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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:

OCT 29 2002

IN RE: Applicant:

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

The record reflects that the applicant was born on December 3, 1961, in the Dominican Republic. The applicant's father, [REDACTED] was born in the Dominican Republic in September 1916 and became a naturalized U.S. citizen on September 18, 1979, when the applicant was 17 years and 9 months old. The applicant's father died on April 5, 1994. The applicant's mother [REDACTED] was born in the Dominican Republic in March 1928 and became a naturalized United States citizen on December 2, 1981, when the applicant was 19 years, 11 months and 29 days old. The applicant's parents married each other on January 22, 1957, and divorced on February 8, 1962. The applicant was lawfully admitted for permanent residence on August 19, 1964. 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 parent's divorce decree granted legal custody of the minor children of that marriage to the mother. However, the applicant's name was not included with the names of the siblings listed in the divorce decree. The district director assumed that the initial petition for divorce was filed before the applicant's birth. The applicant's father married [REDACTED] on July 5, 1962, and was married to her when he became a U.S. citizen in September 1979. It is noted that the applicant's father did not include the applicant's name as a son on his Application for Naturalization and there is no indication that the applicant's father ever supported the applicant or that the applicant ever resided with him.

The district director determined that the applicant was not in his father's custody as required when the father naturalized in September 1979 and denied the application accordingly.

On appeal, the applicant disagrees with that decision and states that the decision was based on a presumption and unfounded allegations. The applicant submits an affidavit from his mother in which she declares that the applicant started to reside with his father after reaching the age of 17 years. The affidavit is unsupported by other probative evidence.

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.

Section 321 of the Act was repealed on February 27, 2001, by the Child Citizenship Act (CCA) of 2000, Pub.L. 106-395, which removed the legal separation requirement from the rules of derivative naturalization. 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 of the Act previously in effect 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 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."

The record contains a Form I-90 which the applicant submitted under oath in July 1979 at the age of 17 years and 7 months. That form indicates that he was processed for a Form I-551 card and his old Form I-151 was destroyed. The address the applicant used on that form was [REDACTED]

The record also contains a Petition for Naturalization submitted under oath by the applicant's father on July 13, 1979. The applicant's father indicated on that document that he was residing at [REDACTED] the address that appears on the father's Certificate of Naturalization dated September 18, 1979. As noted previously, the applicant's name is not listed as a child on this application, though others, both younger and older than the applicant, are.

These two documents, filed under oath during the same month and year, clearly indicate that the applicant was not residing with and in the custody of his father at the time the father was naturalized. They contradict the unsupported assertions contained in his mother's affidavit submitted on appeal.

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 failed to establish that he was in the legal custody of his father prior to his 18th birthday. Therefore, he has failed to meet this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.