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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: **APR 24 2012**

Office: SAN FRANCISCO, CA

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

Application for Certificate of Citizenship under Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).

ON BEHALF OF APPLICANT:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Field Office Director, San Francisco, California, and came before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed. The applicant filed a motion to reconsider. The director dismissed the motion and the matter is now again before the AAO on appeal. The appeal will be dismissed.<sup>1</sup>

The record reflects that the applicant was born on February 6, 1973 in South Korea. The applicant's parents are [REDACTED]. The applicant's parents were divorced in 1986. Custody of the applicant was awarded to his mother upon the applicant's parents' divorce. The applicant's father became a U.S. citizen upon his naturalization on April 15, 1988, when the applicant was 15 years old. The applicant's mother was naturalized in 2000, after the applicant's eighteenth birthday. The applicant was admitted to the United States as a lawful permanent resident on February 28, 1982, when he was nine years old. The applicant seeks a certificate of citizenship claiming that he derived U.S. citizenship through his father.

The application was initially denied upon a finding that the applicant was not in his father's legal custody following his parents' divorce. Specifically, the field office director rejected the Stipulated Order Amending Judgment of Divorce *Nunc Pro Tunc* [Stipulated *Nunc Pro Tunc* Order] and found that the applicant was in his mother's legal and physical custody during the relevant period prior to the applicant's eighteenth birthday. The AAO dismissed the appeal, citing *Fierro v. Reno*, 217 F.3d 1, 6 (1<sup>st</sup> Cir. 2000), and finding that the applicant was in his mother's custody following the divorce.

The applicant filed a motion to reconsider after an immigration judge terminated his removal proceedings. The immigration judge's order includes a note stating that the applicant "is deemed a United States Citizen." See Order of the Immigration Judge dated May 12, 2011. The motion was dismissed by the field office director finding that the immigration judge had no jurisdiction to consider the applicant's citizenship claim. The director also noted that the applicant had failed to submit any new or additional evidence to establish that he was in his father's custody.

The applicable law for derivation of U.S. citizenship is "the law in effect at the time the critical events giving rise to eligibility occurred." See *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). Former section 321 of the Act, 8 U.S.C. § 1432, as in effect prior to February 27, 2001 (the effective date of the Child Citizenship Act of 2000, Pub. L. 106-395, 114 Stat. 1631 (Oct. 30, 2000)) is applicable to this case.

Former section 321 of the Act provided, 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

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<sup>1</sup> As the AAO had made the last decision at the time the applicant filed his motion, the director did not have jurisdiction to decide the motion. 8 C.F.R. § 103.5(a)(1)(ii).

- (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.

At issue in this case is the applicant's custody. The applicant's parents' Judgment of Divorce states, unequivocally, that the applicant's mother "shall have the care, custody, education and control" of the applicant until his 18<sup>th</sup> birthday. See Judgment of Divorce at 2. The Judgment of Divorce further provides, in relevant part, that the applicant shall reside with his mother, but that his father had the right to be with the applicant "at all reasonable times" including half of summer and winter vacation and alternating Christmas holidays. *Id.* at 2-3.

As noted in the AAO's prior decision, the evidence in the record establishes that the applicant's custody in fact conformed to the custody award included in the Judgment of Divorce. At the time of the applicant's father's naturalization, the applicant was permanently residing with his mother in California and only visited his father in Michigan during school vacations. Moreover, the applicant's mother's name appears as his custodian in his high school records.<sup>2</sup>

The applicant's submission is not accompanied by additional evidence other than the order of the immigration judge. The record before the AAO does not contain the transcript of proceedings before the immigration judge or any new evidence that may have been presented in support of the applicant's claim.

More importantly, the AAO is not bound by a determination of the immigration judge that an applicant is a U.S. citizen. An immigration judge may credit an individual's citizenship claim in the course of terminating removal proceedings for lack of jurisdiction because the government has not established the individual's alienage by clear and convincing evidence. See 8 C.F.R.

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<sup>2</sup>The applicant's parents' 2006 Stipulated *Nunc Pro Tunc* Order, which provided for joint legal and physical custody of the applicant, has no effect for immigration purposes. See Decision of the AAO at 3-4 (citing *Fierro*, 217 F.3d at 6 and *Lewis v. Gonzales*, 481 F.3d 125, 131 (2<sup>nd</sup> Cir. 2007)). As noted in the AAO's decision, the Stipulated *Nunc Pro Tunc* Order created a legal fiction by retroactively changing the custodial relationship between the applicant and his parents 20 years after the fact. *Id.*

§ 1240.8(a), (c) (prescribing that the government bears the burden of proof to establish alienage and removability or deportability by clear and convincing evidence). The immigration judge's decision regarding citizenship, however, is not binding on U.S. Citizenship and Immigration Services (USCIS). USCIS retains sole jurisdiction to issue a certificate of citizenship and the agency's decision is reviewable only by the federal courts, not the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). Sections 341(a) and 360 of the Act, 8 U.S.C. §§ 1452(a), 1503; 8 C.F.R. 341.1. *See also Minasyan v. Gonzalez*, 401 F.3d 1069, 1074 n.7 (noting that the immigration court had no jurisdiction to review the agency's denial of Minasyan's citizenship claim). In addition, while the government bears the burden of proof to establish an individual's alienage in removal proceedings before EOIR, in certificate of citizenship proceedings before USCIS the applicant bears the burden of proof to establish the claimed citizenship by a preponderance of the evidence. Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 C.F.R. 341.2(c).

USCIS lacks statutory authority to issue a certificate of citizenship when an applicant fails to meet the relevant statutory provisions set forth in the Act. A person may only obtain citizenship in strict compliance with the statutory requirements imposed by Congress. *INS v. Pangilinan*, 486 U.S. 875, 885 (1988); *see also United States v. Manzi*, 276 U.S. 463, 467 (1928) (stating that "citizenship is a high privilege, and when doubts exist concerning a grant of it ... they should be resolved in favor of the United States and against the claimant"). Moreover, "it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect." *Berenyi v. District Director, INS*, 385 U.S. 630, 637 (1967); *see also* 8 C.F.R. § 341.2(c). The applicant has not met his burden. The appeal will be dismissed.

**ORDER:** The appeal is dismissed.