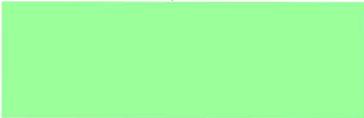




U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **MAR 14 2013** Office: SANTA ANA, CA

FILE:

IN RE: Applicant:

APPLICATION: Application for a Certificate of Citizenship under former Section 321(a) of the Act,
8 U.S.C. § 1432(a) (repealed).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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Santa Ana, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Vietnam on [REDACTED]. The applicant's parents were married in 1970, and divorced on November 16, 1981. The applicant was admitted to the United States as lawful permanent resident on June 23, 1978. The applicant's father became a U.S. citizen upon his naturalization on December 10, 1986. The applicant's eighteenth birthday was on [REDACTED]. The applicant's mother became a U.S. citizen upon her naturalization in 2009, after the applicant's eighteenth birthday. 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 field office director determined that the applicant failed to establish eligibility for derivative citizenship because he was not in his father's legal custody following his parents' divorce. The application was denied accordingly.

On appeal, the applicant, through counsel, contends that his father had legal custody of him under Minnesota state law, which governed his parents' divorce proceedings. *See* Appeal Brief. In support of his claim, the applicant submits a letter from a family law attorney stating, inter alia, that joint custody is presumed in the state of Minnesota. *See* Letter of [REDACTED].

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). Former section 321 of the Act was the law in effect prior to the applicant's eighteenth birthday, and is therefore 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.

Here, the applicant satisfied several of the requirements for derivative citizenship set forth in former section 321(a) of the Act before his eighteenth birthday. Specifically, the applicant was admitted to the United States as a lawful permanent resident and his father naturalized when the applicant was under the age of eighteen. However, the applicant has not shown that his mother naturalized prior to his eighteenth birthday; he therefore cannot derive citizenship under former section 321(a)(1) of the Act. The record also indicates that the applicant's mother was not deceased prior to the applicant's eighteenth birthday, such that he could derive U.S. citizenship solely through his father under former section 321(a)(2) of the Act.

The applicant is also ineligible to derive citizenship under former section 321(a)(3) of the Act because, as discussed below, he was not in his father's legal custody following his parents' divorce.¹ 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 decree includes an unequivocal grant of custody to the applicant's mother. Contrary to counsel's claim, attorney [REDACTED] does not state in her opinion letter that the applicant's father's legal custody is presumed in the divorce decree because it was a default decree. Compare Appeal Brief with Letter of [REDACTED]. Although the applicant's father may have had the legal right to request joint custody, he did not do so. The evidence in the record indicates that the applicant's mother had legal and physical custody of the applicant, and does not contain any evidence of a judicial order invalidating or amending that custody award. See *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000)(stating that "both the language of [former section 321(a)] and its apparent underlying rationale suggest that Congress was concerned with the legal custody status of the child at the time that the parent was naturalized and during the minority of the child")(emphasis in original). The applicant cannot establish that he was in his father's custody following his parents' divorce and prior to his eighteenth birthday, and therefore did not derive U.S. citizenship upon his father's naturalization.

The applicant bears the burden of proof to establish his eligibility for citizenship under the Act. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c). Here, the applicant has not established that he met all of the conditions for the automatic derivation of U.S. citizenship

¹ The second clause of former section 321(a)(3) of the Act provides for derivation of U.S. citizenship by an out of wedlock child upon the mother's naturalization and is therefore inapplicable in this case.

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pursuant to former section 321 of the Act before his eighteenth birthday. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.