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Immigration and Naturalization Service

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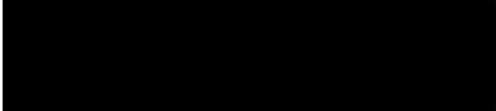
FILE: [Redacted] Office: Phoenix (LVG)

Date: JUN 18 2002

IN RE: Applicant: [Redacted]

APPLICATION: Application for Certificate of Citizenship under Former Section  
321 of the Immigration and Nationality Act, 8 U.S.C. 1432

IN BEHALF OF APPLICANT:



Public Copy

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 District Director, Phoenix, Arizona. The matter is now before the Associate Commissioner on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on September 28, 1975, in El Salvador. The applicant's father, [REDACTED] was born in El Salvador in 1954 and became a naturalized United States citizen on September 6, 1984. The applicant's mother, [REDACTED] was born in El Salvador in 1959 and never became a United States citizen. The applicant's parents married each other in 1974 and divorced on March 16, 1981. The applicant was lawfully admitted for permanent residence on March 11, 1978. The applicant claims eligibility for a certificate of citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432.<sup>1</sup>

The director determined that the record failed to establish that the applicant was in the legal and physical custody of the United States citizen parent when that parent naturalized and denied the application accordingly.

On appeal, counsel submits a stipulated order that was adopted by the District Court of Clark County, Nevada on December 18, 2001, three months after the director denied the application. Pursuant to the stipulation of the applicant's parents, the judge ordered that the final decree of divorce be amended *nunc pro tunc*, effective September 1, 1984, to reflect that the custody of the applicant was granted to the parent who ultimately became a United States citizen. On the basis of this retroactive court order, counsel asserts that the applicant was in the "legal custody" of his father for purposes of former section 321 of the Act.

Former section 321 of the Act 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:

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<sup>1</sup> Section 321 of the Act was repealed by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631, which removed the legal separation requirement from the rules of derivative naturalization. The provisions of the Child Citizenship Act became effective February 27, 2001, and are not retroactive. Matter of Rodriguez-Trejedor, 23 I&N Dec. 153 (BIA 2001); see also Nehme V. INS, 252 F.3d 415, 431 (5th Cir. 2001). However, as noted in the publication of the interim rule implementing the Child Citizenship Act of 2000, all persons who acquired citizenship automatically under former section 321 of the Act, as previously in force prior to February 27, 2001, may apply for a certificate of citizenship at any time. 66 Fed. Reg. 32138, 32141 (June 13, 2001).

- (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.

The issue in this proceeding is whether a state court's *nunc pro tunc*, or "now for then," amendment of a 20-year-old divorce decree may retroactively grant legal custody to the United States citizen parent for purposes of former section 321(a)(3) of the Act.

The record contains a copy of the parents' original divorce decree, dated March 16, 1981. The divorce decree ordered that the applicant's mother, [REDACTED] be awarded the care, custody, and control of the applicant as a minor child, subject to the right of reasonable visitation on the part of the applicant's father. The parents of the applicant claim that the mother subsequently gave the father "complete care, custody, and control" of the applicant in "September, 1984," after the applicant asked to live with his father. The parents state that they "don't remember" if they signed any legal documents regarding the transfer of custody, but that they agreed to this arrangement.

In support of this claim, counsel for the applicant submitted a copy of the *nunc pro tunc* court order, copies of two affidavits from the applicant's parents, as well as the applicant's school records from 1980, 1981, 1982, 1983, 1991, and 1992. The school records reflect the names of both parents through 1983, and the father's name is listed as the legal guardian in the 1991 and 1992 records. The applicant did not submit any documentary evidence that would establish that the father had custody of the applicant on the critical date, September 6, 1984, when the father became a naturalized United States citizen. Relying on the recent *nunc pro tunc* court order, counsel asserts that the applicant was in the "legal custody" of his father for purposes of section 321 of the Act.

