U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: DENVER, CO Date: DEC 03 2009

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 (2000).

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Denver, Colorado, 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 February 16, 1961 in England. The applicant's parents are [redacted] The applicant's parents were divorced on February 10, 1977. The applicant's father became a U.S. citizen upon his naturalization on April 22, 1977, when the applicant was 16 years old. The applicant was admitted as a lawful permanent resident in the United States on October 28, 1971, when he was 10 years old. He seeks a certificate of citizenship claiming that he derived U.S. citizenship upon his father's naturalization pursuant to section 321 of the former Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (2000).

The district director rejected the applicant's claim of citizenship upon finding that the applicant was not in his father's legal custody following his parents' divorce. Specifically, the director noted that the applicant's parents divorce decree awarded custody of the applicant to his mother.

On appeal, the applicant, through counsel, maintains that he was in his father's legal custody, as the term is now understood under the laws of the State of Colorado. *See* Applicant's Appeal Brief. He further states that his parents mutually agreed that custody of him would be transferred from his mother to his father. *Id.*

The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth. *See Chau v. Immigration and Naturalization Service,* 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The Child Citizenship Act of 2000 (CCA), Pub. L. 106-395, 114 Stat. 1631 (Oct. 30, 2000), amended sections 320 and 322 of the Act, and repealed section 321 of the Act. The provisions of the CCA took effect on February 27, 2001, are not retroactive, and apply only to persons who were not yet 18 years old as of February 27, 2001. *See* CCA § 104. The applicant was born in 1961. Because the applicant was under the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. *See Matter of Rodriguez-Tejedor,* 23 I&N Dec. 153 (BIA 2001). Section 321 of the former Act, 8 U.S.C. § 1432 (2000), is therefore applicable to this case.

Section 321 of the former Act, 8 U.S.C. § 1432 (2000), 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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> (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

> (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 has established that his father naturalized and that he was admitted to the United States as a lawful permanent resident prior to his 18th birthday. The question remains, however, whether the applicant can establish that his father had legal custody of the applicant following the applicant's parents' divorce. The AAO finds that he did not.

Legal custody vests "[b]y virtue of either a natural right or a court decree." *Matter of Harris,* 15 I&N Dec. 39 (BIA 1970). The applicant, citing *Matter of M*, 3 I&N Dec. 850, 856 (BIA 1950), notes that 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* Applicant's Appeal Brief. *Matter of M*, however, is inapplicable in this case because there is a court-ordered custody award in this case, included in the applicant's parents' divorce decree.

The record contains a divorce decree entered in 1977, awarding custody of the applicant to his mother. There is evidence in the record to establish that the applicant was in his father's physical custody, but no formal, judicial document amending the 1977 custody award. The AAO further notes that the applicant's citation of Colorado law, effective after 1999, is inapposite because, in relevant part, the applicant's custody was determined in 1977 and not officially revisited. The AAO finds no evidence in the 1977 custody award, or elsewhere in the record, to indicate that the applicant's parents were granted "joint custody."[1] The AAO therefore finds that the applicant cannot establish eligibility for citizenship pursuant to the section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3) (2000).

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[1] Counsel cites *Matter of Fuentes-Martinez*, 21 I&N Dec. 893 (BIA 1997), and U.S. Department of State's Passport Bulletin 96-18, in support of his claim that section 321 of the former Act "does not require sole or exclusive legal custody." *See* Applicant's Appeal Brief. *Fuentes-Martinez* and the Passport Bulletin address the issue of retroactivity of a 1978 amendment to section 321 of the former Act, and not the issue of legal custody. In any event, as noted above, there is no evidence in the record that the applicant's parents were granted "joint custody." The AAO further notes the

The AAO notes the Second Circuit's decision in *Lewis v. Gonzales*, 481 F.3d 125 (2nd Cir. 2007) where the court emphasized that "because derivative citizenship is automatic, and because the legal consequences of citizenship can be significant, the statute is not satisfied by an informal expression, direct or indirect. In all cases besides death, the statute requires formal, legal acts indicating either that both parents wish to raise the child as a U.S. citizen or that one parent has ceded control over the child such that his objection to the child's naturalization no longer controls." 481 F.3d at 131. In this case, there was no formal, legal act transferring legal custody of the applicant to his father. Therefore, the AAO finds that the applicant cannot establish eligibility for citizenship pursuant to the section 321(a)(3) of the former Act, 8 U.S.C. § 1432(a)(3) (2000).

8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The applicant was not in his father's legal custody following his parents' divorce and was therefore statutorily ineligible to derive U.S. citizenship from him. He therefore cannot meet his burden of proof and his appeal will be dismissed.

ORDER: The appeal is dismissed.

Fifth Circuit Court of Appeals' holding in *Bustamante-Barrera v. Gonzales*, 447 F.3d 338 (5th Cir. 2006), that only an award of sole legal custody satisfies the legal custody requirement of section 321 of the former Act, 8 U.S.C.§ 1432 (2000).