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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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DATE: **APR 06 2011**

Office: NEW YORK, NY

FILE: A41 749 997

IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1433 (1989).

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant was born on November 24, 1972 in the Dominican Republic. The applicant's father became a U.S. citizen upon his naturalization on July 27, 1988, when the applicant was 15 years old. The applicant was admitted to the United States as a lawful permanent resident on February 19, 1989, when he was 16 years old. The applicant's parents were divorced six months prior to the applicant's birth in 1972. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship through his father.

The district director found that the applicant did not derive U.S. citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (1989), because, in part, he was not in his father's legal custody following his parents' divorce.

On appeal, the applicant, through counsel, maintains that he derived U.S. citizenship upon his father's naturalization pursuant to former section 321 of the Act, 8 U.S.C. § 1432 (repealed). See Statement of the Applicant on the Form I-290B, Notice of Appeal to the AAO.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005); see also *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001) (holding that the amendments to the Act enacted by the Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000) are not retroactive and apply only to persons who were not yet 18 years old as of February 27, 2001). Former section 321 of the Act is therefore applicable in this case.

Former section 321 of the 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:

- (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 (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 18 years.

The record indicates that the applicant's U.S. citizen father naturalized and that the applicant was admitted to the United States as a lawful permanent resident prior to the applicant's eighteenth birthday. At issue in this case is whether the applicant's father had legal custody of the applicant following his parent's 1972 divorce.

Legal custody vests by virtue of "either a natural right or a court decree". See *Matter of Harris*, 15 I&N Dec. 39, 41 (BIA 1970). The applicant's parents were divorced six months prior to the applicant's birth; therefore, the applicant's parents' divorce decree does not address the issue of custody. Where, as in this case, the parents have legally separated but there is no formal, judicial custody order, the parent having "actual, uncontested custody" is be regarded as having "legal custody" of the child. See *Bagot v. Ashcroft*, 398 F.3d 252, 266-67 (3d Cir. 2005) (citing *Matter of M-*, 3 I & N Dec. 850, 856 (BIA 1950)). The applicant, through counsel, claims that he was in his father's "actual, uncontested custody" and, in support of his claim, the applicant submits a number of detailed and credible affidavits, photographs, tax and school records indicating that he was residing with his father between 1989 and 1991. In addition, the applicant's appeal is accompanied by a corrected "Sworn Affidavit" executed by the applicant's mother before two witnesses purporting to transfer custody of the applicant to his father in 1988.

"There must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v United States*, 449 U.S. 490, 506 (1981). The burden of proof in citizenship cases is on the claimant to establish the claimed citizenship by a preponderance of the evidence. See Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant has met his burden of proof, and his appeal will be sustained. The matter will be returned to the New York City Field Office for issuance of a certificate of citizenship.

ORDER: The appeal is sustained. The matter is returned to the New York City Field Office for issuance of a certificate of citizenship.