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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CHICAGO, IL Date: MAY 23 2007

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under sections 321 of the former Immigration and Nationality Act, 8 U.S.C. § 1432, and 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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Chicago, Illinois. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The record reflects that the applicant was born on May 17, 1986, in Poland. The applicant's father, [redacted], was born in Poland and he became a naturalized U.S. citizen on September 11, 2000, when the applicant was fourteen years old. The applicant's mother, [redacted] was born in Poland. She is not a U.S. citizen. The record reflects that the applicant's parents married in Poland on August 17, 1993, when the applicant was seven years old. They divorced in Poland on January 16, 2001, when the applicant was fourteen. The applicant was admitted into the United States as a lawful permanent resident on April 16, 1994, when she was seven years old. The applicant presently seeks a certificate of citizenship under section 321 of the former Immigration and Nationality Act, 8 U.S.C. § 1432, and section 320 of the Immigration and Nationality Act, as amended (the Act), 8 U.S.C. § 1431.

The district director determined the applicant had failed to establish that she met the physical custody requirement set forth in section 321 of the former Act, and section 320 of the Act. The application was denied accordingly.

On appeal, the applicant asserts that legal evidence contained in the record establishes that her father was granted physical custody over her on April 28, 2003, when she was sixteen years old.

Section 320 of the former Act was amended by the Child Citizenship Act of 2000 (CCA), and the amended provision took effect on February 27, 2001. The provisions of the CCA are not retroactive and the amended provisions of section 320 of the Act apply only to persons who were not yet eighteen years old as of February 27, 2001. *See Matter of Rodriguez-Tejedor,* 23 I&N Dec. 153 (BIA 2001). The applicant was under the age of eighteen on February 27, 2001. She is therefore eligible for consideration under section 320 of the Act.

Section 321 of the former Act was repealed by the CCA. However, all persons who acquired citizenship automatically under section 321 of the former Act, as previously in force prior to February 27, 2001, may apply for a certificate of citizenship at any time. *See Matter of Rodriguez-Tejedor, supra.*

Section 321 of the former Act, states, 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
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> (2) The naturalization of the surviving parent if one of the parents is deceased; or
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> (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.

Section 320(a) of the Act allows a child born outside of the United States to automatically become a citizen of the United States upon fulfillment of the following conditions:

> (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.

Section 101(c) of the Act, 8 U.S.C. § 1101(c), as it exists currently, and as it existed under the former Act, defines "child" for citizenship purposes, and states in pertinent part:

> 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, and except as otherwise provided in section 320, and 321 of title III, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

Because the applicant's parents were not married at the time of the applicant's birth, the applicant must establish that prior to her sixteenth birthday, she was legitimated by her father in order to satisfy the requirements of section 101(c) of the Act. The record reflects that the applicant and her father resided in Poland and Illinois prior to the applicant's sixteenth birthday. The AAO will therefore look to the laws in Poland and Illinois to determine whether the applicant met the legitimation requirements set forth in the Act.

In Poland, legitimation of a child born out of wedlock occurs when the child is acknowledged by its natural father. A birth certificate showing the father's name constitutes evidence of such acknowledgement. *See Matter of K--*, 8 I&N Dec. 73 (BIA 1958). In the present matter, the applicant's birth certificate, dated June 2, 1986 and contained in the record, shows the applicant's father's name. The applicant therefore established that she was legitimated by her father under Polish law prior to her sixteenth birthday. The AAO notes further that Section 40-303 of the Illinois Revised Statutes provides that a child is legitimated by the intermarriage of his or her parents. In the present matter, divorce decree documentation contained in the record reflects that the applicant's parents were married on August 17, 1993, when the applicant was seven years old. The applicant therefore also established that she was legitimated by her father prior to her sixteenth birthday under Illinois law.

The AAO finds that the applicant failed to establish that she derived U.S. citizenship through her father pursuant to section 321 of the former Act. Section 321(a)(1) and (2) of the former Act are not applicable in the present matter. Moreover, section 321(a)(3) of the former Act requires a naturalized parent to be legally separated prior to the parent's naturalization as a U.S. citizen. *See Wedderburn v. I.N.S.*, 215 F.3d 795 (7th Cir.

2000.) The record reflects that the applicant's father became a naturalized U.S. citizen on September 11, 2000. The divorce decree information contained in the record reflects that the applicant's parents were divorced on January 16, 2001, after the applicant's father became a naturalized U.S. citizen. Accordingly, the applicant failed to satisfy the requirements set forth in section 321(a)(3) of the former Act.

The AAO finds, however, that the applicant did establish that she derived U.S. citizenship through her father under section 320 of the Act. The record reflects that the applicant's father became a naturalized U.S. citizen on September 11, 2000, prior to the applicant's sixteenth birthday. The applicant therefore established that she met the requirements set forth in section 320(a)(1) of the Act. The record additionally reflects that the applicant was admitted into the United States as a lawful permanent resident on April 16, 1994, and that she resided in the legal and physical custody of her father in Illinois, prior to her sixteenth birthday.

The Board of Immigration Appeals (Board) held in *Matter of Harris,* 15 I&N Dec. 39 (BIA 1970), that legal custody vests "[b]y virtue of either a natural right or a court decree." The Board held in *Matter of Rivers,* 17 I&N Dec. 419, 422-23 (BIA 1980), that a natural father is presumed to have legal custody of his child at the time of legitimation in the absence of affirmative evidence indicating otherwise. The present record contains no evidence to indicate that the applicant's father was divested of his natural right to legal custody over this child. To the contrary, the record contains Polish divorce decree documentation reflecting that when the applicant's parents obtained a divorce on January 16, 2001, they were both awarded joint legal custody over the applicant. Moreover, although the April 16, 2001, divorce decree reflects that the applicant's mother was awarded physical custody over the applicant, a legal amendment made to the decree on April 28, 2003, and contained in the record, reflects that the physical custody order was amended, and that the applicant's father was awarded physical custody over the applicant on April 28, 2003, when the applicant was sixteen years old. The applicant therefore established that she met the requirements set forth in section 320(a)(3) of the Act prior to her eighteenth birthday.

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. Under the preponderance of evidence standard, it is generally sufficient that the proof establish that something is probably true. *See Matter of E-M-,* 20 I&N Dec. 77 (Comm. 1989). The AAO finds that the applicant has met her burden of proof in the present matter. The appeal will therefore be sustained, and the application approved.

ORDER: The appeal is sustained. The applicant is approved.