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U.S. Citizenship and Immigration Services  
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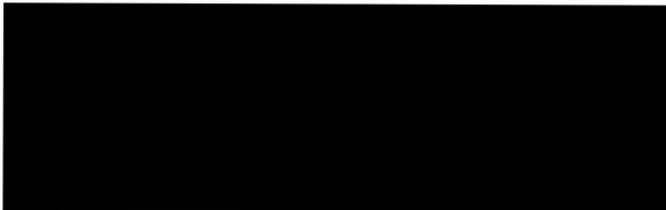
IN RE:

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for Certificate of Citizenship pursuant to section 321 of the former Immigration and Nationality Act, 8 U.S.C § 1432 (repealed).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



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.

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the District Director, Tampa, Florida. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on October 26, 1961 in the Dominican Republic. The applicant's parents, [REDACTED] and [REDACTED] were married in 1960 and divorced in 1965. Custody of the applicant was awarded to his paternal grandmother upon the applicant's parents' divorce. The applicant was admitted to the United States as a lawful permanent resident in 1968. The applicant's father was at the time already residing in the United States. The applicant's father became a U.S. citizen upon his naturalization on March 10, 1978, when the applicant was 16 years old. The applicant's mother is not a U.S. citizen. 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of Citizenship pursuant to section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432 (repealed).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 district director determined that the applicant's parents' divorce decree awarded custody over the applicant to his paternal grandmother, and not to his U.S. citizen parent as required by section 321 of the former Act. The application was accordingly denied.

On appeal, counsel asserts that the applicant's father had actual, uncontested custody of the applicant. The applicant maintains, in relevant part, that his father had legal custody and that his paternal grandmother only had temporary custody of him during the period between his parents' divorce and his father's remarriage. Alternatively, the applicant maintains that his father had actual, uncontested custody after his grandmother's death on February 23, 1979. The applicant indicates that he resided with his father in Lawrence, Massachusetts after his admission to the United States as a lawful permanent resident.

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 record in the present matter contains a November 24, 1965 divorce judgment awarding the applicant’s “guard and care” to his paternal grandmother. The AAO notes that the record contains a notarized statement by the applicant’s mother and step-mother indicating that the applicant was only temporarily in his grandmother’s custody, and that he had always remained in his father’s legal custody. The evidence in the record also suggests that the applicant’s father had physical custody of the applicant since his admission to the United States as a lawful permanent resident in 1968. The record further indicates that the applicant remained in his father’s custody upon his grandmother’s death in 1979.

The AAO notes the Second Circuit Court of Appeals’ 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.

The AAO notes that although the divorce decree indicates that the applicant’s paternal grandmother was awarded his “guard and care,” the decree is silent with respect to custody by one parent *vis a vis* the other parent. 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 evidence in the record indicates that the applicant’s father and mother agreed that the applicant would temporarily reside with his grandmother, but that shortly thereafter he would join his father in the United States. The record further indicates that the applicant indeed only resided with his grandmother until his father’s remarriage, and that shortly thereafter was admitted to the United States and began residing

with his father. The applicant's father thus had actual, uncontested custody of the applicant.<sup>1</sup> The AAO finds that the applicant has established that he was in his father's *legal* custody after his parent's divorce and prior to his 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 established that he meets the requirements for citizenship as set forth in section 321 of the former Act. The appeal will therefore be sustained.

**ORDER:** The appeal is sustained.

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<sup>1</sup> The AAO agrees that, even if his father did not have custody of the applicant upon the divorce, he certainly had actual, uncontested custody upon his grandmother's death in 1979 (while the applicant was still under the age of 18).