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

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[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CA Date: MAR 19 2010

IN RE: [redacted]

APPLICATION: Application for Certificate of Citizenship under Section 321 of the 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, 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 Field Office Director, San Francisco, California, 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 6, 1973 in South Korea. The applicant's parents are [redacted] and [redacted] The applicant's parents were divorced in 1986. Custody of the applicant was awarded to his mother upon the applicant's parents' divorce. The applicant's father became a U. S. citizen upon his naturalization on April 15, 1988, when the applicant was 15 years old. The applicant's mother was naturalized in 2000, after the applicant's 18th birthday. The applicant was admitted to the United States as a lawful permanent resident on February 28, 1982, when he was nine years old. The applicant seeks a certificate of citizenship claiming that he derived U.S. citizenship through his father.

The field office director denied the applicant's claim finding that the applicant was not in his father's legal custody following his parents' divorce. Specifically, the director rejected the Stipulated Order Amending Judgment of Divorce *Nunc Pro Tunc* [Stipulated *Nunc Pro Tunc* Order] and found that the applicant was in his mother's legal and physical custody during the relevant period prior to the applicant's 18th birthday.

On appeal, the applicant, through counsel, maintains that he was in his parents' joint legal custody following their divorce. *See* Applicant's Appeal Brief. Counsel, citing government memoranda, states that "sole or exclusive legal custody is not required." *Id.* Further, counsel states that the Stipulated *Nunc Pro Tunc* Order reflects the applicant's parents' true intentions to retain joint custody at the time of their separation and divorce. *Id.*

The applicable law for derivation of U.S. citizenship is "the law in effect at the time the critical events giving rise to eligibility occurred." *See Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). The applicant in this case was born in 1973. His 18th birthday was in 1991. Former section 321 of the Act, 8 U.S.C. § 1432 (2000), is therefore applicable to this case.[1]

Former section 321 of the 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:
>
> (1) The naturalization of both parents; or

[1] The Child Citizenship Act of 2000 (CCA), Pub. L. 106-395, 114 Stat. 1631 (Oct. 30, 2000), amended sections 320 and 322 of the Immigration and Nationality Act (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. Because the applicant was over 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).

(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 record establishes that the applicant's father naturalized, and that the applicant was admitted to the United States as a lawful permanent resident, prior to his 18th birthday. The record further establishes that the applicant's parents were divorced in 1985. The question remains whether the applicant was in his father's legal custody following his parents' divorce.

The record contains the applicant's parents' Judgment of Divorce entered by the Calhoun County, Michigan Circuit Court on April 2, 1986. The Judgment of Divorce states, unequivocally, that the applicant's mother "shall have the care, custody, education and control" of the applicant until his 18th birthday. *See* Judgment of Divorce at 2. The Judgment of Divorce further provides, in relevant part, that the applicant shall reside with his mother, but that his father had the right to be with the applicant "at all reasonable times" including half of summer and winter vacation and alternating Christmas holidays. *Id.* at 2-3.

In 2006, the applicant's parents' Judgment of Divorce was amended pursuant to a Stipulated *Nunc Pro Tunc* Order that provides, in relevant part, that the applicant's parents had joint legal and physical custody of the applicant. *See* Stipulated *Nunc Pro Tunc* Order.

In *Fierro v. Reno,* 217 F.3d 1, 6 (1st Cir. 2000), the First Circuit held that a state *nunc pro tunc* order, which retroactively changed custody from the petitioner's non-citizen mother to his citizen father, did not establish that he met the requirements of section 321 because during the relevant time period he was *actually* in the custody of his mother. The concern in applicant's case, as it was in *Fierro*, is the applicant's actual legal custody at the time the applicant's father naturalized and prior to his 18th birthday, not a recently obtained order retroactively creating the required custody. *Id.* (stating that "both the language of [section 321(a)] 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" (emphasis in original)).

The AAO also 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 (emphasis in original).

The applicant, through counsel, cites *Minasyan v. Gonzales*, *supra*, and contends that his parents' 2006 Stipulated *Nunc Pro Tunc* Order reflects their true intention to retain joint custody of the applicant upon their divorce in 1986. The applicant's reliance on *Minasyan* is misplaced. First, the AAO notes that the issue in *Minasyan* was the applicant's parents' separation, not child custody. More importantly, the Ninth Circuit in *Minasyan* did not determine whether a *nunc pro tunc* order must be given effect as the applicant suggests. 401 F.3d at 1079 n.18 (stating that the Court "need not consider whether to give any effect to [the *nunc pro tunc*] order"). To the contrary, the Court in *Minasyan* specifically noted that the "the subsequent *nunc pro tunc* order reiterate[d] the original judicial determination . . . [and did] not . . . change in any way the parties' prior status." *Id.* The Ninth Circuit further explained that the case was "unlike those in which petitioners have sought to change relationships retroactively." *Id.* at 1080 n. 20. The Court approvingly cited *Fierro v. Reno*, *supra*, and noted that the divorce decree in *Minasyan* (as well as the subsequent *nunc pro tunc* order) "did not create a legal fiction, but rather acknowledged a separation that was actually in effect both in practice and as a matter of California law at the time Minasyan's mother was naturalized and while Minasyan was under age eighteen". *Id.*

The applicant's parents' Judgment of Divorce awarded custody of the applicant to his mother. The evidence in the record establishes that the applicant's custody in fact conformed to the custody award included in the Judgment of Divorce. At the time of the applicant's father's naturalization, the applicant was permanently residing with his mother in California and only visited his father in Michigan during school vacations. The AAO notes further that only the applicant's mother's name appears as his custodian in his high school records. The applicant now claims that his parents were "unaware" of the implications of the custody award due to their "limited understanding of English" and "unfamiliarity with family law." Applicant's Appeal Brief at 4. The AAO notes, however, that the applicant's parents were represented by counsel in their divorce proceedings. As noted above, moreover, the applicant's custody arrangements in fact conformed to the language in the Judgment of Divorce. The Stipulated *Nunc Pro Tunc* Order, entered 20 years after the fact, creates a legal fiction by retroactively changing the custodial relationship between the applicant and his parents following their divorce.

The requirements for citizenship, as set forth in the Act, are statutorily mandated by Congress, and that U.S. Citizenship and Immigration Services (USCIS) lacks statutory authority to issue a certificate of citizenship when an applicant fails to meet the relevant statutory provisions set forth in the Act. A person may only obtain citizenship in strict compliance with the statutory requirements imposed by Congress. *INS v. Pangilinan*, 486 U.S. 875, 885 (1988); *see also United States v. Manzi*, 276 U.S. 463, 467 (1928) (stating that "citizenship is a high privilege, and when doubts exist concerning a grant of it ... they should be resolved in favor of the United

States and against the claimant"). Moreover, "it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect." *Berenyi v. District Director, INS*, 385 U.S. 630, 637 (1967).

The regulation at 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 has not met his burden because he is statutorily ineligible to derive citizenship through his father alone under section 321 of the Act. The appeal will be dismissed.

ORDER: The appeal is dismissed.