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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: NEW YORK, NY Date: JUL 19 2010

IN RE: Applicant: [redacted]

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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
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 sustained.

The record reflects that the applicant was born on February 21, 1979 in Mexico. The applicant's parents are [redacted] The applicant's parents were married in 1968 and divorced in 1988 in Mexico. The applicant's father became a U.S. citizen upon his naturalization on April 5, 1996, when the applicant was 17 years old. The applicant was admitted to the United States with his mother as a lawful permanent resident in 1995.

The district director determined that the applicant could not derive U.S. citizenship under former section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433 (2000), because he was over the age of 18. The application was accordingly denied.

On appeal, the applicant, through counsel, maintains that he derived U.S. citizenship upon his father's naturalization pursuant to former section 321 of the Act, 8 U.S.C. § 1432 (repealed). *See* Statement of the Applicant on the Form I-290B, Notice of Appeal to the AAO.

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). The Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), which took effect on February 27, 2001, amended sections 320 and 322 of the Act, and repealed section 321 of the Act. The provisions of the CCA are not retroactive, and the amended provisions of section 320 and 322 of the Act apply only to persons who were not yet 18 years old as of February 27, 2001. The applicant's eighteenth birthday was on February 21, 1997. 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). Former section 321 of the Act is therefore applicable in this case.

Former section 321 of the 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 (1) of this subsection, or the parent 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 indicates that the applicant obtained lawful permanent residency in 1995 and that his father naturalized in 1996. The applicant's eighteenth birthday was on February 21, 1997. The applicant has thus established that his U.S. citizen father naturalized and that he was admitted to the United States as a lawful permanent resident prior to his eighteenth birthday. At issue in this case is whether the applicant's father had legal custody of the applicant following his parent's 1988 divorce.

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). Although the applicant's parents' divorce documents include a grant of "custody" to the applicant's mother, the documents also state that the *patria potestad* remains with both parents. *Patria Potestas* is the "responsibility to support and maintain family members." Blacks Law Dictionary (8th ed. 2004). The record also shows that the applicant's mother ceded "custody" of the applicant to his father in 1995. Accordingly, the preponderance of the evidence demonstrates that the applicant was in his parents' joint legal custody following his parents' divorce. The applicant's mother was awarded residential or physical custody upon the divorce, but ceded it to the applicant's father in 1995. Therefore, the applicant was in his father's legal custody as required by former section 321(a)(3) of the Act.

"There must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v United States*, 449 U.S. 490, 506 (1981). The burden of proof in citizenship cases is on the claimant to establish the claimed citizenship by a preponderance of the evidence. *See* Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant has met his burden of proof, and his appeal will be sustained. The matter will be returned to the New York City Field Office for issuance of a certificate of citizenship.

ORDER: The appeal is sustained. The matter is returned to the New York City Field Office for issuance of a certificate of citizenship.