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U.S. Citizenship
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Services

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JAN 22 2009

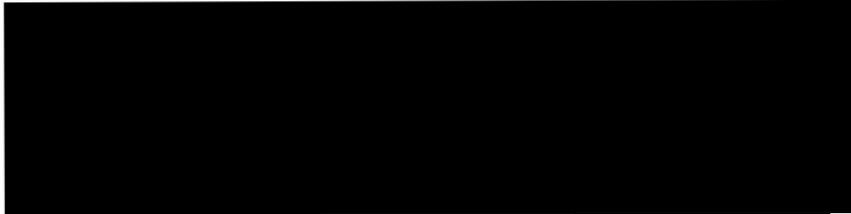
IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship pursuant to Section 321(a)(3) of the Nationality Act, 8 U.S.C. § 1432(a)(2), now repealed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.

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).

John F. Grissom, Acting 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 August 22, 1973 in Jamaica. The applicant's father, [REDACTED], became a naturalized U.S. citizen on February 16, 1990, when the applicant was 16 years old. The applicant's mother, [REDACTED], naturalized on January 12, 1995, when the applicant was 21 years of age. The applicant's parents married on December 30, 1972. The applicant acquired lawful permanent resident status on August 11, 1989 at the age of 15 years. The applicant seeks a certificate of citizenship pursuant to former section 321(a)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432(a)(3), based on his father's naturalization.

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001. However, any person who would have acquired automatic citizenship under its provisions 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 record establishes that the applicant acquired U.S. citizenship under the provisions of section 321(a)(3) 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
- (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.

The field office director denied the applicant's Form N-600s, Application for Certificate of Citizenship, filed on November 29 1996 and May 5, 2008, based on her finding that he had failed to meet the requirements of former sections 321(a)(3) and 322(a) of the Act. She specifically noted that until such time as the applicant's parents were divorced, they had been physically, rather than legally, separated and that with their legal separation, legal custody had been granted to [REDACTED] who did not naturalize until the applicant was 21 years of age.

On appeal, counsel contends that, pursuant to section 321(a)(3), the applicant acquired U.S. citizenship through the naturalization of his father on February 16, 1990. Counsel asserts that on the day that [REDACTED] became a U.S. citizen, he was legally separated from [REDACTED] based on her complaint for divorce filed in 1989, as "it is clear that, once a complaint for divorce has been filed by either or both spouses, those spouses are 'legally separated'." He further asserts that while [REDACTED] divorce complaint was pending, she and [REDACTED] shared legal custody of the applicant, thereby giving [REDACTED] legal custody of the applicant at the time he became a U.S. citizen. In support of his claims, counsel provides an affidavit, dated April 30, 2008, in which he attests that under Massachusetts law, a married couple is not required to obtain a court order to legally live apart and that there is no complaint or petition for separation within Massachusetts state law. He submits copies of pages from Title III, the General Laws of Massachusetts, Chapter 208, section 31 which establish that, in Massachusetts divorce proceedings, parents will generally share legal custody of any minor children until a judgment on the divorce petition is reached. The record also contains copies of [REDACTED]'s divorce complaint, docketed December 5, 1989 and Judgment of Divorce Nisi, dated May 18, 1990.¹

The AAO now turns to a consideration of the applicant's eligibility for citizenship under former section 321(a)(3) of the Act, based on the naturalization of his father on February 16, 1990.

The record establishes that the applicant was admitted to the United States as a lawful permanent resident at the age of 15 years and that his father became a U.S. citizen when he was 16 years of age. The only remaining issues to be considered by the AAO are whether prior to the applicant's 18th birthday, he was in the legal custody of his father, subsequent to [REDACTED]'s legal separation from the applicant's mother.

For immigration purposes, "legal separation" has been clearly defined as a "limited or absolute divorce obtained through judicial proceedings." See *Matter of H*, 3 I&N Dec. 742 (1949) (Quotations omitted). In *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001), the court found legal separation under former section 321(a)(3) of the Act to be "uniformly understood to mean *judicial* separation." In its decision, the 5th Circuit rejected the premise that any voluntary separation under legal circumstances would suffice and concluded that "Congress clearly intended that the naturalization of only one parent would result in the automatic naturalization of an alien child only when there has been a formal judicial alteration of the marital relationship." In the present matter, the marital relationship

¹ The AAO notes that a divorce nisi is not sufficient to establish the final termination of a marriage. The judgment of divorce nisi in the record indicates that the divorce of the applicant's parents will become final in 90 days, as long as no applications are filed within the 90-day period or the court has determined otherwise. However, in the present case, the AAO finds the judgment sufficient for the purposes of establishing a legal separation of the applicant's parents.

of the applicant's parents was not altered as a result of a judicial proceeding until the 1990, at which time, sole legal and physical custody of the applicant was awarded to [REDACTED]. Accordingly, the record does not establish that applicant was in the legal custody of his father following the legal separation of his parents and he has failed to establish eligibility for a certificate of citizenship under section 321(a)(3) 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 and the appeal will be dismissed.

ORDER: The appeal is dismissed.