



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: MIAMI (WEST PALM BEACH), FL Date: **JAN 04 2008**

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:

[REDACTED]

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 (West Palm Beach), Florida. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on August 2, 1983 in Russia. The applicant's parents, as indicated on his birth certificate, are [REDACTED]. The applicant's parents were divorced in 1993. The applicant's father became a U.S. citizen upon his naturalization on May 18, 2001.¹ The applicant's mother is not a U.S. citizen, but she has been residing in the United States since the year 2000. The applicant became a lawful permanent resident of the United States in November 1997. The applicant presently seeks a certificate of citizenship claiming that he acquired U.S. citizenship from his father pursuant to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431.

The district director found that the applicant was ineligible for citizenship because he was not in his father's physical custody. The application was denied accordingly.

On appeal, the applicant, through counsel, states that his father maintained full custody of him while he was studying in Michigan. The applicant thus claims he acquired U.S. citizenship upon his father's naturalization.

Section 320 of the Act, 8 U.S.C. § 1431, was amended by the Child Citizenship Act of 2000 (the CCA). The amendments took effect on February 27, 2001 and apply only to persons who were not yet 18 years old as of February 27, 2001. Because the applicant was under the age of 18 on February 27, 2001, he is eligible for the benefits of section 320 of the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

Section 320 of the Act, 8 U.S.C § 1431, 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 applicant in this case has established that he was admitted as a lawful permanent resident of the United States and that his father naturalized prior to his 18th birthday. The applicant's parents were divorced in 1993. The record contains a copy of the divorce decree, but the decree does not contain a custody order or award. The record instead contains a copy of a Certificate, issued in 2006 by the Head of Administration in Dzerzhinsky District, verifying that the applicant's father "took custody (guardianship) over [the applicant] . . . as a matter of fact in November of 1996."

The immigration regulations state, in relevant part, that USCIS "will presume that a US. citizen parent has legal custody of a child . . . absent evidence to the contrary, in the case of: (i) a biological child who currently

¹ The AAO notes that the record does not contain a copy of the applicant's father's Certificate of Naturalization.

resides with both natural parents (who are married to each other, living in marital union, and not separated.” 8 C.F.R. § 320.1. The regulations further state that, in the case of a child of divorced parents, USCIS will find legal custody “where there has been 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.” *Id.* The term physical custody is not defined in the regulations.

Legal custody cannot be presumed in this case as the applicant’s parents were divorced, and the divorce decree does not address the issue of custody. The AAO finds that the “Certificate” submitted by the applicant fails to establish that there was an award of custody. Rather, it appears to be a verification of the father having taken guardianship of the applicant ‘as a matter of fact’ in 1996. The AAO therefore finds that the applicant was not in his father’s legal custody in 2001, when his naturalization took place.

The AAO further notes that the applicant appears to have been residing in Michigan since the year 2000, while his father remained in Florida. The AAO acknowledges that a child may remain in his father’s physical custody while attending school elsewhere. The circumstances in this case do not suggest that this is the case here. Although it appears that the applicant visited his father frequently in Florida, the evidence indicates that he was residing with his mother in Michigan. The AAO therefore finds that the applicant was not in his father’s physical custody in 2001, when his naturalization took place.

The applicant cannot meet the requirement in section 320(a)(3) of the Act, 8 U.S.C. § 1431(a)(3), because he was not in his father’s legal and physical custody when his father naturalized.

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. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is “probably true” or “more likely than not.” *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The AAO concludes that the applicant has failed to meet his burden to establish, by a preponderance of the evidence, that he acquired U.S. citizenship upon his father’s naturalization. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.