



U.S. Citizenship
and Immigration
Services

E2

FILE: [REDACTED] Office: BOSTON Date: DEC 03 2009

IN RE: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under Section 321 of the former Immigration and Nationality Act; 8 U.S.C. § 1432 (1980).

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Boston Field Office Director and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record shows that the applicant was born on September 11, 1980 in Jamaica. The applicant's birth certificate identifies his father as [REDACTED] and his mother as [REDACTED]. The applicant's parents never married each other. The applicant was admitted to the United States as a lawful permanent resident on June 3, 1994, at the age of 13. The applicant's father became a naturalized U.S. citizen on November 2, 1998 when the applicant was 18 years old. The applicant seeks a certificate of citizenship under section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432 (1980), claiming that he derived citizenship through his father.

The director determined that the applicant did not qualify for citizenship under section 321 of the former Act because his father naturalized after the applicant turned 18. On appeal, counsel asserts that the applicant's father would have naturalized before the applicant's eighteenth birthday but for scheduling delays of the former Immigration and Naturalization Service. *Brief in Support of Appeal* at 2. Counsel further claims that the applicant was in his father's legal custody from the time of his admission to the United States in 1994. *Id.* at 3-4. Counsel's claims and the evidence submitted on appeal fail to establish the applicant's eligibility for citizenship.

Although subsequent amendments to the Act have changed the requirements for transmitting citizenship from a parent to a child, the law in effect at the time of the applicant's birth applies in this case. *See Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir. 2000). The applicant was born in 1980. Section 321 of the former Act is therefore applicable to his case.

Section 321(a) of the former Act, 8 U.S.C. § 1432(a) (1980), provided, in pertinent part, that:

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 such child is under the age of eighteen 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 eighteen years.

The record shows that the applicant's biological mother is alive, remains in Jamaica and is not a citizen of the United States. Accordingly, the applicant does not meet the requirements set forth in sections 321(a)(1), (2) and (4) because both of his parents are alive and neither parent naturalized before his eighteenth birthday.

Counsel asserts that were it not for administrative delay, the applicant's father would have naturalized before his eighteenth birthday. The applicant's father states that he passed the citizenship exam "prior to" the applicant's eighteenth birthday, but "due to circumstances beyond [his] control, [his] actual swearing in was delayed." *Affidavit of [REDACTED]* at 1. The applicant's father does not state the approximate date he filed his application for naturalization, the amount of time that passed between his interview and his oath ceremony, or any other detailed information to support his claim that his naturalization was unduly delayed.

Even if the applicant's father's naturalization was delayed, the AAO lacks authority to apply the doctrine of equitable estoppel. The AAO, like the Board of Immigration Appeals, is "without authority to apply the doctrine of equitable estoppel against the Service [USCIS] so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation." *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991). The jurisdiction of the AAO is limited to that authority specifically granted through the regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on Feb. 28, 2003) and subsequent amendments.

The applicant also has not met the requirements of section 321(a)(3) of the former Act because his parents were never married,¹ and therefore never legally separated. Section 321(a)(3) of the former Act provides that an applicant born out of wedlock whose paternity has been established may derive citizenship through the father only when the father had legal custody of the applicant and "there has been a legal separation of the parents." Section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3) (1980).

Counsel claims that the applicant derived citizenship through his father because he was in his father's legal custody when he entered the United States on the basis of an approved immediate relative petition filed by his step-mother and thereafter resided with his father. *Brief in Support of Appeal* at 2. Counsel nonetheless concedes that numerous federal courts of appeal have held that children born to parents who never marry each other cannot derive citizenship under section 321(a) of the former Act because there is no "legal separation" of the parents in that situation. *Id.* at 3.

¹ The record contains ample evidence that the applicant's biological parents never married each other. See *February 12, 1992 Letter of [REDACTED]* (stating that she and the applicant's father "were not married at the time of our son's birth"); *Affidavit of [REDACTED]* dated November 12, 2009 (stating "I was never married to my son's mother"); and Form N-600, noting that the applicant stated that his biological parents "never married" (annotated at the applicant's interview on Sept. 17, 2009).

The term “legal separation,” as used in section 321(a)(3) of the former Act, means either a limited or absolute divorce obtained through judicial proceedings. *See Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001); *Matter of H*, 3 I&N Dec. 742, 743-44 (1949). If an applicant’s parents were never married to each other, they could not have obtained a legal separation. *Matter of H*, 3 I&N Dec. at 744. *See also Lewis v. Gonzales*, 481 F.3d 125, 130 (2nd Cir. 2007) (listing cases and noting that “every other court confronted with the question has held that the first clause of § [321](a)(3) requires a legal separation even if the child's parents never married”); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003); *Wedderburn v. I.N.S.*, 215 F.3d 795, 799-800 (7th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

A person may only obtain citizenship in strict compliance with the statutory requirements imposed by Congress. *INS v. Pangilinan*, 486 U.S. 875, 885 (1988). *See also Fedorenko v United States*, 449 U.S. 490, 506 (1981) (“[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.”). In this case, the applicant has failed to establish his parents’ naturalization prior to his eighteenth birthday or their “legal separation,” as required by section 321(a)(1), (3) and (4) of the former Act. The applicant therefore has not derived citizenship through his father under section 321(a) of the former Act.

In derivative citizenship proceedings, the applicant bears the burden of proof to establish his eligibility by a preponderance of the evidence. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001). The applicant in the present case has not met his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.