

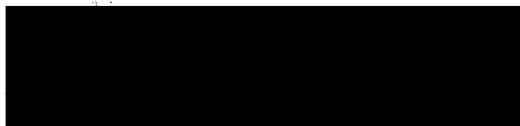


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U.S. Department of Justice
Immigration and Naturalization Service

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



15 AUG 2002

FILE: [Redacted] Office: Miami Date:

IN RE: Applicant: [Redacted]

APPLICATION: Application for Certificate of Citizenship under Section 321 of the
Immigration and Nationality Act, 8 U.S.C. 1432

IN BEHALF OF APPLICANT: Self-represented

Public Copy

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, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting District Director, Miami, Florida, 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 6, 1983, in Russia. The applicant's father, [REDACTED] was born in Russia in April 1958 and became a naturalized U.S. citizen on September 22, 1996. The applicant's mother, [REDACTED] was born in April 1951 in Russia and never became a United States citizen. The applicant's parents married each other in November 1982 and divorced in September 1988. The applicant was lawfully admitted for permanent residence on April 6, 2000. The applicant seeks a certificate of citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432.

The acting district director determined the record failed to establish that the applicant was in the legal and physical custody of the citizen parent. The acting district director then denied the application accordingly.

On appeal, the applicant states that he is a resident of the United States and his father is his legal guardian who has been supporting him since his arrival. The applicant states that his mother agreed that he will permanently live with his father in the United States. The record contains a notarized statement to that effect.

Section 321 of the Act was repealed by the Child Citizenship Act (CCA) of 2000, Pub.L. 106-395, which removed the legal separation requirement from the rules of derivative naturalization. The provision of the CCA became effective on February 27, 2001, and are not retroactive. Matter of Rodriguez-Trejedor, 23 I&N Dec. 153 (BIA 2001). However, as noted in the publication of the interim rule implementing the CCA, all persons who acquired citizenship automatically under former section 321 of the Act, as previously in force prior to February 27, 2001, may apply for a certificate of citizenship at any time.

Former section 321 of the Act provided, in 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.

The record establishes that (1) the applicant's father became a naturalized U.S. citizen on September 26, 1996, (2) the applicant was lawfully admitted for permanent residence on April 6, 2000, and (3) he was in the custody of the parent last naturalized while under the age of 18 years.

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.

INTERP. 322.2(c) states that "legal custody" contemplates a bona fide parent-child relationship and a family unit. The term "family unit" is not to be given a literal, narrow meaning which would deny the unit's existence merely because the parent-child relationship at some time lacked some single aspect of family living while, in other respects, the relationship was entirely consistent with the concept of a "family unit." Thus, a "family unit" may exist despite a showing that the child was not in the actual physical custody, or a member of the household, of the petitioning parent at all times, as where the child resided in the home of the parent's nephew while the parent was temporarily absent abroad for business or other legitimate purposes.

In cases where the divorce or separation decree does not specify who has custody and the naturalized parent has physical custody, the child will derive citizenship provided that all other conditions of the law are met. Section 321 does not require sole or exclusive legal custody. If the parents have joint custody, then both parents have legal custody and the naturalization of either parent would satisfy the requirements.

The record contains a copy of the parent's divorce decree in which the court awarded custody of the applicant and his sister to their mother, thereby establishing legal separation. However, the record fails to contain any legal documentation which repeals, modifies or overturns the decision granting legal custody of the applicant to his mother.

Therefore, the appeal will be dismissed. This decision is without prejudice to the applicant seeking U.S. citizenship through normal naturalization procedures.

ORDER: The appeal is dismissed.