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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE: [redacted] Office: Miami Date: JUN 17 2002

IN RE: Applicant: [redacted]

APPLICATION: Application for Naturalization under Section 322 of the Immigration and Nationality Act, 8 U.S.C. 1433

IN BEHALF OF APPLICANT: [redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Miami, Florida, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained, the district director's decision will be withdrawn.

The applicant was born on April 25, 1983, in Colombia. The applicant's father, was born in Colombia in April 1957 and never had a claim to U.S. citizenship. The applicant's mother, was born in Colombia in June 1968 and acquired U.S. citizenship at birth through her father. The applicant's parents married each other on May 29, 1981. The applicant was admitted to the United States as a nonimmigrant visitor on December 19, 2000. The applicant is seeking to become a naturalized citizen under section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1433.

The district director reviewed the record and concluded that the applicant's mother, hereafter referred to as had failed to satisfy the physical presence requirements in effect at the time of the applicant's birth, a total of 10 years, 5 of which were after the age of 14 to acquire U.S. citizenship at birth under section 301(g) of the Act, 8 U.S.C. 1401(g). The district director also determined that the applicant is now residing in the United States and is ineligible to attain U.S. citizenship under section 322 of the Act.

On appeal, counsel states that the applicant was sworn in by an officer of the Service on March 2, 2001, as a naturalized U.S. citizen and the Service verbally approved the application. Counsel asserts that the applicant was eligible for transmission of U.S. citizenship from under section 301(g) of the Act and from both his grandmother and grandfather under section 322(a) of the Act. Counsel states that, after naturalizing the applicant on March 2, 2001, the Service lost his grandmother's Form N-600 application, and issued a denial decision on March 20, 2001.

Section 322 of the Act, effective February 27, 2001, requires the citizen grandparent to be alive and a U.S. citizen at the time of filing of the application. The prior version of section 322 of the Act allowed the citizen grandparent to be dead at the time of filing, if he died a U.S. citizen and fulfilled the physical presence requirement prior to his death. The record indicates that the applicant's grandfather, is deceased.

On appeal, counsel also states that a Service officer swore the applicant in on March 2, 2001, as a naturalized U.S. citizen after the officer verbally approved the Form N-600 application.

In Matter of M-, 4 I&N Dec. 532 (A.G. 1952; BIA 1952), the Board held that even if an "error" was made, the Service is not required to approve applications or petitions where eligibility has not been demonstrated.

It is important to note that counsel, in effect, raises two different legal theories in support of the above application for a certificate of citizenship. First, counsel claims that under section 301(g) of the Act, the applicant acquired citizenship at birth because [redacted] was a citizen. Second, counsel claims that the applicant is eligible for citizenship under section 322 of the Act.

If the applicant's claim under section 301(g) is successful, then he *became* a citizen "at birth." Section 301 of the Act. If his claim under section 322 is successful, then he *will become* a citizen upon approval of his application and his taking of the oath of allegiance. Section 322, therefore, actually provides a form of naturalization, not a form of birth citizenship. *Cf. id.* Section 101(a)(23), 8 U.S.C. 1101(a)(23). Because the claims under section 301 and section 322 are distinct legal theories, they will be discussed separately.

The claim to birth citizenship under section 301(g)

Section 301(g) of the Act provides for the acquisition of U.S. citizenship at birth by a child born outside the United States who is the child of an alien parent and a U.S. citizen parent who has satisfied the physical presence requirements in effect at the time of the child's birth.

Section 301 of the Act, effective for persons born on or after November 14, 1986, provides in part that the following shall be nationals and citizens of the United States at birth:

> (g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than 5 years, at least 2 of which were after attaining the age 14 years....

The applicant was born in 1983 and is subject to section 301(g) of the Act in effect prior to November 14, 1986. This former section provided, in pertinent part, that a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than 10 years, at least 5 of which were after attaining the age 14 years, shall be nationals and citizens of the United States at birth.

[redacted] submitted an affidavit dated March 2, 2001, in which she indicated that she studied and lived in the United States during the school years of 1964-65, 1965-66, 1970-71, 1971-72 and 1972-73. [redacted] became 14 years old in June 1972. Based on this affidavit, [redacted] failed to establish that she was

physically present in the United States for a period of 5 years after the age of 14 years.

Since [redacted] failed to satisfy the physical presence requirements necessary to transmit U.S. citizenship to the applicant, the applicant did not acquire U.S. citizenship at birth under section 301(g) of the Act. Further, the text of section 301(g) does not make any provision for acquisition of birth citizenship based on a citizen grandparent's having met the residence requirement. Only the citizen parent's citizenship and residence are relevant.

