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

PUBLIC COPY

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FILE:

Office: PHILADELPHIA, PA

Date: NOV 20 2006

IN RE:

Applicant:

APPLICATION:

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

ON BEHALF OF APPLICANT:

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Philadelphia, Pennsylvania 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 England on May 26, 1990. The applicant's mother, [REDACTED] was at the time of her birth, a British citizen and the record does not indicate that her nationality has changed. The applicant's father [REDACTED] was born in Newquay, Cornwall on January 19, 1961 and he became a naturalized U.S. citizen on September 10, 2003, when the applicant was 13 years of age. The record reflects that the applicant's parents were married in England on May 23, 1987, but subsequently divorced on November 19, 1998. The divorce decree does not address the custody arrangements regarding their children. The applicant was admitted into the United States as a lawful permanent resident on June 28, 1993, at three years of age. The applicant seeks a certificate of citizenship under section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431 based on her father's naturalization.

The district director concluded that the record failed to establish that the applicant resided in the United States in the legal custody of her U.S. citizen parent, as required by section 320 of the Act. The application was denied accordingly.

On appeal, [REDACTED] submits an August 15, 2005 custody order issued by the Court of Common Pleas of Berks County, Pennsylvania in connection with his divorce from the applicant's mother. It establishes that the applicant's mother and father will share both legal and physical of the applicant and her brother.

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 birthdays as of February 27, 2001. Because the applicant was ten years old on February 27, 2001, she meets the age requirement for benefits under the CCA.

Section 320 of the Act 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 became a lawful permanent resident in 1993 and that the applicant's father became a naturalized U.S. citizen in 2003. Both events occurred prior to the applicant's eighteenth birthday. The applicant therefore meets the requirements set forth in subsections (a)(1) and (a)(2) of section 320 of the Act.

Legal and physical custody requirements set forth in section 320 of the Act are assessed as of February 27, 2001, the date that the amendments made by the CCA legally came into effect. *See Matter of Jesus Enrique Rodriguez-Tejedor*, 23 I&N Dec. 153, 157 (BIA 2001). In his decision, the director found the record failed to establish that Mr. Tilley had legal custody of the applicant and, based on their differing addresses, to

indicate that she did not live with him.

On appeal [REDACTED] has submitted a court order establishing that, as of August 15, 2005, he has been awarded shared legal and physical custody of the applicant. However, he filed the instant Form N-600 on August 25, 2004, nearly one year prior to acquiring such custody. Accordingly, the court order does not satisfy the requirement of section 320(a)(3) of the Act, as it was not in place at the time of filing. An applicant or petitioner must establish eligibility for the benefit sought at the time of filing. An application or petition shall be denied when eligibility is not established as of the time of filing. *See* 8 C.F.R. § 103.2(b)(12). The AAO therefore finds that the applicant has failed to establish that, at the time of filing, she resided in the legal and physical custody of her U.S. citizen father. Accordingly, she may not be granted a certificate of citizenship under section 320 of the Act, 8 U.S.C. § 1431.

As the applicant was born prior to the February 27, 2001 effective date of the CCA, the AAO has also considered whether she might be eligible for a certificate of citizenship under the relevant provisions of the Act as they existed at the time of her birth – former sections 320, 321 and 322 of the Act.

Former section 320 of the Act, 8 U.S.C. § 1431 provided 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. The applicant therefore does not qualify for U.S. citizenship under former section 320 of the Act.

Former section 321 of the Act, 8 U.S.C. § 1432, repealed by the provisions of the CCA, provided 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 only the applicant's father has naturalized and he is not her sole surviving parent, the conditions of subsections (a)(1) and (a)(2) are not met by the circumstances of the instant case. Further, as previously discussed, the record does not establish that the applicant, at the time of filing, was in the legal custody of her naturalized father and, therefore, her circumstances also fail to satisfy the requirements of subsection (a)(3). Therefore, the applicant may also not be granted a certificate of citizenship under the repealed section 321 of the Act.

The applicant also fails to qualify for U.S. citizenship under former section 322 of the Act, which provided 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.

Again, as the applicant has not been established as being in the legal custody of her U.S. citizen father on the date of filing, she may not benefit from former section 322 of the Act.

For the reasons previously discussed, the applicant has not established that she is eligible for a certificate of citizenship. Accordingly, the AAO will not disturb the director's denial of the application.

Although the applicant may not benefit from the instant application, she is not yet 18 years of age. As her father is now able to establish that she is in his legal and physical custody, she may wish to file a new Form N-600 to obtain a certificate of citizenship.

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 not met her burden.