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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: [REDACTED] Office: NEW YORK, NY

Date:

JAN 05 2011

IN RE: Applicant: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, New York, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on December 19, 1994 in Ecuador. The applicant's parents are [REDACTED]. The applicant's parents were married in 1987, and divorced in 1999. The divorce judgment includes a grant of custody of the applicant to his mother. The applicant's father became a U.S. citizen upon his naturalization on March 19, 2010, when the applicant was 15 years old. The applicant's mother is not a U.S. citizen. The applicant was admitted to the United States as a permanent resident on April 19, 2002, when he was seven years old. The applicant presently seeks a certificate of citizenship pursuant to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431.

The district director determined that the applicant did not automatically acquire U.S. citizenship through his father because he was not in his father's legal custody. The director noted that the divorce documents in the record indicated that the applicant's mother was granted legal custody of the applicant. The application was accordingly denied.

On appeal, the applicant's father maintains that the applicant has been in his legal custody since his admission to the United States. *See* Statement Accompanying Form I-290B, Notice of Appeal to the AAO. The applicant's father states that the applicant's mother relinquished her parental rights in order to facilitate his immigration to the United States and that no court order or separate custody agreement was necessary. *Id.* The applicant submits an affidavit from his mother, dated October 7, 2010, which was executed in Queens, New York, her place of residence, in which she states that a court order granting the applicant's father custody was not necessary since assumed custody was given when the applicant immigrated to the United States to be with his father.

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *See Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). Section 320 of the Act, as amended by the Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), provides for automatic acquisition of U.S. citizenship upon the fulfillment of certain conditions prior to a child's eighteenth birthday. The CCA, which took effect on February 27, 2001, applies to persons who were not yet 18 years old on that date. Because the applicant was under the age of 18 on February 27, 2001, he is eligible for the benefits of the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

Section 320 of the Act, as amended, 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 applicant has established that his father naturalized and that he was admitted to the United States as a lawful permanent resident prior to his eighteenth birthday. The question remains, however, whether the applicant can establish that he is in his father's legal and physical custody.

Legal custody vests by virtue of "either a natural right or a court decree". See *Matter of Harris*, 15 I&N Dec. 39, 41 (BIA 1970). The regulations provide that legal custody "refers to the responsibility for and authority over a child." See 8 C.F.R. § 320.1 (defining "legal custody"). Under the regulation, legal custody is presumed "[i]n the case of a child of divorced or legally separated parents . . . 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 this case, the applicant's parents divorce judgment includes a grant of legal custody to the applicant's mother. The record does not contain any evidence of a court-ordered modified legal custody award. Consequently, legal custody cannot be presumed.

The regulation at 8 C.F.R. § 320.1 further provides, however, that "[t]here may be other factual circumstances under which [USCIS] will find the U.S. citizen parent to have legal custody for purposes of the CCA." In this case, the record indicates that the applicant is residing with his mother, not his father. There are no factual circumstances in the record warranting a finding that the applicant is in his father's legal or physical custody. Accordingly, the applicant has not met the requirements for automatic derivation of citizenship under section 320 of the Act.

The burden of proof in these proceedings is on the claimant to establish the claimed citizenship by a preponderance of the evidence. See Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant has failed to meet his burden of proof, and his appeal will be dismissed.

ORDER: The appeal is dismissed.