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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-D-L-A-

DATE: JAN. 21, 2016

APPEAL OF SAN ANTONIO FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Mexico, seeks a Certificate of Citizenship. *See* Immigration and Nationality Act (the Act) § 321, 8 U.S.C. § 1432 (Repealed by Sec. 103(a), title I, Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000)). The Director, San Antonio Field Office, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

The record reflects the Applicant was born in Mexico on [redacted] The Applicant's parents were married at the time of the Applicant's birth, but later divorced. The Applicant's mother became a naturalized U.S. citizen on January 8, 1988. On February 13, 1995, the Applicant obtained permanent resident status in the United States. There is no evidence that the Applicant's father is a U.S. citizen. The Applicant seeks a Certificate of Citizenship on the basis that he derived U.S. citizenship through his mother under former section 321(a) of the Act.

On November 21, 2014, the Director denied the Applicant's Form N-600 concluding that the Applicant did not derive U.S. citizenship under former section 321(a) of the Act because he had not established that he had ever been in the sole legal custody of his U.S. citizen mother following his parents' divorce. In reaching this conclusion, the Director relied on the holding of the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) in *Bustamante-Barrera v. Gonzales,* 447 F.3d 388 (5th Cir. 2006), that the "legal custody" requirement of subsection (3) of former section 321(a) of the Act may only be satisfied where the U.S. citizen parent has sole legal custody of a child. On appeal, the Applicant states that the Director's decision was incorrect in light of the Fifth Circuit's holding in *Bustamante-Barrera v. Gonzales, supra,* and the evidence submitted.

The Applicant further indicated on the Form I-290B, Notice of Appeal or Motion, that he would file a brief and/or additional evidence with us within 30 days. As of this date, we have not received any additional documents or statements regarding the denial of the Applicant's Form N-600. We will therefore consider the record as complete.

The record includes, but is not limited to: the Applicant's birth certificate, a copy of the Applicant's permanent resident card, the naturalization certificate of the Applicant's mother, the divorce decree of the Applicant's parents, and an affidavit from the Applicant's mother. All evidence was reviewed and considered in rendering this decision.

We conduct appellate review on a de novo basis. *See Soltane v. DOJ,* 381 F.3d 143, 145 (3d Cir. 2004). 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 applicable law for derivative citizenship purposes is that 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); *accord Jordon v. Attorney General,* 424 F.3d 320, 328 (3d Cir. 2005). The Applicant was born on October 3, 1977, when section 321 of the Act was in effect. The Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), effective as of February 27, 2001, repealed section 321 of the Act entirely and amended sections 320 and 322 of the Act. However, the provisions of the CCA apply only to persons who were not yet eighteen years of age on February 27, 2001. The Applicant was over the age of eighteen on the effective date of the CCA, and thus, he cannot benefit from the amended Act. *See Matter of Rodriguez-Tejedor,* 23 I&N Dec. 153 (BIA 2001). Accordingly, this case must be considered under the former section 321 of the Act.

Former section 321 of the Act provided that:

> (a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:
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> (1) The naturalization of both parents; or
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> (2) The naturalization of the surviving parent if one of the parents is deceased; or
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> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if-
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> (4) Such naturalization takes place while such child is under the age of 18 years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

The Applicant claims that he derived U.S. citizenship through his mother, who is a naturalized U.S. citizen. Pursuant to former section 321 of the Act, the Applicant may establish derivative citizenship through his U.S. citizen mother only if his parents were legally separated, he resided in the mother's legal and physical custody pursuant to lawful admission for permanent residence, and all of these requirements, including the mother's naturalization, were satisfied prior to the Applicant's 18th

birthday. The record shows that the Applicant has met several requirements for derivative citizenship set forth in former section 321of the Act.

The Applicant has established that his parents were legally separated at the time his mother naturalized. The term, "legal separation" means "either a limited or absolute divorce obtained through judicial proceedings." *See Matter of H,* 3 I&N Dec. 742, 744 (BIA 1949). The Applicant submitted a copy of a divorce decree issued by a Civil and Family Court in the State of Tamaulipas, Mexico. The decree shows that the Applicant's parents were divorced on [redacted] 1979. Accordingly, the Applicant has established that his parents were legally separated at the time his mother naturalized.

