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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

[redacted]

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DATE: JUL 25 2011 OFFICE: NEW YORK, NY FILE: [redacted]

IN RE: [redacted]

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:

[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 District Director, New York City, New York, denied the Application for Certificate of Citizenship (Form N-600), and a subsequent motion to reconsider. 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 in French Guiana on December 11, 1982. The applicant's parents were married at the time of his birth, and they divorced on February 26, 1988. The applicant's father became a naturalized U.S. citizen on April 12, 1996. The applicant's mother is not a U.S. citizen. The applicant was admitted to the United States as a lawful permanent resident on May 8, 1996. 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 derivative citizenship because his parents' divorce decree placed him in the legal custody of his mother. *See Decision of the Director*, dated July 1, 2008; *Decision on Motion to Reconsider*, dated Mar. 6, 2009. The application was denied accordingly. *Id.* On appeal, the applicant contends through counsel that the New York state court's child custody determination was facially invalid because the court did not have subject matter jurisdiction to make a custody determination. *See Form I-290B, Notice of Appeal*, filed Apr. 8, 2009; *Memorandum of Law in Support of Appeal*, dated Apr. 7, 2009. The applicant also submits the decision of an immigration judge (IJ) terminating the applicant's removal proceedings based on a finding that the applicant derived U.S. citizenship through his father. *See Written Decision and Order of the IJ*, dated Dec. 15, 2009.

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 the applicant's admission as a lawful permanent resident in 1996, 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 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 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 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 eighteen years.

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 New York state court entered a judgment dissolving the applicant's parents' marriage on February 26, 1988. The state court further ordered that all of the children of the marriage, including the applicant, would be under the custody of the applicant's mother. At the time of the divorce, however, the applicant resided in French Guiana, and did not reside in or have sufficient contacts with New York. In a similar case, the U.S. Court of Appeals for the Third Circuit held that the New York state court did not have jurisdiction under the Uniform Child Custody Jurisdiction Act to issue a custody order. *See Bagot v. Ashcroft*, 398 F.3d 252, 264-65 (3d Cir. 2005) (holding that a nearly identical New York state court determination awarding custody of the applicant to his mother was facially invalid). The facts of this case are indistinguishable from *Bagot*. Accordingly, the custody order was invalid.

Without a valid judicial determination of custody, the parent with actual uncontested custody over the applicant is regarded as having legal custody. *See Matter of M-*, 3 I&N Dec. at 856. Here, the evidence shows that the applicant was in his father's actual uncontested custody after his parents' divorce, and while he was under the age of 18 years. *See Affidavits of the Applicant's Parents and Sisters; School Records; and 1999 Tax Return* (showing that the applicant was in his father's physical custody after arrival in the United States in 1996); *see also Immigrant Visa* (showing applicant's intent to reside at his father's address in New York); *Application for Immigrant Visa* (same). Accordingly, the applicant's father is regarded as having legal custody over the applicant as required by former section 321(a)(3) of the Act. *See id.*

Because the applicant's father became a U.S. citizen by naturalization and the applicant was admitted to the United States as a lawful permanent resident when he was 13 years old, the applicant satisfied the remaining requirements of former section 321(a)(4), (5) of the Act.

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 New York District Office for issuance of a certificate of citizenship.