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U.S. Department of Justice
Immigration and Naturalization Service

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



PUBLIC COPY

FILE: [Redacted]

Office: Baltimore

Date: JAN 11 2002

IN RE: Applicant: [Redacted]

APPLICATION: Application for Certificate of Citizenship under Section 338 of the
Immigration and Nationality Act, 8 U.S.C. 1449

IN BEHALF OF APPLICANT:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

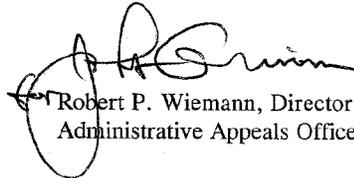
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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, Baltimore, Maryland, and the Associate Commissioner for Examinations dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reconsider the previous decision. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed and the application will be denied.

As discussed in the previous decision, the record reflects that the applicant was born on April 8, 1973, in India. The applicant's father, [REDACTED], was born in India in 1947 and became a naturalized United States citizen on May 19, 2000. The application for certificate of citizenship was filed on May 17, 1999. The applicant's mother, [REDACTED] was born in 1950 in India and became a naturalized United States citizen on October 25, 1985. The applicant's parents married each other on June 8, 1972. The applicant was lawfully admitted for permanent residence on May 5, 1980. The applicant claims eligibility for a certificate of citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432.¹

Former section 321 of the Act 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

¹ Section 321 of the Act was repealed by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631, which removed the legal separation requirement from the rules of derivative naturalization. The provisions of the Child Citizenship Act are not retroactive. Matter of Rodriguez-Trejedor, 23 I&N Dec. 153 (BIA 2001); see also Nehme v. INS, 252 F.3d 415, 431 (5th Cir. 2001).

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 dismissing the applicant's appeal, the Associate Commissioner determined that the applicant's mother became a naturalized United States citizen prior to the applicant's eighteenth birthday and that the applicant was residing in the United States in his mother's legal custody as a lawful permanent resident when his mother naturalized. However, the Associate Commissioner found that the applicant did not automatically derive naturalization in accordance with section 321 of the Act, as his father had naturalized after the applicant turned eighteen years of age. Although the applicant's mother indicated that she and the applicant's father had been separated many times, the Associate Commissioner concluded that the applicant's mother was not legally separated from the applicant's father when his mother naturalized, and therefore did not meet the requirement provided for at section 321(a)(3) of the Act.

In making this determination, the Associate Commissioner relied on Matter of H--, 3 I&N Dec. 742 (C.O. 1949), which held that the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings. Therefore, the applicant's mother was not legally separated from the applicant's father when his mother naturalized.

On motion, counsel for the applicant states that the Associate Commissioner overlooked the plain wording of the statute and improperly relied on a 60-year-old decision that had been rendered irrelevant by subsequent changes in the statute. Counsel asserts that section 321 of the Act merely requires "a legal separation of the parents," and not a divorce. Counsel further attempts to distinguish Matter of H--, supra, from the case at hand by pointing out that the 1940 statute did not address children born out of wedlock. Counsel maintains that "Matter of H-- was an unfortunate attempt to address a factual situation not covered by the existing statute" and should not be viewed as governing the instant matter. Instead, counsel would have the casual separation of the parents satisfy the "legal separation" requirement of the statute.

Counsel's assertion is not persuasive. As noted by counsel, statutory interpretation must begin with the language of the statute itself. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S.Ct. 1146 (1992). Where the statutory language is clear on its face, a court must give it full force and effect. See United States v. Menasche, 348 U.S. 528, 538-39, 75 S. Ct. 513 (1955).

The language of section 321(a)(3) is clear on its face. The statute does not refer simply to "separation," but rather to "legal separation." The plain meaning of this language is that the

separation of the parents must be recognizable legally. Charles v. Reno, 117 F.Supp.2d 412, 418 (D. N.J. 2000). The definition that the applicant proposes would have the Service discard the word "legal" from the statute. Moreover, adopting a definition that does not contemplate a judicial action would lead to an absurd result: under the applicant's proposed definition, every husband and wife that are voluntarily apart from one another under legal circumstances would be "legally separated." Nehme V. INS, 252 F.3d 415, 426 (5th Cir. 2001).

Furthermore, counsel's attempt to distinguish the case at hand from Matter of H-- is found to be ineffective. Counsel asserts that because Matter of H-- addressed a child born out of wedlock, and the statute had not been amended to address children born out of wedlock at the time of the decision, the decision should not govern a case where the parents were actually married. Counsel states that "[h]ad [the question] come up after the statute was amended, Matter of H-- may very well have been decided differently." Contrary to counsel's conjecture, had the Matter of H-- fact pattern been addressed after the amendment of the statute, the Service would have addressed the same question. As the father of the applicant in Matter of H-- was the parent who naturalized, the Service would not have been able to apply the subsequently amended section 321(a)(3), as the amendment provided for the naturalization of a child born out of wedlock only if the *mother* naturalized. Accordingly, even if the statute had been amended, the Service would have been left with the first clause of section 321(a)(3) of the Act, the specific clause considered in Matter of H--.

Despite the evolution of the statute over the past forty years, the Service has consistently interpreted the phrase "legal separation" as requiring "a limited or absolute divorce obtained through legal proceedings," in accordance with the holding of Matter of H--. See I.N.S. INTERP. 320.1(a)(6).

Finally, it is noted that the federal courts have consistently cited to Matter of H--, supra, and interpreted the term "legal separation" at section 321(a)(3) of the Act as requiring "judicial separation" or "a limited or absolute divorce obtained through legal proceedings." See Wedderburn v. INS, 215 F.3d 795 (7th Cir. 2000), *cert. denied*, 121 S.Ct. 1226 (2001); Nehme V. INS, supra; Charles v. Reno, supra.

In a decision mirroring the facts in the present case, the United States Fifth Circuit Court of Appeals recently determined that the phrase "legal separation," in reference to an alien's parents, is uniformly understood to mean judicial separation. In Nehme V. INS, supra, the court reviewed a claim of derivative naturalization which hinged on the "legal separation" language of section 321(a)(3) of the Act. After reviewing the legislative history of the statute and the state law on the matter, the court stated that "[w]e think these state laws make it clear that in the United States, the term 'legal separation' is uniformly understood to mean *judicial separation*." Id. at 426. Citing Matter of H--, supra, the

court noted that "our interpretation is in accord with the INS's official interpretation of [8 U.S.C.] § 1432"

As noted in the previous decision, there is no provision under the law by which the applicant could have automatically acquired United States citizenship through his father's naturalization. Therefore, the district director's decision will be affirmed. This decision is without prejudice to the applicant seeking U.S. citizenship through normal naturalization procedures.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of August 13, 2001 is affirmed. The petition is denied.