**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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: OCT 15 2013 OFFICE: CHICAGO, IL FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Certificate of Citizenship under section 320 of the Immigration and Nationality Act; 8 U.S.C. § 1431

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION**: The Form N-600, Application for Certificate of Citizenship (Form N-600) was denied by the Field Office Director, Chicago, Illinois (the director), and 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 Russia on April 14, 1994, to unmarried parents. The applicant's father became a naturalized U.S. citizen on February 2, 2009, when the applicant was 14 years old. Her mother is not a U.S. citizen. The record reflects that the applicant was admitted into the United States as a lawful permanent resident on April 16, 2012, when she was 18 years old. The applicant presently seeks a certificate of citizenship pursuant to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431, based on the claim that she derived U.S. citizenship through her father.

In a decision dated January 15, 2013, the director determined that the applicant failed to establish that she resided in the United States in the legal and physical custody of her U.S. citizen father prior to her 18th birthday, as required under section 320(a)(3) of the Act. The application was denied accordingly.

On appeal, the applicant asserts, through counsel, that the documentation in the record establishes that she resided in the legal and physical custody of her U.S. citizen father prior to her 18th birthday. In support of the assertions, the record contains affidavits from the applicant's parents, federal income tax return evidence, and divorce documentation for the applicant's parents. Counsel also submits a court order obtained on April 8, 2013, stating that the applicant's father had legal custody over the applicant from April 2008, until she reached the age of majority.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ,* 381 F.3d 143, 145 (3d. Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

Section 320 of the Act provides, in pertinent part, that:

> (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
>
> (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
>
> (2) The child is under the age of eighteen years.
>
> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

Further, section 101(c) of the Act, 8 U.S.C. § 1101(c)(1) provides, in pertinent part, that for naturalization and citizenship purposes, the term "child" means:

> an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation . . . .

The present record does not contain a marriage certificate for the applicant's parents. The record does, however, contain a 2006 default divorce decree, in which the court found that the applicant's parents were legally married on November 3, 1998. Moreover, the applicant would be considered a legitimated child under Illinois law, her father's place of residence, regardless of whether her parents married. *See* 750 Illinois Compiled Statutes chapter 45, sections 2 and 3 (stating that a parent-child relationship exists regardless of the marital status of the parents). The applicant therefore meets the legitimation requirements contained in section 101(c) of the Act.

Legal custody vests "[b]y virtue of either a natural right or a court decree." *Matter of Harris,* 15 I&N Dec. 39, 41 (BIA 1970). Here the record contains a 2006, "Judgement of Dissolution of Marriage by Default" from the Circuit Court of Cook County, Illinois, granting the applicant's father a divorce.[1] The judgment reflects that "[o]ne child was born as the issues *[sic]* of this marriage," and that no agreement was incorporated into, or made part of the judgment.

A March 6, 2013, "Agreed Motion to Correct a Previous Order" indicates that the applicant's father filed a motion for an amendment and modification of his divorce judgment with the Circuit Court of Cook County, Illinois, to reflect that the applicant's mother gave him full legal and physical custody over the applicant in April 2008.

In affidavits dated, March 6, 2013, the applicant's mother and father state that they agreed to joint custody over the applicant before they divorced, with the applicant's father "designated as the primary custodian." They indicate that their agreement was "inadvertently" not reflected in their divorce judgment; that a notarized affidavit signed by the applicant's mother on May 24, 2012, granted full custody over the applicant to her father as of April 2008; that the May 2012 affidavit is "legally binding and recognized by the Judiciary in Russia;" and that they request that their divorce judgment be corrected and modified to reflect that the applicant's father had full custody over the applicant from April 2008, until she reached the age of majority.

The affidavit signed by the applicant's mother on May 24, 2012, is contained in the record and states, in pertinent part, that she gave "full financial and legal custody" over the applicant to the applicant's father in April of 2008. She states further that the applicant "has been residing and has been fully supported financially" by her father since that time.

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[1] The default divorce judgment reflects that it was issued in 2006; however, the judgment does not contain the month or date of the order.

An April 8, 2013, "Agreed Order" from the Circuit Court of Cook County, Illinois states that the applicant's father had full legal custody of his daughter from April 2008, until majority.

Upon review, we find that the April 8, 2013 court order does not establish that the applicant's father was awarded legal custody over the applicant prior to her 18th birthday. State court orders pertaining to retroactive, or *nunc pro tunc,* custody agreements are generally not recognized for purposes of obtaining immigration benefits. *See Hendrix v. INS,* 583 F.2d 1102 (9th Cir. 1978). *See also, Fierro v. Reno,* 217 F.3d 1 (1st Cir. 2000). Simply relying on a "*[n]unc pro tunc* order to recognize derivative citizenship would create the potential for significant abuse and manipulation of federal immigration and naturalization law." *Bustamante-Barrera v. Gonzales,* 447 F.3d 388, 400 (5th Cir. 2006). The Service must look beyond the facial validity of *nunc pro tunc* decrees to determine their legal effect, if any, in federal cases. *See U.S. v. Esparza,* 678 F. 3d 389 (5th 2012).

