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U.S. Citizenship
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Services

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FILE: [redacted] (relates)

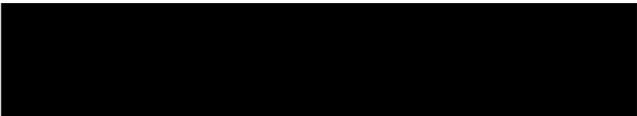
OFFICE: HONOLULU, HI

DATE: AUG 13 2007

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Section 321 of the former Immigration and Nationality Act; 8 U.S.C. § 1432.

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Honolulu, Hawaii on January 23, 2006. The matter was subsequently certified to the Administrative Appeals Office (AAO) for review. The district director's decision was affirmed by the AAO on July 5, 2006. The AAO now moves to reopen the matter *sua sponte* based on new evidence. The July 5, 2006, AAO decision, and January 23, 2006, district director decision will be withdrawn, and the applicant's Form N-600, Application for Certificate of Citizenship (Form N-600 application) will be approved.

The applicant was born in Canada on July 23, 1942. He was admitted into the United States as a lawful permanent resident on November 3, 1951, when he was nine years old. The applicant's mother was born in Canada, and she became a naturalized U.S. citizen on January 31, 1958, when the applicant was fifteen years old. The applicant's father was born in Canada and he is not a U.S. citizen. The record reflects that the applicant's parents were married at the time the applicant's mother became a naturalized U.S. citizen. The applicant's parents obtained an *Interlocutory Judgment of Divorce*, with custody over the applicant being awarded to the applicant's mother, on April 17, 1959, when the applicant was sixteen years old. A final judgment of divorce was granted to the applicant's parents on September 22, 1960, when the applicant was eighteen years old. The applicant lost his lawful permanent resident status upon deportation from the United States in 1969. The record reflects that the applicant returned to the United States around 1972 without legal immigration status. The applicant presently seeks a certificate of citizenship pursuant to section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432, based on the claim that he acquired U.S. citizenship in 1959 through his mother.

The AAO notes that the Child Citizenship Act of 2000, effective February 27, 2001, repealed section 321 of the former Act. Nevertheless, all persons who acquired citizenship automatically under section 321 of the former Act, as previously in force prior to February 27, 2001, may apply for a certificate of citizenship at any time. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

Section 321 of the former Act, states, 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.¹

The conditions set forth in section 321(a)(1) and (2) are not applicable in the present matter.

The district director concluded in his January 23, 2006 decision, that the applicant did not meet the requirements of section 321(a)(3) of the former Act because he had failed to establish that his mother became legally separated and had legal custody over the applicant prior to her naturalization as a U.S. citizen. The district director noted that for section 321(a)(3) of the former Act purposes, 3rd U.S. Circuit Court of Appeals case law required the U.S. citizen parent to obtain a legal separation prior to naturalization as a U.S. citizen. *See Jordan v. Attorney General*, 424 F.3d 320 (3rd Cir. 2005) and *Bagot v. Ashcroft*, 398 F.3d 252 (3rd Cir. 2005.) The district director noted that although the 3rd U.S. Circuit Court of Appeals case law was not legally binding in Hawaii, which falls under the 9th U.S. Circuit Court of Appeals' jurisdiction, there existed no published 9th Circuit Court of Appeals case law on the issue at hand. The district director determined that for national consistency purposes, the 3rd Circuit Court of Appeals holdings should apply to the applicant's case as well. The applicant's Form N-600 application was denied accordingly.

On appeal, counsel asserted that legal case law, congressional intent, and Immigration and Naturalization Service (Service, now U.S. Citizenship and Immigration Services, CIS) policy established that section 321(a)(3) of the former Act did not require the applicant's mother to become legally separated prior to her naturalization as a U.S. citizen. Counsel asserted that the applicant needed only to demonstrate that the conditions set forth in section 321(a)(3)(4) and (5) of the former Act were met prior to the applicant's eighteenth birthday. Counsel asserted that the applicant's mother obtained a legal separation and legal custody over the applicant when she obtained an interlocutory judgment of divorce from the applicant's father on April 17, 1959, and counsel concluded that the applicant's mother's naturalization as a U.S. citizen after a legal separation, but prior to the applicant's eighteenth birthday, satisfied section 321 of the former Act requirements.

In a July 15, 2006 decision, the AAO found that the applicant had failed to provide corroborative evidence to establish the existence of an official Service (CIS) policy allowing the transmission of citizenship to the child of a legally separated, custodial parent who naturalized after he or she became legally separated. The AAO noted that past U.S. Circuit Court of Appeals decisions held that in order for a child to acquire U.S. citizenship under the provisions contained in section 321(a)(3) of the former Act, it must be established that the parent obtained a legal separation and legal custody over the child prior to his or her naturalization as a U.S. citizen. The July 5, 2006 AAO decision referred to *Wedderburn v. INS*, 215 F.3d 795 (7th Cir. 2000) (stating in part at 802, that under section 321(a) of the former Act, "[c]hildren become citizens . . . if the parent having legal custody naturalizes following the parents' legal separation" (quotations omitted) and *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001)

¹ Prior to October 5, 1978, section 321 of the former Act required the custodial parent to become a naturalized U.S. citizen before the child's 16th birthday. The Act of October 5, 1978, Pub. L. No. 95-417, 92 Stat. 917 (the 1978 Act), amended section 321 of the former Act by raising the qualifying age of a child at the time of the custodial parent's naturalization, from sixteen to eighteen. The amended qualifying age requirement has been deemed to be retroactive to the 1952 enactment of the Immigration and Nationality Act. Accordingly, although the applicant's mother became a naturalized U.S. citizen in 1958, prior to the enactment of the 1978 Act, the eighteen year old qualifying age requirements set forth in section 321(a)(4) and (5) of the former Act apply to the applicant. *See generally, In Re Fuentes-Martinez*, 21 I&N Dec. 893 (BIA 1997.)

