



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS

425 Eye Street N.W.

ULLB, 3rd Floor

Washington, D.C. 20536

EL6

FILE: [redacted] Office: Portland (POM)

Date: AUG 20 2002

IN RE: Applicant: [redacted]

APPLICATION: Application for Naturalization under Section 322 of the Immigration and Nationality Act, 8 U.S.C. 1433

IN BEHALF OF APPLICANT: Self-represented

Public Copy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Portland, Maine, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant was born on January 11, 1984, in Canada. The applicant's father [REDACTED] was born in Canada in April 1960 and became a U.S. citizen through his parents. The applicant's mother, [REDACTED] was born in Canada in December 1959 and never had a claim to United States citizenship. The applicant's parents married each other on July 3, 1982, and divorced on May 14, 1999. The applicant was lawfully admitted as a nonimmigrant visitor on December 10, 2001. The applicant seeks to become a naturalized citizen under section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1433.

The district director reviewed the record and noted that the parent's divorce decree dated May 14, 1999, awarded custody of the applicant to his mother. The parties submitted a Variation of the Order of Consent, dated November 21, 2001, granting legal custody of the applicant to both parents. After noting that the applicant's address on the application differed from the address of the U.S. citizen parent, the district director concluded that the applicant had failed to establish he was in the physical custody of his father and denied the application accordingly.

On appeal, the applicant's father states that he has joint custody of the applicant and joint custody includes both legal and physical custody. The applicant's father requests that the applicant's address be changed to that of the father's.

A reading of the definition of the term "joint custody" provided by the applicant's father states that joint custody does not require that the child alternate between living with one parent or the other. The Service considers the terms "legal custody" and "physical custody" as having distinct and separate meanings.

Section 322 of the Act was amended by the Child Citizenship Act of 2000, Pub.L. No. 106-395, 114 Stat. 1631 (CCA), effective February 27, 2001, and provides benefits only to those persons who had not yet reached their 18th birthday. The applicant was 17 years and 1 month old on February 27, 2001.

Section 322 of the Act, in effect on February 27, 2001, provides that:

(a) A parent who is a citizen of the United States may apply for naturalization on behalf of a child born outside of the United States who has not acquired citizenship automatically under section 320. The Attorney General shall issue such a certificate of citizenship to such parent upon proof, to the satisfaction of the Attorney General, 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 United States citizen parent-

(A) has been physically present in the United States or its outlying possessions for a period totaling not less than five years, at least two of which were after attaining the age of fourteen years; or

(B) has a citizen parent who has been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

(3) The child is under the age of 18 years.

(4) The child is residing outside of the United States in the legal and physical custody of the citizen parent, is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

(b) Upon approval of the application (which may be filed from abroad) and, except as provided in the last sentence of section 337(a), upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

(c) Subsections (a) and (b) shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under section 101(b)(1).

8 C.F.R. 322.1 provides, in part, that the term "joint custody," in the case of a child of divorced or legally separated parents, means the award of equal responsibility for and authority over the care, education, religion, medical treatment and general welfare of a child to both parents by a court of law or other appropriate government entity pursuant to the laws of the state of country of residence. The Service will consider a U.S. citizen parent who has been awarded "joint custody," to have legal custody of a child.

8 C.F.R. 322.2(a) provides that to be eligible for naturalization under section 322 of the Act, a child on whose behalf an application for naturalization has been filed by a parent who is, at the time of filing, a citizen of the United States, must be

unmarried and under 18 years of age, both at the time of application and at the time of admission to citizenship.

The applicant has failed to establish that he was in the physical custody of the citizen parent when the application was filed. Further, the applicant is now over the age of 18 years and ineligible for the benefit. Therefore, the appeal will be dismissed.

This decision is without prejudice to the applicant's seeking U.S. citizenship through normal naturalization procedures by filing an Application for Naturalization on Form N-400 with a Service office having jurisdiction over his residence.

ORDER: The appeal is dismissed.