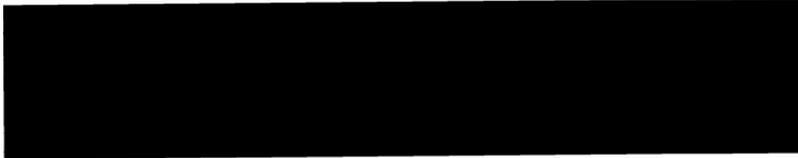




U.S. Citizenship  
and Immigration  
Services

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FILE:



OFFICE: NEW YORK

DATE:

**MAR 05 2009**

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for Certificate of Citizenship pursuant to section 321 of the former Immigration and Nationality Act, 8 U.S.C § 1432 (repealed).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

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 District Director, New York, New York. 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 [REDACTED] Lima, Peru. The applicant's father became a naturalized U.S. citizen on January 5, 1989, when the applicant was 15 years old. The applicant's mother is not a U.S. citizen. The applicant's parents were married on [REDACTED] and divorced on [REDACTED]. The applicant was admitted into the United States as a lawful permanent resident on May 3, 1989, when he was 16 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of Citizenship pursuant to section 321 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1432 (repealed).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 district director determined that the applicant's parents' divorce decree awarded legal custody over the applicant to his mother, and not 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 "responsibility and authority" over him and therefore fulfilled the legal custody requirement in section 321 of the former Act, 8 U.S.C. § 1432 (repealed). The applicant also submits a copy of an Immigration Judge's Order entered in his removal proceedings, wherein he is found to be a U.S. citizen.

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).

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 divorce judgment entered by the New York State Supreme Court. The judgment orders the divorce of the applicant’s parents, and states that the applicant’s mother “shall have custody” of the applicant. The divorce judgment does not contain a child support provision, and makes no other findings regarding the applicant’s parents’ physical or legal custody over the applicant.

The AAO notes that the record contains a notarized statement by the applicant’s mother permitting the applicant to travel to the United States with his paternal grandmother. The AAO further notes the affidavits and other documentary evidence in the record suggesting that the applicant was in his father’s physical custody since his arrival in the United States in 1991. Nevertheless, the divorce judgment between the applicant’s parents awards custody over the applicant to his mother and was not subsequently amended. The AAO must therefore find that the applicant was not in the legal custody of his father, and thus did not derive U.S. citizenship upon his father's naturalization.

The AAO notes that USCIS is not bound by the immigration judge’s finding regarding the applicant’s U.S. citizenship status. The immigration judge does not have jurisdiction or authority to declare that an alien is a U.S. citizen. Rather, the immigration judge’s termination of removal proceedings against the applicant was based on the judge’s jurisdictional determination that the U.S. Department of Homeland Security had failed to meet its burden of proving the applicant’s alienage and deportability by clear, convincing and unequivocal evidence. *See Murphy v. INS*, 54 F.3d 605 (9<sup>th</sup> Cir. 1995) (holding that in deportation proceedings, the government must prove alienage by clear, unequivocal and convincing evidence.) *Minasyan v. Gonzalez*, 401 F.3d 1069 (9<sup>th</sup> Cir. 2005) clarifies further that an immigration judge does not have authority to declare that an alien is a citizen of the United States, and that such jurisdiction rests with the USCIS citizenship unit and with the federal courts. 8 C.F.R. § 341.3(c) specifies further that USCIS has jurisdiction over certificate of citizenship proceedings, with the burden of proof being on the applicant to establish his or her claim to U.S. citizenship by a preponderance of the evidence.

The AAO notes the Third Circuit’s decision in *Bagot v. Ashcroft*, 398 F.3d 352 (3d Cir. 2005). *Bagot* involved a citizenship claim by an applicant whose parents’ divorce judgment was *void ab initio*. There is no indication of any defect, jurisdictional or otherwise, in the judgment of the New York state court nor does the AAO have jurisdiction to overrule or question the validity of a final divorce judgment. The AAO notes that the applicant’s parents’ divorce judgment indicates that the applicant’s mother was served “*within* the state, personally.”

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, the record contains no evidence to establish that the applicant’s father ever obtained an amended court order awarding him legal custody over the applicant. 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 eighteenth 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 establish that he meets the requirements for citizenship as set forth in section 321 of the former Act. The appeal will therefore be dismissed.

**ORDER:** The appeal is dismissed.