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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEW YORK, NEW YORK Date: **AUG 05 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:

SELF-REPRESENTED

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the 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 Bangladesh on February 15, 1987. The applicant's father, [REDACTED] was born in Bangladesh, and he became a naturalized U.S. citizen on October 9, 1996, when the applicant was nine years old. The applicant's mother, [REDACTED] was born in Bangladesh, and she is not a U.S. citizen. The record reflects that the applicant's parents married on September 3, 1985. The applicant's father obtained a divorce from the applicant's mother in New York on October 20, 1993, when the applicant was five years old. The applicant obtained U.S. lawful permanent residence on September 30, 1997, when she was ten 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.

The district director denied the application for lack of prosecution based on the applicant's inability to provide a complete divorce decree addressing legal custody over the applicant.

On appeal the applicant asserts through her father, that she is unable to submit her parents' complete divorce decree because the court is missing the divorce judgment. In support of her assertion, the applicant submits a Certificate of Disposition of Divorce from the County of Kings, New York County Clerk, stating that the a diligent search of the record room was conducted but that the applicant's parents' divorce judgment was not found.

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 birthday as of February 27, 2001. The applicant was fourteen years old on February 27, 2001. She therefore meets the age requirement for benefits under the CCA.

Section 320 of the Act, effective on February 27, 2001, 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.*

(Emphasis added). The AAO notes that legal custody vests "[b]y virtue of either a natural right or a court decree". See *Matter of Harris*, 15 I&N Dec. 39 (BIA 1970). In the absence of a judicial determination or grant of custody, the parent having actual, uncontested custody of the child is to be regarded as having legal custody. See *Matter of M*, 3 I&N Dec. 850, 856 (BIA 1950).

As noted in the district director's decision, the record does not contain the applicant's parents' October 1993, divorce decree. Moreover, the New York, County Clerk, Certificate of Disposition of Divorce contained in the record fails to address whether legal custody determinations were made by the divorce court regarding the applicant. The AAO therefore finds that the applicant has failed to provide evidence to establish that her father had legal custody over the applicant at any time subsequent to his divorce and his naturalization as a U.S. citizen.

Furthermore, the AAO finds that even if the applicant had established that her father had legal custody, her citizenship claim would nevertheless fail because the applicant also failed to establish that she lived in the U.S. in the physical custody of her father prior to her eighteenth birthday.

The record contains two documents pertaining to the applicant's residence in the United States. The first document is a December 12, 2002, letter from Fort Hamilton High School, certifying that [REDACTED] was enrolled at the school, and that her address was [REDACTED]. The second document is a December 18, 2002, letter signed by [REDACTED] of the Maimonides Medical Center stating that [REDACTED] was seen at the Center for medical treatment on December 18, 2002.

The AAO notes that the record contains no evidence to establish where the applicant's father lives. Moreover, the Fort Hamilton High School letter does not state when the applicant enrolled in the high school and the letter contains no information regarding the applicant's actual attendance at the school. The AAO notes further that the medical letter does not contain any information regarding the applicant's residence in the U.S. and the letter contains no previous medical history information with the medical center or in the United States. Accordingly, the AAO finds that the applicant has failed to establish that she resided in the legal or physical custody of her father prior to her eighteenth birthday, as required by § 320 of the Act.

The applicant also does not qualify for citizenship pursuant to sections 320, 321 and 322 of the former Immigration and Naturalization Act (former Act), 8 U.S.C. §§ 1431, 1432 and 1433.

Section 320 of the former Act provided, in pertinent part, that:

(a) A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such parent is naturalized, become a citizen of the United States, when

- (1) such naturalization takes place while such child is under the age of 18 years; and
- (2) such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of 18 years.

Neither of the applicant's parents were U.S. citizens at the time of her birth and the applicant failed to establish that her mother became a naturalized U.S. citizen, or that the applicant resided permanently in the U.S. pursuant to a lawful admission for permanent residence prior to her eighteenth birthday.

Section 321 of the former Act provided, in pertinent part, that:

(a) a child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

- (1) The naturalization of both parents; or
- (2) The naturalization of the surviving parent if one of the parents is deceased;
or
- (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if

the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if-

(4) Such naturalization takes place while said child is under the age of 18 years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

As discussed above, the applicant failed to establish that she resided with her U.S. citizen father in the U.S., or that her father had legal custody over her prior to her eighteenth birthday.

Section 322 of the former Act provided, in pertinent part, that:

(a) A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, "Secretary"] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship 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 child is physically present in the United States pursuant to a lawful admission.
- (3) The child is under the age of 18 years and in the legal custody of the citizen parent.

....

(b) Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

In the present matter, the applicant failed to establish that she was in the legal custody of her father prior to her eighteenth birthday. The applicant additionally failed to establish that her application for citizenship was approved prior to her eighteenth birthday, or that she took an oath of allegiance prior to turning eighteen.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. The applicant has not met her burden. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.