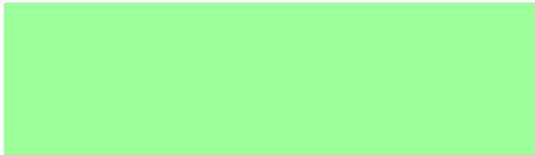


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

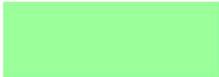


U.S. Citizenship
and Immigration
Services

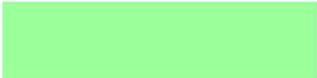


Date: **MAR 05 2014**

Office: SAN ANTONIO, TX

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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432 (repealed).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

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The San Antonio, Texas Field Office Director (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 dismissed and the application will remain denied.

Pertinent Facts and Procedural History

The applicant was born on December 18, 1980 in Vietnam. The record indicates that the applicant's parents were married at the time of his birth, but later divorced on August 13, 1983. The applicant and his mother were admitted to the United States as lawful permanent residents on November 9, 1990. The applicant's mother, [REDACTED] became a naturalized U.S. citizen on May 22, 1997, when the applicant was sixteen years old. The record contains no evidence that the applicant's father, [REDACTED] is a U.S. citizen. The applicant seeks a certificate of citizenship on the basis that he derived U.S. citizenship through his mother under former section 321(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432(a) (repealed).

The director denied the Form N-600, after concluding that the applicant did not derive U.S. citizenship under former section 321(a)(1) of the Act because he had not established that he had ever been in the sole legal custody of his U.S. citizen mother following his parents' divorce and before his eighteenth birthday. On appeal, counsel for the applicant contends that the plain language of the applicant's parents' divorce decree shows that his mother was awarded sole legal custody over him, and alternatively, that the record establishes that he was in the actual, uncontested custody of his mother before his eighteenth birthday. Counsel submits a supporting appellate brief and additional evidence.

Applicable Law

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. *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). The Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), effective as of February 27, 2001, repealed section 321 of the Act entirely and amended sections 320 and 322 of the Act. The CCA applies only to persons who were not yet eighteen years of age on February 27, 2001. The applicant was over the age of eighteen on the effective date of the CCA, and thus, he cannot benefit from the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Accordingly, former section 321 of the Act is applicable in this case.

Former section 321 of the Act provided 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 such 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.

Analysis

The record shows that the applicant has satisfied several of the requirements for derivative citizenship set forth in former section 321(a)(3) of the Act. Specifically, prior to his eighteenth birthday, the applicant's mother became a naturalized U.S. citizen, his parents were legally separated through divorce, and the applicant was residing in the United States pursuant to a lawful admission for permanent residence at the time of his mother's naturalization. At issue is whether the applicant was in the legal custody of his U.S. citizen mother before he turned eighteen years of age, such that he automatically derived U.S. citizenship through her.

The applicant's proceeding falls within the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit), which has determined that the "legal custody" requirement of subsection (3) of former section 321(a) of the Act may only be satisfied where the U.S. citizen parent has sole legal custody of a child, rather than joint legal custody. *See Bustamante-Barrera*, 447 F.3d 388, 395-96 (5th Cir. 2006).

The record contains the applicant's parents' divorce decree, with two translations submitted by the applicant and one translation obtained by United States Citizenship and Immigration Services (USCIS). Relying on the most recent translation from the applicant, certified June 4, 2013, counsel asserts on appeal that the plain language of the divorce decree awarding "custody" to the applicant's mother shows that the latter was granted sole legal custody of the applicant.

The referenced June 4, 2013 translation of the divorce judgment indicates that the applicant's parents agreed that the applicant "will be with" his mother and that his father "will help raise the" applicant by paying child support until the applicant reaches adulthood. It shows that the court approved this

mutual agreement to grant applicant's mother "custody" of the applicant and to have his father provide monthly child support until adulthood. It further provides that the applicant's father would have "the right to regularly visit and care for" the applicant and that "when needed, custody can change and child support can also change." Similarly, an earlier translation from the applicant, certified March 28, 2013, also shows that the applicant's parents agreed to have the applicant "live with" his mother and that his father would pay monthly child support. It too reflects that the court recognized this agreement between the applicant's parents that "assigned custody" of the applicant to his mother for "taking care" of him, required the applicant's father to pay child support until the applicant became an adult, and granted the applicant's father "the right to visit and tak[e] care of the" applicant.¹ Finally, the USCIS translation of the decree, certified May 2, 2013, shows that the court recognized the agreement of the applicant's parents that the applicant would live with his mother and that his father would contribute financially on a monthly basis until the applicant reached adulthood. Further, it provides that the court declared that the applicant's father was "entitled to frequent and liberal parenting time with" the applicant and that "when necessary, both parties can exchange roles to continue contributing to their support" of the applicant.

