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)

Date: FEB 0 6 2015 Office: LAS VEGAS, NEVADA 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for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act; 8 U.S.C. § 1432 (repealed)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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Las Vegas, Nevada (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.

Pertinent Facts and Procedural History

The record reflects that the applicant was born in wedlock on February [redacted] in Romania. The applicant's parents, [redacted] were divorced in [redacted] The applicant's father became a U.S. citizen upon his naturalization on July 21, 2000. The applicant was admitted to the United States as lawful permanent resident on July [redacted] when he was 17 years old. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship through his father pursuant to former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432.

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. *See* Decision of the Field Office Director, dated August 10, 2012.

On appeal, the applicant, through counsel, contends that his mother relinquished her legal custody over him when he immigrated to the United States in 2000. *See* Appeal Statement. The applicant states that his father became his primary caregiver after his immigration. *Id.*

Applicable Law

We conduct appellate review on a *de novo* basis. 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 "preponderance of the evidence" standard requires that the record demonstrate that the applicant's claim is "probably true," based on the specific facts of each case. *See Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-,* 20 I&N Dec. 77, 79-80 (Comm'r. 1989)).

The applicable law for derivative citizenship purposes is "the law 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). 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 and provided, 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 (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

Analysis

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 became a naturalized U.S. citizen 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 the first clause of former section 321(a)(3) of the Act because 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 a grant of custody to the applicant's mother. Although the record contains a sworn statement

[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.

executed by the applicant's mother purporting to transfer custody of the applicant to his father, there is no official court document amending the original custody award in the divorce decree.

The applicant, citing *Matter of W*, 7 I&N Dec 373 (BIA 1956), maintains that his mother relinquished legal custody when she executed her sworn statement. *See* Appeal Statement. *Matter of W* involved the question of custody at the time of legitimation of an out-of-wedlock child. The applicant in this case was born in wedlock, and the question here is his father's physical and legal custody not custody for purposes of legitimation. In derivative citizenship cases where 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)). In this case, however, there is a formal, judicial custody order granting custody of the applicant to his mother. The applicant has not established that a sworn statement is sufficient, under Romanian law, to overcome the custody designation established during the divorce proceedings. The record also fails to indicate that since the applicant's arrival in the United States, her father has taken the steps necessary to modify the Romanian custody award through the state court system.

Conclusion

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 341(a) of the Act, 8 U.S.C. § 1452(a). Here, that burden has not been met.

ORDER: The appeal is dismissed.