U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: PORTLAND, OR Date: APR 26 2005

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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, Director
Administrative Appeals Office

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

The record reflects that the applicant was born on March 23, 1955, in Colombia. The applicant's father, [redacted] was born in Colombia on January 23, 1933, and he became a naturalized U.S. citizen on November 30, 1970, when the applicant was fifteen years old, The applicant's mother, [redacted] was born in Colombia and she is not a U.S. citizen. The applicant's parents married in Colombia on June 26, 1954. [redacted] obtained a divorce in Idaho on March 23, 1964, when the applicant was nine years old, and the applicant was admitted into the United States pursuant to a lawful admission for permanent residence on March 3, 1967, when he was eleven years old. The applicant seeks a certificate of citizenship under section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432, based on the claim that he acquired U.S. citizenship through his father.

The record reflects that on March 23, 1964, an Idaho District Court Judge awarded custody and control of the applicant to his mother, pursuant to a default judgment of divorce between the applicant's parents. On January 25, 2002, when the applicant was forty-six years old, an Idaho District Court Judge issued an Order to [redacted] Amended Order) pursuant to a custody stipulation signed and filed by the applicant's parents. The amended order retroactively awarded custody and control over the applicant to Mr. [redacted] as of March 23, 1964.

The district director, Portland, Oregon found that the March 23, 1964, Idaho divorce decree between the applicant's parents had clearly awarded legal custody over the applicant to his non-citizen mother. The district director found further that pursuant to *Hendrix v. INS,* 583 F.2d 1102 (9th Cir. 1978) and *Fierro v. Reno,* 217 F.3d 1 (1st Cir. 2000), the Order t[redacted] did not establish, for immigration purposes, that [redacted] had legal custody over the applicant prior to his eighteenth birthday. The district director concluded that the applicant had therefore failed to establish that he was eligible for a certificate of citizenship under section 321 of the former Act.

On appeal, counsel asserts that pursuant to Idaho state law, the Idaho District Court did not have jurisdiction to make its initial 1964, child custody decree because the applicant had not resided in Idaho or been physically present in the state prior to the court proceedings or legal custody order. Counsel asserts that the law set forth in the Colombian Civil Code therefore controls the legal custody status of the applicant, and that Colombian law provides that upon divorce, a child's parents share legal custody equally absent a court decree stating otherwise. In the alternative, counsel asserts that the January 2002 Idaho District Court amended order corrected the invalid 1964 custody decree, and that the correction should therefore be recognized retroactively to the date of the original order. Counsel additionally asserts that the Immigration and Naturalization Service (Service, now U.S. Citizenship and Immigration Services, CIS) previously found that the applicant was in the custody of his father (for good moral character purposes relating to [redacted] naturalization proceedings) and that the Service should not now be allowed to change its custody determination regarding [redacted] custody over the applicant.

Section 321 of the former Act states in pertinent part that:

(a) A child born outside of the United States of alien parents . . . 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 such child is under the age of eighteen 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 (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

(Emphasis added). 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 present matter, the record contains an Idaho District Court divorce decree obtained by the applicant's father on March 23, 1964, awarding the applicant's mother [redacted] custody and control over the applicant. Counsel asserts that pursuant to Idaho statutory provisions, the District Court did not have jurisdiction to make a custody order over the applicant.[1]

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[1] The Idaho Code provision relating to court jurisdiction in child custody matters, I.C. §32-1103 (now known as I.C. §32-11-201 (2002)) states that:

> a) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
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> 1) This state (i) is the home of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
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> 2) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
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> 3) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

The AAO notes that its appellate authority is limited. *See generally* 8 C.F.R. § 2.1 (2004) and 8 C.F.R. §103.1(f) (2003). The AAO finds that it is bound by the 1964 District Court decision and that the AAO may not go behind the district court's custody determination in order to establish whether it was in compliance with Idaho Code provisions. *See generally, Matter of Madrigal-Calvo,* 21 I&N Dec. 323, 327 (BIA 1996).

The AAO notes further that state court orders pertaining to retroactive or nunc pro tunc custody agreements are generally not recognized for immigration purposes. *See Fierro v. Reno,* 217 F.3d 1 (1st Cir. 2000). The First Circuit Court of Appeals stated in *Fierro* that:

> [W]e do not think that Congress can be taken as intending to give effect, for purposes of section 1432, to the kind of *ex post* modification of a custody decree reflected in this record
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> . . . .
>
> [B]oth the language of the automatic citizenship provision and its apparent underlying rationale suggest that Congress was concerned with the legal custody status of the child *at the time* that the parent was naturalized and during the minority of the child.
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> . . . .
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> [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 perceived grounds of equity or fairness . . . . 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 Fierro at 6 (citations omitted). Accordingly, the AAO finds that the January 25, 2002, Idaho district court amended, nunc pro tunc custody order submitted by the applicant, fails to establish for immigration purposes that the applicant's father had legal custody over the applicant prior to his eighteenth birthday.

In addition, the AAO finds counsel's assertion that the Service (now CIS) previously found that the applicant was in the legal custody of his father to be without merit. The AAO notes that counsel refers to a 1970 statement by an immigration officer about [redacted] physical custody over his children and his payment of child support. The officer statements pertained to a finding of good moral character during [redacted]

> 4) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3) of this section, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.
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> b) Except under paragraphs (3) and (4) of subsection (a) of this section, physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.
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> c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

naturalization proceedings, and the record contains no evidence to establish that CIS at any point made a finding that the applicant was in the legal custody of his U.S. citizen father prior to his eighteenth birthday.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish his claimed citizenship by a preponderance of the evidence. Because the applicant has failed to establish that he meets the requirements for citizenship as set forth in section 321 of the former Act, his appeal will be dismissed.

ORDER: The appeal is dismissed.