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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



FILE: [Redacted]

Office: Buffalo

Date: 15 AUG 2002

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

The record reflects that the applicant was born on March 2, 1969, in the Panama Canal Zone. The applicant's father, [REDACTED] was born in the Panama Canal Zone in April 1950 and became a naturalized U.S. citizen on July 8, 1975. The applicant's mother, [REDACTED] was born in the Panama Canal Zone in November 1947 and became a naturalized United States citizen on May 15, 1990. The applicant's parents married each other on February 23, 1968, and divorced on March 19, 1980. The applicant was lawfully admitted for permanent residence on August 5, 1978. The applicant seeks a certificate of citizenship under section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432.

The district director determined the record failed to establish that the applicant was in the legal custody of his father and denied the application accordingly.

On appeal, the applicant disagrees with that decision and states that total custody by the father is not required in order to transmit citizenship.

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.

Section 321 of the Act was repealed on February 27, 2001. An applicant who was over the age of 18 on that date is ineligible to obtain the new benefits of the Child Citizenship Act (CCA) of 2000, Pub.L. 106-395, which allows for the naturalization of "at least one parent" to suffice while the child is under the age of 18.

Section 321 of the Act previously in effect 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:

- (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 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."

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.

The divorce decree in the record dated March 19, 1980, indicates that "there are no infant issue" of the parent's marriage, although this is untrue as there were three children born during that marriage. The applicant's mother states that she was not aware of her former husband's intentions when she consented to granting him

custody of the children for tax purposes and she did not know about the divorce until July 2001.

Matter of M-, 3 I&N Dec. 850 (C.O. 1950), held that in the absence of judicial determination or judicial or statutory grant of custody in the case of legal separation of the parent of a person claiming citizenship, the parent having actual uncontested custody is to be regarded as having "legal custody" of the person concerned for the purpose of determining that person's status. The legal custody will be presumed to be in the parent having actual custody.

In cases where the divorce or separation decree does not specify who has custody and if 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 applicant's mother states that all three children spent time with their father at least two days every week, after their separation in 1980, and they were claimed by the father as dependents for income tax purposes.

The record establishes that (1) the applicant's father became a naturalized U.S. citizen in July 1975 prior to the applicant's 18th birthday, (2) the applicant thereafter began to reside permanently in the United States in August 1978 while under the age of 18 years as the beneficiary of a visa petition filed by his U.S. citizen father, and (3) he was in the "joint" physical custody of his parents on March 19, 1980, when his parent's marriage was terminated.

It is concluded that the applicant satisfied the requirements of section 321 of the Act prior to his 18th birthday. Therefore, the district director's decision will be withdrawn, and the application will be approved.

ORDER: The appeal is sustained. The district director's decision is withdrawn, and the application is approved.