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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

FILE:

Office: New Orleans

Date:

FEB 28 2003

IN RE: Applicant:



APPLICATION:

Application for Certificate of Citizenship under Section 341(a) of
the Immigration and Nationality Act, 8 U.S.C. § 1432

IN BEHALF OF APPLICANT:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, New Orleans, Louisiana, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on May 12, 1967, in the Dominican Republic. The applicant's father, [REDACTED], was born in the Dominican Republic in April 1944 and never had a claim to U.S. citizenship. The applicant's mother, [REDACTED] was born in January 1946 in the Dominican Republic and became a naturalized U.S. citizen on September 12, 1984, when the applicant was 17 years and 4 months old. The applicant's parents married each other on September 16, 1962, and divorced on June 19, 1974. The applicant was lawfully admitted for permanent residence on October 24, 1978. 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 indicates that the court awarded custody of the applicant to his father, and after the father remarried in 1976, he brought all of the children to the United States. The district director notes that in an affidavit dated August 5, 1997, the father stated that he gave the applicant's mother full custody (his consent) for her to care for and raise the children.

The district director determined the record failed to establish that the applicant 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, 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. See *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.

Former section 321 of the Act provided, in 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-Martinez*, 21 I&N Dec. 893 (BIA 1997), the Board stated the following in reference to a Department of State *Passport Bulletin-96-18*, issued November 6, 1996: "Through subsequent discussions, [the interested agencies] have agreed on what we believe to be a more judicious interpretation of section 321(a) of the Act. 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. Citizenship would be acquired on the date the last condition is satisfied."

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 INS INTERP § 320.1(a)(6).

The record contains a copy of the parent's divorce decree dated June 19, 1974, in which the court awarded custody of the applicant and his siblings to the father, Toribio Moran.

The record contains a Petition For Enforcement Of Support Order Made By Another Court dated July 1, 1981. This petition reflects that a decree dated June 19, 1974, was entered where the applicant's father was directed to provide for the support of his former wife and the five minor children, including the applicant who was 7 years old in 1974.

The record contains an Order Enforcing Order Made By Another Court dated September 3, 1981, which ordered the applicant's father to pay the applicant's mother child support for his six children. The applicant was 14 years old at that time.

The record contains an Agreement to Support ordered by the Hearing Examiner in the Family Court of the State of New York on February 27, 1990, which reflects that the applicant's father agreed to pay the applicant's mother a fixed sum of money.

The record establishes that (1) the applicant's parents divorced in June 1974 when the applicant was 7 years old, and his father was awarded legal custody by the court; (2) the applicant immigrated in October 1978 at the age of 11 years based on a visa petition filed by his father, and soon thereafter began residing with his mother; (3) the applicant's mother became a naturalized U.S. citizen prior to his 18th birthday, and (4) he was residing in the United States with his mother at the time of her naturalization.

Even though the applicant resided with his mother soon after immigrating in 1978 and his father was ordered to pay child support, the record fails to contain any judicial decree or ruling that overturns or supersedes the original judicial order granting legal custody to the father.

The applicant did not automatically acquire U.S. citizenship through his mother'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.

ORDER: The appeal is dismissed.