(stating in part at 424, that, “[w]hen a child’s parents are still married, the child does not *automatically* acquire a new citizenship upon the naturalization of only one parent. . . . [w]e think Congress clearly intended that the naturalization of only one parent would result in the automatic naturalization of an alien child only when there has been a formal, *judicial* alteration of the marital relationship.” In addition, the January 23, 2006 district director decision noted that the *Jordan v. Attorney General, supra*, and *Bagot v. Ashcroft, supra*, decisions held that a child seeking to establish derivative citizenship under section 321(a) of the former Act must prove that his or her custodial parent was naturalized after a legal separation from the other parent.

It is noted that at the time of the AAO’s July 15, 2006 decision, the record of proceedings did not contain evidence of the section 321(a) of the former Act Service policy referred to by counsel. However, the AAO has since obtained a copy of a February 18, 1997, Memorandum issued by the Naturalization Division of the Service (Section 321(a) Service Memo). The section 321(a) Service memo was written and distributed Service-wide after joint meetings between the Service and the U.S. Department of State, and provides guidance to adjudicators of section 321(a) of the former Act cases. Amongst other things, the section 321(a) Service memo states that:

Section 321(a) of the [former] Act provides for acquisition of citizenship of a minor upon the naturalization of both his/her parent(s) (or the surviving parent or the parent with legal custody) provided certain conditions are satisfied. There is no specific order in which the conditions of the law must be satisfied for citizenship as long as all conditions are satisfied before the child’s 18th birthday.

The AAO notes that the guidance provided in the section 321(a) Service memo differs from the policy set forth in the 3rd, 5th and 7th U.S. Circuit Court of Appeals decisions referred to in the July 5, 2006, AAO decision and the January 23, 2006, district director decision. The AAO notes further that the applicant in the present matter resides within the jurisdiction of the 9th U.S. Circuit Court of Appeals, which, as of yet, has no published case law on this issue. Because the federal case law referred to in the previous AAO and district director decisions is not 9th Circuit Court of Appeal case law, and because a February 18, 1997 Service memorandum provides specific and clear policy guidance on section 321(a) of the former Act adjudications, providing for acquisition of U.S. citizenship as long as all conditions are satisfied –regardless of order – prior to the child’s eighteenth birthday, the AAO shall defer, in the present case, to the policy set forth in the section 321(a) Service memo. Accordingly, the AAO finds that the applicant has established that he acquired U.S. citizenship pursuant to section 321(a) of the former Act.

The record contains the applicant’s birth certificate and a certificate of naturalization establishing that the applicant’s mother became a naturalized U.S. citizen on January 31, 1958, when the applicant was fifteen years old. Information contained in the record also establishes that the applicant was admitted into the United States as a lawful permanent resident on November 3, 1951, when he was nine years old, and that he had lawful permanent resident status until his deportation from the United States in 1969.

For immigration purposes, “[l]egal separation of the parents . . . means either a limited or absolute divorce obtained through judicial proceedings.” *See Matter of H*, 3 I&N Dec. 742 (1949) (Quotations omitted). The record contains a *Final Judgment of Divorce* reflecting that the applicant’s parents were granted a final judgment of divorce on September 22, 1960, when the applicant was eighteen years old. The record also contains, however, a California Superior Court, *Interlocutory Judgment of Divorce* reflecting that the applicant’s mother obtained a judicial interlocutory judgment of divorce from the applicant’s father on April 17, 1959, when the

applicant was sixteen years old. The California Superior Court awarded the applicant's mother custody over the applicant at that time. Although the *Interlocutory Judgment of Divorce* notes on page two that, "[t]he parties are still husband and wife, and will be such until a Final Judgment of Divorce is entered after one year from the entry of this Interlocutory Judgment," the AAO finds that the *Interlocutory Judgment of Divorce* qualifies as a "limited divorce obtained through judicial proceedings." Accordingly, the AAO finds that the applicant has established that his mother became legally separated on April 14, 1959, prior to the applicant's eighteenth birthday.

Legal custody vests "by virtue of either a natural right or a court decree." See *Matter of Harris*, 15 I&N Dec. 39 (BIA 1970). The California Superior Court, *Interlocutory Judgment of Divorce* between the applicant's parents awarded legal custody over the applicant to his mother on April 14, 1959, when the applicant was sixteen. The applicant therefore established that his mother had legal custody over him prior to his eighteenth birthday.

The regulation provides at 8 C.F.R. § 341.2(c) that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. The applicant has established that the conditions set forth in section 321(a)(3), (4), and (5) of the former Act were met prior to his eighteenth birthday. The AAO thus finds that pursuant to the terms of the section 321(a) Service memo, the applicant has acquired U.S. citizenship under section 321(a) of the former Act.

ORDER: The January 23, 2006 decision of the district director and the July 5, 2006 AAO decision are withdrawn. The application is approved.