In the present matter, the April 8, 2013, *nunc pro tunc* custody order appears to have been issued for immigration or equity purposes. The order was issued seven years after the applicant's parents' 2006 default divorce judgment, and the initial divorce judgment does not name the applicant; the child referred to in the divorce judgment was born after the parent's alleged November 1998 marriage; and whereas the applicant was born before the marriage, the divorce judgment makes no reference to a child custody arrangement between the applicant's parents.[2] The record reflects further that the *nunc pro tunc* order was based on uncorroborated affidavit statements from the applicant's parents, made after the applicant's 18th birthday, regarding their custody arrangement; and issuance of the order appears to be a moot point for purposes of Illinois State law, as the applicant was over the age of majority when the order was issued. Furthermore, the applicant's father did not seek a *nunc pro tunc* order until after the applicant was denied U.S. citizenship status, and after the applicant's 18th birthday. The April 8, 2013, *nunc pro tunc* judgment therefore fails to establish that the applicant's father was awarded legal custody over the applicant prior to the applicant's 18th birthday.

In the absence of a judicial determination or grant of custody in a case of a legal separation of the naturalized parent, the parent having actual, uncontested custody of the child is to be regarded as having legal custody. *Matter of M,* 3 I&N Dec. 850, 856 (BIA 1950). Because the applicant's parents' divorce judgment does not address custody over the applicant and states that no agreement was incorporated into, or made part of the judgment, the requirements for legal custody, as set forth in *Matter of M,* apply to the present case.

The regulation at 8 C.F.R. § 320.1 defines the term "legal custody" in part, by referring to "the responsibility for and authority over a child." Under the Act, "[t]he term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33).

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[2] It is also noted that, if the applicant did not reside in the United States at the time of the applicant's parents' divorce, the court likely did not have jurisdiction over the custody matter. *See* Nevada Revised Statutes, Section 125A.305.

In order to establish that the applicant resided with her U.S. citizen father, and that he had responsibility for, and authority over her prior to her 18th birthday, the record contains the applicant's parents' affidavits referred to above. The record also contains a 2011 federal income tax return filed by the applicant's father, reflecting that he claimed the applicant as his dependent in 2011. A 2010 federal income tax return contained in the record reflects that the applicant's father did not claim the applicant as his dependent in 2010.

The applicant's Russian passport, issued in Russia on May 29, 2008, reflects that the applicant obtained a United States multiple entry, tourist visa in Saint Petersburg, Russia on June 9, 2011. She was admitted into the United States as a visitor on August 22, 2011, and on February 21, 2012.

The applicant states on a Form G-325A, Biographic Information Form, dated September 20, 2011, that she resided in Saint Petersburg, Russia between September 2009 and August 2011, and that from August 2011, she resided in Chicago, Illinois.

Upon review, we find that the applicant has failed to establish, by a preponderance of the evidence, that she was in the actual, uncontested custody of her U.S. citizen father prior to her 18th birthday. Immigration, passport, and 2010 federal tax evidence indicates that the applicant lived in Russia prior to her 18th birthday, and the 2011 federal tax evidence, alone, fails to establish that the applicant lived with her father in the United States in 2011. In ascertaining the evidentiary weight of affidavits, the Service must determine the basis for the affiant's knowledge of the information to which he is attesting; and whether the statement is plausible, credible, and consistent both internally and with the other evidence of record. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). Here, the applicant's parents' affidavits have diminished evidentiary weight, in that they lack material detail regarding exact dates and places that the applicant lived; assertions that the applicant lived with her father since April 2008 are uncorroborated by independent evidence; and the assertions conflict with immigration, passport, and tax information contained in the record.

Furthermore, the applicant's claim to citizenship under section 320 of the Act fails because the applicant has not established that she was admitted into the United States pursuant to a lawful admission for permanent residence prior to her 18th birthday. Although not discussed in the director's decision, the record reflects that the applicant's adjustment of status application was approved on April 16, 2012, two days after the applicant's 18th birthday. The applicant therefore also failed to establish that she meets lawful permanent resident requirements contained in section 320(a)(3) of the Act.

The regulation at 8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. In the present matter, the applicant has failed to meet her burden of proof. The appeal will therefore be dismissed.

**ORDER:** The appeal is dismissed.