U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

Date: AUG 1 4 2014 Office: NEW YORK, NY FILE

IN RE: Applicant:

APPLICATION: Application for Certificate of Citizenship under Section 322 of the Immigration and Nationality Act; 8 U.S.C. § 1433.

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Acting District Director of the of the New York, New York District Office (the director) denied the Application for Certificate of Citizenship (Form N-600K) and matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the matter returned to the director for issuance of the applicant's certificate of citizenship.

Pertinent Facts and Procedural History

The applicant was born in Panama on October 1, 2007. Her mother is a U.S. citizen, as is the applicant's maternal grandfather, The applicant, through her mother, seeks a certificate of citizenship claiming that she derived U.S. citizenship.

The director denied the application finding that the preponderance of the evidence in the record did not establish that the applicant was residing with her mother. *See* Decision of the Director, dated August 12, 2013.

On appeal, the applicant, through counsel, maintained that the director erred in denying her application. *See* Statement of the Applicant on Form I-290B, Notice of Appeal or Motion.

On May 27, 2014, we issued a request for additional evidence regarding the applicant's parents' marital status noting that U.S. Citizenship and Immigration Services (USCIS) could not otherwise presume that the applicant was residing in her mother's legal custody as required by section 322 of the Act, 8 U.S.C. § 1433.

The applicant responded to our request for additional evidence on July 21, 2014. The applicant's response includes a brief as well as evidence regarding the applicant's legal custody. Most importantly, the response includes evidence of the applicant's parents' divorce.

Applicable Law

We review these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Because the applicant was born abroad, she is presumed to be an alien and bears the burden of establishing her claim to U.S. citizenship by a preponderance of credible evidence. *See Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008).

By filing the Form N-600K, the applicant's mother is seeking a certificate of citizenship for the applicant under section 322 of the Act, which provides, in pertinent part that:

> (a) A parent who is a citizen of the United States . . . may apply for naturalization on behalf of a child born outside of the United States who has not acquired citizenship automatically under section 320 [of the Act]. The [Secretary of Homeland Security (the Secretary)] shall issue a certificate of citizenship to such

applicant upon proof, to the satisfaction of the [Secretary], that the following conditions have been fulfilled:

(1) At least one parent . . . is a citizen of the United States, whether by birth or naturalization.

(2) The United States citizen parent--

(A) has . . . been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years; or

(B) has . . . a citizen parent who has been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

(3) The child is under the age of eighteen years.

(4) The child is residing outside of the United States in the legal and physical custody of the applicant [citizen parent] . . . .

(5) The child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

(b) Upon approval of the application (which may be filed from abroad) and, except as provided in the last sentence of section [337(a) of the Act], upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this [Act] of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the [Secretary] with a certificate of citizenship.

* * *

Analysis

As noted in our request for evidence, the only issue in this case was whether the applicant can establish that she is residing abroad in her mother's legal and physical custody.

The applicant's and her mother's address is listed in the Form N-600K at Part 3B and 4A, respectively, as being in Israel. The record contains, in relevant part, a letter from the attesting to the applicant's and her

mother's residence; a doctor's letter; school documentation; and a copy of a lease agreement. This evidence suggests that the applicant is residing in the physical custody of her mother in This evidence is re-submitted with the applicant's response to our request for evidence.

We now find that the evidence in the record sufficiently establishes that the applicant resides in her mother's physical custody and, given that the applicant's parents are divorced, also in her legal custody.

Legal custody is defined as "the responsibility for and authority over a child" and is presumed in the case of a "biological child who currently resides with both natural parents (who are married to each other, living in marital union, and not separated)." *See* 8 C.F.R. § 322.1. 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." *Id.*

The applicant's parents' divorce document does not include a custody award. In derivative citizenship cases where the parents have legally separated but there is no formal, judicial custody order, the parent having "actual, uncontested custody" will be regarded as having "legal custody" of the child. *Bagot v. Ashcroft*, 398 F.3d 252, 266-67 (3d Cir. 2005) (citing *Matter of M-*, 3 I&N Dec. 850, 856 (Cent. Office 1950)). Additionally, the regulation at 8 C.F.R. § 320.1 provides 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."

The record, by a preponderance of the evidence, reflects that the applicant in in her mother's actual, uncontested custody. Therefore, we can conclude that she met the conditions for acquiring U.S. citizenship from her mother pursuant to section 322 of the Act.

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 been met.

ORDER: The appeal is sustained. The matter is returned to the New York District Office for further processing and issuance of a certificate of citizenship to the applicant.