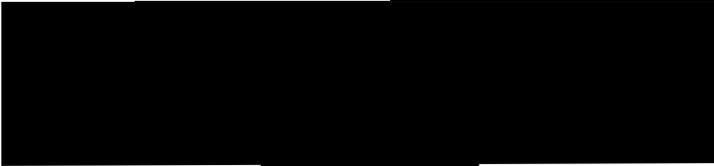




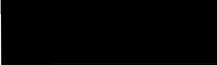
U.S. Citizenship
and Immigration
Services

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OFFICE: BALTIMORE, MD

DATE: JUL 20 2006

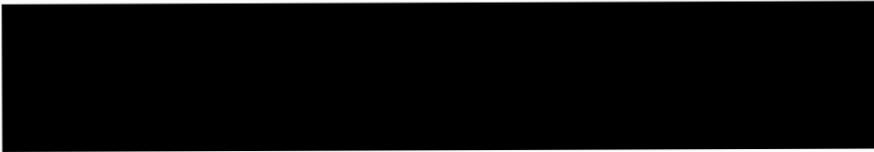
IN RE:

APPLICANT:



APPLICATION: Application for Certificate of Citizenship pursuant to section 321 of the 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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Baltimore, Maryland. 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 October 15, 1981, in China. The applicant's mother was born in China, and she became a naturalized U.S. citizen on December 18, 1998, when the applicant was seventeen years old. The applicant's father was born in China, and he is not a U.S. citizen. The applicant's parents divorced on October 24, 1990, when the applicant was nine years old. The applicant was admitted into the United States as a lawful permanent resident on February 25, 1996, when he was fourteen 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's parents' divorce decree awarded legal custody over the applicant to his father. The application was subsequently denied because the applicant had failed to establish that his U.S. citizen mother had legal custody over him prior to his eighteenth birthday.

On appeal, counsel asserts that the applicant was in the physical custody of his mother at the time of her naturalization as a U.S. citizen, and that under Chinese law, legal custody over the applicant was transferred to the applicant's mother when the applicant moved to the United States to join his mother and stepfather. Counsel asserts that the applicant therefore meets the requirements of section 321 of the former Act.

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:

(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).

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 AAO notes that section 321 of the former Act does not contain a requirement that a child's U.S. citizen parent have *sole* legal custody over the child subsequent to legal separation. Indeed, in *Matter of Rivers*, 17 I&N Dec. 419, 422-23 (BIA 1980), the Board of Immigration Appeals (Board) held that “[u]nless

there is evidence to show that the father of a legitimated child has been deprived of his natural right to custody, he will be presumed to share custody with the mother.” “[W]e will presume that the father has not been divested of his natural right to equal custody in the absence of affirmative evidence indicating otherwise.” *Matter of Rivers, supra*. It is further noted that the unpublished Board decision, *Matter of Delcid*, 2005 WL 1766776 (BIA 2005), held generally that sole legal custody was not required for derivative citizenship purposes under section 321 of the former Act. The case cited further, California Family Code, Volume 8 of the Code of Federal Regulations (8 C.F.R.) section 320.1, and State Department provisions supporting the interpretation that joint legal custody satisfies legal custody provisions for section 321 of the former Act, derivative citizenship purposes. *See* Cal. Fam. Code § 3003 (stating that “joint legal custody” means “[b]oth parents shall share the rights and the responsibility to make the decisions relating to the health, education and welfare of a child”), and Cal. Fam. Code § 3085 (stating that a court can grant joint legal custody without granting joint physical custody to the parents.) *See also*, State Department Passport Bulletin 96-18, November 6, 1996 (providing in part that parents with a joint custody decree each have legal custody over the child, and providing that section 321 of the former Act does not require that the naturalized parent have sole legal custody.)

The record in the present matter contains an April 19, 1995, Shanghai City HongKou District People’s Court, China, divorce settlement for the applicant’s parents. The divorce orders the divorce of the applicant’s parents, and states that the applicant “will be raised” by his father, the defendant. The divorce settlement provides further that the applicant’s mother, the plaintiff, shall pay monthly child support payments to the applicant’s father until the child becomes independent. The divorce settlement makes no other order regarding the parents’ custody rights over the applicant.

The AAO finds that although the divorce decree between the applicant’s parents appears to award primary physical custody over the applicant to his father, the divorce settlement does not state that it is awarding sole legal custody over the applicant to his father, and it does not divest the applicant’s mother of her natural right to equal custody over the applicant. The AAO notes that the record contains no other evidence to indicate that the applicant’s mother was in any way, divested of her equal custody rights over the applicant. Moreover, the AAO notes that the applicant’s 1996 immigration to the United States, pursuant to a family-based visa petition filed by the applicant’s mother’s new husband, further supports a finding that the applicant’s mother retained joint legal custody over the applicant subsequent to her 1990 divorce from his father. Accordingly, the AAO finds that the applicant’s mother had legal custody over the applicant subsequent to her October 24, 1990 divorce.

The record reflects that the applicant resided in the U.S. with his mother pursuant to a lawful admission for permanent residence at the time of his mother’s naturalization as a U.S. citizen. The record additionally contains U.S. Certificate of Naturalization information reflecting that the applicant’s mother became a naturalized U.S. citizen prior to the applicant’s eighteenth birthday.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. The AAO finds the applicant has established that he meets the requirements for citizenship as set forth in section 321 of the former Act. The appeal will therefore be sustained.

ORDER: The appeal is sustained.