

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Er

FILE:



Office: HONOLULU, HI

Date:

FEB 02 2007

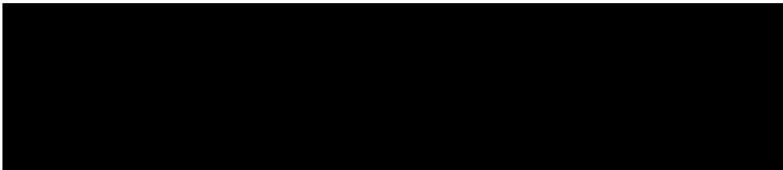
IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship pursuant to Section 321(a) of the Nationality Act,
8 U.S.C. § 1432(a), now repealed

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Honolulu, Hawaii and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on July 1, 1975 in Tokyo. The applicant's mother, [REDACTED] was born in China on September 12, 1945 and became a naturalized U.S. citizen on September 17, 1992. The applicant's father, [REDACTED], is a Japanese citizen. The applicant's parents were married on May 1, 1969 and divorced on August 13, 1984 under Japanese law. The applicant was admitted to the United States as a lawful permanent resident on September 28, 1988. The applicant seeks a certificate of citizenship based on the claim that he acquired U.S. citizenship through the naturalization of his mother under section 321(a) of the Act, 8 U.S.C. § 1432(a).

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001. However, any person who would have acquired automatic citizenship under its provisions prior to February 27, 2001 may apply for a certificate of citizenship at any time. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Therefore, the issue before the AAO is whether the applicant has established that he acquired U.S. citizenship under the provisions of section 321(a)(2) of the Act prior to February 27, 2001.

Former section 321 of the Act, 8 U.S.C. § 1432, provided 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.

The applicant contends that he acquired U.S. citizenship upon the 1992 naturalization of his mother under section 321(a)(3). To establish his eligibility, the applicant has submitted:

- His mother's naturalization certificate, which demonstrates that she became a naturalized U.S. citizen on September 17, 1992 in the U.S. District Court, District of Hawaii;

- Translated copies of his parents' August 13, 1984 notice of divorce, a Tokyo family register for the applicant's mother indicating an address separate from that of the applicant's father and noting the date of her August 13, 1984 divorce from the applicant's father; a September 8, 1988 certified abstract of a Tokyo family register that indicates the applicant was residing with his father as of November 22, 1985 and that his father is the parent with "parental authority" over the applicant.
- A statement from the applicant's father, sworn on September 11, 1988 in London before a notary public, which indicates he wishes to transfer his parental authority over the applicant to the applicant's mother.
- Excerpts from the Civil Code of Japan related to child custody.
- A February 2003 opinion from the Eastern Law Division, Library of Congress articulating the differences between the two concepts of child custody – *shinken* and *kango* – under Japanese law, issued in response to a January 28, 2003 request from the district director.
- An expert opinion from Professor [REDACTED], Waseda University School of Law in Japan explaining child custody in Japan.
- A discussion of the concepts of parental power and custodial rights in the Civil Code of Japan prepared by the [REDACTED] in Tokyo, including commentary on custodial rights in Article 766 of the Code.
- A child custody order issued by the Family Court of the First Circuit, State of Hawaii, awarding legal and physical custody of the applicant *nunc pro tunc* to his mother effective as of September 28, 1988.

The record establishes that the applicant's mother became a naturalized U.S. citizen on September 17, 1992 when the applicant was 17 years of age and that he was, at that time, a lawful permanent resident, admitted to the United States on September 28, 1988. It further proves that the applicant's parents were divorced as of August 13, 1984. Therefore, the only remaining issue is whether, at the time the applicant's mother naturalized, he was in her legal custody, as required by former section 321(a)(3) of the Act.

Legal custody vests "by virtue of either a natural right or a court decree." See *Matter of Harris*, 15 I&N Dec. 39 (BIA 1970). In the absence of a judicial determination or grant of custody in a case of a legal separation of the naturalized parent, the parent having actual, uncontested custody of the child is to be regarded as having "legal custody." See *Matter of M*, 3 I&N Dec. 850, 856 (BIA 1950).

In the instant case, child custody was addressed in the August 13, 1984 Japanese divorce notice submitted by the applicant and indicates that the applicant's father was awarded "parental authority" for the applicant and his two siblings. The applicant's mother was assigned no legal rights regarding her children. This same custody arrangement is reflected in the abstract from the family register for the applicant's father, which identifies him as the individual with parental authority over the applicant. Subsequently, the applicant's father sent a sworn statement dated September 10, 1988 to the U.S. Embassy in Tokyo indicating that he wished to transfer his parental authority for the applicant and his siblings to his ex-wife until they completed their educations.

The applicant contends that, under Japanese law, child custody may be transferred based solely on the agreement of divorced parents and, therefore, that his father's letter is proof that he was in the legal custody of his mother as of his September 28, 1988 arrival in the United States. He also submits a copy of a *nunc pro tunc* order issued by the Family Court of the First Circuit, State of Hawaii awarding his legal and physical custody to his mother as of September 28, 1988.

The AAO turns first to the *nunc pro tunc* child custody order, which was filed on March 31, 2004, when the applicant was 28 years of age. While, as discussed below, the AAO finds the applicant to have established that he was in the legal custody of his mother on the date of her naturalization, its decision is not based on the *nunc pro tunc* custody order obtained by the applicant. The Family Court order does not establish that the applicant was in his mother's legal custody following his arrival in the United States. The AAO's reasoning in this matter is reflected by the court in *Fierro v. Reno*, 217 F.3d 1 (1st Cir. 2000):

[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 equity or fairness. 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 petitioner] 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.

