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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-L-P-H-

DATE: FEB. 24, 2016

APPEAL OF FRESNO FIELD OFFICE DECISION

APPLICATION: FORM N-600K, APPLICATION FOR CITIZENSHIP AND ISSUANCE OF CERTIFICATE UNDER SECTION 322

The Applicant, a native and citizen of the Philippines, seeks a Certificate of Citizenship. *See* Immigration and Nationality Act (the Act) § 322, 8 U.S.C. § 1433. The Director, Fresno Field Office, 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 the Philippines on , to married parents. The Applicant currently resides in the Philippines. The Applicant's father, who obtained U.S. citizenship through naturalization on November 1, 2000, resides in California. The Applicant's mother is not a U.S. citizen. She resides in France. The Applicant filed Form N-600K, Application for Citizenship and Issuance of Certificate under Section 322, claiming eligibility for derivative citizenship through her U.S. citizen father.

On June 25, 2015, the Director denied the application finding that the Applicant was not eligible for issuance of a certificate of citizenship pursuant to section 322 of the Act. Specifically, the Director determined the Applicant did not demonstrate that she was residing outside of the United States in the physical custody of her U.S. citizen father.

On appeal, the Applicant submits additional evidence to show that she is in her father's physical custody. Further, the Applicant states that the Director's decision incorrectly referenced the Applicant's testimony during the interview, as the Applicant was not interviewed in connection with her Form N-600K.

The record includes, but is not limited to: birth and marriage certificates, a copy of the certificate confirming the Applicant's residence in the Philippines, certification regarding her school enrollment in the Philippines, a copy of her father's U.S. passport, documents relating to his physical presence in the United States, and affidavits.

We review these proceedings de novo. The entire record was reviewed and considered in rendering a decision on appeal.

As amended by the Child Citizenship Act (CCA) of 2000, which took effect on February 27, 2001, section 322 of the Act applies to children born and residing outside of the United States. It 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. The Attorney General shall issue a certificate of citizenship to such applicant upon proof, to the satisfaction of the Attorney General, that the following conditions have been fulfilled:
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> > (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; . . .
> >
> > (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.
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> (b) Upon approval of the application (which may be filed from abroad) and . . . 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 Attorney General with a certificate of citizenship.

As a preliminary matter, we note that the record does not indicate that either the Applicant or her father were interviewed in connection with the Applicant's Form N-600K. Accordingly, we agree with the Applicant that the Director's reference to "testimony during the interview" in the adverse decision was incorrect.

After review of the record, we find that the Applicant has demonstrated that her father is a U.S. citizen and that she is under 18 years of age. Further, the preponderance of evidence indicates that the Applicant's father has been physically present in the United States for the requisite 5 years, 2 of which followed his 14th birthday. Accordingly, the Applicant has satisfied the requirements of

sections 322(a)(1), (2) and (3) of the Act. However, although materials submitted indicate the Applicant resides outside the United States, they do not show that she does so in the legal and physical custody of her U.S. citizen father, as required by section 322(a)(4) of the Act, or that she is temporarily present in the United States pursuant to a lawful admission, and maintaining lawful status, as required in section 322(a)(5) of the Act.

The Act defines the term "residence" as "the place of general abode . . . principal, actual dwelling place in fact, without regard to intent." Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33). The Applicant represented on the Form N-600K that her U.S. citizen father resides in California, while the Applicant resides in the Philippines. In an affidavit submitted with the Form N-600K, the Applicant's father confirms that he has been residing in California with his brother since 2012. Further, the Applicant has submitted a Philippine certificate of residency, dated May 18, 2015, which states that she has been a resident in the municipality of Philippines, since 2002. The school certification the Applicant submits on appeal confirms that she has been attending school in the Philippines during the 2014-2015 school year. Accordingly, the Applicant has not demonstrated that she is residing with her father.

Furthermore, the regulations provide that the term "legal custody" refers to the responsibility for and authority over a child. Absent evidence to the contrary, legal custody 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)." 8 C.F.R. § 322.1(1)(i). Although the Applicant represented on the Form N-600K that her parents are married to each other, the record shows that they do not currently live together in marital union, and that the Applicant does not reside with either parent. Accordingly, because the Applicant does not reside with her parents, we find that the Applicant has not established that she is in her father's legal custody, as that term is explained in 8 C.F.R. § 322.1(1)(i).

We further find that, for the same reason, the Applicant has not established that she resides in her father's physical custody. Neither the Act nor the regulations define the term "physical custody." However, "physical custody" has been considered in several derivative citizenship proceedings and interpreted to mean actual residence with the parent. *See Bagot v. Ashcroft,* 398 F.3d 252, 267 (3rd Cir. 2005) (father had actual physical custody of the child where the child lived with him and no one contested the father's custody); *See Matter of M-, supra* (father had "actual uncontested custody" of a child where the father lived with the child, took care of the child, and the mother consented to his custody).

To show that her father has physical custody of the Applicant, the Applicant submits a school certification and an affidavit. The school certification states that the Applicant has been in the physical custody and guardianship of her parents while attending school in the Philippines. However, this statement is not supported by the record, which shows that the Applicant's parents do not reside with her in the Philippines. The Applicant also submits a joint affidavit by two residents of Philippines, who claim to be the neighbors of the Applicant's family in the Philippines. The affiants state that the Applicant is the biological child of her parents, that her parents have legal and

physical custody of the Applicant, and that they provide for all her financial necessities and emotional needs even though they live abroad and the Applicant resides in the Philippines. However, these statements, without more, do not demonstrate how the Applicant satisfies the definitions of legal and physical custody related to section 322 of the Act.

Based on the foregoing, we must conclude that the Applicant is not eligible for issuance of certificate of citizenship under section 322 of the Act, because she has not demonstrated that she is residing outside of the United States in the legal and physical custody of her U.S. citizen father as required in section 322(a)(4) of the Act.

Furthermore, the Applicant has not shown that she satisfies the requirement set forth in section 322(a)(5) of the Act, which states that in order to obtain a certificate of citizenship pursuant to section 322 of the Act the child must be temporarily present in the United States pursuant to a lawful admission, and must be maintaining such lawful status. In the present matter, there is no evidence to indicate that the Applicant has been lawfully admitted to the United States at any time, or that she is currently maintaining such lawful status in the United States. Therefore, the Applicant has not demonstrated that she meets the requirements of section 322(a)(5) of the Act.

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 J-L-P-H-*, ID# 15470 (AAO Feb. 24, 2016)