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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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DATE: JUL 11 2011

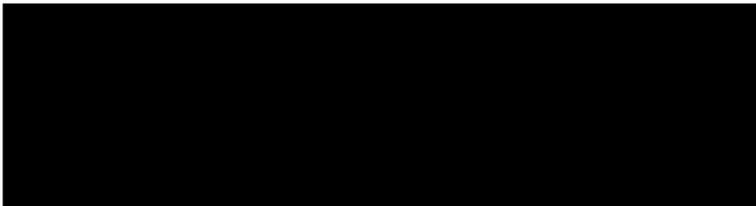
Office: ORLANDO, FLORIDA

FILE: 

IN RE: 

APPLICATION: Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432

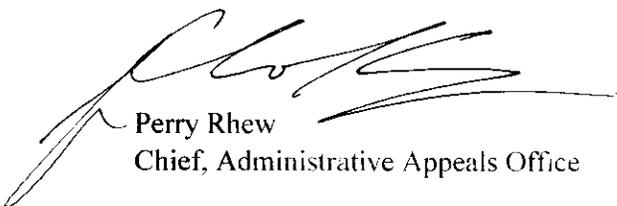
ON BEHALF OF PETITIONER:



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 for Certificate of Citizenship (Form N-600) was denied by the Field Office Director, Orlando, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born in Kuwait on April 20, 1980. The applicant's parents were married at the time of his birth. The applicant was admitted to the United States as a lawful permanent resident on December 2, 1981. The applicant's parents divorced on February 12, 1995. The applicant's father became a naturalized U.S. citizen on June 19, 1995. The applicant seeks a Certificate of Citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432, claiming that he derived citizenship through his father.

The director determined that the applicant failed to establish eligibility for citizenship under former section 321 of the Act because he failed to establish that he was in his father's legal custody after his parents' divorce. The application was denied accordingly. On appeal, the applicant contends through counsel that the evidence shows that he was in his father's legal and physical custody after his parents' divorce. The applicant also submitted an audio file and typed transcript of his removal proceedings, which the immigration judge terminated based on a finding that the applicant derived U.S. citizenship through his father. See *Order of the Immigration Judge*, dated Feb. 3, 2010; *Transcript of Proceedings*.

The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Because the applicant was born abroad, he is presumed to be an alien and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. See *Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008). The applicable law for derivative citizenship purposes is that in effect at the time the critical events giving rise to eligibility occurred. *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005); accord *Jordon v. Attorney General*, 424 F.3d 320, 328 (3d Cir. 2005). Former section 321 of the Act, in effect at the time of his father's naturalization in 1995, is applicable in this case.

Former section 321(a) of the Act provided, in pertinent part:

A child born outside of the United States of alien parents . . . 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 . . . ; and if
- (4) Such naturalization takes place while such child is unmarried and under the age of eighteen 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 naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

The term legal separation means "either a limited or absolute divorce obtained through judicial proceedings." *Afeta v. Gonzales*, 467 F.3d 402, 406 (4th Cir. 2006) (affirming the Board of Immigration Appeals' construction of the term legal separation in *Matter of H*, 3 I&N Dec. 742, 744 (BIA 1949)) (internal quotation marks omitted); *see also Minasyan v. Gonzales*, 401 F.3d at 1076 (stating that term legal separation refers to a separation recognized by law; considering the law of California, which had jurisdiction over the applicant's parents' marriage). Whether a parent has "legal custody of the child" is based on a judicial determination or a judicial or statutory grant of custody. *See Matter of M-*, 3 I&N Dec. 850, 856 (CO 1950) (determining "legal custody" under the derivative citizenship provision set forth in section 314(c) of the Nationality Act of 1940). In the absence of a judicial or statutory decree, "the parent having actual uncontested custody is to be regarded as having 'legal custody' of the person concerned for the purpose of determining that person's status[.] . . ." *Id.* (concluding that child who came to the United States to live with her father was in his father's legal custody).

