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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: SAN JUAN, PR

Date:

JUL 17 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:

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 black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, San Juan, Puerto Rico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on August 8, 1989 in Venezuela. The applicant's parents are [REDACTED] and [REDACTED]. The applicant's parents were married in 1982 and divorced in 1991. The applicant's father has been a U.S. citizen since his naturalization in 2005. The applicant was admitted to the United States as a lawful permanent resident in 2006. She reached the age of 18 years old in 2007. 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 field office director concluded, in relevant part, that the applicant did not acquire U.S. citizenship under section 320 of the Act because she was not in her father's legal custody following her parents' divorce. The application was therefore denied.

On appeal, the applicant, through counsel, maintains that her parents were awarded joint legal custody upon their divorce, and that she had been in her father's physical custody for several years prior to her 18th birthday.

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 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, and that her father naturalized, prior to her 18th birthday in 2007. It is also undisputed that the applicant had been residing in her father's physical custody prior to her 18th birthday. The question remains whether she was 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 (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”). 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).

The AAO finds that the applicant’s parents’ divorce decree, issued in Venezuela in 1991, awards joint legal custody to the applicant’s parents.¹ The plain language of the decree, at paragraph II, states that “tutorship will be shared by both parents . . . [and] care and guardianship will be given by the mother.”² The AAO notes that “tutorship” is referred to in the original Spanish language decree as *Patria Potestad*. *Patria Potestas*, according to Black’s Law Dictionary, is the “responsibility to support and maintain family members.” A tutor is described in Black’s Law Dictionary as the “guardian of a minor” and “tutorship” as “the power . . . to take care of one who cannot care for himself or herself.” The AAO notes the definition of “joint custody” in 8 C.F.R. § 320.1 as the “equal responsibility for and authority over the care, education, religion, medical treatment, and general welfare of a child” The AAO finds that the applicant was in her parents’ joint legal custody upon her parents’ divorce.

Pursuant to 8 C.F.R. § 341.2(c), the burden of proof shall be on the claimant 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 in this case has established that she was residing in the United States, as a lawful permanent resident, in the legal and physical custody of her U.S. citizen parent, prior to her 18th birthday. Thus, she has met her burden to prove that she automatically acquired U.S. citizenship pursuant to section 320 of the Act, 8 U.S.C. § 1431, and the appeal will be sustained.

ORDER: The appeal is sustained.

¹ The AAO therefore need not address the effect of the 2008 legal custody determination by the Puerto Rican court.

² The divorce decree thus awards physical custody to the applicant’s mother. The AAO notes that the director’s decision refers to the applicant’s father’s statement that the applicant was not in his legal custody. The AAO finds that this statement was likely a misstatement or the result of a misunderstanding of the difference between legal and physical custody.