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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

[Redacted]

FILE: [Redacted]

Office: Portland (POO)

Date:

AUG 20 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:

[Redacted]

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, Portland, Oregon, 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 December 26, 1956, in the Republic of Panama. The applicant's father, [REDACTED] was born in Panama and never became a U.S. citizen. The applicant's mother, [REDACTED] was born in September 1936 in Panama and became a naturalized United States citizen on July 23, 1974 when the applicant was 17 years and 7 months old. The applicant's parents never married each other. The applicant was lawfully admitted for permanent residence on April 24, 1974. 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's parent naturalized prior to his 16th birthday. The district director then denied the application accordingly.

On appeal, counsel states that the applicant qualifies as a citizen under section 321(a) of the Act as amended in 1978.

Section 321 of the Act was repealed on February 27, 2001, 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 provisions of the CCA 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.

Section 321 of the Act in effect prior to its amendment by Pub. L. No. 95-417, Sec. 7, 92 Stat. 918, (Oct. 5, 1978), provides, 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, and it is immaterial which of the actions occurs last:

- (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 16 years; and

(5) Such child is residing in the United States at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 16 years.

(b) Subsection (a) of this section shall not apply to an adopted child.

In Matter of Fuentes, 21 I&N Dec. 893 (BIA 1997), the Board stated that a child's acquisition of citizenship on a derivative basis occurs by operation of law and not by adjudication. The actual determination of derivative citizenship under section 321(a) of the Act may occur long after the fact. The Board discussed the 1978 amendments and indicated that they were curative in nature, as underscored by the legislative history. The Department of Justice informed the Chair of the House Judiciary Committee that currently a person is not eligible to file a petition for naturalization in his own behalf until reaching the age of 18. Thus, there is a 2-year period during which a child is not able to derive citizenship by reason of his parent's naturalization, but is not able to file his own petition for naturalization either...Young people between the ages of 16 and 18 should be allowed to derive citizenship automatically under sections 320 and 321.

Through subsequent discussions, the Department of State and the Service have agreed and now hold that, as long as all the conditions specified in section 321(a) of the Act are satisfied before the minor's 18th birthday, the order in which they occur is irrelevant. The date the law was amended (October 5, 1978) has no significance in the adjudication of such claims to citizenship. The amendment applies to any person claiming citizenship through a parent(s)' naturalization under section 321 who can establish that, after December 24, 1952, and before the person reaches the age of 18 years all the conditions of the law were satisfied. The amendment is to be applied retroactively to the effective date of the Act.

Section 321(a)(3) of the Act, in part, requires 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.

Under the Constitution of Panama of March 1, 1946, and its implementing law of September 30, 1946, all acknowledged children are to be treated equally and considered legitimate, regardless of whether or not the natural parents ever marry.

Following the Constitution of Panama, the applicant was legitimate at birth and paternity was established as his natural father's name is listed on the applicant's Panamanian birth certificate. See Matter of Goorahoo, 20 I&N Dec. 782 (BIA 1994); Matter of Maloney, 16 I&N Dec. 650 (BIA 1978). Therefore, the applicant does not qualify under this part of section 321(a)(3) of the Act.

Section 321(a)(3) of the Act, in part, requires the naturalization of the parent having legal custody of the child when there has been a legal separation of the parents.

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. Where the parents never married, there can be no "legal separation." Therefore, the applicant does not qualify under this part of section 321(a)(3) of the Act.

The applicant has failed to satisfy the requirements of section 321(a)(3) of the Act, and he has failed to automatically derive United States citizenship under section 321 of the Act.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met this burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.