The claim to naturalization under section 322

Section 322 of the Act was amended by the Child Citizenship Act of 2000, Pub.L. No. 106-395, 114 Stat. 1631 (CCA), effective February 27, 2001, and provides benefits only to those persons who had not yet reached their 18th birthday. The applicant was 17 years, 9 months, and 12 days old on February 27, 2001.

The application was filed in December 1998 and a duplicate application was filed on a later date. Pending Form N-600 applications filed under the old section 322 for biological children who were not lawful permanent residents but were eligible for citizenship based on the physical presence in the United States of a U.S. citizen parent or the physical presence of a citizen parent of a citizen parent, are to be processed under the new section 322.

Section 322 of the Act, in effect on February 27, 2001, provides that:

> (a) A parent who is a citizen of the United States may apply for naturalization on behalf of a child born outside of the United States who has not acquired citizenship automatically under section 320. The Attorney General shall issue such a certificate of citizenship to such parent upon proof, to the satisfaction of the Attorney General, that the following conditions have been fulfilled:
>
> (1) At least one parent is a citizen of the United States, whether by birth or naturalization.
>
> (2) The United States citizen parent-
>
> (A) has been physically present in the United States or its outlying possessions for a period totaling not less than five years, at least two of which were after attaining the age of fourteen years; or
>
> (B) has a citizen parent who has been physically present in the United States or its outlying possessions for a period or periods

 [redacted]

totaling not less than five years, at least two of which were after attaining the age of fourteen years.

(3) The child is under the age of 18 years.

(4) The child is residing outside of the United States in the legal and physical custody of the citizen parent, is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

(b) Upon approval of the application (which may be filed from abroad) and, except as provided in the last sentence of section 337(a), upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

(c) Subsections (a) and (b) shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under section 101(b)(1).

According to the affidavit of [redacted] she attended Twin Lakes High School from 1972 to 1973 when she was 15 years of age. Therefore, [redacted] was physically present in the United States for one year following her 14th birthday.

On appeal, the applicant submitted a more detailed résumé [redacted] residences following her reaching the age of 14 years. The affidavit indicates that she remained in Florida until her parents divorced in 1974 and she accompanied her mother to Colombia in February or March of 1975. The applicant, in respect to a shared custody agreement, spent half of the year in Colombia with her mother and half of the year in Florida with her father until the end of 1980. Based on this more detailed résumé of his mother's physical presence in the United States, it is concluded that Mrs. Eckert has established that she was physically present in the United States for at least two years following her 14th birthday.

The record reflects that the applicant's grandmother was continuously physically present in the United States from 1949 to 1956 and temporarily from 1956 to 1973. Although the grandmother established the required physical presence in this matter, the applicant must be residing outside the United States in the legal and physical custody of the citizen parent. The applicant was admitted as a nonimmigrant, which establishes that he is temporarily present in the United States.

The question to be resolved is whether the applicant has satisfied section 322(a)(4) of the Act by establishing that he is "residing outside the United States in the legal and physical custody of the citizen parent."

INTERP. 322.2(c) states that "legal custody" contemplates a bona fide parent-child relationship and a family unit. The term "family unit" is not to be given a literal, narrow meaning which would deny the unit's existence merely because the parent-child relationship at some time lacked some single aspect of family living while, in other respects, the relationship was entirely consistent with the concept of a "family unit." Thus, a "family unit" may exist despite a showing that the child was not in the actual physical custody, or a member of the household, of the petitioning parent at all times, as where the child resided in the home of the parent's nephew while the parent was temporarily absent abroad for business or other legitimate purposes "such as a lengthy quest to obtain U.S. citizenship for the applicant."

After a careful review of the record and following the discussion of the meaning of legal custody, family unit and actual physical custody in INTERP. 322.2(c), it is concluded that the applicant has also satisfied section 322(a)(4) of the Act. He is residing outside of the United States in the legal and physical custody of the citizen parent, and is temporarily present in the United States pursuant to a lawful admission. He was maintaining that lawful status when he took the Oath of Allegiance.

An alien may acquire citizenship only upon strict compliance with the requirements that Congress has established by statute. *INS v. Pangilinan*, 486 U.S. 876, 884 (1988). Congress has provided that a citizen parent may apply for a child's naturalization under section 322 of the Act. Section 322 of the Act requires that the application be approved and the oath taken before the child reaches his or her 18th birthday.

The record establishes that the application was originally approved and the Oath of Allegiance was taken on March 2, 2001, a date prior to the applicant's 18th birthday. Therefore, the district director's decision will be withdrawn, and the original decision will be reinstated as of the date that the oath of allegiance was taken.

8 C.F.R. 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant has provided that evidence.

ORDER: The appeal is sustained. The district director's decision is withdrawn, and the original decision to approve the application is reinstated as of March 2, 2001, the date that the Oath of Allegiance was taken.