

The record establishes that both of the applicant's parents are naturalized citizens of the United States, but that only [REDACTED]; naturalization took place prior to the applicant's 18th birthday. Therefore, the applicant's claim to citizenship must be based on his father's 1985 naturalization and he must prove that prior to the date of his 18th birthday, November 21, 1993, he was a lawful permanent resident in the custody of his father following the legal separation of his parents, the requirements of section 321(a)(3) of the Act. As the applicant's admission to the United States as a lawful permanent resident occurred in 1979 when he was only three years of age, the only remaining proof required of the applicant is that he was in his father's custody following [REDACTED]'s legal separation from [REDACTED].

While the AAO notes counsel's assertions on appeal regarding the proof of custody and separation offered by custody/guardianship document signed by [REDACTED] on April 30, 1978, it finds his claims to be unpersuasive. Turning first to the issue of legal separation, the AAO observes that the Board of Immigration Appeals (BIA) states clearly 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, Morgan v. Attorney General*, 432 F.3d 226 (3d Cir. 2005); *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").



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As the applicant's parents in the present matter never married, the applicant cannot demonstrate that, prior to his 18th birthday, they had obtained the divorce or other legal separation necessary to satisfy the requirements of section 321(a)(3) of the Act. Therefore, the record does not establish that the applicant is eligible for a certificate of citizenship based on the naturalization of his father. In the absence of a legal separation of the applicant's parents, the AAO will not consider the issue of the applicant's custody prior to his 18th birthday as it finds no useful purpose would be served.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.