



U.S. Citizenship
and Immigration
Services

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FILE:



OFFICE: HONOLULU, HI

DATE: JUL 05 2006

IN RE:

APPLICANT:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Honolulu, Hawaii, and the matter has been certified to the Administrative Appeals Office (AAO) for review. The district director's decision will be affirmed.

The record reflects that the applicant was born in Canada on July 23, 1942. The applicant's mother [REDACTED] 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 when [REDACTED] became a naturalized U.S. citizen. The applicant's parents obtained an Interlocutory Judgment of Divorce 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 was admitted into the United States as a lawful permanent resident on November 3, 1951, when he was nine years old. The applicant was deported from the U.S. in 1969, and the record reflects that he returned to the U.S. 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.

The district director concluded the applicant had failed to establish that both of his parents became naturalized U.S. citizens prior to his eighteenth birthday, as required by section 321(a)(1) of the former Act. The district director determined further that the applicant failed to establish his mother became legally separated and had legal custody over the applicant prior to her naturalization as a U.S. citizen, as required by section 321(a)(3) of the former Act. The application was denied accordingly.

On appeal, counsel does not dispute the district director's finding that the applicant does not qualify for citizenship under section 321(a)(1) of the former Act. Counsel asserts, however, that Congressional intent, legal case law, and Immigration and Naturalization Service (Service, now U.S. Citizenship and Immigration Services, CIS) policy reflect that section 321(a)(3) of the former Act did not require the applicant's mother to become legally separated and obtain legal custody over the applicant prior to her naturalization as a U.S. citizen. Counsel concludes that the applicant therefore derived U.S. citizenship through his mother in 1959, when she obtained an Interlocutory Judgment of Divorce from the applicant's father.

It is noted that counsel submitted no evidence to corroborate the assertion that Service (CIS) policy does not require a child's parent to become legally separated and obtain legal custody over the child prior to his or her naturalization as a U.S. citizen, for section 321(a)(3) citizenship purposes.

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.

(Emphasis added.) The record contains a Certificate of Naturalization establishing that the applicant's mother became a naturalized U.S. citizen on January 31, 1958. A California Superior Court, Interlocutory Judgment of Divorce on Amended Complaint contained in the record reflects that the applicant's mother obtained an interlocutory judgment of divorce from the applicant's father on April 17, 1959, and that she obtained custody over the applicant. The Interlocutory Judgment states on page two that, "[t]his is not a Judgment of Divorce. The 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 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.

For immigration purposes, "[l]egal separation of the parents . . . means either a limited or absolute divorce obtained through judicial proceedings." *Matter of H*, 3 I&N Dec. 742 (1949) (Quotations omitted). The AAO finds that the Interlocutory Judgment of Divorce satisfies the "limited divorce obtained through judicial proceedings" definition for "legal separation." Legal custody vests "by virtue of either a natural right or a court decree." *Matter of Harris*, 15 I&N Dec. 39 (BIA 1970). The AAO finds that the Interlocutory Judgment of Divorce between the applicant's parents awarded legal custody over the applicant to his mother. The applicant has therefore established that his mother became legally separated, and obtained legal custody over him in 1959, prior to the applicant's eighteenth birthday.

In support of the assertion that section 321(a)(3) of the former Act did not require the applicant's mother to be legally separated, and to have legal custody over the applicant prior to her naturalization as a U.S. citizen, counsel discusses Congressional intent and refers to the February 2002, Pennsylvania U.S. District Court case, *Bucknor v. INS*, (Not Reported in F. Supp. 2d, 2002 WL 221540 (E.D.Pa.)). In *Bucknor*, the Pennsylvania U.S. District Court (District Court) discusses the U.S. Government contention that, for section 321(a)(3) of the former Act purposes, a parent must become legally separated and have legal custody of a child before becoming a naturalized U.S. citizen. The District Court additionally states that other courts have held that section 321(a) of the former Act requires a custodial parent to naturalize after obtaining a legal separation. See *Bucknor, supra* at 3 (citing *Wedderburn v. I.N.S.*, 215 F.3d 795, 801 (7th Cir. 2000), and *Barton v. Ashcroft*, 171 F.Supp.2d 86, 90 (D. Conn. 2001.)) The District Court stated in *Bucknor*, that it disagreed with the Government. In addition, the District Court stated that the court decisions it reviewed on the issue did not specifically address or analyze the statutory language of section 321(a)(3) of the former Act. The District Court then held that based on its reading of the former Act, section 321(a)(3) of the former Act did, "[n]ot require that naturalization occur before or after legal separation. Instead, naturalization must simply occur while the child is under 18." *Bucknor, supra* at 3.