In addition, the Applicant has established that the qualifying events set forth in former section 321 occurred while the Applicant was under the age of 18. Specifically, the record shows that the Applicant's mother naturalized on January 8, 1988, when the Applicant was [redacted] years old. Further, the Applicant was admitted to the United States as a permanent resident on February 13, 1995, when he was [redacted] years old. Accordingly the Applicant meets the derivative citizenship age limit requirement of former section 321.

At issue is whether the Applicant was residing in the physical and legal custody of his U.S. citizen mother before he turned 18 years of age, as required under section 321(a)(3) of the Act, to derive citizenship in cases where parents are legally separated. The Director determined that because the family court did not specifically state that the Applicant's father was divested of the authority to make significant decisions regarding the Applicant, the Applicant did not establish that his mother had sole legal custody pursuant to the Fifth Circuit's holding in *Bustamante-Barrera, supra.*

Legal custody "implies either a natural right or a court decree." *Matter of Harris,* 15 I&N Dec. 39, 41 (BIA 1970). In the absence of a judicial determination or grant of custody in a case of a legal separation of the naturalized parent, the parent having actual, uncontested custody of the child is to be regarded as having "legal custody." *See Matter of M-,* 3 I&N Dec. 850, 856 (BIA 1950).

Outside of the Fifth and Ninth Circuit Courts of Appeal, former section 321(a)(3) of the Act does not require "sole" legal custody over the child subsequent to a legal separation of parents.[1] *See Fierro v. Reno,* 217 F.3d 1, 4 (1st Cir. 2000) (the legal custody requirement in former section 321of the Act "should be taken presumptively to mean legal custody under the law of the state in question[.]").

The Applicant's proceedings fall within the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit, which has determined that the "legal custody" requirement of subsection (3) of former section 321(a) of the Act may only be satisfied where the U.S. citizen parent has sole legal custody of a child, rather than joint legal custody. *See Bustamante-Barrera,* 447 F.3d at 395-96. Therefore,

[1] The U.S. Fifth and Ninth Circuit Courts of Appeals held in *Bustamante-Barrera v. Gonzales,* 447 F.3d 388 (5th Cir. 2006), and *U.S. v. Casasola,* 670 F.3d 1023 (9th Cir. 2012) held that a grant of "joint" legal custody is insufficient to satisfy the legal custody requirement in former section 321(a)(3) of the Act.

the Court's holding in *Bustamante-Barrera* constitutes mandatory authority and must be followed in this case. *Bustamante-Barrera* involved a citizenship claim pursuant to former section 321 of the Act of an applicant whose parents were divorced. The divorce judgment granted only sole physical custody to the citizen parent but retained joint legal custody for both parents, by virtue of which, the noncitizen parent retained visitation and other parental rights. Based on these facts, the Fifth Circuit determined that because both parents were awarded legal custody, the applicant's citizen parent did not have sole legal custody and the applicant could not, therefore, derive citizenship from that parent. *See generally, Bustamante-Barrera,* 447 F.3d at 390-91.

Subsequent to the Director's adverse decision, the Fifth Circuit clarified that *Bustamante-Barrera* did not replace the uniformly followed *Matter of M-, supra,* two-step framework with a "sole legal custody" standard, but instead refined the *Matter of M-* analysis to require sole legal custody in cases featuring a joint custody order. *See Kamara v. Lynch, 786 F.3d 420, 424* (5th Cir. 2015).

The Fifth Circuit held:

> 'Sole legal custody' is not a higher standard than *Matter of M-*'s 'actual uncontested custody' standard, it is just a different inquiry that arises when a formal custody order exists. It would be incoherent to say that this court requires evidence of sole legal custody in cases lacking any formal custody order. But when placed within the *Matter of M-* framework, the two standards are compatible. The first step is to determine whether a custody order exists. If the answer is yes, *Bustamante-Barrera* asks whether that order authorized sole legal custody. If no custody award exists, then under the second portion of the *Matter of M-* analysis, the question becomes whether the naturalized parent exercised 'actual uncontested custody.'

