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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: Albany (BUF)

Date: OCT 03 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 is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The record reflects that the applicant was born on April 25, 1969, in Jamaica. The applicant's father, [REDACTED] was born in Jamaica in October 1938 and never had a claim to U.S. citizenship. The applicant's mother, [REDACTED] was born in May 1940 in Jamaica and became a naturalized U.S. citizen on April 16, 1986, when the applicant was 16 years and 11 months old. The applicant's parents married each other on February 4, 1961, and the marriage was terminated on July 18, 1985. The applicant was lawfully admitted for permanent residence on February 21, 1981, at the age of 11 years and 10 months. 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 noted that the Complaint in Divorce, executed on February 28, 1985 in the State of Pennsylvania, states that the parties have not entered into a written agreement as to support, custody, visitation of children, alimony and property division. The district director also noted that none of those issues were addressed in the Divorce Decree. The district director then determined the record failed to establish that he was in the legal custody of the naturalizing parent and denied the application accordingly.

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 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(a) of the Act in effect prior to being repealed, provides 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."

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 establishes that (1) the applicant's mother became a naturalized U.S. citizen prior to the applicant's 18th birthday; (2) his parent's marriage was terminated by a judicial proceedings in July 1985, thereby establishing "legal separation" as held in Matter of H--, 3 I&N Dec. 742 (C.O. 1949); (3) the applicant became the beneficiary of a Petition for Alien Relative filed by his mother and approved on April 21, 1980, classifying him as the unmarried son of a lawful permanent resident; and (4) the applicant was admitted to the United States in February 1981 to join his mother who was living in Philadelphia, and he was residing in the

United States with his mother as a lawful permanent resident when his mother naturalized.

The record establishes that the applicant has satisfied the requirements of section 321 of the Act. Therefore, he automatically derived United States citizenship on April 16, 1986, when his mother naturalized.

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 met this burden. Accordingly, the appeal will be sustained.

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