U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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APR 18 2007

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

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:

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 Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application denied.

The record reflects that the applicant was born on October 12, 2005, in Switzerland. The applicant's mother, [redacted] was born in Switzerland on March 11, 1974. She derived U.S. citizenship at birth through her U.S. citizen parents. The applicant's father is not a U.S. citizen. The applicant's parents were married on July 6, 2001. The applicant presently seeks a certificate of citizenship pursuant to section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431.

The director determined that the applicant had failed to establish that he acquired U.S. citizenship under section 322 of the Act, because he did not reside outside of the United States in the legal and physical custody of his U.S. citizen parent, as required by section 322(a)(4) of the Act. The director determined further that the applicant had failed to establish that he acquired U.S. citizenship under section 320 of the Act, 8 U.S.C. § 1430, because he had not been admitted into the U.S. as a lawful permanent resident, as required by section 320(a)(3) of the Act. In addition, the director determined that the applicant did not derive U.S. citizenship at birth through his U.S. citizen mother pursuant to section 301(g) of the Act; 8 U.S.C. 1401(g), because his mother did not meet the U.S. physical presence requirements set forth in that section. The Form N-600, Application for Citizenship (Form N-600 application) was denied accordingly.

On appeal, the applicant asserts, through his mother, that his maternal grandparents meet U.S. citizenship and physical presence requirements set forth in section 322(a)(2)(B) of the Act. The applicant indicates that he otherwise meets the requirements for acquisition of U.S. citizenship under section 322 of the Act, and he requests that his application for citizenship be approved. The applicant does not contest the director's finding that he does not qualify for U.S. citizenship under sections 320 and 301(g) of the Act.

Section 322 of the Act applies to children born and residing outside of the United States, and provides 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, Department of 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 (or, at the time of his or her death, had) 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 AAO finds that U.S. Department of State Consular documentation, as well as U.S. passport and birth certificate evidence contained in the record establish that the requirements set forth in section 322(a)(1), (2) and (3) of the Act have been met. The AAO finds, however, that the applicant has failed to establish that the requirements set forth in section 322(a)(4) and (5) have been satisfied in the present matter.

The record reflects that the applicant did not have a valid unexpired immigrant visa when he arrived in the United States in November 2005. The record reflects further that visa requirements were waived for the applicant pursuant to section 211.1(b)(1) of Volume 8 of the Code of Federal Regulations (8 C.F.R.), and that the applicant's admission into the United States was deferred under an "XA3" classification on November 29, 2005.

The regulation provides in pertinent part at 8 C.F.R. § 211.1(a) that:

> [E]xcept as provided in paragraph (b)(1) of this section, each arriving alien applying for admission . . . into the United States for lawful permanent residence, or as a lawful permanent resident returning to an unrelinquished lawful permanent residence in the United States, shall present one of the following . . . (1) A valid, unexpired immigrant visa . . . .

The regulation at 8 C.F.R. § 211.1(b)(1) provides that:

> [A] waiver of the visa required in paragraph (a) of this section shall be granted without fee or application by the district director, upon presentation of the child's birth certificate, to a child born subsequent to the issuance of an immigrant visa to his or her accompanying parent who applies for admission during the validity of such a visa; or a child born during the temporary visit abroad of a mother who is a lawful permanent resident alien, or a national, of the United States, provided that the child's application for admission to the United States is made within 2 years of birth, the child is accompanied by the parent who is applying for readmission as a permanent resident upon the first return of the parent to the United States after the birth of the child, and the accompanying parent is found to be admissible to the United States.

In the present matter, the record contains no evidence establishing that the applicant's U.S. citizen mother has filed an application for the applicant's admission into the United States as a lawful permanent resident, and the applicant has failed to establish that he was at any time *admitted* into the United States. The applicant therefore fails to meet the section 322(a)(5) of the Act requirement that he is present in the United States pursuant to a lawful admission. The applicant additionally failed to establish that he is temporarily present in the United States, as set forth in section 322(a)(5) of the Act, or that he resides outside of the United States in the legal and physical custody of his U.S. citizen parent, as required by section 322(a)(4) of the Act.

Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33), defines the term, "residence" as a person's, "[p]lace of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." The applicant's Form N-600 application, and the evidence contained in the record reflect that the applicant has resided at [redacted] in Houston, Texas since his entry into the U.S. in November 2005. The AAO therefore finds that the applicant resides with his parents permanently, rather than temporarily as set forth in section 322(a)(5) of the Act. The AAO finds further that the applicant resides with his parents in the United States, rather than outside of the U.S., as required by section 322(a)(4) of the Act. Accordingly, the applicant has failed to establish that he acquired U.S. citizenship pursuant to section 322 of the Act.

The applicant has also failed to establish that he qualifies for U.S. citizenship under sections 320 or 301(g) of the Act. Section 320 of the Act permits a child born outside of the U.S. 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.

As discussed above, the evidence in the record fails to establish that the applicant is in the United States pursuant to a lawful admission for permanent residence. Accordingly, the applicant does not meet the requirements set forth in section 320(a)(3) of the Act, and he has not qualify for automatic citizenship as set forth in section 320 of the Act.

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *See Chau v. Immigration and Naturalization Service,* 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The applicant was born in Switzerland on October 12, 2005. The applicant must therefore establish that his mother satisfied the requirements set forth in section 301(g) of the Act.

Section 301(g) of the Act, 8 U.S.C. § 1401, provides in pertinent part, that the following shall be nationals or citizens of the United States at birth:

> [A] person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was 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 . . . .

In order to meet the physical presence requirements as set forth in section 301(g) of the Act, the applicant must establish that his mother was physically present in the U.S. for five years between March 11, 1974 and October 12, 2005, and that two of the years occurred after March 11, 1988, when his mother turned fourteen.

The record contains no evidence to establish or indicate that the applicant's mother was physically present in the United States during the requisite period described above. Moreover, the applicant's mother clearly states in an August 10, 2006, response to a U.S. Citizenship and Immigration Service, *Request for Evidence*, that

she did not reside in the United States prior to the applicant's birth. The applicant has therefore failed to establish that he qualifies for derivative citizenship under section 301(g) 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 his or her claimed citizenship by a preponderance of the evidence. The applicant has not met his burden of proof in the present matter. The appeal will therefore be dismissed, and the application denied.

ORDER: The appeal is dismissed. The application is denied. [1]

[1] This decision is without prejudice to the applicant's filing a new application for citizenship pursuant to section 320 of the Act, if he is admitted into the United States as a lawful permanent resident prior to his 18th birthday, and otherwise satisfies section 320 of the Act requirements.