The AAO notes that the *Bucknor* decision made by the Pennsylvania U.S. District Court is not legally binding in the present matter. The AAO notes further that the *Bucknor* decision acknowledged that the Government's policy regarding section 321(a)(3) of the former Act, is to require a parent to be legally separated and to have legal custody over a child prior to the parent's naturalization as a U.S. citizen. The AAO additionally notes the U.S. Seventh Circuit Court of Appeals discussion relating to section 321(a) of the former Act, in *Wedderburn v. INS, supra* at 800. In *Wedderburn*, the U.S. Seventh Circuit Court of Appeals stated in pertinent part that "[C]ongress

rationality could conclude that as long as the marriage continues the citizenship of the children should not change *automatically* with the citizenship of a single parent Section 321(a) limits automatic changes to situations in which the other parent has been removed from the picture-either by death or by legal separation.” (Quotations omitted.) The U.S. Seventh Circuit Court of Appeals noted the possibility that in some cases, it may be impossible to meet the joint legal custody and legal separation requirement. The Court stated, however, that in such cases, section 322 of the former Act “[p]ermits the custodial parent to obtain U.S. citizenship for his or her child as a matter of right, by filing an application [S]ection 321(a) is a mismatch for a custody-but-not-legal-separation situation only when read independently of section 322, which would be unsound.”¹ The U.S. Seventh Circuit Court of Appeals then reiterated in *Wedderburn* at 802 that, “[l]egitimated children become citizens if both parents naturalize, if the surviving parent naturalizes, or if the parent having legal custody naturalizes following the parents’ legal separation.” (Quotations omitted.)

Furthermore, the AAO notes the U.S. Fifth Circuit Court of Appeal discussion in *Nehme v. INS*, 252 F.3d 415, 424 (5th Cir. 2001), of the Nationality Act of 1940, requirement that both parents of a child be naturalized for derivative citizenship purposes, “[u]nless the parents had been legally separated and the parent with legal custody obtained naturalization.” The U.S. Fifth Circuit Court of Appeals stated at 425-426 that:

We also think Congress could have rationally concluded that requiring the naturalization of both parents of the alien child, when the parents remain married, was necessary to promote marital and family harmony and to prevent the child from being separated from an alien parent who has a legal right to custody It makes sense, therefore, that when the child’s parents are still married, the child does not *automatically* acquire a new citizenship upon the naturalization of only one parent. Given these considerations, we think Congress clearly

¹ Section 322 of the former Act stated, in pertinent part:

(a) Application of citizen parents; requirements

A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, “Secretary”] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [Secretary] that the following conditions have been fulfilled:

- 1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- 2) The child is physically present in the United States pursuant to a lawful admission.
- 3) The child is under the age of 18 years and in the legal custody of the citizen parent.

b) Attainment of citizenship status; receipt of certificate

Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service [CIS] within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

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.

The present record contains no evidence to establish an official Service (CIS) policy allowing the transmission of citizenship to the child of a legally separated, custodial parent who naturalizes after becoming legally separated. Moreover, the AAO finds that the legal case law discussed above clearly reflects the Immigration Service policy and U.S. Circuit Court of Appeals interpretation that in order for a child to derive U.S. citizenship under the legal separation, legal custody provision 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.

8 C.F.R. § 341.2(c) states that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. Based upon a thorough review of the evidence in the record, the AAO finds that the applicant has failed to establish that he qualifies for citizenship under section 321(a)(3) of the former Act. The district director's decision denying the applicant's citizenship application will therefore be affirmed.

ORDER: The district director's decision denying the applicant's citizenship application will be affirmed.