U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

E2

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

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FILE: [redacted] Office: Hartford (BOS) Date: **JAN 10 2003**

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Section 320 of the Immigration and Nationality Act, 8 U.S.C. § 1431

IN BEHALF OF APPLICANT: Self-represented

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting District Director, Boston, Massachusetts, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The applicant was born on October 23, 1989, in the Dominican Republic. The applicant's father, [redacted] was born in the Dominican Republic in March 1960 and became a naturalized U.S. citizen on March 11, 1996. The applicant's mother, [redacted] was born in the Dominican Republic in November 1960 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 July 13, 1997. The applicant is seeking a certificate of citizenship under sections 320 or 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1431 or 1432.

The acting district director reviewed the record and noted that the applicant's father was married to another woman, [redacted] when the applicant was born. The applicant's father married [redacted] in August 1986 and they divorced in March 1993. The acting district director determined that the applicant was ineligible for the benefits of former section 321 of the Act.

On appeal, the applicant argues that she was in the legal custody of her natural father when she was born because her father did not leave for the United States until March 31, 1990.

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 INTERP 320.1(a)(6).

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.

Section 321 of the Act was repealed on February 27, 2001. Section 321 of the Act previously in effect provided, 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.

In Matter of Fuentes, 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 section 321(a). 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."

The record establishes that the applicant's father became a naturalized U.S. citizen prior to the applicants 18th birthday, and that the applicant was residing in the United States in her father's legal custody as a lawful permanent resident after her father naturalized.

However, in order for the applicant to receive the benefits of section 321 of the Act, there must have been a legal separation of the parents. Since the applicant's parents were never married they could not have obtained a divorce. Therefore, the applicant's father was not legally separated from the applicant's mother, and the applicant does not qualify for the benefits of former section 321 of the Act.

Sections 320 and 322 of the Act were amended by the Child Citizenship Act of 2000 (CCA), and took effect on February 27, 2001. The CCA benefits all persons who have not yet reached their 18th birthday as of February 27, 2001. The applicant was 11 years

and 4 months old on February 27, 2001. Therefore, she is eligible for the benefits of the CCA.

Section 320(a) of the Act, effective on February 27, 2001, provides, in part, that a child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

> (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
>
> (2) The child is under the age of eighteen years.
>
> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.
>
> (b) Subsection (a) shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under section 101(b)(1).

Step-children and children born out of wedlock who have not been legitimated are not included in the definition of the term "child" as used in Title III. Therefore, unless such children are adopted or legitimated, they will not be eligible for benefits under the CCA.

The record reflects that the applicant was legitimated by her father following her birth in the Dominican Republic, notwithstanding the fact that the father was married to a person other than the applicant's mother.

Section 101(c) of the Act, 8 U.S.C. 1101(c), provides that the term "child" as used in Title III means an unmarried person under 21 years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile,...if such legitimation takes place before the child reaches the age of 16 years..., and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

The applicant was classified as the child of a United States citizen (IR-2) and issued an immigrant visa. Therefore, it has already been determined that the applicant satisfied the definition of the term "child" as that term is used in section 101(b) of the Act as used in titles I and II. The only difference between the definition of the term "legitimated child" in titles I and II and in title III, is the age requirement.

The applicant has one parent who is a U.S. citizen, is under the age of 16 years, and is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful

admission for permanent residence. The applicant and her biological father and mother are now residing at the same address.

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 satisfied the requirements of section 320 of the Act. Therefore, the appeal will be sustained.

ORDER: The appeal is sustained. The acting district director's decision is withdrawn, and the application is approved.