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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

PUBLIC COPY

[Redacted]

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FILE:

[Redacted]

Office: BOSTON, MA

Date:

JAN 05 2011

IN RE:

Applicant:

[Redacted]

APPLICATION:

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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Boston, Massachusetts. 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 November 3, 1977 in Jamaica. The applicant's birth certificate lists [REDACTED] as the applicant's mother. The applicant's father, [REDACTED] is not listed on his birth certificate. The applicant's parents were married in 1983. The applicant's mother became a U.S. citizen upon her naturalization on July 23, 1995, when the applicant was 17 years old. The applicant and his father were admitted to the United States as lawful permanent residents in 1985. The applicant presently seeks a certificate of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (repealed).

The field office director determined that the applicant could not derive U.S. citizenship under former section 321 of the Act because his parents were not "legally separated." The application was accordingly denied.

On appeal, the applicant, through counsel, maintains that his parents were "legally separated" as evidenced by a child support document and his mother's affidavit stating that she filed for a restraining order against the applicant's father. See Statement of the Applicant on Form I-290B, Notice of Appeal to the AAO. Counsel cites *Brisset v. Ashcroft*, 363 F.3d 130 (2nd Cir. 2004) and an AAO decision in another case in support of her argument that "legal separation" does not require a judicial order. See Statement in Support of Form I-290B (Notice of Appeal or Motion).

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). The Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), 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). Former section 321 of the Act is therefore applicable in this case.

Former section 321 of the 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 (1) of this subsection, or the parent 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.

Pursuant to former section 321 of the Act, citizenship may be derived solely through one parent only when the other parent is deceased, where the child was born out of wedlock and paternity was not established by legitimation, or through the parent having custody of the applicant when there has been a legal separation of the parents. *See Nehme v. INS*, 252 F.3d 415, 425-26 (5th Cir. 2001) (recognizing that requiring the naturalization of both parents, when the parents were married, “was necessary to promote the child from being separated from an alien parent who has a legal right to custody”); *see also Wedderburn v. INS*, 215 F.3d 795, 800 (7th Cir. 2000) (explaining that “Congress rationally could conclude that as long as the marriage continues the citizenship of children should not change *automatically* with the citizenship of a single parent”) (emphasis in original).

The record indicates that the applicant obtained lawful permanent residency in 1985 and that his mother naturalized in 1995, prior to his eighteenth birthday. The applicant’s father is not deceased and is not a U.S. citizen, consequently the applicant did not derive citizenship under subsections (1) or (2) of former section 321 of the Act. Further, although the applicant was born out of wedlock, his paternity was established through legitimation when his parents married in Jamaica in 1983. The applicant therefore did not derive U.S. citizenship solely through his mother as an out of wedlock child. Lastly, because the applicant’s parents were married in 1983 and not “legally separated,” the applicant did not derive U.S. citizenship under the first clause of former section 321(a)(3) of the Act. The Board of Immigration Appeals (the Board) stated clearly in *Matter of H*, 3 I&N Dec. 742 (BIA 1949), that “legal separation” means either a limited or absolute divorce obtained through judicial proceedings. *See also, Nehme, supra*. A married couple, even when living apart with no plans of reconciliation, is not legally separated. *Matter of Mowrer*, 17 I&N Dec. 613, 615 (BIA 1981). A privately-executed separation agreement made between the applicant’s parents does not qualify as a “legal separation” under section 321(a)(3) of the former Act. *Afeta v. Gonzales*, 467 F.3d 402, 407 (4th Cir. 2006).

“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 burden of proof in citizenship cases is on the claimant to establish the claimed citizenship by a preponderance of the evidence. See Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant has not met his burden of proof, and his appeal will be dismissed.

ORDER: The appeal is dismissed.