



U.S. Citizenship  
and Immigration  
Services

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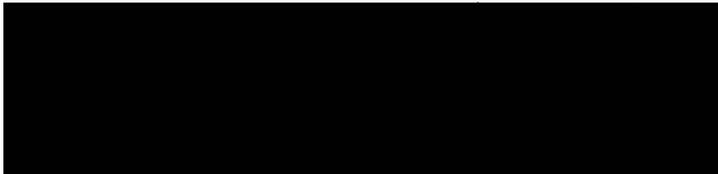
Office: VERMONT SERVICE CENTER

Date: NOV 30 2006

IN RE: Applicant: [REDACTED]

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, Vermont Service Center 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 Poland on May 9, 1987. The applicant's mother, [REDACTED], resides in Poland and is not identified in the record as a U.S. citizen. The applicant's father, [REDACTED], was born in Poland on November 14, 1960 and naturalized on January 28, 2000, when the applicant was 12 years of age. The record reflects that the applicant's parents were married in Poland on October 21, 1986. They subsequently divorced in the District of Columbia on November 18, 1994. The applicant was approved for lawful permanent residence on December 9, 2003, at sixteen years of age. She presently seeks a certificate of citizenship under section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431, based on the naturalization of her father.

The district director concluded that the divorce judgment issued by the Superior Court of the District of Columbia (D.C. Superior Court) awarded permanent custody of the applicant to her mother in Poland and, therefore, that the applicant had failed to establish she resided in the United States in the legal custody of her U.S. citizen parent, as required to establish eligibility for a certificate of citizenship. The application was denied accordingly.

On appeal, counsel asserts that the director relied on the wrong legal standard in denying the instant application, that section 321 of the Act was repealed by the Congress in 2000. She further asserts that the District of Columbia divorce decree, which indicates that the applicant was then living with her mother in Poland, does not establish the legal custody of the applicant. Counsel contends that since there has been no award of custody by a U.S. court of law in the United States since the applicant's arrival in the United States, and she lives in Maryland, that legal and physical custody must be assessed according to Maryland domestic relations laws, which recognize private custody agreements like that entered into by the applicant's parents. In support of her position, counsel cites *Bagot v. Ashcroft*, 398 F.3d 252 (3d Cir. 2005): "Where legal custody has not been determined by decree or statute, the parent having actual uncontested custody is to be regarded as having legal custody of the person concerned for the purpose of determining that person's status."

The AAO notes counsel's contention that the director's failed to consider the applicant's Form N-600 under the language of section 320 of the Act. However, the director's decision indicates that he did consider the applicant's eligibility for a certificate of citizenship under section 320 of the Act, but also reviewed her qualifications under the requirements of former section 321 of the Act, which, as counsel indicates, was repealed by the Child Citizenship Act (CCA), effective February 27, 2001. In that the applicant was born prior to the effective date of the CCA, the director's consideration of former section 321 requirements was appropriate. A person who would have acquired automatic citizenship under these provisions prior to February 27, 2001 may apply for a certificate of citizenship at any time. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Accordingly, as discussed below, the AAO has also considered the extent to which the evidence of record satisfies the requirements of former section 321 of the Act, as well as those of former sections 320 and 322.

Counsel also asserts that the director incorrectly relied on the regulation at 8 C.F.R. § 322 in determining what constituted legal custody in the instant case. The AAO acknowledges that the director referenced the regulation at 8 C.F.R. § 322.1(2) in his discussion of legal custody, rather than that at 8 C.F.R. § 320.1(2). However, as indicated in the following discussion, the definition of legal custody relied upon by the director at 8 C.F.R. § 322.1(2) is identical to that provided at 8 C.F.R. § 320.1(2).

The AAO now turns to a consideration of the instant application under the requirements of section 320 of the Act, as amended by the CCA. The CCA benefits all persons who had not yet reached their 18<sup>th</sup> birthday as of February 27, 2001. Because the applicant was 13 years old on February 27, 2001, she 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 became a lawful permanent resident on December 9, 2003, and that the applicant's father became a naturalized U.S. citizen on January 28, 2000. Both events occurred prior to the applicant's 18<sup>th</sup> birthday. The applicant has, therefore, proved she meets the requirements set forth in subsections (a)(1) and (a)(2) of section 320 of the Act. She has not, however, demonstrated that she was residing in the legal and physical custody of her father prior to her 18<sup>th</sup> birthday.

