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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEW YORK, NY Date: FEB 25 2010

IN RE: [redacted]

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:

[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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, New York, New York. 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 March 15, 1973 in the Dominican Republic. The applicant's father, [redacted], became a U.S. citizen upon his naturalization on February 8, 1989, when the applicant was 15 years old. The applicant's mother is not a U.S. citizen. The applicant's parents were never married to each other. The applicant was admitted to the United States as a lawful permanent resident on November 14, 1990, when he was 17 years old. The applicant presently seeks a Certificate of Citizenship pursuant to section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432 (repealed).

The district director determined that the applicant could not derive U.S. citizenship through his father, because section 321 of the former Act only allows for derivation through the mother's naturalization in the case of child born out of wedlock. The director further noted that the applicant was not legitimated under the applicable Dominican law. Finally, the director noted that the applicant was ineligible for benefits under the Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), because he was over the age of 18 on its effective date. The application was accordingly denied.

On appeal, the applicant maintains that he was legitimated by his father, that he was in his father's custody, and that there was a legal separation between his parents under New York law. *See* Statement of Applicant on Form I-290B, Notice of Appeal to the AAO.

The CCA, which took effect on February 27, 2001, amended sections 320 and 322 of the Act, and repealed section 321 of the Act. The provisions of the CCA are not retroactive, and the amended provisions of section 320 and 322 of the Act apply only to persons who were not yet 18 years old as of February 27, 2001. Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. *See Matter of Rodriguez-Tejedor,* 23 I&N Dec. 153 (BIA 2001). Section 321 of the former Act, 8 U.S.C. § 1432 (repealed), is therefore applicable in this case.

Section 321 of the former Act, 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.

8 U.S.C. § 1431 (emphasis added).

The AAO notes that the applicant was born out of wedlock. The plain language of section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3), allows for derivation of U.S. citizenship by a child born out of wedlock only through a naturalizing mother (when paternity has not been established by legitimation).

The AAO notes the Second Circuit's decision in *Lewis v. Gonzales*, 481 F.3d 125, 130 (2nd Cir. 2007) where the court emphasized that "because the second clause of § 1432(a)(3) explicitly provides for the circumstance in which 'the child was born out of wedlock,' we cannot interpret the first clause to silently recognize the same circumstance . . . ." Although the issue in the *Lewis* case was whether the parents had legally separated, the analysis and logic remain the same. Where the second clause of section 321(a)(3) explicitly provides for the mechanism for derivation of U.S. citizenship when a child is born out of wedlock, the first clause cannot be read to provide a way around the listed requirements.

The applicant maintains that his parents were legally separated and that, as the legitimate child of a U.S. citizen, he could derive U.S. citizenship through his father. The applicant concedes that his parents were never married. *See* Form N-600, Application for Certificate of Citizenship; *see also* Statement of the Applicant on Form I-290B, Notice of Appeal to the AAO. The term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings. *Matter of H*, 3 I&N Dec. 742 (1949); *see also 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 because the child's parents were never married and therefore never legally separated); *see also Lewis, supra.* As the applicant cannot establish that there was a legal separation between his parents, the AAO need not address whether he was legitimated or whether he was in his father's custody.

"There 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(c) 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." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The AAO finds that the applicant has not met his burden of proof, and his appeal will be dismissed.

ORDER: The appeal is dismissed.