Upon *de novo* review, the AAO concludes the divorce decree did not award sole legal custody of the applicant to his mother, as required by the Fifth Circuit for purposes of satisfying former section 321(a)(3) of the Act. The language of the divorce judgment, under any of the referenced translations, makes clear that although the applicant was to reside with his mother in her *physical* custody, the applicant's father retained parental rights over the applicant, including visitation rights and the right to exchange custodial roles, as needed. *See generally, Bustamante-Barrera*, 447 F.3d at 390-91 (noting that the divorce judgment granted only sole physical custody to the citizen parent but retained joint legal custody for both parents, by virtue of which, the noncitizen parent there retained visitation and other parental rights).

The applicant's mother's statement in the record indicates that she and the applicant's father agreed, and the court concurred, that she would have full custody of the applicant. She asserts that, at all times after the divorce, she had physical and legal custody of the applicant and was solely responsible for the applicant legally, financially, and physically. However, all three translations of the initial divorce petition show that the applicant's parents' voluntary agreement addressed the applicant's physical residence and day to day care only. Nothing in the language of the divorce decree suggests that the applicant's mother was awarded sole *legal* custody or that the applicant's father's parental and custodial rights were divested or terminated. *See Matter of Rivers*, 17 I&N Dec. 419, 421 (BIA 1980) (holding that unless local law specifically divests the father of custody, all children are assumed to be in custody of both natural parents). The record also lacks any evidence that the custody order was later amended, prior to the applicant's eighteenth birthday, to grant sole legal custody to the applicant's mother.

Counsel cites to *Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008) and *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000) for the proposition that the applicant's father's visitation rights and duty to pay child support, as decreed in the divorce judgment, did not confer custodial rights over the applicant.

¹ The last portion of the court order is inadequately translated, but like the other translations, it roughly appears to indicate that the individual roles of the parents assigned in the agreement could be voluntarily changed if necessary.

Counsel's reliance on these cases is misplaced. In the first instance, *Abbott* was reversed, and *Croll* abrogated, by the U.S. Supreme Court in *Abbott v. Abbott*, 560 U.S. 1 (2010). Secondly, these cases relate to the parental "right of custody" as determined by the Hague Convention on the Civil Aspects of International Child Abduction and are not applicable here. *See Abbott*, 560 U.S. at 9-10 (addressing whether a minor was "wrongfully removed" to the United States by one parent in violation of the other parent's right of custody under the Hague Convention).

On appeal, counsel also contends that, alternatively, the applicant can establish that his mother had sole legal custody of the applicant because she had actual, uncontested custody of the applicant. However, the parent having actual, uncontested custody of the child is regarded as having "legal custody" only in the absence of a judicial order granting custody to the naturalized parent upon a legal separation. *See Matter of M*, 3 I&N Dec. 850,856 (BIA 1950). As noted, the record here contains a judicial order, the terms of which grant joint legal custody to both the applicant's parents. The record lacks any evidence that the custody order was judicially amended at a later time to grant the applicant's mother sole legal custody prior to the applicant's eighteenth birthday.

Counsel relies in error on *Bustamante-Barrera* for the proposition that for purposes of former section 321(a)(3) of the Act, an applicant can show, as a matter of federal law, that he or she was in the sole legal custody of the naturalized parent even where there is an explicit order of joint legal custody. 447 F.3d at 399. The Fifth Circuit, in *Bustamante-Barrera*, noted, only in hypothetical terms, that "at least in theory . . . a [lawful permanent resident] child seeking derivative citizenship under [section 321(a)] might prove that, despite a state's explicit grant of joint legal custody to his parents, he must be regarded as being (or having been) in the sole legal custody of his naturalized parent as a matter of federal law." (Emphasis added). However, it did not apply this theory or consider its validity or application, since the petitioner there put forth no evidence in support of his claim that he was effectively in the sole legal custody of his U.S. citizen parent despite an order granting his parents joint legal custody. The applicant cites to no other relevant case law for the proposition that actual uncontested custody can establish sole legal custody even where a court custody order exists. Accordingly, the applicant has failed to demonstrate that he was in the sole legal custody of his U.S. citizen mother following his parents' divorce, as required under former section 321(a)(3) of the Act.

The applicant is also ineligible to derive citizenship under any other subsection of former section 321(a) of the Act. The applicant's citizenship claim does not fall within either subsections (1) or (2) of former section 321(a) of the Act, as there is no evidence that his father was ever naturalized or that his father was deceased prior to his eighteenth birthday such that his U.S. citizen mother was his sole surviving parent. He also does not qualify under the second clause of former section 321(a)(3) of the Act, as that provision only applies to children born out of wedlock and the applicant was born to married parents.

Accordingly, the applicant has not satisfied his burden to demonstrate that he derived citizenship through his U.S. citizen mother under former section 321 of the Act.

Conclusion

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

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NON-PRECEDENT DECISION

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that he met all of the conditions for the automatic derivation of U.S. citizenship pursuant to former section 321 of the Act before his eighteenth birthday. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed and the application remains denied.