

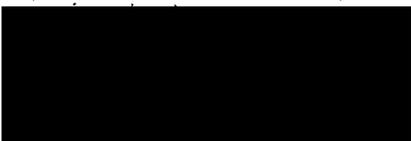


U.S. Department of Justice

Immigration and Naturalization Service

Ed

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: [Redacted]

Office: Philadelphia

Date:

AUG 22 2000

IN RE: Applicant:



APPLICATION:

Application for Certificate of Citizenship under § 341(a) of the
Immigration and Nationality Act, 8 U.S.C. 1452(a)

IN BEHALF OF APPLICANT: Self-represented

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrence M. O'Reilly, Director
Administrative Appeals Office

Identifying data should be
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The application was denied by the Acting 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 January 12, 1961 in the Dominican Republic. The applicant's father, [REDACTED] was born in the Dominican Republic in 1929 and became a naturalized U.S. citizen on April 5, 1977. His mother, [REDACTED] was born in 1936 in the Dominican Republic and never became a United States citizen. The applicant's parents never married each other. The applicant was recognized by his father on February 1, 1961 in the Dominican Republic. The applicant was lawfully admitted for permanent residence on September 9, 1978. He seeks a certificate of citizenship under § 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432.

The district director determined the record failed to establish that the applicant derived U.S. citizenship upon his father's naturalization because he was born out of wedlock. The district director then denied the application accordingly.

On appeal, the applicant states that he came to the United States at the age of 17 years to live with his father who petitioned for him, his father had been his provider from the day he was born and Dominican law on parentage and filiation was changed in 1994 to eliminate all legal distinctions between children born in and out of wedlock.

Section 321(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: "Through subsequent discussions, [the interested agencies] have agreed on what we believe to be a more judicious interpretation of § 321(a). We now hold that, as long as all the conditions specified in § 321(a) are satisfied before the minor's 18th birthday, the order in which they occur is irrelevant."

A child born out of wedlock in the Dominican Republic is placed in the same legal position as one born in wedlock once the child has been acknowledged by the father in accordance with Dominican law and hence qualifies as a "legitimated" child under § 101(b)(1)(C) of the Act. See Matter of Cabrera, 21 I&N Dec. 589 (BIA 1996). The Board also found that the father has met the legal custody requirement of § 101(b)(1)(C) of the Act as interpreted in Matter of Rivers, 17 I&N Dec. 419 (BIA 1980) holding that a natural father is presumed to have legal custody of his child at the time of legitimation in the absence of affirmative evidence indicating otherwise.

In Matter of Rivers, *supra*, the Board stated that it strictly interpreted the legal custody requirement of § 101(b)(1)(C) of the Act, holding that legal custody would vest only "by virtue of either a natural right or a court decree." See Matter of Harris, 15 I&N Dec. 39 (BIA 1970); Matter of Dela Rosa, 14 I&N Dec. 728 (BIA 1974). It further stated in those cases the general rule that the mother of an illegitimate child has the primary right to the custody of that child.

While it is true that the mother of an illegitimate child is presumed to have custody of that child, the same is not true where the child has been legitimated as in the present matter. Cases construing the prior California law regarding legitimation hold that once the natural father has legitimated his child, the child's status becomes that of a legitimate child of both parents, and the...rights of the child and of the parents thenceforth are the same as they would be had the child been born of the marriage of its natural parents...neither of such parents has a superior right to [the child's] custody...

The Board indicated that its prior view of "natural right" was too restrictive in that it recognized only the mother's natural right in a child. The Board now holds that unless the local law otherwise dictates (i.e. through statutory or case law giving greater rights to one parent than to the other), the father's "natural right" to the custody of a child he has legitimated is equal to the "natural right" of the mother to the child's custody.

Under Dela Rosa, *supra*, and Harris, *supra*, legal custody for purposes of § 101(b)(1)(C) of the Act required, in effect, actual physical custody of a child, and custody to the exclusion of everyone else, including the child's mother. Yet we have not had such a restrictive definition of legal custody under § 101(b)(1)(E) of the Act, which defines adopted children. The cases have been clear that a parent may have legal custody of an adopted child while not residing with that child, and where in fact the parent and child may be thousands of miles apart. See Matter of Cho, 16

I&N Dec. 188 (BIA 1977); Matter of M-, 8 I&N Dec. 118 (BIA 1958, A.G. 1959). In light of holding that the natural parents of a child who has been legitimated have equal rights to the custody of that child, the exclusive custody aspect of our prior holdings is inappropriate. Unless there is evidence to show that the father of a legitimated child has been deprived of his natural right to custody, he will be presumed to share custody with the mother, and to satisfy the legal custody requirement of § 101(b)(1)(C) of the Act.

The record establishes that (1) the applicant's father became a naturalized U.S. citizen prior to his 18th birthday, (2) the applicant was acknowledged by his father shortly after his birth, (3) he became the beneficiary of an approved visa petition filed by his father, and (4) he was residing in the United States in his father's legal custody.

However, in order for the applicant to receive the benefits of § 321 of the Act, there must have been a legal separation of the parents. 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, and where the actual parents of the child were never lawfully married, there could be no "legal separation," of such parents. Therefore, the applicant's father was not legally separated from the applicant's mother when his father naturalized. If the parents were never lawfully married, there can be no legal separation, as such, and an award of custody to a naturalized parent under such circumstances does not result in derivation even though other requisite conditions are satisfied. See INTERP 320.1(a)(6).

The applicant has failed to satisfy the requirement at § 321(a)(3) of the Act regarding legal separation. There is no provision under the law by which the applicant could have automatically acquired U.S. citizenship through his father's naturalization. Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.