U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: WASHINGTON, DC Date: JAN 30 2007

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship pursuant to Section 321(a)(3) of the Nationality Act, 8 U.S.C. § 1432(a)(3), now repealed

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Washington, D.C., 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 November 17, 1980 in Ghana. The applicant's father, [redacted] also born in Ghana, became a naturalized U.S. citizen on March 31, 1995, when the applicant was 14 years old. The applicant's mother, was at the time of the applicant's birth a citizen of Ghana and the record does not indicate that she has subsequently acquired another nationality. The applicant's parents were married on February 18, 1978 in Ghana and divorced on December 4, 1986 in the Superior Court of the District of Columbia. The applicant was admitted into the United States as a lawful permanent resident on October 7, 1992, when he was 11 years old. The applicant, seeks a certificate of citizenship pursuant to former section 321(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432(a).

The section of law under which the applicant contends he has established U.S. citizenship was repealed by the Child Citizenship Act of 2000 (CCA), effective as of February 27, 2001. However, any person who would have acquired automatic citizenship under its provisions prior to February 27, 2001 may apply for a certificate of citizenship at any time. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Therefore, the issue before the AAO is whether the applicant has established that he acquired U.S. citizenship under the provisions of former section 321(a) of the Act prior to February 27, 2001.

Section 321 of the Act, 8 U.S.C. § 1432, provided 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
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> (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-
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> (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 director denied the application based on her determination that the applicant had failed to establish the naturalization of both his parents prior to his 18th birthday. Section 321(a)(1) of the Act, 8 U.S.C. § 1432(a)(1). On appeal, counsel contends that the applicant acquired U.S. citizenship at the time of his father's 1995 naturalization since he had entered the United States in 1992 as "the child of a United States

citizen through his step-mother." However, the applicant's 1992 admission to the United States as the child of his U.S. citizen stepmother does not es tablish her as his parent for the purposes of acquiring U.S. citizenship under section 321(a)(1) of the Act. Counsel's reasoning in this matter has ignored the differing statutory definitions of child found at sections 101(b)(1) and 101(c)(1) of the Act, 8 U.S. C. §§ 1101(b)(1) and (c)(1).

Section 101(b) of the Act states, in pertinent part, that as used in Title I ("General Provisions") and Title II ("Immigration") of the Act:

> (1) The term "child" means an unmarried person under twenty-one years of age who is –
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> > (A) a child born in wedlock;
> > (B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;
> > (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile . . . ;
> > (D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father . . . ;
> > (E) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parents or parents for at least two years . . . ; or
> > (F) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parents is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption . . . .

This expansive definition of child is not, however, used when determining an applicant's eligibility for U.S. citizenship. Pursuant to section 101(c)(1) of the Act, a child under Title III ("Nationality and Naturalization") is defined as:

> [A]n unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and , except as otherwise provided . . . a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

Based on the definition of child used when adjudicating immigrant visa petitions under Title II of the Act, the applicant was able to benefit from the Form I-130, Petition for Alien Relative, filed by his U.S. citizen stepmother. This step relationship, which brought him to the United States in 1992 as a lawful permanent resident, is not, however, recognized in Title III derivative citizenship determinations. In that the record fails

to indicate that the applicant was formally adopted by his stepmother prior to his 16th birthday, as required by the definition of child at section 101(c)(1), he may not claim her as a U.S. citizen parent for the purposes of acquiring U.S. citizenship under section 321(a)(1) of the Act.

The AAO now turns to a consideration of the applicant's eligibility for citizenship under section 321(a)(3) of the Act, based solely on the naturalization of his father on March 31, 1995.

The record establishes that the applicant was admitted to the United States as a lawful permanent resident on October 7, 1992 at the age of 11 years and that his father naturalized on March 31, 1995, when he was 14 years of age. The applicant has also submitted documentation to prove that at the time of his father's naturalization his parents were divorced.[1] The only remaining issue to be considered by the AAO is whether the applicant's father, at the time of his naturalization, had legal custody of the applicant.

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). 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 in the present matter includes a copy of the 1986 divorce decree ending the marriage of the applicant's parents. Although the decree does not address the issue of the applicant's custody, it does refer to a July 1982 agreement entered into by the applicant's parents, which, it states, deals with such matters such as "alimony, maintenance, support, custody of children or property rights." The decree provides no indication of the actual content of the 1982 agreement and the applicant has not provided a copy of this document on appeal. Accordingly, the record does not establish that the applicant's father acquired legal custody of him at the time he separated from his ex-wife.

The applicant has submitted a copy of a February 14, 1991 "statutory declaration" made by his mother to the effect that the applicant was then living with her and had been receiving financial support from his father. In the affidavit, the applicant's mother also states that she has no objection to the applicant moving to the United States to live with his stepmother and father. Counsel characterizes the declaration as a relinquishment of parental rights on the part of the applicant's mother, thereby placing the applicant in his father's legal custody.

The AAO finds the statement given by the applicant's mother to indicate that, until he traveled to the United States in 1992, the applicant lived with her in Ghana and that she received some type of child support from the applicant's father. In the absence of a custody agreement establishing another arrangement, the declaration indicates that it was the applicant's mother who had actual, uncontested, i.e., "legal," custody of the applicant subsequent to her separation and divorce from the applicant's father. Counsel interprets the statements made by the applicant's mother to be a relinquishment of the parental rights she previously exercised in relation to the applicant. A reading of the 1991 document does not, however, support such a conclusion.

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[1] The AAO notes that the divorce decree states that the applicant's parents were lawfully married in Ghana on February 18, 1978. It finds the decree to resolve the applicant's conflicting statements regarding his legitimacy.

The AAO finds the declaration to fall far short of a relinquishment of parental rights. The applicant's mother provided the 1991 sworn statement in support of the Form I-130 filed by the applicant's stepmother, stating only that she had no objection to the applicant joining his stepmother in the United States. At no point in her declaration does she indicate that she is relinquishing her parental rights in relation to the applicant or that she intends the declaration to serve as a vehicle for transferring the applicant's legal custody to his father. Further, even if the applicant's mother had made such statements, counsel has submitted no evidence to indicate that, under Ghanaian law in 1991, an individual could relinquish his or her parental rights to another person on the basis of a sworn statement. Moreover, the declaration submitted by the applicant appears to have been altered at a number of points, with the applicant's name substituted for the individual originally identified in the text and "son" inserted in place of "daughter." Even if the declaration were all that was required to reassign child custody in this case, the identified alterations undercut its reliability. Neither counsel nor the applicant has offered an explanation for the amendments that have been made to the document. Therefore, the declaration fails to establish that the applicant's mother transferred his legal custody to his father in 1991.

For the reasons previously discussed, the record does not establish that the applicant was in the legal custody of his father at the time of his father's 1995 naturalization. The applicant has not satisfied the requirements of former section 321(a)(3) and the appeal will be dismissed.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the applicant to establish the claimed citizenship by a preponderance of the evidence. The evidence submitted by the applicant does not meet this standard.

ORDER: The appeal is dismissed.