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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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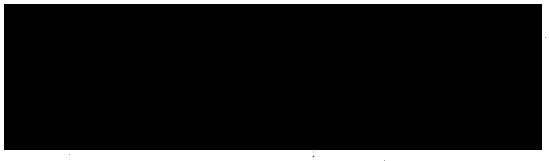
FILE: [redacted] Office: NEW YORK, NEW YORK Date: JAN 10 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Interim District Director, New York, 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 Egypt on July 12, 1992. The applicant's mother, was born in Egypt, and she became a naturalized United States (U.S.) citizen on September 17, 2002, when the applicant was ten years old. The applicant's father was born in Egypt and he is not a U.S. citizen. The record reflects that the applicant's parents married in Egypt on September 26, 1989. The applicant was admitted into the United States as a lawful permanent resident on June 26, 1996, when he was three 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 interim district director denied the applicant's certificate of citizenship application for lack of prosecution based on the applicant's failure to present evidence establishing that he resided in the United States in the physical custody of his U.S. citizen mother, as required by section 320(a)(3) of the Act.

On appeal, counsel asserts that interim regulations implementing Title I of the Child Citizenship Act, do not define the term "residence in the United States", and that the Immigration and Naturalization Service (Service, now, Citizenship and Immigration Services, CIS) notes in its interim regulations that it is reviewing the legal question of whether a child with lawful permanent resident status who is living outside of the U.S. can be described as "residing in the U.S." for purposes of the CCA. On this basis, counsel asserts that the definition of "residence in the United States" remains undefined for purposes of section 320 of the Act and that the applicant has therefore established that she resides in the United States. Counsel asserts further that even if the applicant resided outside of the United States, she would nevertheless qualify for U.S. citizenship under section 322 of the Act, 8 U.S.C. § 1432. Counsel additionally asserts that the interim district director's decision improperly stated that the applicant did not speak English. Counsel asserts that the statement is untrue and that, in any event, knowledge of English is not relevant to obtaining citizenship under sections 320 and 322 of the Act.

The AAO agrees that knowledge of English is not required to establish eligibility for citizenship under section 320 and section 322 of the Act. The AAO finds, however, that the basis of the interim district director's denial of the applicant's application for citizenship was not the applicant's inability to speak English. Rather, the denial was based on the applicant's failure to establish that he resided in the U.S. in the physical custody of his U.S. citizen mother, or, in the alternative, to establish that he lives with his mother outside of the United States and was admitted into the U.S. pursuant to a temporary lawful admission.

The AAO notes that 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.

The record in the present matter reflects that the applicant was admitted into the United States in 1996, and that the applicant's mother became a naturalized U.S. citizen in 2002. Both events occurred prior to the applicant's eighteenth birthday. The applicant therefore meets the requirements set forth in subsections (a)(1) and (a)(2) of section 320 of the Act.

Legal and physical custody requirements set forth in section 320 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). The record in the present matter reflects that the applicant's parents married and that both parents share legal custody over the applicant. *See generally, Matter of Rivers,* 17 I&N Dec. 419 (BIA 1980). The AAO finds, however, that the evidence in the record fails to establish that the applicant resided in the United States in the physical custody of his mother on February 27, 2001, or thereafter, as required by section 320 of the Act.

As noted in the interim district director's decision and as referred to by counsel on appeal, the Service (CIS) issued a memorandum on February 26, 2001, stating, in pertinent part that:

> For children admitted as lawful permanent residents prior to February 27, 2001, the Service will presume that the U.S. citizen parent had legal custody, if the child is still living with and in the physical custody of the citizen parent on February 27, 2001.

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 AAO notes that the Yates memo clearly reflects that a child must be "living with and in the physical custody of the citizen parent" for purposes of the CCA. Furthermore, the AAO finds that the statutory terms contained in section 320(a)(3) of the Act, as well as the regulatory terms contained in 8 C.F.R. § 320.2(a)(3) 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 citizenship pursuant to section 320 provisions.

The present record contains no evidence to indicate the that the applicant resided in the United States in the physical custody of his U.S. citizen mother either on February 27, 2001, or subsequent to that date. Accordingly, the AAO finds that the applicant has failed to establish that he meets the requirements for citizenship as set forth in section 320(a)(3) of the Act. The applicant thus does not qualify for citizenship under section 320 of the Act.

The AAO finds that the applicant has also failed to establish that he qualifies for citizenship under section 322 of the Act. Section 322 of the Act applies to children born and residing outside of the United States and states, in pertinent part, 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 [now Secretary, Homeland Security "Secretary"] shall issue a certificate of citizenship to such applicant 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 United States citizen parent--

(A) 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; 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 eighteen years.

(4) The child is residing outside of the United States in the legal and physical custody of the applicant

(5) The child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

The record in the present matter contains no evidence to establish that the applicant resides outside of the United States in the physical custody of his U.S. citizen mother. The applicant has also failed to establish that he was temporarily admitted into the United States or that his mother has been physically present in the U.S. or its outlying possessions for at least five years since becoming a U.S. citizen, as set forth in sections 322(5) and 322(2) of the Act.

The AAO notes that the applicant also does not qualify for citizenship under former Immigration and Nationality Act (former Act) provisions, as they existed prior to February 27, 2001, since the applicant's mother was not a U.S. citizen prior to February 27, 2001, and was not entitled to file an application for citizenship on the applicant's behalf prior to naturalizing in September 2002.

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. *See also* § 341 of the Act, 8 U.S.C. § 1452. The applicant has not met his burden, and the appeal will be dismissed.

ORDER: The appeal is dismissed.