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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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DATE: JUL 29 2011 OFFICE: BUFFALO, NEW YORK FILE: [redacted]

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.

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 for a certificate of citizenship (Form N-600) was denied by the Buffalo Field Office Director and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant claims he derived citizenship through his mother under section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431. The field office director denied the application because the petitioner was not in his mother's legal and physical custody after she naturalized and before he turned 18, as required for him to derive citizenship through her under section 320(a) of the Act. On appeal, the applicant submits a letter and additional evidence.

Applicable Law

The applicable law for derivative citizenship purposes is "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005); *accord Jordon v. Attorney General*, 424 F.3d 320, 328 (3rd Cir. 2005). Section 320 of the Act, as amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (CCA), applies to this appeal because the applicant was not yet 18 years old as of the February 27, 2001 effective date of the CCA. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 156 (BIA 2001) (en banc).

Section 320 of the Act provides:

> (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.
>
> (b) Subsection (a) shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under section 101(b)(1).

Pertinent Facts and Procedural History

The applicant was born on August 3, 1992 in Jamaica to parents who never married each other. On May 18, 2001, the petitioner's mother married a U.S. citizen. On March 9, 2004, the petitioner was admitted to the United States as a lawful permanent resident based on the approved alien relative petition filed by his stepfather. In September 2007, the applicant went to Canada to visit his biological father. On September 25, 2009, the applicant's mother naturalized. The applicant was deported from Canada to the United States on March 18, 2011.

The applicant filed the instant Form N-600 on April 19, 2011. After the applicant was interviewed, the field office director denied the application and the applicant timely filed an appeal. The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Because the applicant was born abroad, he is presumed to be an alien and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. *See Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008). The applicant's claims and the evidence submitted on appeal fail to overcome the grounds for denial and the appeal will be dismissed for the following reasons.

Analysis

The applicant did not derive citizenship through his stepfather. Section 320 of the Act does not encompass derivation of U.S. citizenship through a non-adoptive stepparent. *See Matter of Guzman-Gomez*, 24 I&N Dec. 824, 829 (BIA 2009). The record lacks any evidence that the applicant's stepfather adopted him and the applicant consequently does not meet the requirements for adopted children under section 320(b) of the Act. The record further indicates that the applicant's biological father never resided in the United States or obtained U.S. citizenship. Accordingly, the applicant did not acquire or derive U.S. citizenship through his biological father or his stepfather.

A full review of the record and the claims and evidence submitted on appeal also fails to establish that the applicant derived citizenship through his mother. The record shows that the applicant was not in his mother's legal and physical custody at any time after her naturalization on September 25, 2009 and prior to his eighteenth birthday on August 3, 2010. In a May 5, 2011 sworn statement executed by the applicant in conjunction with his Form N-600, the applicant stated that he went to Canada in September 2007 to visit his biological father. The applicant explained that although he only intended to stay for two weeks, his father did not allow him to leave and he remained in Canada until March 18, 2011. In their letters submitted on appeal, the applicant's brother and mother affirm that he remained in Canada despite his mother's efforts to have him returned. A friend of the family, [redacted] whose letter was also submitted on appeal, further explains that the applicant's mother repeatedly sought his return from Canada. In addition, court records show that the applicant was in Canada a few months after his eighteenth birthday as he was convicted of committing an offense in Ontario on November 12, 2010.[1] Accordingly, the applicant was not in the United States in the legal and physical custody of his mother after her naturalization and before his eighteenth birthday, as required by subsection 320(a)(3) of the Act.

On appeal, the applicant through his attorney asserts that section 320 of the Act "does not say that the conditions have to exist simultaneously." The applicant claims he derived citizenship through his mother because she naturalized before he turned 18 and he was in her legal and physical custody prior to his eighteenth birthday, "just not at the time [his] mother naturalized." The clear language of the statute negates this interpretation. Subsection 320(a)(3) of the Act requires the parent to be a citizen when the child "*is* residing in the United States in the legal and physical custody of the *citizen* parent . . . " (emphasis added). Although the petitioner may have resided in the United States in his

[1] *Order of Disposition*, Ontario Province, Canada, Central East Region Court of Justice, Information Number 2811 998 11 25008 01, Occurrence Number 10-231428 (Feb. 24, 2011).

mother's custody prior to his departure to Canada in 2007, he never resumed such residence in his mother's custody after she naturalized in 2009 and prior to his eighteenth birthday in 2010. Accordingly, the petitioner's prior residence with his mother in the United States before her naturalization is insufficient to meet the requirements of subsection 320(a)(3) of the Act.

The claims through his attorney, in the alternative, that the applicant's "mother never relinquished legal and physical custody of the applicant, as evidenced by her efforts to get her son back to the U.S." While we do not discount the personal, financial and legal difficulties the petitioner's mother faced in seeking the applicant's return, the record contains no evidence to support the assertion that the applicant's mother retained legal custody of him while he was in Canada. Absent evidence to the contrary, U.S. Citizenship and Immigration Services (USCIS) will presume that a U.S. citizen parent has legal custody of a biological child born out of wedlock when the child is currently residing with the natural parent. 8 C.F.R. § 320.1 (definition of "legal custody" at (1)(iii)). In this case, the applicant was not residing with his mother at any time after her naturalization and before his eighteenth birthday. Consequently, the record does not establish that the applicant was in his mother's legal custody during the requisite period.

The relevant evidence also contradicts the claim that the applicant was in his mother's physical custody when he was residing in Canada and she remained in the United States. The letters submitted on appeal all confirm that the applicant's mother remained in the United States throughout the applicant's stay in Canada. In his May 5, 2011 sworn statement, the applicant explained that he lived in Ontario, Canada from 2007 to 2011 and that his mother remained in the United States and was unable to visit him. The relevant evidence thus shows that the applicant was not in his mother's physical custody after her naturalization in 2009 and prior to his eighteenth birthday in 2010.

Conclusion

The applicant bears the burden of proof to establish his eligibility for derivative citizenship. 8 C.F.R. § 320.3(b)(1). The applicant has not met this burden. Although the applicant resided with his mother in the United States as a lawful permanent resident between the ages of 13 and 15, he left the United States before his mother naturalized and he did not reside in his mother's legal and physical custody after her naturalization and prior to his eighteenth birthday. Accordingly, the applicant did not derive citizenship through his mother under section 320 of the Act and the appeal will be dismissed.

ORDER: The appeal is dismissed.