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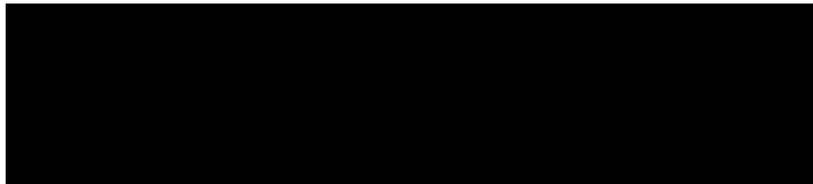
U.S. Department of Homeland Security
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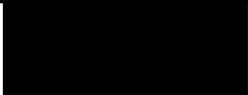
U.S. Citizenship
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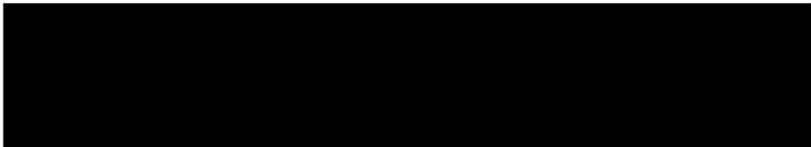
IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship pursuant to Section 321(a)(3) of the Nationality Act, 8 U.S.C. § 1432(a)(3), now repealed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 Field Office Director, Boston, Massachusetts and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on March 7, 1967 in the Dominican Republic.¹ The applicant's father, [REDACTED], also born in the Dominican Republic, became a naturalized U.S. citizen on April 17, 1974, when the applicant was seven years old. The applicant's mother, Jorgina [REDACTED], naturalized in 1992, when the applicant was 25 years old. The applicant's parents were married on February 14, 1971 and divorced on October 7, 1976. The applicant was admitted to the United States as a lawful permanent resident on December 31, 1975, when he was eight years old. The applicant, seeks a certificate of citizenship based on the naturalization of his father, pursuant to former section 321(a) of the Immigration and Nationality Act (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The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001.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 former section 321(a) of the Act prior to February 27, 2001.

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.

¹ Although born out of wedlock, the applicant was legitimated by his parents' marriage under the Dominican law in effect prior to the enactment of the 1994 Code for the Protection of Children (effective date January 1, 1995) and qualifies as a child for the purposes of former section 321(a) of the Act. *See Matter of Reyes*, 17 I&N Dec. 512 (BIA 1980); *see also Matter of Martinez*, 17 I&N Dec. 1035 (BIA 1997).

The field office director denied the application based on her determination that the applicant had failed to establish that he was in the sole legal custody of his father prior to his 18th birthday. On appeal, counsel contends that the applicant was in the joint legal custody of his parents following their 1976 divorce and that such joint custody satisfies the requirements of former section 321(a)(3) of the Act.

The record indicates that the applicant was admitted to the United States as a lawful permanent resident on December 31, 1975 at eight years of age and that his father naturalized on April 17, 1974, when he was seven years old. The applicant has also submitted documentation to establish the divorce of his parents when he was nine years of age. Therefore, the only issue to be considered by the AAO is whether the applicant, prior to his 18th birthday, was in the legal custody of his father.

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 the 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).

The 1976 divorce decree ending the marriage of the applicant's parents does not address the issue of child custody and there are no other documents in the record to establish that the applicant's custody was ever legally adjudicated by a Jamaican or U.S. court. Although counsel contends that the applicant was in the joint legal custody of his parents following their 1976 divorce, the record on appeal provides no basis on which to reach this conclusion. The silence of the submitted divorce decree with respect to custody does not create a presumption that custody was, therefore, vested with both parents. Accordingly, the AAO does not find the record to establish that [REDACTED] had legal custody of the applicant on the basis of a judicial determination.²

The record does, however, demonstrate that the applicant resided in the actual uncontested custody of his father prior to his 18th birthday, which, as noted above, is sufficient to establish legal custody when there has been no judicial determination of custody following a legal separation. *Id.* An affidavit signed by both of the applicant's parents indicates that subsequent to their 1976 divorce, they and the applicant lived together at the same Miami address. This statement is supported by the immigrant visa application filed by the applicant at the U.S. embassy in Santo Domingo in 1975, which reports that the applicant was joining his mother in Miami, and that she and the applicant's father were residing at the same address. In that the applicant lived with his father and mother following his 1975 arrival in the United States, the AAO finds that the preponderance of the evidence indicates that he resided in the actual, uncontested custody of his father, i.e., in his legal custody, after his parent's divorce, as required to satisfy former section 321(a)(3) of the Act.

For the reasons previously discussed, the record establishes that the applicant was in the legal custody of his father prior to his 18th birthday. The applicant is, therefore, found to have satisfied all of the requirements of former section 321(a)(3) and the appeal will be sustained.

² The AAO acknowledges counsel's contention on appeal that the applicant is not required to demonstrate that he was in the sole or exclusive custody of his father in order to satisfy the requirements of former section 321(a)(3) of the Act. In cases where joint custody has been awarded in connection with a legal separation, both parents are appropriately viewed as having legal custody for the purposes of former section 321(a) of the Act.

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. The evidence submitted by the applicant meets this standard.

ORDER: The appeal is sustained.