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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
and Immigration
Services

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FILE:

Office: DALLAS, TX

Date: NOV 18 2009

IN RE:

Applicant:

APPLICATION:

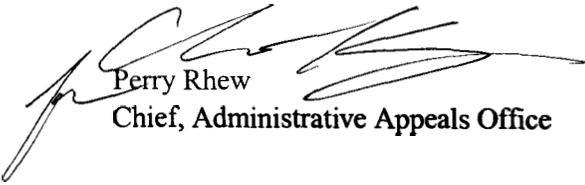
Application for Certificate of Citizenship under Section 320 of the Immigration and Nationality Act; 8 U.S.C. §1431.

ON BEHALF OF APPLICANT:

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.


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Dallas, Texas, 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 March 17, 1992 in Brazil. The applicant's parents are [REDACTED] and [REDACTED]. The applicant's parents were divorced in 1997, and the applicant's mother was awarded primary custody. The applicant's father has been a U.S. citizen since his naturalization in 2008. The applicant's mother is not a U.S. citizen. The applicant was admitted to the United States as a lawful permanent resident in 2004. 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 he acquired U.S. citizenship through his 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 he is not in his father's legal custody. The director noted that the applicant's parents' divorce decree states that custody of the applicant remained with his mother following the divorce. The application was therefore denied.

On appeal, the applicant's father maintains that the applicant is now in his "sole custody." See Statement of Applicant on Form I-290B, Notice of Appeal to the AAO. The applicant's father further indicates that the applicant is in his physical custody. *Id.* In support of this claim, the applicant submits a copy of a recent school report card, a child support order, and an order to modify parent-child relationship.

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. See CCA § 104. The applicant is under 18 years of age. He therefore 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 2004, and that his father naturalized in 2008. The applicant is still under 18 years of age. The question remains whether the applicant is in his father's legal and physical custody.

Legal custody vests by virtue of "either a natural right or a court decree". *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).

Although the applicant's parents' divorce decree, issued in 1996, awarded primary custody of the applicant to his mother, the 2009 Agreed Order in Suit to Modify Parent-Child Relationship indicates that the applicant's father now has primary custody of the applicant. *See* Agreed Order in Suit to Modify Parent-Child Relationship. The AAO notes specifically the section of the Agreed Order titled "Conservatorship" where the applicant's father is appointed "Sole Managing Conservator" and where his parental duties are enumerated. *Id.* at 2-3. The AAO thus finds that the applicant is in his father's legal custody.

With respect to physical custody, the AAO notes that the record establishes, by a preponderance of the evidence, that the applicant has been residing with his father. *See e.g.* Agreed Order at 5 (granting the applicant's father "the exclusive right to designate the primary residence of the child[.]"); Applicant's Report Card. Therefore, the AAO must find that the applicant is in his father's legal and physical custody, and has 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 in the present case has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.