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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
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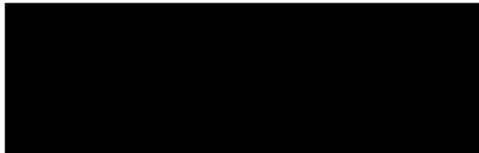
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FILE: [REDACTED] Office: NEWARK, NJ Date: JAN 07 2011

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:



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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision shall be withdrawn and the matter remanded for entry of a new decision.

The record reflects that the applicant was born on March 26, 1983 in the Dominican Republic. The applicant's parents, [REDACTED] were married on March 13, 1983 and divorced on November 9, 1994. The applicant's father became a U.S. citizen upon his naturalization on December 9, 1980. The applicant was admitted to the United States as lawful permanent resident on September 24, 1989. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship pursuant to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431.

The field office director denied the application finding that the applicant was not residing in his father's physical custody such that he could acquire U.S. citizenship on February 27, 2001, the effective date of the Child Citizenship Act of 2000 (the CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000).

On appeal, the applicant, through counsel, maintains that he resided with both parents between his admission to the United States in 1989 and his parents' divorce in 1994. *See* Appeal Brief. Counsel further maintains that the applicant's father did not relinquish custody of the applicant following his divorce. *Id.*

The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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). The applicant was born on March 26, 1983, about a month after the effective date of the CCA. The CCA amended sections 320 and 322 of the Act, 8 U.S.C. §§ 1431 and 1433, and repealed section 321, 8 U.S.C. § 1432. Therefore, section 320 of the Immigration and Nationality Act (the Act), as amended by the CCA, is applicable to his case.

Section 320 of the Act provides, 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 was admitted to the United States as a lawful permanent resident in 1989. His father became a U.S. citizen upon his naturalization in 1980. The applicant's parents were divorced in 1994, and the applicant since resided with his mother. The applicant's mother is not a U.S. citizen.

The regulations at 8 C.F.R. § 320.2, provide that the requirements set forth in the CCA must "have been met after February 26, 2001." Therefore, the applicant must establish that he was in the legal and physical custody of his father on or after February 27, 2001 in order to automatically acquire U.S. citizenship under section 320 of the Act. 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." The applicant's parents' divorce decree does not contain a custody award.

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 was residing with his mother, not his father, on February 27, 2001. There are no factual circumstances in the record warranting a finding that the applicant was in his father's legal or physical custody. Accordingly, the applicant did not meet the requirements for automatic acquisition of U.S. citizenship under section 320 of the Act.

The question remains whether the applicant had already acquired U.S. citizenship at birth under section 301(g) of the Act, 8 U.S.C. § 1401(g) (1983),¹ or derived U.S. citizenship under section 321 of the Act,² before the CCA's effective date.

¹ Section 301(g) of the Act, as in effect in 1983, stated, in pertinent part, that the following shall be nationals and citizens of the United States at birth:

[A] person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years

² Former section 321 of the Act, stated, in pertinent part, that:

As the director did not consider the applicant's eligibility for U.S. citizenship under former sections 301(g) or 321 of the Act, her decision must be withdrawn and the matter remanded for entry of a new decision. Upon remand, the director must provide the applicant an opportunity to submit evidence regarding his eligibility for U.S. citizenship under former sections 301(g) and 321 of the Act before entering a new decision into the record. If the applicant is found ineligible for citizenship under former sections 301(g) and 321 of the Act, the director shall certify her decision to the AAO for review.

ORDER: The director's decision is withdrawn and the matter remanded for entry of a new decision, which if adverse to the applicant, shall be certified to the AAO for review.

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- (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 . . . [t]he naturalization of the parent having legal custody of the child when there has been a legal separation of the parents . . . ; 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 (1) of this subsection, or the parent 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.