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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: Buffalo

Date: JUL 19 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, Buffalo, New York, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The Associate Commissioner dismissed a subsequent motion to reopen. The matter will be reopened by the Associate Commissioner on Service motion. The applicant's motion will again be dismissed, and the decision dismissing the appeal will again be affirmed. The matter is reopened for the sole purpose of providing the applicant with a more comprehensive explanation of his ineligibility for a benefit under section 321 of the Act, 8 U.S.C. 1432.

The record reflects that the applicant was born on July 22, 1961, in Italy. The applicant's father, Giuseppe [REDACTED] was born in Italy on an unspecified date and never had a claim to U.S. citizenship. The applicant's mother, [REDACTED] was born in 1941 in Italy and became a naturalized United States citizen on May 23, 1978. The applicant's parents married each other on November 9, 1959, and divorced on September 16, 1983. The applicant was lawfully admitted for permanent residence on December 27, 1970. 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 that the record failed to establish that the applicant met the requirements of section 321 of the Act in that he failed to establish that there had been a legal separation of his parents as held in Matter of H--, 3 I&N Dec. 742 (BIA 1949) prior to his 18th birthday. The district director denied the application accordingly. The Associate Commissioner affirmed that decision on appeal and on motion.

On motion, the applicant disagrees with the finding and especially with the term "legal separation" as held in Matter of H--, supra. The applicant contends that the above definition is inconsistent with both law and Congressional intent. The applicant refers to recent amendments to the Act, especially the new benefits of the Child Citizenship Act (the CCA) of 2000, Pub.L. 106-395. The applicant insists that Congress meant for the law to apply retroactively and the requirements are merged into section 320 of the Act, 8 U.S.C. 1431.

On motion, the applicant raises constitutional issues. The Service is without authority to decide the constitutionality of the statutes it administers. See Matter of L-S-J, 21 I&N Dec. 973 (BIA 1997), and related cases.

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 CCA, 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 39 years and seven 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."

Section 321(a)(3) of the Act clearly states that there must have been a legal separation of the parents in order for the applicant to have obtained United States citizenship in these circumstances. The record indicates that the applicant's parents were not legally separated until his mother obtained a divorce in 1983. To accept the applicant's claim that *de facto* or actual separation constitutes "legal" separation is inconsistent with the Service interpretation in Matter of H--, 3 I&N Dec. 742 (C.O. 1949) (the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings), and would constitute an unwarranted departure from Federal case law and New York Domestic Relations law. See Nehme v. INS, 252 F.3d 415 (5th Cir. 2001) (The term "legal separation" in reference to an alien's parents is

uniformly understood to mean judicial separation under INS section 321, as amended¹).

New York case law reveals a formalistic approach to determining what constitutes a separation agreement. See Peck v. Peck, 78 Misc. 2d 207, 356 N.Y.S. 517 (Sup. Ct. Monroe County 1974) (a judgment denying a divorce, but ordering the husband to make mortgage and tax payments on the marital residence, was held not to constitute a separation agreement); Stone v. Stone, 45 A.D.2d 967, 359 N.Y.S. 2d 351 (2nd Dept. 1974) (an open court stipulation of settlement, made in Family Court and which provided for the husband to vacate marital premises, was not a separation agreement sufficient to form the basis for a divorce); Jacobs v. Jacobs, 55 Misc.2d 9, 284 N.Y.S.2d 326 (Sup. Ct. Kings County 1967) (an oral declaration on the record, since it was not written (apart from the transcript thereof), subscribed and acknowledged, could not be used as a predicate for a conversion divorce). There is simply nothing in the record that gives merit to the applicant's argument that his parents' "separation" prior to their divorce met the requisite legal standards.

Further, the applicant has failed to establish that his mother had legal custody of him when she naturalized, as required by section 321(a)(3) of the Act. INS Interpretations 320.1(a)(6) provide that "the parent having actual uncontested custody of the child is regarded as having the requisite "legal custody" provided the required "legal separation" of the parents has taken place. Because the applicant's parents were not legally separated, his mother's actual custody of him does not entitle him to benefit from section 321 of the Act.

ORDER: The order of July 12, 2002 is withdrawn and superceded by this order. The applicant's motion is dismissed. The order of August 14, 2001, dismissing the appeal is affirmed. The application for a certificate of citizenship is denied.

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In reviewing the congressional history of INA section 321, the Nehme Court concluded that Congress clearly intended that the naturalization of only one parent would result in the automatic naturalization of an alien only when there has been a formal judicial alteration of the marital relationship. *Id.* at 425-426, citing *Espindola v. Barber*, 152 F. Supp. 829, 831 (N.D. Cal. 1957) (court observed that the Senate committee investigating immigration laws in 1950 concluded that under the 1940 Act, the naturalized parent must have been judicially separated and have had sole legal custody of the child in order for the child to be automatically naturalized. A private agreement would not have sufficed.)