U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CA Date: AUG 29 2005

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship pursuant to section 321 of the Act, 8 U.S.C. § 1432.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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, San Francisco, California. 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 April 15, 1971, in Canada. The applicant's father was born in Canada, and he became a naturalized U.S. citizen on August 14, 1979, when the applicant was eight years old. The applicant's mother was born in Canada and she is not a U.S. citizen. The applicant was admitted into the United States as a lawful permanent resident on June 27, 1973, when he was two years old, and the applicant's parents divorced on March 4, 1980, when the applicant was eight years old. The applicant presently seeks a certificate of citizenship pursuant to section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432.

The district director determined that the applicant did not qualify for citizenship under section 321 of the former Act because he failed to establish he was in the legal custody of his U.S. citizen father subsequent to his parents' divorce, and prior to his eighteenth birthday. Specifically, the district director found that the divorce decree submitted by the applicant did not contain a stipulation regarding the legal custody of the applicant's parents' children. The district director found that written statements from the applicant's mother and father did not establish that the applicant was in his father's legal custody subsequent to his parents' divorce. In addition, the district director found that the applicant's present assertions contradicted statements that he had provided to a U.S. Immigration Officer in 1992, when he stated that he had lived with his mother in Canada after his parents' divorce.

On appeal, the applicant asserts that he lived with his father subsequent to his parents' divorce, and that under California and federal law he was in his U.S. citizen father's custody prior to his eighteenth birthday. The applicant asserts further that the immigration officer statements referred to by the district director are misleading.

Section 321 of the former Act, stated, 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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> (1) The naturalization of both parents; or
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> (2) The naturalization of the surviving parent if one of the parents is deceased; or
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> (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-**
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> (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. (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).

The present record contains a divorce decree reflecting that the applicant's parents obtained a final judgment of dissolution of marriage in Napa County, California on March 4, 1980, when the applicant was eight years old. The divorce decree does not contain a judicial determination or grant of custody over the applicant. Thus the parent having actual, uncontested custody over the applicant will be regarded as the parent with legal custody.

The record contains the following evidence relating to the applicant's father's (Mr. [redacted]) custody over the applicant subsequent to his divorce, and prior to the applicant's eighteenth birthday:

> A March 6, 2003, declaration signed by the applicant's mother ([redacted]) stating that she moved to Canada in November 1985, and that Mr. [redacted] had custody of the applicant in California from May 1985 to January 1987. The applicant's mother states that the applicant visited her in Canada for two weeks in 1985. She additionally states that Mr. [redacted] had full responsibility to make decisions regarding the applicant's health, education, welfare and benefit from November 1985 onward.
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> A January 6, 2003, declaration signed by Mr. [redacted] stating that the applicant's mother moved to Canada in October 1985, and that he had custody of the applicant from the time of her departure until January 1987.
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> An October 23, 1985, school application for the Monterey Bay Academy in Watsonville, California. The application reflects that the applicant's mother lived in Deer Park, California and that the applicant lived in St. Helena, California with his father. The application additionally reflects that the applicant previously attended Foothills Elementary School in St. Helena, California. The application is signed by Mr. [redacted] and the applicant.
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> A January 2, 2003, letter signed by [redacted], Assistant Professor of Education, Pacific Union College. The letter states that Mr. [redacted] has known the applicant since 1985 when Mr. [redacted] was the principal of Foothills Elementary School in St. Helena, California. Mr. [redacted] states that the applicant was in the eighth grade at the time and that he remembers working with the applicant's father. Mr. [redacted] states that he does not remember the applicant's mother.
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> A January 3, 2003, letter signed by [redacted], stating that he has been a teacher at the Foothills Adventist Elementary School in St. Helena, California since 1981. Mr. [redacted] states that the applicant was in his seventh and eight grade class between 1983 and 1985. Mr. [redacted] states that the applicant lived with his father near the school. Mr. [redacted] states further that he remembers interacting with the applicant's father on school related matters, but does not remember interacting with the applicant's mother.
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> A January 2, 2003, letter signed by Curtis Church, Senior Pastor, Mountain View Central

resident in the school dormitory under Mr. [redacted] supervision from June 1986 to January 1987, and from June 1987 to September 1987. Mr. [redacted] states that Mr. [redacted] enrolled the applicant at the academy and that he dealt with Mr. [redacted] on all school related matters. Mr. [redacted] states that he remembers Mr. [redacted] visiting the applicant and that the applicant's mother lived in Canada.

The record additionally contains a November 1992, Form I-213, Record of Deportable/Inadmissible Alien which states, in part, that the applicant reported he lived with his father when his mother returned to Canada.

8 C.F.R. § 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. Under the preponderance of evidence standard, it is generally sufficient that the proof establish that something is probably true. *See Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

The AAO finds that the contradictory immigration officer, Record of Investigation information referred to by the district director does not overcome the fact that the combined evidence contained in the record establishes it is probably true that after the applicant's parents' divorce, the applicant was in the actual, uncontested custody of his U.S. citizen father between November 1985 and January 1987. The evidence in the record establishes further that the applicant was under the age of eighteen when his father became a naturalized citizen, and the evidence establishes that the applicant resided in the U.S. pursuant to a lawful admission for permanent residence at the time. Accordingly, the AAO finds that the applicant has established, by a preponderance of the evidence, that he fulfilled the conditions for citizenship as set forth in section 321 of the former Act. The appeal will therefore be sustained.

ORDER: The appeal is sustained.