



U.S. Citizenship
and Immigration
Services

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FILE:

Office: SAN JOSE, CA

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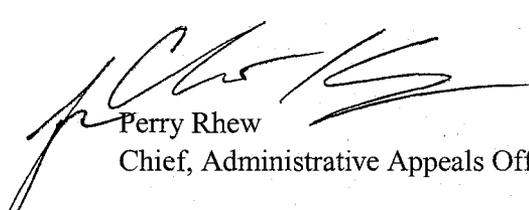
APPLICATION: Application for Certificate of Citizenship under Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (2000).

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


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, San Jose, California, 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 June 5, 1980 in Vietnam. The applicant was born out of wedlock to [REDACTED] and [REDACTED]. The applicant's mother became a U. S. citizen upon her naturalization on November 13, 1991, when the applicant was 11 years old. The applicant was admitted to the United States as a lawful permanent resident on May 28, 1992, when the applicant was 11 years old. The applicant seeks a certificate of citizenship claiming that he derived U.S. citizenship through his mother.

The field office director denied the applicant's application finding that the applicant was not in his U.S. citizen mother's legal custody. On appeal, the applicant, through counsel, maintains that he was in his mother's custody "for all relevant times following the divorce." See Counsel's Letter dated August 28, 2008. Counsel further explains that the applicant's father obtained the divorce as a default judgment and that he never had custody of the applicant. *Id.*

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. See *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The Child Citizenship Act of 2000 (CCA), Pub. L. 106-395, 114 Stat. 1631 (Oct. 30, 2000), amended sections 320 and 322 of the Act, and repealed section 321 of the Act. The provisions of the CCA took effect on February 27, 2001, are not retroactive, and apply only to persons who were not yet 18 years old as of February 27, 2001. See CCA § 104. The applicant was born in 1980. Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Section 321 of the former Act, 8 U.S.C. § 1432 (2000), is therefore applicable to this case.

Section 321 of the former Act, 8 U.S.C. § 1432 (2000), 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 establishes that the applicant's mother naturalized, and that he was admitted to the United States as a lawful permanent resident, prior to the applicant's 18th birthday.

The applicant's parent's *marriage certificate is not in the record*. The applicant's Form N-600, Application for Certificate of Citizenship, indicates that his parents were married subsequent to his birth and divorced, in Canada, in 1989. The AAO notes that the applicant's parents' divorce judgment indicates that they were married in Canada. The AAO further notes that, under the judgment, the applicant's mother was awarded custody of [REDACTED] and the applicant's father was awarded custody of the applicant. There is no indication that the divorce decree was issued as a result of a default judgment.

As the record indicates that the applicant was born out of wedlock, he must establish that his paternity was not established by legitimation in order to derive U.S. citizenship solely through his mother. Section 321(a)(3) of the Act, 8 U.S.C. § 1432(a)(3) (2000). The AAO finds that the applicant was legitimated under the law of Vietnam 2002. See Advisory opinions from the Library of Congress entitled "Law and Legitimation in Vietnam," dated November 7, 2003 [REDACTED] and "Legitimation Law in Vietnam," dated April 18, 2002, [REDACTED] (advising that an illegitimate child who is acknowledged by the father or the mother or by court order will have the same duties and rights as a legitimate child). Further, the AAO finds that the applicant was also legitimated under the law of Alberta, Canada. See Advisory opinion from the Library of Congress (LOC 97-2009) (stating that the term "child includes . . . a child born within or outside marriage"). The applicant therefore did not derive U.S. citizenship through his mother because his paternity was established by legitimation.

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). 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." 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). As noted above, however, the applicant's parents divorce judgment awarded legal custody of the applicant to his father.

The requirements for citizenship, as set forth in the Act, are statutorily mandated by Congress, and that USCIS lacks statutory authority to issue a certificate of citizenship when an applicant fails to

meet the relevant statutory provisions set forth in the Act. A person may only obtain citizenship in strict compliance with the statutory requirements imposed by Congress. *INS v. Pangilinan*, 486 U.S. 875, 885 (1988); *see also United States v. Manzi*, 276 U.S. 463, 467 (1928) (stating that "citizenship is a high privilege, and when doubts exist concerning a grant of it ... they should be resolved in favor of the United States and against the claimant"). Moreover, "it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect." *Berenyi v. District Director, INS*, 385 U.S. 630, 637 (1967).

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. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The applicant is statutorily ineligible to derive citizenship solely through his mother under section 321 of the former Act. He therefore cannot meet his burden of proof. The appeal will be dismissed.

ORDER: The appeal is dismissed.