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

(b)(6)

[redacted]

Date: JUN 03 2014 Office: HIALEAH, FL 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

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the Hialeah, Florida Field Office (the director) denied the Application for Certificate of Citizenship (Form N-600), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, and the matter returned to the director for issuance of a certificate of citizenship to the applicant.

Pertinent Facts and Procedural History

The applicant was born to married parents in Cuba on May 10, 1975, and he was admitted into the United States as a lawful permanent resident on May 11, 1980, when he was five years old. The applicant's father became a naturalized U.S. citizen on February 20, 1990, when the applicant was 14 years old. His mother is not a U.S. citizen. The applicant's parents divorced on May 24, 1983, when the applicant was eight years old. The applicant seeks a certificate of citizenship pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432, based on the claim that he derived citizenship through his U.S. citizen father.

In a decision dated December 27, 2013, the director determined that the applicant was ineligible for derivative citizenship under former section 321 of the Act, because he failed to establish that he was in his father's legal custody after his parents divorced, and prior to his 18th birthday. The application was denied accordingly. On appeal, the applicant indicates, through counsel, that he lived with his father after his parents divorced and prior to his 18th birthday, and that he therefore satisfies the legal custody requirements contained in former section 321 of the Act.

Applicable Law

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3rd Cir. 2004). The applicable law for derivative citizenship purposes is that 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); *accord Jordon v. Attorney General*, 424 F.3d 320, 328 (3d Cir. 2005). Former section 321 of the Act is applicable in the applicant's case.

Former section 321 of the Act provided, in pertinent part that:

> (a) 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
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> (4) Such naturalization takes place while such child is unmarried and under the age of eighteen years; and
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> (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 term, "legal separation" means "either a limited or absolute divorce obtained through judicial proceedings." *See Matter of H*, 3 I&N Dec. 742, 744 (BIA 1949). Legal custody vests "[b]y virtue of either a natural right or a court decree." *See Matter of Harris,* 15 I&N Dec. 39, 41 (BIA 1970). 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." *See Matter of M,* 3 I&N Dec. 850, 856 (BIA 1950).

Analysis

There is no dispute that the applicant was under the age of 18 when his father became a naturalized U.S. citizen; and that the applicant resided in the United States as a lawful permanent resident at the time of his father's naturalization, and while under the age of 18. Divorce decree evidence contained in the record reflects further that the applicant's parents were legally divorced in Florida on May 24, 1983, when the applicant was eight years old. The "legal separation" definition contained in former section 321(a)(3) has thus also been met. The issue in the present case is, therefore, whether the applicant was in his U.S. citizen father's legal custody after his father naturalized on February 20, 1990, and prior to the applicant's 18th birthday.

The applicant's parents' divorce decree reflects that the Family Division of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida ordered that: both parents share parental responsibility over the applicant, pursuant to Florida Statute 61.13(2)(b); and that the applicant's "primary residence home" would be with his mother.

Statutory provisions contained in Florida Statute section 61.13(2)(b) (1983), provided, in pertinent part that:

> (2) The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child. If the court determines that shared parental

responsibility would be detrimental to the child, the court may order sole parental responsibility.

> a) 'Shared parental responsibility' means that both parents retain full parental rights and responsibilities with respect to their child and requires both parents to confer so that major decisions affecting the welfare of the child will be determined jointly[.]

See Ballah v. Poole, 453 So. 2d 924, 925 (Fla. Dist. Ct. App. 1984) (discussing Florida Statute section 61.13(2)(b)). Accordingly, at the time of their divorce, the applicant's mother and father were awarded shared, or joint, legal custody over the applicant under Florida law.

The award of shared legal custody in this case satisfies the statutory terms under former section 321(a)(3) of the Act, in that the language contained in former section 321(a)(3) of the Act refers to "the naturalization of the parent having legal custody of the child when there has been a legal separation of the parents." Outside of the Fifth and Ninth Circuit Courts of Appeal, former section 321(a)(3) of the Act does not require "sole" legal custody over the child subsequent to a legal separation.[1] *See Fierro v. Reno,* 217 F.3d 1, 4 (1st Cir. 2000) (the legal custody requirement in former section 321of the Act "should be taken presumptively to mean legal custody under the law of the state in question[.]"). The applicant therefore meets the requirements set forth in former section 321(a)(3) of the Act.

The burden of proof rests on the claimant to establish the claimed citizenship by a preponderance of the evidence. *See* 8 C.F.R. § 341.2(c). Here, the applicant has established that all conditions for derivative U.S. citizenship pursuant to former section 321 of the Act have been met. Accordingly, the appeal will be sustained.

Conclusion

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The matter is returned to the director for issuance of a certificate of citizenship to the applicant.

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[1] The U.S. Fifth and Ninth Circuit Courts of Appeals held in *Bustamante-Barrera v. Gonzales,* 447 F.3d 388 (5th Cir. 2006), and *U.S. v. Casasola*, 670 F.3d 1023 (9th Cir. 2012) that a grant of "joint" legal custody is insufficient to satisfy the legal custody requirement in former section 321(a)(3) of the Act. The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals and, therefore, *Bustamante-Barrera and Casasola* are not binding authorities in this case.