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

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[redacted]

FILE: [redacted] Office: Baltimore Date: AUG 13 2001

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Section 338 of the Immigration and Nationality Act, 8 U.S.C. 1449

IN BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision 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 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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Baltimore, Maryland, 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 April 8, 1973, in India. The applicant's father, [redacted], was born in India in 1947 and became a naturalized United States citizen on May 19, 2000. The application for certificate of citizenship was filed on May 17, 1999. The applicant's mother, [redacted], was born in 1950 in India and became a naturalized United States citizen on October 25, 1985. The applicant's parents married each other on June 8, 1972. The applicant was lawfully admitted for permanent residence on May 5, 1980. The applicant claims eligibility for a certificate of citizenship under section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432.

The applicant's mother states that she and the applicant's father have been separated many times, both before and after she became a U.S. citizen. The mother indicates that after 1985 she was separated about two years and she supported the applicant. The district director determined the record failed to establish that there had been a legal separation of the applicant's parents and denied the application accordingly.

On appeal, counsel states that the State of Maryland affords no statutory recognition of "legal separation." Nevertheless, the applicant's mother had been in fact legally separated from the applicant's father, a non-citizen, prior to her naturalization in 1985 and continuing beyond the applicant's 18th birthday in 1991. Counsel asserts that, during this period, the applicant was continuously in the legal custody of his U.S. citizen mother. Counsel argues that, since the State of Maryland does not recognize "legal separation," the applicant's parents should not be precluded from being considered "legally separated" under the appropriate federal law.

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.

Prior to its repeal by section 103 of P.L. 106-395, section 321 of the Act provided, 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:
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> (1) The naturalization of both parents; or
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> (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 section 321(a). We now hold that, as long as all the conditions specified in section 321(a) are satisfied before the minor's 18th birthday, the order in which they occur is irrelevant."

The record establishes that (1) the applicant's mother became a naturalized U.S. citizen prior to the applicants 18th birthday and (2) the applicant was residing in the United States in his mother's legal custody as a lawful permanent resident when his mother naturalized.

However, in order for the applicant to receive the benefits of former section 321 of the Act, there must have been a legal separation of the parents. Matter of H--, supra, 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 mother

was not legally separated from the applicant's father when his mother naturalized.

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 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.