Id. at 424-425. The record contains a divorce decree of the Applicant's parents issued by a family court in [redacted] Mexico, on [redacted] 1979. According to the divorce decree, the parents jointly submitted a petition for uncontested divorce along with an agreement concerning the status of their minor child, the Applicant. The divorce decree states, in pertinent part:

> ....They [the spouses] founded their filing on the considerations of law they believed were applicable to the case and attached it to the documents mentioned in the petition, as well as the agreement in which they decide the status of heir minor child, the clauses of which read as follows: "....TWO: The minor child [the Applicant] will live with his mother....THREE: As support for the minor child [the father] commits to pay 30% of his salary each month and in the case of illness, the two parents will mutually agree on how to pay the costs." Both parties state that this AGREEMENT is fair and they therefore sign it in approval....

The divorce decree shows that the court approved this mutual agreement of the Applicant's parents, in which the Applicant's mother would have physical custody of the Applicant, and his father would provide financial support for the Applicant each month. The divorce decree is silent as to the award

of "legal custody." Nothing in the language of the divorce decree suggests that the Applicant's mother was awarded sole legal custody or that the parental and custodial rights of the Applicant's father were divested or terminated. Although the Applicant's mother submitted an affidavit stating that the Applicant's father never paid child support or helped raise the Applicant, the record lacks evidence that the custody order was amended prior to the Applicant's 18th birthday to grant sole legal custody to the Applicant's mother.

As stated above, the divorce decree in this case does not contain a provision regarding award of legal custody of the Applicant to either parent. Therefore, pursuant to the Fifth Circuit's holdings in *Bustamante-Barrera* and *Kamara v. Lynch, supra*, the Applicant must establish only that he resided in his U.S. citizen's mother's "actual uncontested custody" at the time of her naturalization as required under the *Matter of M-* standard.

The fact that a child continuously lives with the naturalized parent is not enough to satisfy the "uncontested" requirement of *Matter of M-*. In order to protect the non-naturalized parent, there must be persuasive, sufficient proof of inaction or acquiescence by the other parent to show that he or she has been "removed from the picture." *See Kamara v. Lynch* at 425 (citing cf. *Matter of M-*, 3 I&N. Dec. at 851 (noting the presence of an affidavit from the non-naturalized parent that illustrated the naturalized parent had been solely tasked with raising the child)). *See also Bagot v. Ashcroft,* 398 F.3d 252, 267 (3d Cir. 2005) (father had "actual uncontested custody" where the court awarded physical custody to the mother, but the child resided with the father, the mother approved of the arrangement, and no one else disputed the father's custody at any time).

The Applicant's immigration records, including the Applicant's Form G-325, Biographic Information, pre-trial statement submitted in removal proceedings, affidavit executed in connection with an application for employment authorization filed in 1994, his mother's 1994 paystub, and the affidavit she submitted in support of the instant application, do not establish that the Applicant resided with his mother at the time she naturalized in January of 1988 or at any time thereafter, nor is there evidence indicating that the father was sufficiently removed from the picture. Specifically, on the Form I-130, Petition for Alien Relative, which the Applicant's mother filed on his behalf in 1994, she represented that she and the Applicant had the same mailing address. However, no residential address was listed for either the Applicant, or his mother, on the form to indicate that they resided together. On the application for employment authorization filed in November 1994, the Applicant listed his residence as [redacted] Texas. In the affidavit submitted with the application, the Applicant stated only that he did not live with his father and that his mother supported him and his four siblings. The affidavit does not clarify whether the Applicant resided with his mother at the time. The Applicant's mother's address on a paystub from the same time period, December 1994, is listed as [redacted] Texas. Similarly, the pre-trail statement signed by the Applicant's attorney and submitted to the immigration court in 1995, states that the Applicant's father never resided with him and that his whereabouts were unknown. No statements were made regarding the Applicant's residence at the time. Although the Applicant listed his address on various immigration forms included in the record as [redacted] Texas, there are no documents in the record to confirm that this address was also his mother's residence. Finally, in the affidavit submitted in support of the Applicant's Form N-600, the Applicant's mother states only that she brought the

Applicant with her to the United States, was responsible for enrolling him in school, taking him to the doctor and providing for all his needs. She makes no claims regarding the Applicant's residence in the United States. As such, we find the record does not contain sufficient evidence, including contemporaneous evidence, indicating the Applicant resided with his mother during the relevant time period.

In view of the above, we conclude that the Applicant has not met his burden by establishing that he resided in his mother's "actual uncontested custody" at the time she naturalized. Therefore, the Applicant has not demonstrated eligibility for derivative citizenship under former section 321 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 A-D-L-A-*, ID# 14406 (AAO Jan. 21, 2016)