From: Joseph Whalen [mailto:joseph.whalen774@gmail.com]
Sent: Friday, December 30, 2011 11:38 PM
To: USCISFRComment@dhs.gov**Cc:** Public Engagement
Subject: Comment on form N-600

In advance of the FR Notice of Tues Jan 3, 2012, I wanted to point out something that is going on in the 2nd circuit. The relevant cases have been collected at: http://www.slideshare.net/BigJoe5 They pertain to an individual who had his N-600 denied (twice) and both times AAO upheld the decisions to deny. The District Court agreed, the BIA agreed, BUT the 2nd Circuit is making strange waves again this year on former INA 321. The earlier District Court decision quoted below makes a darn good point in citing from a 5th Cir. decision and the Congressional history. This quote reinforces my last comment submitted for this information collection request.

"The legislative history of INA § 321 indicates that **"Congress enacted the provision to ensure that only those alien children whose real interests were located in America with their custodial parent, and not abroad, should be automatically naturalized."** *Bustamante-Barrera v. Gonzales,* 447 F.3d 388, 397 (5th Cir. 2006), *cert. denied,* 547 U.S. 1205 (2006); *see also* H.R. Rep. No. 82-1365, reprinted in 1952 U.S.C.C.A.N. 1653, 1680. In *Bustamante-Barrera*, the Fifth Circuit construed the section of § 321(a)(3) that stated "the naturalization of the parent having legal custody when there has been a legal separation of the parents ..." as requiring the naturalizing parent to have *sole* as opposed to joint legal custody. *Bustamante-Barrera*, 447 F.3d at 396. The *Bustamante-Barrera* court further reasoned that Congress chose to use the singular form, "parent," to describe the person having custody, which "leaves no room to dispute that, when only one of the two legally separated parents is a naturalized U.S. citizen, that parent is the one who must have legal custody." *Id*. Thus, a petitioner who was in the sole *physical* custody of his mother, but subject to joint *legal* custody of both parents under the divorce decree, did not derive citizenship at the time of his mother's naturalization under INA § 321. *Id.* at 398-99.

The dispute in the instant case centers around the requirement of INA § 321 that the naturalized parent must have legal custody of the child seeking derivative citizenship. Petitioner is unable to establish that he was in the legal custody of his father, who was the only parent who was naturalized prior to Garcia's eighteenth birthday. The Dominican divorce decree submitted to the Immigration Court provides that personal guardianship of Garcia was granted to his mother. See Divorce Certificate Extract at Ex. F. That decree does not provide that petitioner's father had joint or sole custody of the five minor children (including petitioner) listed on the divorce decree. According to the decree, the only judicial determination made with respect to petitioner is that guardianship was granted to his mother, but there is no provision that his father assumed any rights or responsibilities regarding care and custody of the children. It is apparent from the record that Garcia was in the custody of his mother after the divorce."[1]

[1] *Garcia v. Heron*, No. 09-CV-416, 2009 WL 3231924 (W.D.N.Y. Oct. 1, 2009) http://law.justia.com/cases/federal/district-courts/new-york/nywdce/1:2009cv00416/73728/11

Thank you,

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