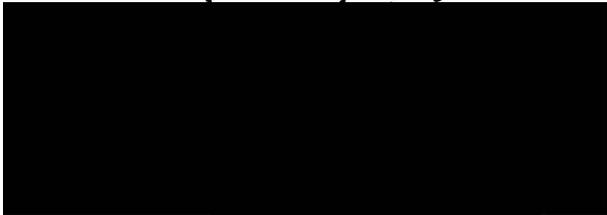




U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: NOV 30 2006

EAC 05 227 51279

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center 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 Nigeria on October 22, 1991. The applicant's mother, [REDACTED] resides in Nigeria and is not identified in the record as a U.S. citizen. The applicant's father, [REDACTED] was born in Nigeria October 31, 1959 and became a naturalized U.S. citizen on June 14, 2005, when the applicant was 13 years of age. The record reflects that the applicant's parents were married in Nigeria on February 24, 1989. They subsequently divorced, as evidenced by a February 27, 1997 order of the Customary Court of [REDACTED] State of Nigeria and the November 7, 1997 divorce decree issued by the Family Division of the Superior Court of the District of Columbia (D.C. Superior Court). The applicant was admitted into the United States as a lawful permanent resident on July 21, 2001, at nine years of age. She presently seeks a certificate of citizenship under section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431, based on the naturalization of her father.

The district director concluded that the applicant had failed to establish she 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, counsel contends that the director relied on the wrong legal standard in denying the instant application, that section 321 of the Act was repealed by the Congress in 2000. She further asserts that the District of Columbia divorce decree, which indicates that the applicant was then living with her mother, does not establish the legal custody of the applicant and that, at the time of her parents' divorce in Nigeria, the customary court awarded only physical custody to the applicant's mother. Counsel contends that since there has been no award of custody by a U.S. court of law in the United States since the applicant's arrival in the United States and she lives in Maryland, that legal and physical custody must be assessed according to Maryland domestic relations laws, which recognize the type of private custody agreement reached by the applicant's parents. In support of her position, counsel cites *Bagot v. Ashcroft*, 398 F.3d 252 (3d Cir. 2005): "Where legal custody has not been determined by decree or statute, the parent having actual uncontested custody is to be regarded as having legal custody of the person concerned for the purpose of determining that person's status."

The AAO notes counsel's contention that the director failed to consider the applicant's Form N-600 under the language of section 320 of the Act. However, the director's decision indicates that he did consider the applicant's eligibility for a certificate of citizenship under section 320 of the Act, but also reviewed her qualifications under the requirements of former section 321 of the Act, which, as counsel indicates, was repealed by the Child Citizenship Act (CCA), effective February 27, 2001. In that the applicant was born prior to the effective date of the CCA, the director's consideration of former section 321 requirements was appropriate. A person who would have acquired automatic citizenship under these provisions prior to February 27, 2001 may apply for a certificate of citizenship at any time. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Accordingly, as discussed below, the AAO has also considered the extent to which the evidence of record satisfies the requirements of former section 321 of the Act, as well as those of former sections 320 and 322.

Counsel also asserts that the director incorrectly relied on the regulation at 8 C.F.R. § 322 in determining what constituted legal custody in the instant case. The AAO acknowledges that the director referenced the regulation at 8 C.F.R. § 322.1(2) in his discussion of legal custody, rather than that at 8 C.F.R. § 320.1(2). However, as

indicated in the following discussion, the definition of legal custody relied upon by the director at 8 C.F.R. § 322.1(2) is identical to that provided at 8 C.F.R. § 320.1(2).

The AAO turns first to a consideration of the instant application under the requirements of section 320 of the Act, as amended by the CCA. The CCA benefits all persons who had not yet reached their eighteenth birthday as of February 27, 2001. Because the applicant was nine 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 was admitted into the United States in 2001, and that the applicant's father became a naturalized U.S. citizen in 2005. Both events occurred prior to the applicant's eighteenth birthday. The applicant has, therefore, proved she meets the requirements set forth in subsections (a)(1) and (a)(2) of section 320 of the Act. She has not, however, demonstrated that she was residing in the legal and physical custody of her father prior to her 18th birthday.

Legal and physical custody requirements set forth in section 320(a)(3) 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). Legal custody vests "by 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 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." *See Matter of M*, 3 I&N Dec. 850, 856 (BIA 1950).

Counsel on appeal asserts that neither the divorce decree issued by District of Columbia Superior Court nor the decision from the Customary Court of Osun awarded legal custody of the applicant to her mother. A review of the record does not, however, support counsel's interpretation of the evidence submitted by the applicant.

While the divorce judgment issued by the District of Columbia Superior Court establishes that the court did not consider the issue of custody in issuing its judgment to the applicant's father, the Nigerian dissolution of the marriage of the applicant's parents specifically places the applicant and her four-year-old sibling in the custody of their mother. Counsel characterizes this placement as an award of physical, rather than legal, custody. However, the AAO's reading of the document finds no basis on which to make such a distinction and counsel offers no evidence to support her interpretation of the document's language. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA

1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the AAO finds the custody awarded to the applicant's mother by the Customary Court of Osun on February 27, 1997 to be legal custody for the purposes of the CCA, "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." See 8 C.F.R. § 320.1(2).

The record also fails to offer evidence that the customary court's order has been legally amended in favor of her father or that it is no longer in force and may, therefore, be disregarded. While the AAO notes that the December 23, 2005 affidavit sworn to and signed by the applicant's mother assigns custody of her children to her ex-husband, the record does not establish that a sworn statement is sufficient, under Nigerian law, to overcome the custody designation established by Nigerian customary law. The record also fails to indicate that since the applicant's arrival in the United States, her father has taken the steps necessary to modify the Nigerian custody document through the Maryland court system.¹ Although the AAO acknowledges counsel's statement that Maryland law recognizes private custody agreements between parents, the previously noted affidavit from the applicant's mother is not a custody consent order, the proof required to establish the applicant's parents have reached a private custody agreement sanctioned by a Maryland court.² Accordingly, the record fails to demonstrate that the applicant resides in the legal custody of her U.S. citizen father and she is, therefore, ineligible for 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

¹ See "Modification of out-of-state custody determination" at § 9.5-203, *Maryland Code: Family Law, Subtitle 2, Jurisdiction*, which states "except as otherwise provided in § 9.5-204 of this subtitle, a court of this State may not modify a child custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under § 9.5-201(a)(1) or (2) of this subtitle and: (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under § 9.5-202 of this subtitle or that a court of this State would be a more convenient forum under § 9.5-207 of this subtitle; or (2) a court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state. The AAO notes that in September 2005, the Maryland Court of Special Appeals held that Maryland's Uniform Child Custody Jurisdiction Act (now the Uniform Child Custody Jurisdiction and Enforcement Act) applies to custody disputes between its citizens and those of foreign countries.

Research Guide to Child Custody, Visitation, & Support in MD at www.peoples-law.org.

(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 is in the legal custody of her naturalized father and, therefore, her circumstances also fail to satisfy the requirements of subsection (a)(3). Accordingly, the applicant may 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.

As the applicant has not been found to reside in the legal custody of her U.S. citizen father, 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. The appeal will, therefore, be dismissed.

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.

ORDER: The appeal is dismissed.