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

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**JUL 17 2009**

FILE:

OFFICE: ATLANTA, GA

DATE:

IN RE:

APPLICANT:

APPLICATION:

Application for Certificate of Citizenship pursuant to section 321 of the former Immigration and Nationality Act, 8 U.S.C § 1432 (repealed).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 Office Director, Atlanta, Georgia. 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 May 17, 1979 in Haiti. The applicant's parents, as reflected on his birth certificate, were [REDACTED] and [REDACTED]. The applicant's parents were divorced in 1982. The 1982 divorce judgment awards custody of the applicant to his mother. The divorce judgment was modified in 2007. The applicant was admitted to the United States as a lawful permanent resident on February 13, 1987, when the applicant was seven years old. The applicant's father became a U.S. citizen upon his naturalization on October 3, 1989, when the applicant was ten 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of Citizenship pursuant to section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432 (repealed).

The field office director determined that the applicant was not in his father's legal custody after the divorce. The director also noted some discrepancies in the applicant's parents' immigration records and found that there was no evidence that the applicant was residing with his father during the time in question. The director thus found that the applicant did not derive U.S. citizenship through his father under section 321 of the former Act. The application was accordingly denied.

On appeal, the applicant cites *Bagot v. Ashcroft*, 398 F.3d 352 (3d Cir. 2005) and notes the 2007 modified custody order. The applicant also maintains that he was in his father's physical and legal custody. He submits, in relevant part, copies of his Florida school records starting in the year 1986 and a 2007 Final Judgment Modifying Dissolution. The record also contains his parents' immigration documents, such as his father's naturalization application and his mother's residence and naturalization application.

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).

8 U.S.C. § 1431 (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). 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*.

The applicant’s parents were divorced in 1982. The Final Judgment of Dissolution grants the applicant’s mother custody over the applicant. The applicant concedes that he was living in Haiti at the time (with his mother). See Applicant’s Statement Accompanying Appeal. The applicant claims that the 1982 Final Judgment of Dissolution was improper because the Florida Court lacked jurisdiction over him and his mother. *Id.* The applicant cites *Bagot v. Ashcroft, supra*.

The AAO is not bound by the Third Circuit’s decision in *Bagot v. Ashcroft, supra*, as this matter arises within the jurisdiction of the Eleventh Circuit Court of Appeals. The AAO further notes that 2007 Final Judgment Modifying Dissolution obtained by the applicant does not declare that the 1982 Final Judgment of Dissolution was *void ab initio*. Rather, it ‘affirms’ the 1982 Final Judgment of Dissolution and orders it “modified *nunc pro tunc*.” It is well established that a retroactive modification of a custody order (such as the 2007 *nunc pro tunc* modification in this case) cannot have any effect for immigration purposes. *Fierro v. Reno*, 217 F.3d 1, 6 (1<sup>st</sup> Cir. 2000) (holding that “recognizing the *nunc pro tunc* order . . . would in substance allow the state court to create loopholes in the immigration laws on grounds of perceived equity or fairness... [and that] a state court has no more power to modify them on equitable grounds than does a federal court or agency”).

The AAO notes the Second Circuit’s decision in *Lewis v. Gonzales*, 481 F.3d 125 (2<sup>nd</sup> Cir. 2007) where the court emphasized that “because derivative citizenship is automatic, and because the legal consequences of citizenship can be significant, the statute is not satisfied by an informal expression, direct or indirect. In all cases besides death, the statute requires formal, legal acts indicating either that both parents wish to raise the child as a U.S. citizen or that one parent has ceded control over the child such that his objection to the child’s naturalization no longer controls.” 481 F.3d at 131.

Although the evidence in the record suggests that the applicant was in his father’s *physical* custody beginning in 1986, the record contains no evidence to establish that the *legal* custody of the applicant was transferred to the applicant’s father prior to 2007. The applicant’s 18<sup>th</sup> birthday was in 1997.

Accordingly, the AAO finds that the applicant has failed to establish that he resided in his father's *legal* custody after his parent's divorce and prior to the applicant's 18<sup>th</sup> birthday, as required by section 321(a)(3) of the former Act.

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 failed to meet his burden and the appeal will therefore be dismissed.

**ORDER:** The appeal is dismissed.