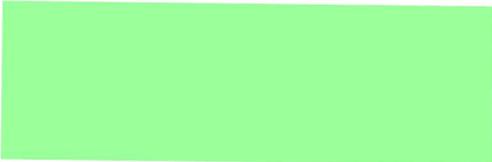




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 16 2014** OFFICE: CHICAGO, IL

FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the Chicago, Illinois Field Office (the director) denied the Form N-600, Application for Certificate of Citizenship (Form N-600), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Pertinent Facts and Procedural History

The applicant was born to unmarried parents in Lima, Peru, on November 18, 1995. She was admitted into the United States as a lawful permanent resident on April 4, 2013, when she was 17 years old. The applicant's father became a naturalized U.S. citizen on September 28, 2012, when the applicant was 16 years old. Her mother is not a U.S. citizen. 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 derived U.S. citizenship through her father.

In a decision dated July 24, 2013, the director determined that the applicant failed to establish that she resided in the United States in her father's legal custody prior to her 18th birthday, as required by section 320 of the Act. The application was denied accordingly.

On appeal the applicant asserts, through counsel, that prior to her 18th birthday, she was presumed to be in the legal custody of her father under 8 C.F.R. § 320.1(1)(iii), because her parents never married and, thus, no evidence of a legal separation exists; and because she was legitimated at birth by her father, and has resided with him in the United States since 2012.

Applicable Law

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d. Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

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), applies to the applicant's U.S. citizenship claim. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

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.

Section 101(c) of the Act, 8 U.S.C. § 1101(c)(1) provides, in pertinent part, that for citizenship purposes the term “child” means:

an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in the United States or elsewhere . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation

In the present case, the applicant’s parents did not marry; however, the applicant’s father acknowledged his paternity over the applicant on her birth certificate, registered on November 21, 1995. The applicant is therefore considered to be a legitimated child at birth, under the law in Peru. See *Matter of Torres*, 22 I&N Dec. 28 (BIA 1998).

Legal custody vests “[b]y virtue of either a natural right or a court decree.” *Matter of Harris*, 15 I&N Dec. 39, 41 (BIA 1970). A natural father is presumed to have legal custody of his child at the time of legitimation in the absence of affirmative evidence indicating otherwise. See *Matter of Rivers*, 17 I&N Dec. 419 (BIA 1980).

The regulation also provides, in pertinent part, at 8 C.F.R. § 320.1(1) that:

For the purpose of the CCA, the Service will presume that a U.S. citizen parent has legal custody of a child, and will recognize that U.S. citizen parent as having lawful authority over the child, absent evidence to the contrary, in the case of:

* * *

(iii) [a] biological child born out of wedlock who has been legitimated and currently resides with the natural parent.

We find that in the present matter, the record contains evidence that rebuts the presumption that the applicant’s father had legal custody over the applicant prior to her 18th birthday, as required under section 320(a)(3) of the Act.

Analysis

The record contains an Extrajudicial Agreement (the Agreement) signed by the applicant’s mother and father before a Notary Public and Lawyer in Lima, Peru on December 28, 2004. The agreement reflects, in pertinent part in the second paragraph (under Minutes), that the applicant’s parents mutually agreed that custody over the applicant would be exercised by her mother; and paragraph nine reflects that, “any negotiation related to custody” over the applicant “will be agreed

personally and directly by both parents, admitting the arbitration of Mr. [REDACTED]. Paragraph four of the Agreement reflects that the applicant's father authorized the applicant to travel to Uruguay to live with her mother, and that "[f]or such purpose, both parents appeared on [sic] a notary public's office to grant the travel permit." The Agreement reflects in paragraph three, that both parties agree that the applicant's father shall pay a "monthly alimony . . . in favor of" the applicant; and paragraph eight states that "due to the foregoing, [the applicant's parents] agree to terminate the alimony proceedings . . . in the Magistrate's Court of File No. [REDACTED]. The Agreement reflects further, in paragraphs 10 and 11 that, "non-compliance of any obligation accepted in this document by any party will result in the immediate suspension of its validity (until its next renegotiation)", and that "any disagreements between the parties shall be solved by the judges of the city of Lima, Capital of Peru."

The record contains no evidence discussing the legal effect in Peru of the Extrajudicial Agreement signed between the applicant's parents. Upon review, however, we find that the agreement language itself, strongly suggests that it serves as a judicially enforceable determination and grant of custody over the applicant. The Extrajudicial Agreement contains a Notarial Instrument number, a Minutes number, and a File number; and the Agreement reflects in its conclusion section, that it is a "notarially recorded instrument." The Extrajudicial Agreement additionally indicates that tribunal child support proceedings (referred to as alimony proceedings in the document) were terminated upon mutual agreement by the applicant's parents over the matter; moreover, the Agreement reflects that any change in custody arrangements for the applicant must be agreed to personally by both parents before an arbitrator; that non-compliance with the provisions requires renegotiation of the provision(s); and that related disagreements between the parties shall be resolved in court.¹

The record also contains a document entitled, "Certification of Authorization," signed by the applicant's mother on February 21, 2013, and stating that the applicant's mother grants permission for the applicant to continue living with her father in the United States. The document reflects that it was signed before a Notary Public in [REDACTED] Peru; however, it signed only by the applicant's mother. Moreover, notary stamps on the document clarify that the "document was not written in this notary office," and that the document "is a certification of the signature, but not of the

¹ Information from the U.S. Library of Congress is also consistent with our belief that the Extrajudicial Agreement between the applicant's parents is a judicially enforceable determination. The Library of Congress states at: http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l20540783_text that:

On October 16, 2008, Peru's President Alan Garcia Perez promulgated Law No. 29269, amending articles 81 and 84 of the Code of the Child and the Adolescent to incorporate a provision dealing with joint custody. The new version of article 81 states that when the parents are "de facto" (actually) separated, the custody of the children or adolescents is determined by common agreement between the parents, taking into account the opinion of the child or adolescent. If there is no agreement or if the agreement is harmful to the children, custody will be decided by a special judge, who will issue the necessary measures for implementation of his decision

content.” The document therefore appears to be a private document. It does not constitute a court order or a mutually agreed upon, and arbitrated amendment to the custody provisions contained in the Extrajudicial Agreement between the applicant’s parents.

The burden of proof is on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. 8 C.F.R. § 341.2(c). The “preponderance of the evidence” standard requires that the record demonstrate that the applicant’s claim is “probably true,” based on the specific facts of each case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r. 1989)). Even where some doubt remains, an applicant will meet this standard if she or he submits relevant, probative and credible evidence that the claim is “more likely than not” or “probably” true. *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)).

In the present matter, the Extrajudicial Agreement between the applicant’s parents appears to be a judicially enforceable determination and grant of custody over the applicant, and the Agreement establishes that the applicant’s mother obtained custody over the applicant in December 2004. The applicant thus failed to establish that she resided in the legal custody of her U.S. citizen father prior to her 18th birthday.

Conclusion

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will therefore be dismissed.²

ORDER: The appeal is dismissed. The application remains denied.

² The present decision is without prejudice to the applicant filing a Form N-400, Application for Naturalization, pursuant to section 316 of the Act, 8 U.S.C. § 1427, if eligible.