Legal and physical custody requirements set forth in section 320(a)(3) 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 Jesus Enrique Rodriguez-Tejedor*, 23 I&N Dec. 153, 157 (BIA 2001). 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).

Although the record establishes that the applicant resides at her father's address, the director found the D.C. Superior Court's divorce judgment awarding permanent custody of the applicant to her mother to prevent her from demonstrating that she was in the legal custody of her U.S. citizen father.

Counsel on appeal asserts that the district director erred in reaching this conclusion. She characterizes the court's placement of the applicant as an award of physical, rather than legal, custody, contending that the Superior Court of the District of Columbia did not have jurisdiction under the Uniform Child Custody Jurisdiction Act then in effect to determine the applicant's legal custody in her parents' divorce proceedings. However, the issue of the D.C. Superior Court's jurisdiction in the matter of the applicant's custody is beyond the scope of these proceedings and will not be considered. Moreover, counsel has offered no evidence to support her claims in this regard. Without supporting documentary evidence, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The applicant has submitted a November 18, 1994 D.C. Superior Court judgment that places her in the permanent custody of her mother, according “visitation rights” to her father. In the absence of any language limiting the nature of that custody, the AAO finds the judgment to constitute “an award of primary care, control, and maintenance of a minor child to a parent by a court of law or other appropriate government entity pursuant to the laws of the state or country of residence,” the definition of legal custody for the purposes of the CCA. *See* 8 C.F.R. § 320.1(2). Accordingly, the record does not establish that the applicant resides in the legal custody of her U.S. citizen father. She is, therefore, ineligible for a certificate of citizenship under section 320 of the Act, 8 U.S.C. § 1431.

In reaching this conclusion, the AAO has considered counsel’s discussion of Maryland family law, specifically whether the record offers evidence that would establish that the D.C. Superior Court judgment has been amended in favor of the applicant’s father. The record does not, however, demonstrate that the applicant’s father has taken the legal action necessary under the Maryland Uniform Child Custody Jurisdiction and Enforcement Act to modify the D.C. Superior Court’s award of custody to the applicant’s mother.<sup>1</sup> Although the AAO acknowledges counsel’s statement that Maryland law recognizes private custody agreements between parents, the January 13, 2006 letter from the applicant’s mother, incorrectly identified by counsel as a notarized affidavit, is not proof of such an agreement. While the statement indicates that the applicant has been living with her father since August 2002 based on an agreement reached by her parents, it is not a custody consent order, the proof required to establish that the applicant’s parents have reached a private custody agreement sanctioned by a Maryland court.<sup>2</sup> Accordingly, the record fails to demonstrate that the custody arrangement established by the D.C. Superior Court judgment has been modified in any way.

As the applicant was born prior to the February 27, 2001 effective date of the CCA, the AAO has also considered whether she might be eligible for a certificate of citizenship under the relevant provisions of the Act as they existed at the time of her 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

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<sup>1</sup> *See* “Modification of out-of-state custody determination” at § 9.5-203, Maryland Code: Family Law, Subtitle 2, Jurisdiction, which states “except as otherwise provided in § 9.5-204 of this subtitle, a court of this State may not modify a child custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under § 9.5-201(a)(1) or (2) of this subtitle and: (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under § 9.5-202 of this subtitle or that a court of this State would be a more convenient forum under § 9.5-207 of this subtitle; or (2) a court of this State or a court of the other state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in the other state.

<sup>2</sup> *Research Guide to Child Custody, Visitation, & Support in MD* at [www.peoples-law.org](http://www.peoples-law.org).

(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 her 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 her 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 record does not establish that the applicant is in the legal custody of her naturalized father and, therefore, her circumstances also fail to satisfy the requirements of subsection (a)(3). Accordingly, the applicant may 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 has not been found to reside in the legal custody of her U.S. citizen father, she may not benefit from former section 322 of the Act. Moreover, whether or not an applicant satisfies the requirements set forth in former section 322(a) of the Act, section 322(b) required that an applicant also establish that his or her application for citizenship was approved by Citizenship and Immigration Service (CIS) prior to the applicant's eighteenth birthday, and that the applicant had taken an oath of allegiance prior to turning eighteen. The applicant in the instant case has not met the requirements set forth in former section 322(b) of the Act. CIS did not approve her certificate of citizenship application before she turned eighteen on May 9, 2005, and she did not take an oath of allegiance prior to that date.

For the reasons previously discussed, the applicant has not established that she is eligible for a certificate of citizenship. Accordingly, the appeal will be dismissed.

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 her burden.

**ORDER:** The appeal is dismissed.