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

ER



FILE: [REDACTED] Office: PHILADELPHIA, PA Date: NOV 25 2008

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship pursuant to Section 320 of the Nationality Act,
8 U.S.C. § 1431

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 "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office 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 [REDACTED] in Jamaica. The applicant's father, [REDACTED], also born in Jamaica, became a naturalized U.S. citizen on June 14, 2000, when the applicant was 14 years old. The applicant's mother, [REDACTED] was a citizen of Jamaica at the time of her birth and the record does not indicate that she has acquired another nationality. The applicant's parents never married. The applicant was admitted to the United States as a lawful permanent resident on March 2, 1992, when she was six years old. She seeks a certificate of citizenship pursuant to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431 based on her father's naturalization.

The field office director, noting the applicant's out of wedlock birth, found that the applicant had failed to establish that she had been legitimated under the laws of Jamaica, and, therefore, had failed to establish eligibility for derivative citizenship under section 320 of the Act. The field operations director denied the application accordingly. *Decision of the Field Operations Director*, dated July 20, 2008.

On appeal, the applicant asserts that she has been in the physical and legal custody of [REDACTED] since they were admitted to the United States on March 2, 1992. She asks if her biological relationship to [REDACTED] and the fact that she has been in his custody since she was a child is not sufficient to establish her legitimation. *Applicant's letter*, dated August 10, 2008.

Section 320 of the Act was amended by the Child Citizenship Act of 2000 (CCA), and took effect on [REDACTED]. The CCA benefits all persons who had not reached their 18th birthdays as of [REDACTED]. Because the applicant was only 15 years old on [REDACTED] she meets the age requirement for benefits under the CCA.

Section 320 of the Act states in pertinent part that:

- (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
 - (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
 - (2) The child is under the age of eighteen years.
 - (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

The AAO turns first to the question of whether the record establishes the applicant as a child for the purposes of section 320 of the Act.

To qualify as a child under section 320 of the Act, the regulation at 8 C.F.R. 320.1 requires an applicant to meet the definition of child set forth in section 101(c)(1) of the Act, which states that for Title III naturalization and citizenship purposes:

The term "child" means an unmarried person under twenty-one years of age and includes a child 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 or adoption takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

As a child born out of wedlock, the applicant must, therefore, demonstrate that she was legitimated by Mr. [REDACTED] in Jamaica or the State of New York, [REDACTED] domicile, if she is to be deemed a child for the purposes of section 320(a) of the Act.

Pursuant to Article 3, section 24 of New York domestic relations law, the parents of a child born out of wedlock must marry in order to legitimate that child. *See Matter of Vizcaino*, 19 I&N Dec. 644 (BIA 1988); *see also Matter of Bullen*, 16 I&N Dec. 378 (BIA 1977); *Matter of Archer*, 10 I&N Dec. 92 (BIA 1962). The record, however, contains no evidence to prove that the applicant's parents ever married. Accordingly, the record does not establish that the applicant has been legitimated under the laws of New York .

The record also fails to prove that she has been legitimated under Jamaican law. In *Matter of Shawn Theodore Hines*, 24 I&N Dec. 544 (BIA 2008), the Board of Immigration Appeals held that the sole means of legitimating a child born out of wedlock in Jamaica is the marriage of that child's natural parents. The BIA's decision in *Hines* overruled *Matter of Clahar*, 18 I&N Dec. 1 (BIA 1981) under which a child subject to the 1976 Jamaican Status of Children Act (SCA) was determined to be legitimate. The AAO is bound by the BIA's recent precedent and must conclude that the applicant, whose parents never married, has not been legitimated under Jamaican law and, therefore, may not be classified as a child under section 101(c)(1) of the Act. As the applicant has not established that she meets the definition of a child under section 101(c)(1) of the Act, she is not a child for the purposes of section 320 of the Act and is not eligible to receive a certificate of citizenship based on the naturalization of her father.

The AAO also notes that the applicant is unable to establish eligibility for citizenship under former section 321(a) of the Act. Although this section of law was repealed by the CCA, any person who would have automatically acquired citizenship under the provisions of section 321 prior to [REDACTED] may apply for a certificate of citizenship at any time. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Former section 321 stated 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

(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.

As the applicant is seeking a certificate of citizenship based on her father's naturalization and her parents never married to legitimate her, the applicant, as previously discussed, cannot establish that she meet the definition of child for the purposes of former section 321 of the Act. Further, the fact that applicant's parents never married prevents the applicant from demonstrating that she was in the legal custody of her father following his legal separation from her mother prior to the applicant's 18th birthday, as required by former section 321(a)(3) of the Act, the subsection under which the applicant must establish her eligibility for citizenship. The AAO notes that the Board of Immigration Appeals in *Matter of H*, 3 I&N Dec. 742 (1949) held that "legal separation" means either a limited or absolute divorce obtained through judicial proceedings. However, a limited or absolute divorce, or other formal separation cannot be obtained by a couple who 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 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 applicant is also ineligible for a certificate of citizenship under former section 322 of the Act, which provided:

(a) A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, ["Secretary"]] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [Secretary] that the following conditions have been fulfilled:

- (1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- (2) The child is physically present in the United States pursuant to a lawful admission.
- (3) The child is under the age of 18 years and in the legal custody of the citizen parent.

(b) Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this chapter of an

applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

Whether or not an applicant satisfies the requirements set forth in former section 322(a) of the Act, section 322(b) required that an applicant also establish that his or her application for citizenship was approved by Citizenship and Immigration Service (CIS) prior to the applicant's eighteenth birthday, and that the applicant had also taken an oath of allegiance prior to turning 18 years of age. In the present case, the applicant has not met the requirements set forth in former section 322(b) of the Act as CIS did not approve her certificate of citizenship application before she turned 18 years of age on October 28, 2003 and she did not take an oath of allegiance prior to that date.

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). As previously noted, 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.