

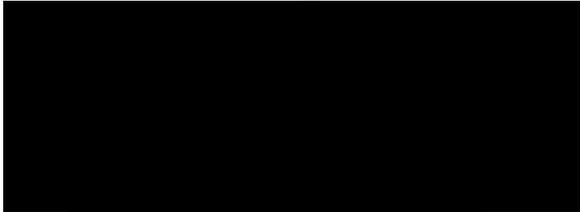
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: ST. PAUL (BLOOMINGTON), MN

Date:

DEC 02 2005

IN RE:

Applicant:



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:



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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, St. Paul, Minnesota. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on December 19, 1979, in Romania. The applicant's father, [REDACTED] was born in Romania and he became a naturalized U.S. citizen on November 28, 1990, when the applicant was ten years old. The applicant's mother was born in Romania and she became a naturalized U.S. citizen on March 3, 1998, when the applicant was eighteen years old. The applicant's parents obtained a judgment of divorce in California on January 31, 1991, when the applicant was eleven years old. The record reflects that the applicant was admitted to the U.S. as a lawful permanent resident in 1992, when he was twelve 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, based on the claim that he acquired citizenship through his naturalized U.S. citizen father.

The district director determined that the applicant's mother was not a naturalized U.S. citizen prior to the applicant's eighteenth birthday. The district director determined further that the applicant's parents' divorce documents reflected that no child custody determination was made, and the district director determined that subsequent to his parents' divorce, the applicant lived with his mother rather than his father. The district director concluded that the applicant had thus 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, and his application for citizenship under section 321 of the former Act was denied.

On appeal, counsel asserts that under California law the applicant's father and mother had equal legal custody over the applicant subsequent to their divorce, and counsel asserts that the district director erroneously required the applicant to be in his father's physical custody in order to meet section 321 of the former Act legal custody requirements.

Section 321 of the former Act provides, 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 (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). The applicant does not claim that his mother is deceased or that she became a naturalized U.S. citizen prior to his eighteenth birthday, and the record contains no evidence to indicate that either event occurred. The AAO therefore finds that the conditions set forth in section 321(a)(1) and 321(a)(2) of the former Act have not been met.

The AAO finds further that the applicant has failed to establish that he resided in the legal custody of his U.S. citizen father, as set forth in section 321(a)(3) of the former Act. The AAO notes that 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). The divorce decree contained in the record fails to address legal custody over the applicant. 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 record contains no evidence to establish that the applicant was at any time in the actual custody of his U.S. citizen father. Moreover, September 2005 interview information obtained from the applicant’s father, as well as Form G-28, Biographic Information contained in the record reflect that the applicant lived with his mother prior, and subsequent to, his father’s naturalization as a U.S. citizen. The AAO therefore finds that the applicant has failed to establish he was in the actual, uncontested custody of his U.S. citizen father subsequent to his parents’ divorce and prior to the applicant’s eighteenth birthday. Accordingly, the AAO finds that the applicant was not in his father’s legal custody and that he is ineligible for citizenship under section 321 of the former Act.

8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. The applicant has not met his burden in the present matter. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.