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U.S. Department of Justice  
Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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



FILE: [Redacted] Office: Miami Date: AUG 16 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, 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 April 21, 1984, in Colombia. The applicant's father, [REDACTED] was born in Colombia March 1960 and became a naturalized U.S. citizen on September 25, 1999. The applicant's mother, [REDACTED] was born in Colombia in May 1957 and never became a U.S. citizen. The applicant's parents married each other on June 12, 1982, and divorced on January 12, 1999. The applicant was lawfully admitted for permanent residence on August 18, 1990. 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 noted that the applicant's mother was granted legal custody of the applicant. The district director determined that the parent having legal custody did not naturalize and denied the application accordingly.

On appeal, the applicant submits a modification agreement of property settlement agreement relating to paragraph 13 in his parent's property settlement agreement. The original agreement dated December 10, 1998, stated as follows:

13. The parties agree that the primary residence of the minor children shall be with the respondent (applicant's mother). The petitioner (applicant's father) shall have liberal visitation rights.

The modified agreement dated October 1, 2001, states as follows:

13. The parties agree that the primary residence/custody of the minor children shall be with the petitioner [REDACTED] Respondent, [REDACTED] shall have liberal visitation rights.

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. The record contains the parent's divorce decree.

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. The CCA provides benefits only to those persons who had not yet reached their 18th birthday as of February 27, 2001. The applicant was 16 years and 10 months old on February 27, 2001.

Former section 321(a) of the Act provided that 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."

The record establishes that (1) the applicant's father 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 and his mother has never naturalized. Although the applicant submitted a modified

agreement of property settlement agreement granting primary residence/custody to the applicant's father, that court decision was rendered after the February 27, 2001, CCA amendments repealing section 321 of the Act.

Service instructions provide for applications for certificate of citizenship filed to recognize citizenship already acquired should be adjudicated under the relevant law. For applicants who acquired citizenship automatically under sections 320 and 321 on or before February 26, 2001, the Service should continue to issue certificates based on acquisition of citizenship under those provisions as in effect before the CCA took effect. Pending applications filed pursuant to old sections 320 or 321 which would not have been approvable under that section of law, but are now approvable under new section 320, should be adjudicated under the new law. The applicant did not acquire citizenship automatically prior to the CCA amendments, therefore, he is not eligible under former section 321 of the Act.

However, the applicant was still under the age of 18 years when the application was filed and was eligible for the above benefits under section 320 of the Act.

Section 320(a) of the Act, effective on February 27, 2001, provides, in part, that a child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have fulfilled:

(1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

(2) The child is under the age of eighteen 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 United States citizen parent if the child satisfies the requirements applicable to adopted children under section 101(b) (1).

The record reflects that the applicant has not satisfied all the requirements of new section 320 of the Act because he is now over the age of 18 years. 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.