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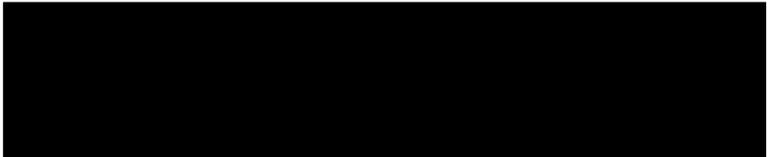
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEW YORK

Date: DEC 01 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:

SELF-REPRESENTED

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, New York, 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 Caracas, Venezuela on December 12, 1992. The applicant's father, [REDACTED] was born in Ecuador on June 11, 1956, and the record does not show that he is a U.S. citizen. The applicant's mother, [REDACTED] was born in Colombia, and she became a naturalized U.S. citizen on September 13, 2002, when the applicant was nine years old. The applicant was admitted into the United States as a lawful permanent resident on February 26, 1998, when he was five years old. 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 denied the application for lack of prosecution. Specifically, the district director noted that the applicant failed to submit sufficient evidence in response to a request for evidence to show whether his U.S. citizen parent has physical and legal custody of him. *Decision of the District Director*, dated February 20, 2003. The district director noted that the divorce decree and Sentencia (custody agreement) of the applicant's parents provides that they had no children, thus it does not serve as evidence of who has custody of the applicant. *Id.*

On appeal, the applicant's mother asserts that the attorney who assisted in her divorce did not include a Sentencia for the applicant, and the divorce took place prior to her and the applicant's entry to the United States. *Statement on Form I-290B*, dated February 28, 2003. Thus, the applicant's mother suggests that official documentation of the applicant's custody is unavailable.

The record contains a statement from the applicant's mother; a copy of the applicant's permanent resident card; a copy of the applicant's mother's naturalization certificate; a copy of the applicant's birth certificate; copies of documentation of the divorce of the applicant's parents, and; a copy of the applicant's mother's marriage certificate for her current marriage. The entire record was reviewed and considered in rendering this decision.

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 eight 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.

As a preliminary matter, the district director denied the application on the ground of lack of prosecution, or

abandonment. The denial of an application based on abandonment may not be appealed. 8 C.F.R. § 103.2(a)(15). However, upon review of the record, the applicant did respond to the district director's request for evidence. The district director reviewed the submitted evidence, yet found that it failed to establish that the applicant's U.S. citizen parent has physical and legal custody of him. Accordingly, the true basis for the district director's denial was a failure to meet the requirements of section 320 of the Act, not abandonment. Therefore, the present appeal is not barred by the regulation at 8 C.F.R. § 103.2(a)(15).

At issue in the present proceeding is whether the applicant is residing in the United States in the legal and physical custody of his U.S. citizen mother, as required by section 320(a)(3) of the Act. As noted by the district director, the divorce decree of the applicant's parents does not provide a custody agreement. The record contains no other official document that assigns custody of the applicant to one of his parents. Further, as observed by the district director, the applicant provided a document in connection with his parents' divorce that reports that his parents "did not procreate any child . . ." *Document from Second Civil Court, Ambato, Ecuador*, dated January 21, 2003.

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 absence of an official document awarding custody to the applicant's mother, the AAO may look at other evidence that reflects that the applicant's mother has uncontested custody of the applicant. Such documentation may include: evidence that the applicant resides with his mother, such as his schools records reflecting that they share the same address; a statement from the applicant's father reflecting that the applicant is in the care of his mother without dispute; statements from other individuals who have a direct awareness of the applicant's residence with his mother; documentation that reflects that the applicant's mother makes legal decisions on behalf of the applicant, such as medical and school records, and; any other documentation that reflects that the applicant's mother in fact exercises legal custody of him.

However, the applicant has not provided any such evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the applicant has not established that he meets the custody requirements of section 320(a)(3) of the Act.¹ For this reason, the application may not be approved.

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.

¹ It is noted that the present application fails for a lack of evidence. The record does not affirmatively indicate that the applicant is ineligible for a certificate of citizenship. The dismissal of this appeal is without prejudice to the applicant, and he may file a new Form N-600 with additional evidence if he feels he may meet the requirements of section 320(a) of the Act.