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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

E2



FILE:



Office: MIAMI, FL

Date: **AUG 29 2006**

IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship under Section 320 of the Immigration and Nationality Act; 8 U.S.C. § 1431.

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Miami, Florida and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Cuba on December 4, 1989. The applicant's mother, [REDACTED] was born in Cuba and remains a citizen of that country. The applicant's father, [REDACTED], was born in Cuba on January 19, 1943 and naturalized on September 26, 2002, when the applicant was 12 years of age. The record reflects that the applicant's parents were married in Cuba on July 30, 1982, but subsequently divorced on January 7, 1997. The applicant was admitted into the United States as a lawful permanent resident on March 12, 2003, at the age of 13 years. He presently seeks a certificate of citizenship under section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431.

The district director concluded that the applicant had failed to establish that he resided in the United States in the legal custody of his U.S. citizen parent, as required by section 320 of the Act. The application was denied accordingly.

On appeal, the applicant provides a May 26, 2004 sworn affidavit from his mother in Cuba, in which [REDACTED] renounces her legal custody of the applicant, awarded at the time of her divorce from the applicant's father. [REDACTED] states that she wishes to convey that custody to her former husband, with whom the applicant is residing in the United States.

Section 320 of the Act was amended by the Child Citizenship Act of 2000 (CCA), and took effect on February 27, 2001. The CCA benefits all persons who have not yet reached their eighteenth birthdays as of February 27, 2001. Because the applicant was 11 years old on February 27, 2001, he meets the age requirement for benefits under the CCA.

Section 320 of the Act states in pertinent part that:

- (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
 - (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
 - (2) The child is under the age of eighteen years.
 - (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

The record reflects that the applicant was admitted into the United States in 2003, and that the applicant's father became a naturalized U.S. citizen in 2002. Both events occurred prior to the applicant's eighteenth birthday. The applicant therefore meets the requirements set forth in subsections (a)(1) and (a)(2) of section 320 of the Act.

Legal and physical custody requirements set forth in section 320 of the Act are assessed as of February 27, 2001, the date that the amendments made by the CCA legally came into effect. *See Matter of* [REDACTED], 23 I&N Dec. 153, 157 (BIA 2001). While the record indicates that the applicant resides at his father's address, it does not establish that he is in his legal custody, as required to satisfy the requirement at subsection (a)(3) of section 320 of the Act.

Legal custody vests “by virtue of either a natural right or a court decree”. *See Matter of Harris*, 15 I&N Dec. 39 (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).

In the present matter, the record reflects that the applicant’s mother has a judicial grant of custody over the applicant. The divorce decree terminating the marriage of the applicant’s parents on January 7, 1997 specifically awarded custody of the applicant to [REDACTED]. Although the applicant has submitted a sworn affidavit from [REDACTED] stating that she renounces the custody rights awarded her, this affidavit does not establish [REDACTED] as having legal custody of the applicant. The record contains no amended court order awarding [REDACTED] custody of the applicant or evidence that such a court order was issued. The AAO therefore finds that the applicant has failed to establish that he resides in the legal custody of his U.S. citizen father. Accordingly, he may not be granted a certificate of citizenship under section 320 of the Act, 8 U.S.C. § 1431.

As the applicant was born prior to the February 27, 2001 effective date of the CCA, the AAO has also considered whether he might be eligible for a certificate of citizenship under the relevant provisions of the Act as they existed at the time of his birth – former sections 320, 321 and 322 of the Act.

Former section 320 of the Act, 8 U.S.C. § 1431 provided that:

(a) A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such parent is naturalized, become a citizen of the United States, when

(1) such naturalization takes place while such child is under the age of 18 years; and

(2) such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of 18 years.

Neither of the applicant’s parents were U.S. citizens at the time of his birth. The applicant therefore does not qualify for U.S. citizenship under former section 320 of the Act.

Former section 321 of the Act, 8 U.S.C. § 1432, repealed by the provisions of the CCA, 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 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.

As only the applicant's father has naturalized and he is not his sole surviving parent, the conditions of subsections (a)(1) and (a)(2) are not met by the circumstances of the instant case. Further, as previously discussed, the applicant is not in the legal custody of his naturalized father and, therefore, his circumstances also fail to satisfy the requirements of subsection (a)(3). Therefore, the applicant may also not be granted a certificate of citizenship under the repealed section 321 of the Act.

The applicant also fails to qualify for U.S. citizenship under former section 322 of the Act, which provided that:

(a) A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, "Secretary"] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [Secretary] 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 child is physically present in the United States pursuant to a lawful admission.
- (3) The child is under the age of 18 years and in the legal custody of the citizen parent.

(b) Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

As the applicant is not in the legal custody of his U.S. citizen father, he may not benefit from former section 322 of the Act.

For the reasons previously discussed, the applicant has not established that he is eligible for a certificate of citizenship. Accordingly, the AAO will not disturb the director's denial of the application.

The regulation at 8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met his burden. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.