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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE [REDACTED]

Office: Philadelphia

Date:

APR 18 2001

IN RE: Applicant:



APPLICATION:

Application for Certificate of Citizenship under § 341(a) of the
Immigration and Nationality Act, 8 U.S.C. 1452(a)

IN BEHALF OF APPLICANT:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting District Director, Philadelphia, Pennsylvania, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on November 26, 1952, in Santo Domingo, Dominican Republic. The applicant's father, [REDACTED] was born in the Dominican Republic in April 1907 and became a naturalized U.S. citizen on May 20, 1963. The applicant's mother, [REDACTED] was born in the Dominican Republic and became a naturalized United States citizen on January 15, 1993. The applicant's parents never married each other. The applicant was lawfully admitted for permanent residence on February 25, 1958 to join his father. The applicant claims eligibility for a certificate of citizenship under § 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432.

The acting district director determined that the applicant failed to derive U.S. citizenship as his mother became a U.S. citizen after the applicant's 18th birthday, his parents were never married to each other and thereafter became legally separated or divorced with legal custody being accorded to the citizen parent. The acting district director then denied the application accordingly.

On appeal, counsel states that the acting director's decision is a violation of the mandate of the decision in Lake v. Reno, 226 F.3d 141 (2nd Cir. 2000). Counsel states that the applicant is a resident of the State of New York and the decision in Lake is governing.

In Lake, the applicant was born in Jamaica in 1953 to a U.S. citizen father and an alien mother. The applicant's parents never married. The applicant in that matter was claiming U.S. citizenship at birth under former § 301(a)(7) of the Act (now codified as § 301(g)) on the basis that his father was a U.S. citizen at the time of his birth and who had met the residency requirement. The immigration judge determined that the applicant failed to acquire U.S. citizenship at birth under § 309 of the Act, 8 U.S.C. 1409, as a child born out of wedlock whose father had failed to establish the child's paternity prior to the child's 21st birthday. The circuit court determined in Lake that, the gender-based distinction mandated by § 309 of the Act violated the right to equal protection under the Fifth Amendment and that the applicant was a U.S. citizen at birth under §301(a)(7) of the Act.

The present matter differs from Lake because the present applicant's parents were both aliens when the applicant was born. Therefore, neither § 301 nor § 309 of the Act can be applied to the present situation because the U.S. citizen parent must have been a citizen at the time of the child's birth. The applicant's father, [REDACTED], did not become a naturalized U.S. citizen until the applicant was 10 years old.

Section 321. CHILD BORN OUTSIDE OF UNITED STATES OF ALIEN PARENT;
CONDITIONS UNDER WHICH CITIZENSHIP AUTOMATICALLY ACQUIRED

(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.

In Matter of Fuentes, 21 I&N Dec. 893 (BIA 1997), the Board stated the following: "Through subsequent discussions, [the interested agencies] have agreed on what we believe to be a more judicious interpretation of § 321(a). We now hold that, as long as all the conditions specified in § 321(a) are satisfied before the minor's 18th birthday, the order in which they occur is irrelevant."

A child born out of wedlock in the Dominican Republic is placed in the same legal position as one born in wedlock once the child has been acknowledged by the father in accordance with Dominican law and hence qualifies as a "legitimated" child under § 101(b)(1)(C) of the Act. See **Matter of Cabrera**, Interim Decision 3294 (BIA 1996). The Board also found that the father has met the legal custody requirement of § 101(b)(1)(C) of the Act as interpreted in **Matter of Rivers**, 17 I&N Dec. 419 (BIA 1980) holding that a natural father is presumed to have legal custody of his child at the time of legitimation in the absence of affirmative evidence indicating otherwise.

The record establishes that (1) the applicant's father became a naturalized U.S. citizen prior to the applicant's 18th birthday,

(2) the applicant was legitimated under Jamaican law, (3) he became the beneficiary of an approved visa petition filed by his father, and (4) he was residing in the United States in his father's legal custody as a lawful permanent resident when his father naturalized.

In order for the applicant to receive the benefits of § 321 of the Act, there must have been a legal separation of the parents. Matter of H--, 3 I&N Dec. 742 (C.O. 1949), held that the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings, and where the actual parents of the child were never lawfully married, there could be no "legal separation," of such parents. Therefore, the applicant's father was not legally separated from the applicant's mother when his father naturalized. If the parents were never lawfully married, there can be no legal separation, as such, and an award of custody to a naturalized parent under such circumstances does not result in derivation even though other requisite conditions are satisfied. See INTERP 320.1(a)(6).

There is no provision under the law by which the applicant could have automatically acquired U.S. citizenship through his father's naturalization. Therefore, the acting district director's decision will be affirmed. This decision is without prejudice to the applicant seeking U.S. citizenship through normal naturalization procedures.

ORDER: The appeal is dismissed.