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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: New York

Date:

APR 25 2001

IN RE: Applicant: [Redacted]

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 District Director, New York, New York, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant was born on October 25, 1983, in the Dominican Republic. The applicant's father, [REDACTED], was born in the Dominican Republic in 1962 and never became a U.S. citizen. The applicant's mother, [REDACTED], was born in the Dominican Republic in July 1965 and became a naturalized United States citizen in May 1997. The applicant's parents never married each other. The applicant was lawfully admitted for permanent residence on March 23, 1990. The applicant is seeking a certificate of citizenship under § 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1433.

The district director reviewed the record and concluded that the applicant had failed to establish she was in the full legal custody of her mother and denied the application accordingly.

On appeal, counsel discusses the history of the matter and submits a copy of a Notarial Act (affidavit) which is dated January 11, 1990, in which the applicant's natural father grants permission for the applicant's mother to conduct the necessary proceedings for the applicant and her brother to obtain U.S. residency and authorizes the children's mother to have custody of them in the United States.

Section 322(a) of the Act provides, in part, that: A parent who is a citizen of the United States may apply to the Attorney General for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General that the following conditions have been fulfilled:

- (1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- (2) The child is physically present in the United States pursuant to a lawful admission.
- (3) The child is under the age of 18 years and in the legal custody of the citizen parent.
- (4) If the citizen parent is an adoptive parent of the child, the child was adopted by the citizen parent before the child reached the age of 16 years and the child meets the requirements for being a child under subparagraph (E) or (F) of § 101(b)(1).
- (5) If the citizen parent has not been physically present in the United States or its outlying possessions for a period or periods totaling not less than 5 years, at least 2 of which were after attaining the age of 14 years-

(A) The child is residing permanently in the United States with the citizen parent, pursuant to a lawful admission for permanent residence, or

(B) A citizen parent of the citizen parent has been physically present in the United States or its outlying possessions for a period or periods totaling not less than 5 years, at least 2 of which were after attaining the age of 14 years.

(b) Upon approval of the application (which may be filed abroad) and, except as provided in the last sentence of § 337(a), upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

Sections 320 and 322 of the Act were amended by the Child Citizenship Act of 2000 (CCA), and took effect on February 27, 2001. Section 321 was repealed. The CCA benefits all persons who have not yet reached their 18th birthdays as of February 27, 2001. The applicant is still under 18 years of age. Pending N-600's filed pursuant to the old § 320, 321 or 322 which would not have been approvable under those laws should be adjudicated under the new law. Any office that becomes aware of an N-600 that has been properly denied under the old statute but would have been approved if filed on February 27, 2001, should reopen the application on a Service motion, without fee, and adjudicate pursuant to the new law.

New § 322 of the Act relates only to a child who is residing outside the United States in the legal and physical custody of the citizen parent. New § 320 of the Act relates to a child who is residing in the United States in the legal and physical custody of the citizen parent.

Section 320(a) of the Act provides that: A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

- (1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- (2) The child is under the age of 18 years.
- (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

(b) Subsection (a) shall apply to a child adopted by a United States citizen parent if the child satisfies the

requirements applicable to adopted children under section 101(b)(1).

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, 21 I&N Dec. 589 (BIA 1996).

The applicant in this matter was acknowledged by her father on November 13, 1989, under Dominican Republic law. The definition of legitimated child in § 101(c)(1) of the Act, not only requires that the child be legitimated, but also that the child be in the legal custody of the legitimating parent(s) at the time of such legitimation.

Although the applicant's immigrant visa is not present for review, the record reflects that the applicant and her mother entered the United States in 1990 as lawful permanent residents. The record is unclear whether the applicant was also in the legal custody of the legitimating parent on November 13, 1989. The record is also silent as to what classification the applicant, her brother and her mother were accorded on their immigrant visas.

Legal custody of a child as an element of derivation contained in the 1940 statute, and in the present law, may follow judicial proceedings which either terminate the marriage completely, as by absolute divorce, or which merely separate the parties without destroying the marital status. Generally, the question of legal custody may be determined by the law of a state or by the adjudication of a court, whether this be in proceedings relating to the termination of the marital relationship or in separate proceedings dealing solely with the question of the child's custody. In the absence of such determination, the parent having actual uncontested custody of the child is regarded as having the requisite "legal custody" for immigration purposes, provided that the required "legal separation" of the parents has taken place. See INTERP 320.1(a)(6).

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.

Since the applicant's parents never married each other, there cannot be a "legal separation" as required for immigration purposes in order to satisfy the "legal custody" requirement.

Although, the notarized statement signed by the applicant's parents on January 11, 1990, may have satisfied certain requirements necessary for the applicant to have been issued an immigrant visa, absent evidence to the contrary, it fails to satisfy the "legal custody" requirement of the statute.



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. The applicant has failed to meet that burden and the appeal will be dismissed.

This decision is without prejudice to the applicant's seeking U.S. citizenship through normal naturalization procedures by filing an Application for Naturalization on Form N-400 with a Service office having jurisdiction over her residence or providing evidence of eligibility under new § 320 of the Act.

ORDER: The appeal is dismissed.