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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

Office: Philadelphia

Date:

AUG 20 2002

IN RE: Applicant:

APPLICATION:

Application for Certificate of Citizenship under Section 320 of the
Immigration and Nationality Act, 8 U.S.C. 1431

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, Philadelphia, Pennsylvania, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The applicant was born on February 20, 1987, in India. The applicant's father, [REDACTED] was born in India in June 1960 and became a naturalized U.S. citizen on July 6, 2000. The applicant's mother, [REDACTED], was born in June 1965 in India and never had a claim to United States citizenship. The applicant's parents married each other in July 1983 and divorced on October 27, 1994. The applicant was lawfully admitted for permanent residence on April 19, 1997. The applicant seeks a certificate of citizenship under section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1431.

The acting district director reviewed the record and concluded that the applicant was not in the legal custody of his U.S. citizen parent and denied the application accordingly.

According to the original divorce decree, custody of both children was accorded to the applicant's mother.

On appeal, counsel submits a copy of an agreement in which the applicant's father and mother agreed that both of their children would remain with the applicant's father in the United States and the mother would have the right to meet them whenever they came to India. Counsel points out that the applicant was classified as a step-child for visa issuing purposes, and he was issued an immigrant visa by a consular officer who made sure that the father had legal custody of the applicant.

Sections 320 and 322 of the Act were amended by the Child Citizenship Act of 2000 (CCA), and took effect on February 27, 2001. The CCA benefits all persons who have not yet reached their 18th birthdays as of February 27, 2001. The applicant was 14 years old on February 27, 2001.

Section 320(a) of the Act, 8 U.S.C. 1431(a), effective February 27, 2001, provides that a child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been 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 18 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 a United States citizen parent if the child satisfies the

requirements applicable to adopted children under section 101(b)(1).

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).

The record clearly establishes that the applicant was in the legal custody of his father when he was issued an immigrant visa and was allowed to leave India and travel to the United States pursuant to the agreement submitted by counsel on appeal. The record also indicates that the applicant's sibling resides in the United States. There is no evidence to show that the attached agreement is not valid for the purpose of establishing the applicant's legal custody status.

8 C.F.R. 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. Therefore, the appeal will be sustained.

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