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**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF N-G-G-

DATE: NOV. 13, 2015

APPEAL OF SAN FRANCISCO FIELD OFFICE DECISION

APPLICATION: FORM N-600, APPLICATION FOR CERTIFICATE OF CITIZENSHIP

The Applicant, a native of Mexico, seeks a Certificate of Citizenship. *See* Immigration and Nationality Act (the Act) § 320, 8 U.S.C. § 1431. The Field Office Director, San Francisco, California, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

The record reflects that the Applicant was born in Mexico on [REDACTED] 1990, to married, non-U.S. citizen parents. The Applicant entered the United States as a lawful permanent resident on March 16, 1999, at the age of [REDACTED]. On December 4, 2006, the Applicant was sentenced to a two-year term of incarceration after pleading guilty to committing the act of assault with a deadly weapon or by means of force likely to produce great bodily injury. The Applicant's father became a naturalized U.S. citizen on March 27, 2007, when the Applicant was [REDACTED] years of age. The Applicant seeks a certificate of citizenship indicating that he derived U.S. citizenship from his father pursuant to section 320 of the Act, 8 U.S.C. § 1431.

In a December 18, 2014, decision, the Director determined that the Applicant did not establish that he was in the physical custody of his father at the time his father became a naturalized U.S. citizen, as required by section 320(a)(3) of the Act, 8 U.S.C. § 1431(a)(3). The Form N-600, Application for Certificate of Citizenship, was denied accordingly.

On appeal, the Applicant contends that the physical and legal custody distinction only exists in the context of a divorce or separation of the parents, and not in the context of a minor being taken into custody. The Applicant also asserts that he was in the physical custody of his father at the time his father became a naturalized citizen, and thus derived citizenship from his father.

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.

Because the Applicant was born abroad, he is presumed to be a foreign national 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 "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. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing

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*Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

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, 8 U.S.C. § 1431, 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(a) of the Act, 8 U.S.C. § 1431(a), provides:

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 record indicates that the Applicant was admitted to the United States as a lawful permanent resident on March 16, 1999, prior to his eighteenth birthday, and that his father became a naturalized U.S. citizen on March 27, 2007, also prior to the Applicant’s eighteenth birthday. The issue is whether the Applicant was residing in the United States in the legal and physical custody of his U.S. citizen father at any point after his father naturalized, on March 27, 2007, and before he turned 18 years of age, on [REDACTED]

The record indicates that the Applicant was arrested on [REDACTED] 2006, and on [REDACTED], 2006, he pled guilty to the offense of assault with a deadly weapon or by means of force likely to produce great bodily injury, in violation of California Penal Code PC 245(a)(1). The record indicates that the Applicant was sentenced to a term of two years imprisonment.

With respect to legal custody of the Applicant prior to his eighteenth birthday, title 8 of the Code of Federal Regulations includes a definition of legal custody.

8 C.F.R. § 320 states, in pertinent part:

Legal custody refers to the responsibility for and authority over a child.

- (1) 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:

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- (i) A biological child who currently resides with both natural parents (who are married to each other, living in marital union, and not separated),
- (ii) A biological child who currently resides with a surviving natural parent (if the other parent is deceased), or
- (iii) In the case of a biological child born out of wedlock who has been legitimated and currently resides with the natural parent.

This provision indicates that the presumption of legal custody and lawful authority only exists absent evidence to the contrary. The Applicant did not submit any evidence indicating that a family or criminal court had issued any order terminating or affecting legal custody in any manner prior to or at the time of the Applicant's father's naturalization.

There is no indication that the legal custody presumption of 8 C.F.R. § 320 extends to physical custody. The record indicates that the Applicant was arrested and incarcerated in [REDACTED] 2006, and there is no evidence in the record to indicate that the Applicant was in the physical custody of his father following his father's naturalization on March 27, 2007, and before the Applicant turned eighteen years of age on [REDACTED]

The record indicates that on [REDACTED] 2006, the Applicant was convicted in the Superior Court of California, County of [REDACTED], in violation of California Penal Code P 245(a)(1), Assault with a Deadly Weapon or by means of Force Likely to Produce Great Bodily Injury, and that he was sentenced to a term of two years imprisonment.

The record contains a copy of a Reporter's Transcript of Judgment and Sentencing, dated February 6, 2009, which indicates that the court permanently revoked the Applicant's probation and sentenced him to the term of two years with credit for 391 days of actual time.

The record also includes a copy of an Abstract of Judgment which indicates that in 2006, the Applicant was convicted of the commission of the felony of assault with a deadly weapon, with time imposed listed as two years. This document was stamped "Endorsed-Filed" on February 10, 2009 by the Clerk of [REDACTED] Superior Court of California.

The record further includes a copy of a document titled "Criminal Background Check" from the Superior Court of California, dated July 24, 2009, which indicates that the Applicant received 365 days of jail time, with 208 days credit time served.

In order to determine whether the Applicant was ever in the physical custody of his father after his father's naturalization and prior to the Applicant's eighteenth birthday, it is necessary to determine the exact nature of his detention following his conviction, the length of his detention, and whether he was detained in a facility that exercised physical custody over the Applicant such that his father was no longer holding physical custody over him.

The exact details regarding the Applicant's incarceration following his conviction on [REDACTED] 2006, are not clear. On March 3, 2014, the Director issued a request for evidence (RFE) to the

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Applicant to request further information and documentation regarding his incarceration, including copies of court dispositions and information from the Applicant's probation officer.

In response to the Director's RFE, and on appeal, the Applicant contended that the distinction between physical custody and legal custody is in the context of a divorce, and not in the context of an extant marriage between the biological parents. However, the Applicant did not provide any further evidence regarding the nature of his incarceration, either in response to the Field Office's request for evidence, or on appeal.

It is the Applicant's burden to establish the claimed citizenship by a preponderance of the evidence. Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 C.F.R. § 341.2(c). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of N-G-G-*, ID# 12964 (AAO Nov. 13, 2015)