



U.S. Citizenship
and Immigration
Services

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FILE:

Office: HARLINGEN, TX

Date:

NOV 11 2009

IN RE:

Applicant:

APPLICATION:

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

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Acting Field Office Director, Harlingen, Texas 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 August 19, 1979 in Antigua. 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 December 23, 1991, at the age of 12. The applicant's father became a naturalized U.S. citizen on August 3, 1995, when the applicant was 15 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 (1979), 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, 8 U.S.C. § 1432, because his parents were never "legally separated." On appeal, counsel asserts that the director erroneously focused on legal separation "when the key element of transmission of citizenship from USC father to son is legal custody." *Applicant's Appeal Brief* at 3. Counsel then claims that the applicant was in his father's legal custody from the time he began to live with his father in the United States. *Id.* at 3-4. However, counsel fails to demonstrate that the applicant met all the requirements to derive citizenship from his father under section 321 of the former Act.

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 1979. 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) (1979), 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 mother is alive and became a naturalized citizen of the United States on June 30, 2000, when the applicant was 20 years old. Accordingly, the applicant does not meet the requirements set forth in sections 321(a)(1) and (2) because both of his parents are alive and only one of his parents naturalized before he turned 18.

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 for whom paternity has been established may derive citizenship through one parent only when that parent 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) (1979). Contrary to counsel's claim, legal custody alone is not sufficient to transmit citizenship.

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. *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 *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").

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' "legal separation," as required by section 321(a)(3) of the former Act. The applicant therefore does not qualify for citizenship under section 321 of the former Act and we do not reach the issue of whether or not the applicant was in his father's legal custody prior to his eighteenth birthday.

The applicant bears the burden of proof in these proceedings to establish the claimed citizenship by a preponderance of the evidence. 8 C.F.R. § 341.2(c). The applicant in the present case has not met his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.

¹ The record contains ample evidence that the applicant's biological parents never married each other. See *Declaration and Letter of* [REDACTED] respectively dated November 13, 1991 and November 14, 2008; *Declaration of* [REDACTED] dated November 14, 2008; and *Affidavit of* [REDACTED], *Administer of the High Court of Justice in Saint John, Antigua*, dated June 5, 2008.