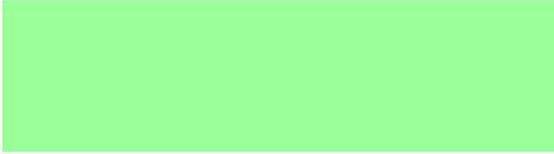




U.S. Citizenship
and Immigration
Services

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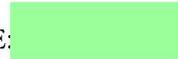


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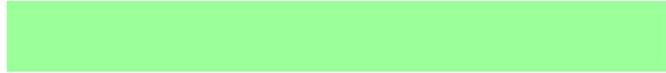
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OFFICE: ST. LOUIS, MO

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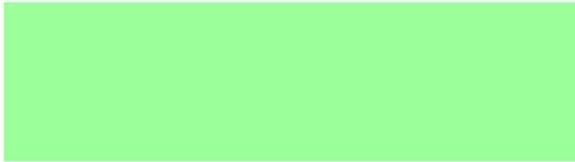
IN RE:



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. 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 St. Louis, Missouri Field Office (the director) denied the Application for Citizenship and Issuance of Certificate under Section 322 (Form N-600K), 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 in the Philippines on April 10, 2001. He was adopted in the Philippines by U.S. citizens [REDACTED] and her spouse on June 19, 2008, when he was seven-years-old. The applicant seeks a certificate of citizenship pursuant to section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433, based on the claim that he derived U.S. citizenship through his adoptive mother.

In a decision dated January 31, 2013, the director determined that the applicant failed to establish that he resides abroad in the physical custody of his U.S. citizen mother, as required under section 322(a)(4) of the Act. The application was denied accordingly. On appeal the applicant concedes, through counsel, that his U.S. citizen mother lives permanently in the United States and that he lives in the Philippines with a caretaker. Citing to the definition of *physical custody* contained in Title 28 U.S.C. § 1738A, and to the Eighth Circuit Court of Appeals case, *Schmidt v. Des Moines Public Schools*, 655 F. 3d 811 (8th Cir. 2011), however, the applicant asserts that he nevertheless meets section 322 of the Act requirements that he reside abroad in the physical custody of his U.S. citizen parent.

We conduct 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.

Applicable Law

Section 322 of the Act, applies to children born and residing outside of the United States, and provides, in pertinent part:

- (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 (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 [citizen parent]

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

* * *

Section 322(a) of the Act applies 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).” Section 322(c) of the Act, 8 U.S.C. § 1433(c).¹

The term *residence* is defined in the Act as a person’s, “[p]lace of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.” Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33).

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). *See also*, 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)).

Analysis

It is uncontested that the applicant resides in the Philippines, and that his adoptive mother has resided in the United States since October 2008. Furthermore, court and employment documents contained in the record, as well as city government and social welfare officer statements, and letters

¹ Section 101(b)(1)(E)(i) of the Act, 8 U.S.C. § 1101(b)(1)(E)(i), defines the term *child*, in pertinent part, for immigrant visa purposes as an unmarried person under 21 years of age who is, “a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years[.]” The two year residence requirement may be satisfied before or after the adoption. *See Matter of M*, 8 I&N Dec. 118 (BIA 1958; A.G. 1959).

from the applicant's caretaker and adoptive mother state that the applicant lives in the Philippines and that his adoptive mother has lived in the United States since October 2008. The applicant therefore does not meet the condition that he reside outside of the United States in the physical custody of his U.S. citizen parent, as set forth in section 322(a)(4) of the Act. The applicant asserts, however, that because he lives in his mother's family home in the Philippines and because his mother is in daily contact with him, visits him in the Philippines, and provides for and directs all aspects of his care, he meets the section 322(a)(4) of the Act condition that he reside outside of the United States in the physical custody of his adoptive mother. To support his assertions, the applicant refers to the U.S. Eighth Circuit Court of Appeals decision, *Schmidt v. Des Moines Public Schools*, *supra*, and to the definition of *physical custody*, as defined in Title 28 U.S.C. § 1738A(b)(7).

The applicant's case arises within the jurisdiction of the U.S. Seventh Circuit Court of Appeals, and *Schmidt v. Des Moines Public Schools*, *supra*, is an Eighth Circuit Court decision. The decision is therefore not binding in the applicant's case. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (the AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals where the action arose.) Even if *Schmidt v. Des Moines Public Schools* were binding case law, the decision does not pertain to, or address derivative citizenship issues, or state that a child who resides abroad with a caretaker meets conditions set forth in section 322(a)(4) of the Act. Similarly, the definition of *physical custody* contained in Title 28 U.S.C. § 1738A(b)(7) does not pertain to derivative citizenship issues under the Act, or indicate that a child residing abroad with a caretaker satisfies section 322(a)(4) of the Act physical custody requirements.²

In the applicant's case, the record clearly reflects that the applicant's adoptive mother resides permanently in the United States, and that the applicant resides in the Philippines with a caretaker. The applicant has therefore failed to establish that he resides outside of the United States in the physical custody of his U.S. citizen mother, as required under section 322(a)(4) of the Act. The remaining requirements contained in section 322 of the Act need therefore not be addressed, and the appeal will be dismissed.

Conclusion

The regulation provides at 8 C.F.R. § 341.2(c) that the burden of proof shall be on the applicant to establish his or her claimed citizenship by a preponderance of the evidence. Here, the applicant has failed to meet his burden of proof.

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

² *Schmidt v. Des Moines Public Schools*, *supra*, pertains to the right of a parent who was not awarded physical custody, to manage and care for their child. Title 28 U.S.C. § 1738A(b)(7) is a full faith and credit provision for child custody determinations in the United States, and states that, "*physical custody* means actual possession and control of a child."