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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[redacted]

FILE: [redacted] Office: NORFOLK, VA Date: FEB 13 2008

IN RE: Applicant: [redacted]

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

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 Field Office Director, Norfolk, Virginia and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant, [redacted] was born in El Salvador on March 4, 1990. The applicant's mother, [redacted], born in El Salvador, became a U.S. citizen on September 21, 2006. The applicant's father, [redacted], was a citizen of El Salvador at the time of the applicant's birth and the record does not establish that he has acquired another nationality. The applicant's parents never married. The applicant seeks a certificate of citizenship under section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. §14333, based on the naturalization of his mother.

The field office director determined that the applicant had failed to establish that he met the requirements of section 322(a)(4) of the Act, as he was not residing outside the United States in the physical custody of Ms. [redacted] Accordingly, the field office director denied the application. *Decision of the Field Office Director*, dated September 13, 2007.

On appeal, counsel states that the field office director applied erroneous interpretations of physical custody and the requirements of section 322 of the Act. *See Form I-290B, Notice of Appeal or Motion*, dated October 11, 2007. The appeal is accompanied by counsel's brief expanding upon his statements in the Form I-290B. *Counsel's brief*, dated October 11, 2007.

On appeal, counsel also asserts that the decision of the field office director failed to advise the applicant of his right to appeal the denial of the present application. The AAO notes that the decision issued by the field office director does not inform the applicant of his appeal rights, as required by the regulation at 8 C.F.R. § 103.3(a)(iii), but finds that no purpose would be served by returning the application to the field office director to correct this procedural error. Although he was not informed of his right to appeal, the applicant has, nevertheless, exercised this right, submitting a timely appeal and supplementing the record with additional evidence in the form of counsel's brief. Accordingly, the AAO finds the record to be complete and will proceed with its review of the evidence.

As amended by the Child Citizenship Act (CCA) of 2000, which took effect on February 27, 2001, section 322 of the Act, 8 U.S.C. § 1433, applies to children born and residing outside of the United States, and 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 a certificate of citizenship to such applicant 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 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 [citizen parent] (or, if the citizen parent is deceased, an individual who does not object to the application).

(5) The child 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).

The AAO first considers whether the record establishes the applicant as a child for the purposes of section 322 of the Act. Section 101(c) of the Act, 8 U.S.C. § 1101(c) states, in pertinent part, that for Title III naturalization and citizenship purposes:

> The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation.

Although the applicant was born out of wedlock and his parents never married, his birth certificate indicates that his natural father acknowledged the applicant as his son when he registered the applicant's birth in El Salvador in 1990. Under Salvadoran law, a child born out of wedlock on or after December 16, 1965 is legitimated once paternity is established. *Matter of Moraga*, 23 I&N Dec. 195 (BIA 2001). Therefore, the applicant meets the definition of child in section 101(c) of the Act, as a child legitimated under the law of his father's domicile prior to his 16th birthday.

The AAO now turns to whether the record establishes that the applicant has also satisfied the requirements of section 322 of the Act.

Based on the evidence before it, the AAO finds the applicant to have demonstrated that [redacted] is a U.S. citizen; that she has been physically present in the United States for the requisite five years, two of which followed her 14th birthday; and that he is under 18 years of age, i.e., he has satisfied the requirements of sections 322(a)(1), (2) and (3) of the Act. The applicant has not, however, established either that he resides outside the United States in the legal and physical custody of [redacted] as required by section 322(a)(4) of the Act, or that he is or has been temporarily in the United States in lawful status, the requirement in section 322(a)(5) of the Act.

The record does not establish that the applicant is in legal custody. There is no documentary **evidence that** [redacted] has been formally awarded legal custody of the applicant and the sworn statement from the applicant's natural father, which indicates that he separated from [redacted] when the applicant was one month old and has not seen him since, is not proof of her legal custody. The AAO has, therefore, considered whether, under the regulation at 8 C.F.R. § 322.1, [redacted] may be presumed to have legal custody of the applicant.

The regulation at 8 C.F.R. § 322.1 states the circumstances under which a U.S. citizen parent may be presumed to have legal custody of a child, i.e., to have responsibility for and authority over a child:

> (1) For the purpose of the CCA, the Service will presume that a U.S. citizen parent has legal custody of a child, and will recognize that U.S. citizen parent as having lawful authority over the child, absent evidence to the contrary, in the case of:
>
> > (i) A biological child who currently resides with both natural parents (who are married to each other, living in marital union, and not separated),
> > (ii) A biological child who currently resides with a surviving natural parent (if the other parent is deceased), or
> > (iii) In the case of a biological child born out of wedlock who has been legitimated and currently resides with the natural parent.

