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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



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FILE: [REDACTED] Office: BUFFALO, NY

Date: APR 13 2009

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under Section 321 of the former Immigration and Nationality Act; 8 U.S.C. §1432 (repealed).

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Field Operations Director, Buffalo, New York, 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 September 9, 1978 in the Dominican Republic. The applicant's parents are [REDACTED] and [REDACTED]. The applicant's parents were married in 1978, and divorced in 1986. The applicant's mother was awarded legal custody of the applicant upon the divorce. The applicant was admitted to the United States as a lawful permanent resident on March 26, 1995, when he was 16 years old. The applicant's father became a U.S. citizen on March 11, 1992, when the applicant was 13 years old. The applicant's mother is not a U.S. citizen. The applicant seeks a certificate of citizenship pursuant to section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432 (repealed), based on the claim that he acquired U.S. citizenship through his father.

The field operations director concluded that the applicant had failed to establish that he was in the legal custody of his U.S. citizen father upon his parents' divorce, as required by section 321 of the former Act. The application was denied accordingly. The applicant filed a Motion to Reopen, which was granted by the director. The applicant's claim was denied upon reopening. This appeal followed.

On appeal, the applicant, through counsel, states that "[t]he fact that he was residing in New York with the consent of his mother and in the care and custody of his legitimate father" means that he was in his father's legal custody. See Statement by [REDACTED], attached to the Form I-290B, Notice of Appeal to the AAO. The AAO notes that counsel indicated on the Form I-290B (filed February 27, 2009) that a brief or additional evidence would be submitted within 30 days to this office, but none has been received to date.

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The applicant in this case was born in 1978. The applicant was over 18 on the effective date of the Child Citizenship Act of 2000. Section 321 of the former Act, 8 U.S.C. § 1432, is therefore applicable to this case.

Section 321 of the former Act, 8 U.S.C. § 1432, 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

- (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 reflects that the applicant was admitted to the United States as a lawful permanent resident and that his father became a U.S. citizen prior to his 18<sup>th</sup> birthday. The record contains the applicant's parents' divorce decree, awarding legal custody of the applicant to his mother. The applicant therefore cannot establish that he was in the legal custody of his U.S. citizen father. Accordingly, the AAO finds that he did not acquired citizenship pursuant to section 321 of the former Act, 8 U.S.C. § 1432 (repealed).

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). Where the parents were never married, the mother is presumed to retain legal custody by natural right. *Id.* at 41. Where, as here, the applicant's parents were married, the applicant must present a copy of a court document, such as a divorce decree, legal separation, or custody order, indicating which parent was awarded custody upon their separation. *See e.g.* 8 C.F.R. § 320.1 (providing that "[i]n the case of a child of divorced or legally separated parents, the Service will find a U.S. citizen parent to have legal custody of a child, for the purpose of the CCA, where there has been an award of primary care, control, and maintenance of a minor child to a parent by a court of law or other appropriate government entity pursuant to the laws of the state or country of residence"). The applicant claims that the fact that he was in his father's physical custody, or that his mother executed a notarized statement transferring custody to his father before his immigration to the United States, serves to override the custody order issued by the Dominican court upon the applicant's parents' divorce. There is no evidence, however, that the grant of legal custody to the applicant's mother in the applicant's parents' divorce decree has been officially amended. Nor has counsel provided a legal basis for her contention that the notarized statement overrides the divorce decree. A document from the Consul General of the Dominican Republic only states that written consent must be provided by one parent to allow the other parent to travel abroad with the children. It does not address a court ordered custody agreement. The AAO notes that the divorce document grants legal custody to the applicant's mother, not joint custody to both parents. Therefore, the AAO must conclude that

the applicant is not in his father's legal custody, and therefore did not acquire U.S. citizenship upon his naturalization.

The AAO notes that, as is well established, "[t]here 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). 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. The applicant in the present case has not met his burden and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.