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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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[REDACTED]

FILE:

[REDACTED]

Office: PHILADELPHIA, PA

Date: FEB 04 2011

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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).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 Field Office Director, Philadelphia, Pennsylvania. 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 March 2, 1977 in Russia. The applicant's father became a U.S. citizen upon his naturalization on March 17, 1989. The applicant was admitted to the United States as a refugee and subsequently adjusted his status to that of lawful permanent resident as of January 1, 1980. The applicant's parents were married in 1976, and divorced in 1992. The applicant's eighteenth birthday was on March 2, 1995. The applicant seeks a certificate of citizenship claiming that he derived U.S. citizenship through his father pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (repealed).

The field office director determined that the applicant could not derive U.S. citizenship under former section 321 of the Act because he was not in his father's legal custody following his parents' divorce. The director also noted that the applicant's father naturalized prior to his divorce. The application was accordingly denied.

On appeal, the applicant, through counsel, maintains that he was in his father's custody prior to his eighteenth birthday. See Applicant's Brief. Specifically, the applicant claims that his mother left him in his father's custody in 1992, following the applicant's parents divorce. *Id.*; see also Affidavits of Applicant's Relatives. Counsel cites *Matter of M-*, 3 I&N Dec. 850 (1950) and the USCIS Adjudicator's Field Manual § 71.1(d)(2) (2008), arguing that the applicant's parents' divorce need not precede the applicant's father's naturalization. See Applicant's Brief.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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. 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 1980 and that his father naturalized in 1989. The applicant's eighteenth birthday was in 1995. 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 1992 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). The applicant's parents' divorce judgment does not include a custody award but incorporates by reference their settlement agreement. Although the applicant's parents' settlement agreement includes a grant of "custody" to the applicant's mother, the settlement agreement clearly stipulates joint legal custody to the applicant's parents. *See e.g.* Applicant's Parents' Settlement Agreement at Article V, ¶ 4 (indicating that the applicant's parents "shall consult with each other with respect to any decision affecting the schooling, health, summer activities and similar matters relating to the children's health, education or general welfare ..."). Accordingly, the preponderance of the evidence demonstrates that the applicant was in his parents' joint legal custody following his parents' divorce. The record also indicates that the applicant's mother ceded physical custody of the applicant to his father in 1992. Therefore, the applicant was in his father's legal custody as required by former section 321(a)(3) of the Act.

The AAO notes further the decision of the Board of Immigration Appeals (the Board) in *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008) provides that a child may derive citizenship under former section 321 of the Act so long as the requirements were fulfilled prior to his or her 18th birthday, regardless of the order in which they were fulfilled. The Board in *Baires-Larios* held that

“that in order to establish derivative citizenship under section 321(a) of the former Act, [the applicant] must show only that she was in the legal custody of her father before she reached the age of 18 years, rather than on the date her father naturalized.” *See Matter of Baires-Larios, supra*, at 470. It is therefore immaterial that the applicant’s father’s naturalization occurred prior to his divorce. The applicant derived U.S. citizenship under former section 321 of the Act because, prior to his eighteenth birthday, he fulfilled all the requirements for derivation.

“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 Philadelphia Field Office for issuance of a certificate of citizenship.

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