

€ DOS Revises Interpretation of INA Requirements for Derivative Naturalization

[Editorial Summary: In the Department of State's Passport Bulletin No. 96-18, dated Nov. 9, 1996, the DOS revised its interpretation of the [INA § 321\(a\)](#) requirements for derivative naturalization, holding that there is no specific order in which the conditions of part (a) must be satisfied for citizenship to be acquired, as long as conditions are satisfied before the child's 18th birthday. This document was cited in a recent BIA precedent decision, *Matter of Fuentes-Martinez*, 21 I. & N. Dec. ___, Interim Decision No. 3316 (BIA, Mar. 18, 1997), and is reprinted here for our readers convenience. See related INS memo on page 537 of this issue.]

United States Department of State

Washington, D.C. 20520

Nov. 6, 1996

PASSPORT BULLETIN - 96-18

TO: All Regional Directors

Director, NPC

All Field Agency Staff Personnel

FROM: CA/PPT - Mr. Larry L. Emery

Managing Director, Passport Services

SUBJECT: New Interpretation of Claims to Citizenship Under [Section 321\(a\)](#) INA

REF: 1. Passport Bulletin 93-2 dated January 8, 1993

2. Recent CA/INS

Citizenship Meeting

This Passport Bulletin Number **96-18** supersedes and cancels Passport Bulletin Number 93-2 referenced above.

SUMMARY:

CA/OCS, in coordination with CA/PPT and INS, has revised its interpretation of the [Section 321\(a\)](#) INA requirements for derivative naturalization. We now hold that there is no specific order in which the conditions of part (a) must be satisfied for citizenship to be acquired as long as conditions are satisfied before the child's 18th birthday. We also consider the age limit of 18 applies to all persons who come within the purview of the INA.

BACKGROUND:

[Section 321\(a\)](#) INA provides for acquisition of citizenship of a minor upon the naturalization of his/her parent(s) provided certain conditions are satisfied. Because 321(a) did not specify that the conditions must occur in any certain order,

there were differing opinions among adjudicators as to whether a person could claim citizenship under Section 321(a) regardless of the order in which the conditions occurred. The referenced Passport Bulletin addressed this problem with regard to the two most often asked questions:

- Whether the naturalization of one parent must occur after the death of the other parent in order for the child to acquire citizenship through the parent's naturalization under Section 321(a)(2), and
- Whether the naturalization of the parent with custody must occur after the parent is divorced or separated, and has custody, for the child to acquire citizenship through the naturalization of the custodial parent under Section 321(a)(3).

The Bulletin advised that, in order for a child to derive citizenship under Section 321(a), the death of an alien parent or the awarding of custody of a child following a divorce or legal separation must occur prior to the naturalization of the surviving or custodial parent. (A copy of this Bulletin is attached for your reference.)

NEW INTERPRETATIONS:

Through subsequent discussions, CA/OCS, CA/PT and INS 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. Citizenship would be acquired on the date the last condition is satisfied. (Please note: This interpretation cannot be applied without qualification in the case of an adopted child who claims citizenship under [Section 321\(b\)](#) INA because Section 321(b) specifically requires that an adopted child be residing in the United States pursuant to a lawful admission for permanent residence "at the time of naturalization".)

With reference to the issues discussed in the Bulletin, we now hold as follows:

Naturalization of the Surviving Parent (Sec. 321(a)(2))

A child whose alien parent dies after the naturalization of the other parent would derive citizenship automatically under Section 321(a)(2) on the date of the alien parent's death provided the death occurs before the child's 18th birthday and the child is residing in the United States pursuant to lawful permanent residence on that date. If the child is not residing in the United States on that date but thereafter enters the United States to begin lawful permanent residence before age 18, citizenship would be acquired on the date of such entry.

Naturalization of the Parent with Legal Custody After a Divorce or Legal Separation of the Parents (Sec. 321(a)(3))

A child who is given into the custody of a parent following that parent's naturalization (the other parent being an alien) would derive citizenship under [Section 321\(a\)\(3\)](#) INA on the date custody is awarded provided such date is prior to child's 18th birthday and the child is residing in the United

States pursuant to lawful permanent residence on that date. If the child is not residing in the United States on that date but enters the United States to begin lawful permanent residence before age 18, citizenship would be acquired on the date of such entry.

Legal Custody

The Department has not changed its interpretation of what constitutes "legal custody". As stated in the referenced Bulletin, in cases where the divorce or separation decree does not specify who has custody and the naturalized parent has physical custody, the child can be documented as a citizen under Section 321(a)(3) provided that all other conditions of the law are met. Section 321 does not require sole or exclusive legal custody. If the parents have a joint custody decree, then both parents have legal custody. Thus, the naturalization of either parent would be sufficient to satisfy the Section 321(a)(3). If there is a specific question about the sufficiency of legal custody evidence, OCS, PPT and INS agree that we should review the matter on a case by case basis.

APPLICATION OF THE 1978 AMENDMENT

P.L. 95-417, effective October 10, 1978, amended [Section 321](#) INA to raise, from 16 to 18, the age upon which all the conditions of the law had to be fulfilled in order for citizenship to be acquired. The Department and INS now interpret this amendment to apply to any person claiming citizenship through a parent(s) naturalization under Section 321 who can establish that, after December 24, 1952 (the effective date of the INA) and before the person's age of 18 all the conditions of the law were satisfied. We do not consider the date the law was amended (October 5, 1978) to have any significance in the adjudication of such claims. Previously, we held that the amendment was not retroactive (see [7 FAM 1153.4-4c.\(2\)](#)). We now hold that the amendment is to be applied retroactively to the effective date of the INA.

OCS has received several questions from passport adjudicators, most recently from the Philadelphia and New York agencies, about the interpretation of Section 321. Regional Directors are asked to ensure that all Passport Agencies and acceptance agents are made aware of these changes. All new interpretations will be included in the revised 7 FAM.

Attachment:

Passport Bulletin

cc: CA/PPT -Mr. Kenneth Hunter

CA/PPT -Office Directors

CA/OCS/PRI -Mr. Carmen A. DiPlacido

CA/FPP -Mr. Vasquez

CA/VO -Ms. Donna Hamilton

CA/EX -Mr. Theodore

Strickler

© 2002 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Portions copyright © eHelp Corporation.
All rights reserved.