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U.S. Citizenship
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Services

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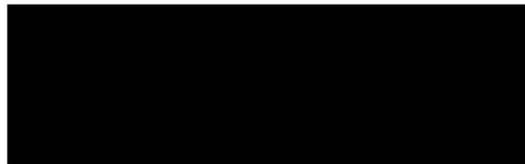


FILE: [Redacted] Office: PHILADELPHIA, PA Date: OCT 17 2008

IN RE: Applicant: [Redacted]

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Immigration and Nationality Act; 8 U.S.C. § 1432(a)(3), now repealed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.

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 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 September 2, 1982 in Saint Vincent and the Grenadines. The applicant's natural father, [REDACTED], became a naturalized U.S. citizen on October 1, 1996, when the applicant was 14 years of age. The applicant's mother, [REDACTED], who was a citizen of St. Vincent and the Grenadines at the time of the applicant's birth, now resides in Holland. The applicant's parents did not marry. The applicant was admitted to the United States as a lawful permanent resident on April 17, 2000, when he was 17 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 section 321(a) of the Act and denied the Form N-600, Application for Certificate of Citizenship, because she found that the record failed to establish [REDACTED] as the applicant's biological father, that the applicant had been legitimated by [REDACTED] under the laws of the State of New York or of Saint Vincent and the Grenadines, or that the applicant was in [REDACTED]'s legal custody at the time of legitimation. She denied the application accordingly. *Decision of the Field Office Director*, dated June 27, 2008.

On appeal, the applicant, through counsel, contends that Citizenship and Immigration Services (CIS) erred in denying the Form I-600. *Form I-290B*, dated July 29, 2008. To support his claim to citizenship, the applicant submits a brief and copies of his birth certificate, certified on July 11, 2008; his Permanent Resident Card; statements from [REDACTED] and [REDACTED] regarding [REDACTED]'s custody of the applicant; a May 28, 2008 letter issued by the Consul General at the Consulate General of Saint Vincent and the Grenadines in New York, which indicates that parental custody may be assumed without a court order under the laws of Saint Vincent and the Grenadines; Chapter 180 (Status of Children Act) of the Laws of Saint Vincent and the Grenadines, in force as of January 1, 1991; a July 15, 2008 letter from the Caribbean International Law Firm identifying the parents of the applicant as [REDACTED] and [REDACTED]; and Section 4-1.2 of the New York Estates, Powers and Trusts Law.

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 established 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:

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

(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 seeks a certificate of citizenship based on the 1990 naturalization of his father, he must establish his eligibility under the third criterion of former section 321(a) of the Act – the naturalization of the parent having legal custody of the child when there has been a legal separation of the parents. Guidance issued by the legacy Immigration and Naturalization Service (now CIS) on February 18, 1997² provides the following discussion of 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.

Accordingly, to establish eligibility for citizenship under the language of former section 321(a)(3) of the Act, the applicant must prove that prior to the date of his 18th birthday, September 2, 2000, his father had become a U.S. citizen, and that he was living in the United States as a lawful permanent resident in the legal custody of his father subsequent to the legal separation of his parents.

The record establishes that the applicant was less than 18 years of age at the time of his father's 1996 naturalization and his own adjustment to lawful permanent resident status on April 17, 2000. However, as the applicant's parents were never legally married, he 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.

² Memorandum from Terrance M. O'Reilly, Acting Assistant Commissioner, Naturalization Division, Immigration and Naturalization Service, *Section 321(a) of the INA*, HQ321 (February 18, 1997).

The AAO notes that the Board of Immigration Appeals (BIA) stated 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”).

While the AAO acknowledges the applicant’s submission of evidence to establish [REDACTED] as his natural father, as well as his legitimation under the laws of New York state and Saint Vincent and the Grenadines, it concludes that no purpose would served by considering whether the record establishes the applicant as a child for the purposes of section 321 of the Act. As the record has failed to demonstrate that the applicant is eligible for a certificate of citizenship under section 321(a)(3) of the Act, the AAO need not determine whether he falls within the definition of child set forth in section 101(c) 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.