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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: WASHINGTON, DC Date: JUL 08 2009

IN RE: Applicant: [redacted]

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

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.

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).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Washington D.C., and 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 13, 1975 in Granada, Spain. The applicant's parents are [redacted] and [redacted]. The applicant's parents were divorced in 1980, and "sole custody" of the applicant was awarded at the time to his mother. The applicant's father became a U.S. citizen upon his naturalization on September 21, 1987. The applicant was admitted to the United States as a lawful permanent resident on May 19, 1977. The applicant seeks a certificate of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the former Act), 8 U.S.C. §1432, based on his father's naturalization.

The district director denied the applicant's claim upon finding that he was not in his father's legal custody following his parents' divorce as required by section 321 of the former Act, 8 U.S.C. § 1432. The application was denied accordingly.

On appeal, the applicant maintains that he was in his father's legal custody subsequent to his parents' divorce and before his 18th birthday.

"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 1975. The applicant was over 18 on the effective date of the Child Citizenship Act of 2000 (CCA). Therefore, the applicant does not benefit from the amendments introduced by the CCA. *See Matter of Rodriguez-Tejedor,* 23 I&N Dec. 153 (BIA 2001). Section 321 of the former Act, 8 U.S.C. § 1432, is applicable to the applicant's case.

Former 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:
>
> (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 district director found that the applicant did not derive U.S. citizenship upon his father's naturalization because he could not establish that he was in his father's legal custody following his parents' divorce. The AAO notes that the applicant's parents' divorce decree awards "sole custody" of the applicant to his mother. "Sole custody" means that only the mother (the custodial parent) had physical legal custody of the applicant, and that the father (the non-custodial parent) only had visitation rights. Determining the question on the basis of the 1980 divorce decree alone, the AAO must agree with the director that the applicant's father did not have legal custody of the applicant.

The AAO also considers the fact that the applicant resided with both his parents at various times subsequent to their divorce. The record includes, in relevant part, affidavits executed by the applicant's mother, the applicant's paternal aunt, two family friends and a Pennsylvania attorney specializing in family law. The record also includes court documents (orders and transcripts) relating to the applicant's father's 1986 petition to obtain sole legal custody. The 1986 court documents indicate that the applicant was placed in his paternal aunt's custody "for an indefinite period of time until this is resolved" (*see e.g.*, Transcript of December 5, 1986 Hearing before Supreme Court of the State of New York) and that there were restraining orders entered against the applicant's mother. The applicant's mother states in her affidavit that she removed the applicant from his father's custody in November 1986, but that the applicant returned to live with his father from April 1987 until 1991. Thus, even after the restraining orders were issued against the applicant's mother, he resided with her for a six-month period.

The AAO finds that the applicant has not established that he was in his father's legal custody at the time of his naturalization in 1987 and prior to the applicant's 18th birthday. First, the AAO notes that there is no final order resulting from the proceedings instituted by the applicant's father in 1986 and, although restraining orders were issued against the applicant's mother and temporary custody awarded to his aunt, the applicant resided with his mother for at least six months in late 1986 to 1987. The AAO further notes the suggestion in the record that the applicant's mother may have instituted custody proceedings in California during this time. The AAO thus cannot find that the applicant was in his father's actual, uncontested custody, even if there was no judicial custody award. *See Matter of M*, 3 I&N Dec. 850, 856 (BIA 1950) (holding that in the absence of a judicial determination or grant of custody, the parent having actual, uncontested custody of the child is to be regarded as having "legal custody").[1]

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[1] The AAO has considered the affidavit of the Pennsylvania family lawyer indicating that Pennsylvania law allows for transfer of legal and physical custody upon agreement of the parents. There is no indication in the file, however, of a contemporaneous custody transfer agreement between the applicant's parents. In any event, because citizenship is

8 C.F.R. § 341.2 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." See *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The applicant has failed to meet his burden in this proceeding. The appeal will, therefore, be dismissed.

ORDER: The appeal is dismissed.

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automatically derived under section 321 of the former Act, a private agreement to transfer custody –like a private agreement to separate – cannot legally alter the custody status of a child for immigration purposes. *See Afeta v. Gonzales*, 467 F.3d 402, 407 (4th Cir. 2006). (holding that a privately-executed separation agreement made between the applicant's parents does not qualify as a "legal separation" under section 321(a)(3) of the former Act).