Here, the applicant satisfied the requirements for derivative citizenship set forth in former section 321(a) of the Act before his eighteenth birthday. First, the applicant was admitted to the United States as a lawful permanent resident when he was one year old, and his father became a U.S. citizen by naturalization when the applicant was 15 years old. *See* former section 321(a)(4), (5) of the Act.

Second, the record reflects that the applicant's parents divorced in Kuwait on February 12, 1995, in accordance with Kuwaiti law. *See Certification/Official Declaration Regarding Marital Status* (issued by the State of Kuwait, Ministry of Justice, Legal Authentication Department on Jan. 31, 2010); *Certification of Divorce from Lawyer* [REDACTED] dated Nov. 29, 2009; Divorce Declaration No. 634 (issued by the State of Kuwait, Ministry of Justice, Main Authentication Department on Nov. 5, 2009); *Immigration Court Testimony of* [REDACTED] (stating that the couple divorced by mutual agreement, in front of two witnesses, and without a judicial ruling); *Affidavit of* [REDACTED], dated Dec. 17, 2009 (confirming her divorce from the applicant's father). Further, the record contains evidence that a divorce in Kuwait may be made by an explicit oral declaration without the involvement of a judicial authority. *See Letter from Assistant Undersecretary of the* [REDACTED] *Kuwait Ministry of Awqaf and Islamic Affairs*, dated Feb. 1, 2010; *Overview of* [REDACTED] *Divorce and Child Custody; Council of Ministers Family Matters Law* (Sixth Edition, Jan. 2004); *Letter from the Islamic Society of Central Florida*, dated Jan. 28, 2010. Accordingly, the applicant meets the legal separation requirement in former section 321(a)(3) of the Act. *See Minasyan v. Gonzales*, 401 F.3d at 1076.

Third, the applicant has established that he was in his father's legal custody after his parent's divorce and before his eighteenth birthday. The director determined that the applicant did not establish that he was in his father's legal custody because the custody agreement was not recorded at the time of his parents' divorce. Here, the evidence indicates that the applicant's parents made an oral

agreement at the time of the divorce that the applicant would remain in the legal and physical custody of his father. *See Immigration Court Testimony of [REDACTED]*, (stating that the couple agreed that he would retain custody of the applicant after the divorce); *Affidavit of [REDACTED]*, *supra* (stating that the applicant was in his father's custody after the divorce). Additionally, the record contains evidence that in Kuwait, and under Sharia law, child custody following divorce is generally awarded to the father. *See Letter from Assistant Undersecretary of the [REDACTED] Kuwait Ministry of Awqaf and Islamic Affairs, supra; Letter from the [REDACTED] supra; Overview of Shari'a and [REDACTED] – Divorce and Child Custody, supra.* Accordingly, although the applicant's parents did not obtain a judicial determination of custody, the applicant has shown by a preponderance of the evidence that his father had legal custody in accordance with Sharia law. Therefore, the applicant meets the legal custody requirement in former section 321(a)(5) of the Act.

Even in the absence of a judicial or statutory grant of custody, the applicant's father would be regarded as having legal custody over the applicant because he had actual uncontested custody over the applicant after the divorce and while he was under the age of 18. *See Matter of M-*, 3 I&N Dec. 850, 856; *see also school and address records* (showing a joint address and reflecting the applicant's father as his parent or guardian); *Immigration Court Testimony of Charles Frank Faro, supra.*

The applicant bears the burden of proof to establish his eligibility for citizenship under the Act by a preponderance of the evidence. *See id.* at 468; 8 C.F.R. § 341.2(c). Here, the applicant has established by a preponderance of the evidence that he met all of the conditions for the automatic derivation of U.S. citizenship pursuant to former section 321 of the Act before his eighteenth birthday. Accordingly, the appeal will be sustained, the decision of the director will be withdrawn, and the matter will be returned to the director for the issuance of a certificate of citizenship.

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