



U.S. Department of Justice
Immigration and Naturalization Service

DB

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

[Redacted]

Date: MAY 12 2000

IN RE: Applicant: [Redacted]

APPLICATION: [Redacted]

IN BEHALF OF APPLICANT:

[Redacted]

Public Copy

INSTRUCTIONS:

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

Clarence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Houston, Texas, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant was born on August 26, 1979 in San Salvador, El Salvador. The applicant's father, [REDACTED], was born in El Salvador in October 1954 and became a naturalized U.S. citizen on July 6, 1990. The applicant's mother, [REDACTED], was born in El Salvador and never had a claim to United States citizenship. The applicant's parents never married each other. The applicant was lawfully admitted for permanent residence on November 17, 1989. The applicant is seeking a certificate of citizenship under § 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1433.

The district director reviewed the record and concluded that the applicant had already reached the age of 18 years and he had failed to establish a bona fide parent-child relationship because he was never legitimated or acknowledged by his natural father before the age of 16. The district director denied the application accordingly.

On appeal, counsel states that the applicant has met the legitimation requirement and the Service should be estopped from raising it. Counsel states that [REDACTED] identified himself as the applicant's father when the applicant's birth was registered, [REDACTED] brought the applicant to the United States at the age of 10 where the applicant has been raised by and has been in the custody of [REDACTED] since that time. Counsel argues that the applicant acquired U.S. citizenship automatically under the provisions of § 321 of the Act, 8 U.S.C. 1432, and 322 is inapplicable to this case. Counsel states that the phrase "legal separation" used in § 321 of the Act should not be read to require that the applicant's parents have been married.

Section 322 CHILD BORN OUTSIDE THE UNITED STATES; APPLICATION FOR CERTIFICATE OF CITIZENSHIP REQUIREMENTS

(a) APPLICATION OF CITIZEN PARENTS: REQUIREMENTS. -A parent who is a citizen of the United States may apply to the Attorney General for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General 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.
- (4) If the citizen parent is an adoptive parent of the child, the child was adopted by the citizen parent before

the child reached the age of 16 years and the child meets the requirements for being a child under subparagraph (E) or (F) of § 101(b)(1).

(5) If the citizen parent has not been physically present in the United States or its outlying possessions for a period or periods totaling not less than 5 years, at least 2 of which were after attaining the age of 14 years-

(A) The child is residing permanently in the United States with the citizen parent, pursuant to a lawful admission for permanent residence, or

(B) A citizen parent of the citizen parent has been physically present in the United States or its outlying possessions for a period or periods totaling not less than 5 years, at least 2 of which were after attaining the age of 14 years.

(b) ATTAINMENT OF CITIZENSHIP STATUS; RECEIPT OF CERTIFICATE. - Upon approval of the application (which may be filed abroad) and, except as provided in the last sentence of § 337(a), upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

8 C.F.R. 322.2(a) provides that to be eligible for naturalization under § 322 of the Act, a child on whose behalf an application for naturalization has been filed by a parent who is, at the time of filing, a citizen of the United States, must:

(1) Be unmarried and under 18 years of age, both at the time of application and at the time of admission to citizenship;

(2) Be physically present in the United States pursuant to a lawful admission, and in the legal custody of the applying citizen parent;

(3) Be a person of good moral character, attached to the principles of the Constitution of the United States, and favorably disposed toward the good order and happiness of the United States; a child under the age of 14 will generally be presumed to satisfy this requirement;

(4) Comply with other requirements for naturalization as provided in the Act....(Emphasis supplied.)

The record reflects that the applicant's father filed the present application on July 22, 1999 when the applicant was 19 years, 10 months and 24 days old. Therefore, the applicant has failed to satisfy 8 C.F.R. 322.2(a)(1).

Section 321 CHILD BORN OUTSIDE OF UNITED STATES OF ALIEN PARENT;
CONDITIONS UNDER WHICH CITIZENSHIP AUTOMATICALLY ACQUIRED

(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, Interim Decision 3316 (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."

The second part of the district director's decision relates to the finding that the applicant has not been acknowledged or legitimated. The Associate Commissioner will respond to that premise at this time even though the applicant's Service file is not present for review because that premise is also advanced by counsel on appeal. According to counsel, the applicant's father, [REDACTED], filed an immigrant visa petition for the applicant and the application indicates that the applicant was lawfully admitted for permanent residence on November 17, 1989. Therefore, it is presumed that this Service and/or the Department of State made a previous determination classifying the applicant as the immediate relative "child" of [REDACTED] as that term is defined under § 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1).

The record establishes that [REDACTED] became a naturalized U.S. citizen in 1990 and prior to the applicant's 18th birthday, (2) the applicant was acknowledged by [REDACTED] shortly after the applicant's birth according to the Civil Code of El Salvador,

Articles 135 and 143, (3) the applicant became the beneficiary of an approved immigrant visa petition filed by [REDACTED], and (4) he was residing in the United States in [REDACTED]'s legal custody as a lawful permanent resident when [REDACTED] naturalized in July 1990.

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).

There is no provision under the law by which the applicant could have automatically acquired U.S. citizenship through his father's naturalization.

8 C.F.R. 341.2(c) provides 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 has satisfied all of the requirements of §§ 321 or 322 of the Act. The appeal will be dismissed.

ORDER: The appeal is dismissed.