The record before the AAO offers no basis for concluding that the original custody arrangement reached by the applicant's parents or its subsequent amendment by his father is inconsistent with Japanese law or was entered into without the agreement of both parents. Therefore, the applicant must establish that the authority transferred by his father's sworn statement to his mother constitutes legal custody for the purposes of satisfying the requirements of former section 321(a)(3) of the Act.

To reach its decision regarding the type of custody exercised by the applicant's mother, the AAO has relied primarily on the translation of Chapter IV of the Civil Code of Japan (Civil Code) found in the record, which deals with parental power, and the Eastern Law Division's discussion of the dual nature of child custody in Japan. It notes, however, that the Library of Congress' discussion is also reflected in the materials prepared by the [redacted] in Tokyo and the opinion of Professor [redacted] as noted above.

Chapter IV of the Civil Code indicates that couples who divorce by agreement, as in the present case, may themselves determine who is to have parental power over any children from the marriage. Only in cases where no agreement is reached or is possible will a Japanese family court render judgment. An individual exercising parental power has the right and duty to provide for the custody and education of his or her child and the child shall reside with the parent who exercises parental power. The divorce agreement reached by the applicant's parents identified his father as the individual exercising parental power, assigning him the legal custody of the applicant.

The opinion issued by the Eastern Law Division of the Library of Congress reports, however, that under the Civil Code, there are two concepts of child custody included within the parental authority discussed above, *shinken* and *kango*:

Shinken is a more formal concept of child custody. Custody of physical and spiritual care is

called *kango*. The person who exercises *kango* has the right to designate where the child lives, the right to discipline the child, and the right to authorize the child to hold a job. Usually, the person who has *shinken* also has *kango*. However, *kango* can be separated from *shinken* in certain conditions. For example, when one divorced parent who has *shinken* lives separately from the child, *kango* will be bestowed to the parent who lives with the child. *Kango* can be transferred from one divorced parent to the other only by their agreement, without formal legal procedures. The *shinken* must be registered at the family registry, but the person who exercises *kango* is not registered. No registration system exists for *kango*.

[The applicant's father] wrote in his letter that he transferred "parental authority" to . . . the applicant's mother. Whether he meant *shinken* or *kango* by the term "parental authority" is not clear. However, it may be inferred that only *kango* was transferred, because *kango* could be transferred by agreement between [the applicant's parents], while the transfer of *shinken* would require registration at the family registry.

The regulation at 8 C.F.R. § 320.1(2) states that in the case of a child of divorced or legally separated parents, that a U.S. citizen parent will be found to have legal custody for the purposes of the Child Citizenship Act (CCA) of 2000 if there has been "an award of primary care, control, and maintenance of a minor child to a parent by a court of law or other appropriate government entity pursuant to the laws of the state or country of residence." While the applicant is not covered by the provisions of the CCA, the definition of what constitutes legal custody under the CCA is, nevertheless, relevant to the AAO's evaluation of what constitute legal custody in this proceeding.¹

The applicant has submitted a September 11, 1988 sworn statement from his father indicating that he was transferring parental authority for the applicant and his siblings to his ex-wife until such time as the children had completed their educations. While this statement does not, for reasons previously discussed, constitute a complete transfer of parental authority to the applicant's mother, it is sufficient evidence that the applicant's father transferred those aspects of parental power related to the care and maintenance of the applicant, including the right to discipline him,² to the applicant's mother in accordance with the laws of Japan, his country of residence. However, while the *kango* authorities transferred to the applicant's mother by his father's statement resemble the exercise of "primary care, control and maintenance" which defines legal custody under the CCA, the AAO finds even greater similarity between the parental authority shared by the applicant's parents as of September 11, 1988 and the joint custody determinations issued by U.S. courts. Although established by the agreement of the applicant's parents rather than a judicial proceeding, the continued responsibility of the applicant's father for the *shinken* component of parental authority and his mother's assumption of its *kango* aspects placed the applicant's parents, beginning in September 1988, in a custody arrangement where they lawfully shared parental responsibility for the applicant, albeit exercising different aspects of that responsibility. Therefore, the AAO finds the statement sworn by the applicant's

¹ Only those individuals who had not yet reached their 18th birthdays as of February 27, 2001, the effective date of the CCA, are covered by its provisions. The applicant was 25 years old on February 27, 2001.

² The letter from [REDACTED] indicates that *kango* also includes the right to make decisions regarding a child's education. The expert opinion provided by Professor [REDACTED] indicates that opinions differ as to whether *kango* includes education but "that the prevailing opinion is that education is included since the *kango* of a child that excludes education is meaningless."

father on September 11, 1988 to establish that his ex-wife exercised joint custody of the applicant at the time she became a U.S. citizen.

In that there is no requirement in former section 321(a)(3) of the Act, 8 U.S.C. § 1432(A)(3) that the naturalizing parent have sole or exclusive custody, the applicant has established that he was in his mother's legal custody at the time of her naturalization. Accordingly, the applicant is eligible for a certificate of citizenship under former section 321(a)(3) of the Act, 8 U.S.C. § 1432(a)(3).

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the applicant to establish the claimed citizenship by a preponderance of the evidence. For the reasons discussed above, the applicant has met his burden. The appeal will be sustained.

ORDER: The appeal is sustained.