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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

Date: **MAY 24 2013**

Office: HONOLULU, HI

FILE

IN RE:

Applicant:

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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed).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

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Honolulu, Hawaii. 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 on March 6, 1975 in South Korea. The applicant's parents are [REDACTED]. The applicant's parents were married in 1980, and divorced in 1991. The applicant was admitted to the United States as a lawful permanent resident on December 26, 1983, when he was 8 years old. The applicant's mother became a U.S. citizen upon her naturalization on June 12, 1990, when the applicant was 15 years old. The applicant seeks a certificate of citizenship claiming that he automatically derived U.S. citizenship through his mother.

The District Director determined that the applicant did not derive U.S. citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432 (1989), finding that he was not in his mother's legal custody following his parents' divorce. The application was accordingly denied.

On appeal, the applicant, through counsel, maintains that he was in his mother's legal custody. Counsel submits evidence that, under Korean law, the applicant's name remaining on his father's family registry is not evidence of his father's custody over him.

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). The Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), which took effect on February 27, 2001, amended sections 320 and 322 of the Act, and repealed section 321 of the Act. The provisions of the CCA are not retroactive, and the amended provisions of section 320 and 322 of the Act apply only to persons who were not yet 18 years old as of February 27, 2001. Because the applicant was over the age of 18 on February 27, 2001, he is not eligible for the benefits of the amended Act. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Former section 321 of the Act is therefore applicable in this case.

Former section 321 of the Act, stated, 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
- (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 (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 18 years.

The record indicates that the applicant obtained lawful permanent residency on December 26, 1983 and that his mother naturalized in 1990. The applicant has thus established that his U.S. citizen mother naturalized and that he was admitted to the United States as a lawful permanent resident prior to his eighteenth birthday.

The applicant was born prior to his parents' marriage. Thus, the applicant was born out of wedlock and the second clause of former subsection 321(a)(3) of the Act is applicable to his case only if his paternity was not established by legitimation. The applicant was born in 1975. His parents were married in 1980 and the applicant is registered in the Family Register. In accordance with Korean law, the applicant was legitimated upon his parents' marriage and registration in the Family Register. *See Matter of Kim*, 14 I&N Dec. 561 (BIA 1974); *Matter of Lee*, 16 I&N Dec. 305 (BIA 1977).

Having found that the applicant was legitimated, the AAO must conclude that the applicant did not derive U.S. citizenship solely through his mother as an out of wedlock child pursuant to the second clause of former subsection 321(a)(3) of the Act.

Nevertheless, the applicant's parents were divorced in 1991, prior to the applicant's eighteenth birthday. As such, the applicant can derive U.S. citizenship prior to his eighteenth birthday by establishing that he was in his mother's custody upon his parents' divorce. The record in this regard establishes, by a preponderance of the evidence, that the applicant remained in his mother's custody following his parents' divorce. 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). In derivative citizenship cases where, as in this case, the parents have legally separated but there is no formal, judicial custody order, the parent having "actual, uncontested custody" will be regarded as having "legal custody" of the child. *Bagot v. Ashcroft*, 398 F.3d 252, 266-67 (3d Cir. 2005) (citing *Matter of M-*, 3 I&N Dec. 850, 856 (Cent. Office 1950)). The record supports the applicant's claim that he was in his mother's "actual, uncontested custody" prior to his eighteenth birthday. Thus, the applicant automatically derived U.S. citizenship prior to his eighteenth birthday pursuant to the first

clause of former subsection 321(a)(3) of the Act, as a child in the legal custody of a U.S. citizen parent where there has been a legal separation of the parents.

“There must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.” *Fedorenko v United States*, 449 U.S. 490, 506 (1981). The burden of proof in citizenship cases is on the claimant to establish the claimed citizenship by a preponderance of the evidence. See Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant has met his burden of proof, and his appeal will be sustained. The matter will be returned to the Honolulu District Office for issuance of a certificate of citizenship

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