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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]

Date: **APR 19 2013**

Office: **BUFFALO, NY**

FILE: [Redacted]

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 (1996)

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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Application for Certificate of Citizenship (Form N-600) was denied by the Buffalo, New York District Director, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal as well as the applicant's request for the AAO to reconsider its appellate decision. The AAO has reopened and reconsidered these proceedings on its own motion. The AAO's prior decisions will be withdrawn, the appeal will be sustained, and the matter returned to the Director of the Buffalo, New York Field Office (the director) for issuance of a certificate of citizenship.

The applicant was born in the Dominican Republic on [REDACTED] and was admitted to the United States as a lawful permanent resident on January 21, 1984 when he was five years old. The applicant's parents were married at the time of his birth but subsequently divorced in the Dominican Republic in September 1988. The applicant's father became a U.S. citizen on April 20, 1996 when the applicant was seventeen years old. The applicant's mother is not a U.S. citizen. The applicant filed the instant Form N-600 on September 16, 2003, seeking 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 denied the Form N-600 because the applicant failed to demonstrate that he was in his father's legal custody. In our decision dismissing the applicant's appeal, we concurred with the director, finding that the applicant's parents' Dominican divorce decree contained a notation granting custody of the applicant to his mother and the applicant had presented no evidence that his father had obtained an amended divorce decree or a separate order granting custody over the applicant to him.

Subsequent to our dismissal of his appeal, the applicant filed a lawsuit in the United States District Court, Western District of New York (District Court), which determined that the applicant was not in his father's legal custody at the time of the father's naturalization. The applicant appealed that adverse decision to the United States Court of Appeals, Second Circuit (Second Circuit). In its December 11, 2011 decision, the Second Circuit vacated the District Court's decision, finding that the Dominican divorce decree awarding custody to the applicant's mother was invalid under the laws of New York and, therefore, could not be relied upon to determine that the applicant was in his mother's legal custody at the time of his father's naturalization.¹ The Second Circuit subsequently remanded the matter to the District Court for a new hearing. Based upon the Second Circuit's decision, depositions were taken from the applicant, his mother and one of his sisters concerning the issues of the applicant's custody during the time period leading up to the father's naturalization in 1996. Based upon our review of these deposition transcripts, along with evidence from the applicant, his father, and his step-mother's administrative records, we reopened these proceedings on Service motion pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(ii) and provided the applicant a period of 30 days to submit a brief. In response, the applicant's counsel submitted a brief. Counsel requested oral argument "to explain why [the applicant] is a United States citizen." The record in this case is

¹ *Garcia v. U.S. Dept. of Homeland Sec.*, 657 F. Supp. 2d 403 (W.D.N.Y. 2009) vacated sub nom. *Garcia v. USICE (Dept. of Homeland Sec.)*, 669 F.3d 91 (2nd Cir. 2011).

voluminous and adequately addresses the pertinent facts and legal issues. Counsel's request is therefore denied pursuant to 8 C.F.R. § 103.3(b)(2).

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 "preponderance of the evidence" standard requires that the record demonstrate that the applicant's claim is "probably true," based on the specific facts of each case. *Matter of Chawathe*, 25 I&N Dec. 369 at 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989)). Even where some doubt remains, applicants will meet this standard if they submit relevant, probative and credible evidence that their claim is "more likely than not" or "probably" true. *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)).

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(a) of the Act, in effect at the time the applicant's father became a U.S. citizen, 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.

The order of the qualifying events does not matter, as long as they occurred prior to the

applicant's eighteenth birthday. *Matter of Baries-Larios*, 24 I&N Dec. 467 at 469-470. 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 (the 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.*

As supplemented after our prior decisions were issued, the record now demonstrates that it is more likely than not that the applicant was in his father's actual uncontested custody subsequent to his parents' divorce. Accordingly, the applicant is eligible for a certificate of citizenship pursuant to former section 321(a)(3) of the Act.

The applicant retains the burden of proof in these proceedings. See Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 CFR § 341.2(c). Here, that burden has now been met.

ORDER: The AAO's prior decisions dismissing the appeal are withdrawn. The matter is returned to the Director of the Buffalo, New York Field Office for issuance of a certificate of citizenship.