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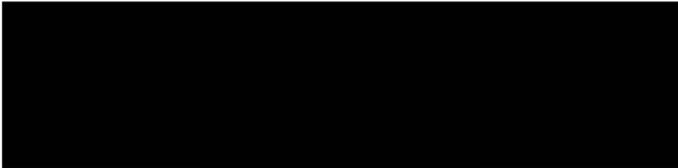
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

OFFICE: SAN ANTONIO, TX

DATE: **MAR 07 2008**

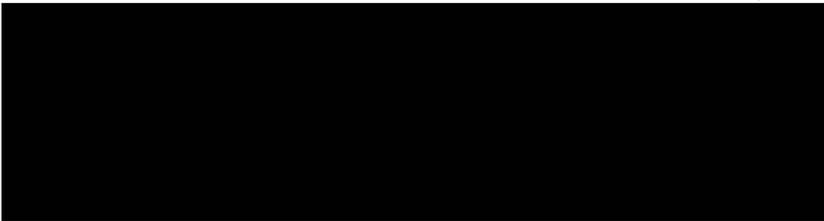
IN RE:

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, San Antonio, Texas. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application denied.

The applicant was born in Mexico on February 1, 1992. The applicant's father, [REDACTED] was born in Mexico on November 27, 1964, and he became a naturalized U.S. citizen on September 7, 2000, when the applicant was 8 years old. The applicant's mother is not a U.S. citizen. The record reflects that the applicant's parents married prior to her birth, and they remain legally married. The applicant was admitted into the United States as a lawful permanent resident on December 19, 2005, when she was 13 years old. She presently seeks a certificate of citizenship pursuant to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. §1431 based on the claim that she derived U.S. citizenship through her father.

The district director noted that the applicant was admitted into the United States as a lawful permanent resident on December 19, 2005, based on a Violence Against Women Act (VAWA) self-petition filed by her mother. The district director noted that the applicant was not living with her father when she was admitted into the United States as a lawful permanent resident on December 19, 2005, nor has she lived with her father since that time. The district director concluded that the applicant was ineligible for U.S. citizenship because she had failed to establish that she resided in the United States in the physical custody of her U.S. citizen father, as set forth in section 320(a)(3) of the Act. The application was denied accordingly.

On appeal the applicant asserts, through counsel, that her parents have not legally divorced, and that her father is therefore entitled to rights of legal and physical custody over the applicant, under Texas Family Code section 151.001. Counsel asserts that the applicant's father's right to physical possession over the applicant establishes his actual physical custody over the applicant for section 320 of the Act purposes. Counsel concludes that the applicant therefore meets the, "residing in the United States in the legal and physical custody of her citizen parent" requirement contained in section 320(a)(3) of the Act. Counsel does not dispute the district director's finding that the applicant has not, in fact, lived with her father since her admission into the United States as a lawful permanent resident on December 19, 2005.

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.

Legal custody refers to the responsibility for and authority over a child. *See* 8 C.F.R. § 320.1. Legal custody vests "by virtue of either a natural right or a court decree." *Matter of Harris*, 15 I&N Dec. 39 (BIA 1970). Unless there is evidence to show that the father of a child has been deprived of his natural right to custody, he will be presumed to share custody with the mother. *Matter of Rivers*, 17 I&N Dec. 419, (BIA 1980).

Counsel for the applicant points out further that under Texas Family Code § 151.001, a parent has rights and duties related to a child, including a right to have physical possession over a child.

In the present matter, the record reflects that the applicant's parents married in June 1991, and that they have not legally separated. The record contains no evidence to indicate that the applicant's father has lost his natural right to custody over the applicant. The AAO finds, however, that the applicant has failed to establish that she resides in the United States in the custody of her father, as required by section 320(a)(3) of the Act.

The statutory language contained in section 320(a)(3) of the Act, clearly state that a child must "reside in the United States in the legal and physical custody of the citizen parent" in order to qualify for automatic citizenship under section 320 provisions. Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33) provides that, "[t]he term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." In the present matter, a child must be, "living with and in the physical custody of the citizen parent" for purposes of section 320 of the Act. *See (HQISD 70/33), "Implementation Instructions for Title I of the Child Citizenship Act of 2000, Public Law 106-395 (CCA),* by William R. Yates, Deputy Executive Associate Commissioner, Office of Field Operations at 7.

The present record contains no evidence to establish that, since she was admitted into the U.S. as a lawful permanent resident, the applicant has resided in the United States in the physical custody of her U.S. citizen father, as required by section 320(a)(3) of the Act. Rather, the evidence in the record indicates that the applicant was admitted into the United States as a lawful permanent resident on December 19, 2005, pursuant to a VAWA based self-petition filed by her mother, and the record indicates that the applicant's father has remained in Mexico. Because the applicant failed to fully satisfy the requirements set forth in section 320(a)(3) of the Act, she does not qualify for U.S. citizenship under section 320 of the Act.

The regulation provides at 8 C.F.R. § 341.2(c) 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 of proof. The appeal will therefore be dismissed and the application will be denied.

ORDER: The appeal is dismissed. The application is denied.