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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE:

Office: NEW YORK, NEW YORK

Date: **OCT 09 2009**

IN RE:

APPLICATION: Application for Certificate of Citizenship under Section 320 of the Immigration and Nationality Act; 8 U.S.C. §1431.

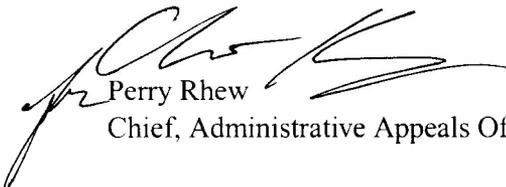
ON BEHALF OF APPLICANT:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, 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 on January 22, 1993 in Ecuador. The applicant's parents are [REDACTED] and [REDACTED]. The applicant's parents were married in 1990 and divorced in 1996. The applicant's father has been a U.S. citizen since his naturalization in 2008. The applicant was admitted to the United States as a lawful permanent resident in 2005. The applicant seeks a certificate of citizenship pursuant to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431, based on the claim that she acquired U.S. citizenship through her father.

The district director concluded, in relevant part, that the applicant did not acquire U.S. citizenship under section 320 of the Act because she is not in her father's legal custody. The director noted that the applicant's parents' divorce decree states that custody of the applicant remained with her mother following the divorce. The application was therefore denied.

On appeal, the applicant's father maintains that the applicant has been in his physical custody since her arrival in the United States. In support of this claim, he submits an affidavit executed by the applicant's mother. He further indicates that he provides financial support and is very involved in the applicant's life. The applicant's father also includes insurance documents and school records as evidence that the applicant is residing with him.

Section 320 of the Act was amended by the Child Citizenship Act of 2000 (CCA), Pub. L. 106-395, 114 Stat. 1631 (Oct. 30, 2000), and took effect on February 27, 2001. The CCA benefits all persons who had not yet reached their 18th birthdays as of February 27, 2001. Because the applicant was under 18 years old on February 27, 2001, she meets the age requirement for benefits under the CCA.

Section 320 of the Act, 8 U.S.C. § 1431, 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 reflects that the applicant was admitted to the United States as a lawful permanent resident in 2005, and that her father naturalized in 2008. The applicant is still under 18 years of age.

It is also established that the applicant had been residing in her father's physical custody since her admission as a lawful permanent resident in 2005. The question remains whether she has been in her father's legal custody following her parents' divorce.

Legal custody vests by virtue of "either a natural right or a court decree". *See Matter of Harris*, 15 I&N Dec. 39, 41 (BIA 1970). The regulations provide that "[i]n the case of a child of divorced or legally separated parents, the Service will find a U.S. citizen parent to have legal custody of a child, for the purpose of the CCA, where there has been an award of primary care, control, and maintenance of a minor child to a parent by a court of law or other appropriate government entity pursuant to the laws of the state or country of residence." 8 C.F.R. § 322.1. In the absence of a judicial determination or grant of custody in a case of a legal separation of the naturalized parent, the parent having actual, uncontested custody of the child is to be regarded as having "legal custody." *Matter of M*, 3 I&N Dec. 850, 856 (BIA 1950).

The AAO finds that the applicant's parents' divorce decree, issued in Ecuador in 1996, awards custody of the applicant to her mother. *See Applicant's Parents Divorce Decree*. The affidavit executed by the applicant's mother is not "an award of primary care, control, and maintenance of a minor child to a parent by a court of law or other appropriate government entity" as required by the regulations. Therefore, the AAO must find that the applicant is not in her father's legal custody. As such, she has not automatically acquired U.S. citizenship pursuant to section 320 of the Act, 8 U.S.C. § 1431.

8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant, or his or her parent if acting on the claimant's behalf, to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The applicant's father in the present case has not met his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.