Counsel's assertions are not persuasive. First, the United States citizen father has not established that he had actual custody of the applicant at the time that he became a citizen. The father's claim of "legal custody," as well as the state court's retroactive amendment of the divorce decree, is based on the father's claim that the applicant was in his custody as of "September, 1984." No evidence was submitted in support of this claim. The parents of the applicant simply assert in their affidavits that the applicant went to live with his father in "September, 1984." The applicant does not provide a specific date on which the father obtained custody of the applicant as a minor child, nor does the applicant provide any probative evidence in support of this claim. Although the unsupported affidavits might be sufficient for the purposes of a stipulated *nunc pro tunc* order in a state family court, the affidavits alone are not sufficient to meet the burden of proof in this immigration proceeding. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, the applicant has not established that the retroactive amendment of the divorce decree effectively granted the father "legal custody" of the applicant, as required by repealed section 321(a)(3) of the Act. Upon review, it is not clear that the retroactive grant of *nunc pro tunc* custody was proper under Nevada law. The Nevada Rules of Civil Procedure place limitations on a courts' authority to make retroactive amendments to prior orders. A court may retroactively amend an order or judgement entered due to mistake, inadvertence, surprise, excusable neglect, or fraud, but only if a party files a motion no more than six months after the erroneous judgement or order was entered. See Nevada Rule Civil Procedure 60(b). In the present case, the parents' stipulation was adopted as a *nunc pro tunc* correction more than twenty years after the original divorce decree was entered.

In addition, the Nevada Rules of Civil Procedure state that an amendment *nunc pro tunc* may be utilized to retroactively correct clerical mistakes and court error. See Nevada Rule Civil Procedure 60(a). Counsel quotes Koester v. Administrator of Estate of Koester, 101 Nev. 68, 693 P.2d 569 (Nev. 1985), which states that the purpose of a *nunc pro tunc* order is "to make the record speak the truth as to what was actually determined or done or intended to be done by the court." As noted in the affidavits of the applicant's parents, the mother was granted legal custody of the applicant as a minor child through the divorce decree of March 16, 1981. The United States citizen father does not claim to have obtained custody of the applicant until "September, 1984," more than three years after the divorce decree was entered. Neither of the parents suggest that the divorce decree's original custody provision was entered by mistake or contains any error. Accordingly, with regard to the original divorce decree, there was no error on the part of the court when it originally entered the custody order on March 16, 1981. The *nunc pro tunc* "correction" of the custody terms of the divorce decree appears to have been

entered in error. See, e.g. Rodela v. Rodela, 88 Nev. 134, 494 P.2d 277 (Nev. 1972).

Finally, without regard to the question of whether the retroactive custody order was proper under Nevada law, it is noted that the United States First Circuit Court of Appeals has stated that a state court has no power to modify Congress' rules for naturalization on equitable grounds through a *nunc pro tunc* custody order. Fierro v. Reno, 217 F.3d 1 (1st Cir. 2000). In a decision mirroring the facts of the present case, the First Circuit Court of Appeals stated that the recognition of a state court's retroactive custody order would defy Congressional intent that the child's citizenship should follow that of the parent who had legal custody. The court reasoned that Congress wanted to protect the child against separation from the parent having legal custody during the child's minority. Id. at 6.

In addition, the First Circuit declined to recognize the retroactive court order as it would allow the state courts to undermine federal immigration law. The court declared that:

[R]ecognizing the *nunc pro tunc* order in the present case would in substance allow the state court to create loopholes in the immigration laws on grounds of perceived fairness or equity. There is no suggestion that the original custody decree was entered by mistake, was contrary to law, or otherwise did not reflect the true legal relationship between [the applicant] and his parents at any time during his minority. Congress' rules for naturalization must be applied as they are written, and a state court has no more power to modify them on equitable grounds than does a federal court or agency. See generally INS v. Pangilinan, 486 U.S. 875, 883-85, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988); Examining Bd. of Engineers, Architects & Surveyors v. de Otero, 426 U.S. 572, 605, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976).

Fierro v. Reno, at 6. The Associate Commissioner accedes to the decision of the First Circuit Court of Appeals and adopts the court's reasoning. For this reason alone, the application may not be approved.

Counsel asserts that the Service has accepted *nunc pro tunc* custody orders in support of at least one application that was filed pursuant to former section 321 of the Act. The director's decision does not indicate whether she reviewed the prior approval of any other applications. The record of proceeding does not contain copies of the application that is claimed to have been previously approved. If the previous application was approved based on unsupported assertions similar to those contained in the current record, the approval would constitute clear and gross error on the part of the Service. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been

erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. Sussex Enng. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988). The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a district office or service center. See, e.g. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La.).

As noted by the director, there is no other provision under the law by which the applicant could have automatically acquired United States citizenship through his father's naturalization. The district director's decision will be affirmed. This decision is without prejudice to the applicant seeking United States citizenship through normal naturalization procedures.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The applicant has not sustained that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.