Accordingly, to establish a presumption of legal custody on the part of the applicant must demonstrate that, as a legitimated biological child, he currently resides with [redacted] The record indicates, **however, that the applicant lives in El Salvador and that** [redacted] resides in the United States. As the applicant does not reside with [redacted], the AAO is unable to find that he is in her legal custody.[1] For this same reason, the applicant has also failed to establish that he resides in [redacted] physical custody.

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[1] The AAO notes that the field office director concluded that might well have legal custody of the applicant. The AAO, however, conducts a *de novo* review of the record of evidence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office director did not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

On appeal, counsel correctly states that the term "physical custody" is not defined in statute or regulation. He contends that physical custody is the "right of a parent to control the freedom and residence of a minor child" and does not require actual physical presence. Counsel further asserts that this definition of physical custody is supported by a reading of the language of related statute and regulation, and the policy memorandum issued by William R. Yates, Acting Associate Director for Operations, Citizenship and Immigration Services, *Introducing revised Form N-600, Application for Certificate of Citizenship, and new Form N-600K, Application for Citizenship and Issuance of Certificate under Section 322,* HQ 70/34.2-P (June 23, 2003). He contends that consideration of the filing and eligibility requirements for the Form N-600K can lead to only one conclusion, that the U.S. citizen parent must be physically present in the United States to file the Form N-600K and the child must be residing outside the United States at the time the N-600K is filed. Accordingly, counsel asserts that the field officer director erred in requiring the applicant to be residing with [redacted] outside the United States at the time of filing. Counsel reasoning is not persuasive.

Counsel has wrongly concluded that the physical presence requirement of section 322(a)(2) of the Act and the language of section 322(b) of the Act, which states that the Form N-600K "may" be filed from overseas, require a U.S. citizen parent to be physically present in the United States at the time of filing. Counsel has misunderstood the requirement of section 322(a)(2), which stipulates only that a U.S. citizen living abroad have been physically present in the United States for a total of five years prior to the date on which the application is filed. It does not require the U.S. citizen parent's physical presence in the United States at the time of filing. He has also wrongly concluded that section 322(b) of the Act, by allowing the Form N-600K to be filed in the United States, supports the conclusion that the physical custody of section 322(a)(4) of the Act does not require the applicant to reside with [redacted] outside the United States. Whether the Form N-600K is filed in the United States or from an overseas location is unrelated to the issue of whether the applicant is residing in the physical custody of a U.S. citizen parent outside the United States.

The AAO also finds counsel's definition of physical custody to be inconsistent with the understanding given this term in several immigration proceedings where it has been distinguished from legal custody. In *Matter of M*, 3 I&N Dec. 850 (BIA 1950), the Board of Immigration Appeals found that in the absence of a judicial determination or judicial or statutory grant of custody, the parent with legal custody will be the parent having "actual uncontested custody." In *Bagot v. Ashcroft*, 398 F.3d 252 (3rd Cir. 2005), the court in determining legal custody in a derivative naturalization case identified the father as having had actual physical custody of as his child had lived with him while attending high school. Contrary to counsel's assertions, physical custody in the immigration context requires the applicant to live with [redacted] As applicant does not live with [redacted], he has not established that he resides in her physical custody, pursuant to section 322(a)(4) of the Act.

The applicant has also failed to establish that he satisfies the requirement set forth in section 322(a)(5) of the Act, which states that the child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status. A memorandum issued by William R. Yates, Deputy Executive Associate Commissioner, Immigration and Naturalization Service, *Implementation Instructions for Title I of the Child Citizenship Act of 2000,* HQISD 70/33 (February 26, 2001) provides that:

> Under section 322 of the Act a foreign-born child who resides outside the United States must be lawfully admitted to the United States and maintain such lawful status until the application for certificate of citizenship is approved and the oath of allegiance administered . . . . A child may be admitted in any nonimmigrant classification. A child is considered to have

maintained lawful status if his or her nonimmigrant classification has not been revoked or has not expired by operation of law.

In the present matter, there is no evidence in the record to indicate that the applicant has been lawfully admitted to the United States at any time or that he has ever maintained a temporary lawful status in the United States. The applicant has thus failed to meet the requirements set forth in section 322(a)(5) of the Act.

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 failed to meet his burden in the present matter. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.