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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: Miami

Date: AUG 29 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 Acting District Director, Miami, Florida, 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 June 12, 1985, in Iran. The applicant's father, [REDACTED] was born in Iran in 1952 and became a naturalized U.S. citizen on April 29, 1997, when the applicant was 11 years old. The applicant's mother, [REDACTED] was born in 1957 in Iran and never became a United States citizen. The applicant's parents divorced on January 27, 1988, in Iran, remarried each other on July 7, 1990, and divorced again, in Iran on April 21, 1991, when the applicant was 5 years and 8 months old. The applicant was lawfully admitted for permanent residence on February 28, 1991. She seeks a certificate of citizenship under 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 custody of her father when her father naturalized and denied the application accordingly.

On appeal, the applicant's father states that the applicant has been in his custody since she was seven years old. The applicant provides evidence of Iranian rules and regulations related to the family which indicates that a child's mother has preference to take care of a child from his birthday until two years old. After this period, the father has preference for custody of a child, but about (the custody) of female children, the mother has preference for custody up to seven years from the birthday.

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 15 years old on February 27, 2001.

Former section 321 of the Act provided 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-Martinez, 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."

New Section 320 is for persons who have not yet reached their 18th birthday.

Section 320 of the Act, 8 U.S.C. 1431(a), provides that:

(a) 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.

The record reflects that the applicant's parents divorced the second time on April 21, 1991, when the applicant was 5 years and 10 months old. Guardianship was awarded to the applicant's mother. This action coincides with the thrust of the documentation submitted on appeal which asserts that the mother of a female child has custody preference until the child reaches 7 years of age. The record further reflects that the applicant and her brother were

issued immigrant visas to accompany their father to the United States to reside permanently.

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.

The record establishes that (1) the applicant's father became a naturalized U.S. citizen prior to the applicant's 18th birthday, (2) the applicant became the derivative beneficiary of a visa petition approved in behalf of her father, (3) the applicant was residing in the United States in her father's legal custody, following a legal separation, as a lawful permanent resident when her father naturalized and (4) at the age of 16, the applicant continues to reside at the same address where her father and step-mother reside.

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. The applicant has established her eligibility under both section 320 and former section 321 of the Act. Therefore, the acting district director's decision will be withdrawn, and the application will be approved.



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