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U.S. Citizenship and Immigration Services

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

MATTER OF C-M-S-D-R-

DATE: JUNE 22, 2016

APPEAL OF LOS ANGELES, CALIFORNIA FIELD OFFICE DECISION

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

The Applicant, a native and citizen of the Philippines, seeks a Certificate of Citizenship. *See* Immigration and Nationality Act (the Act) section 320, 8 U.S.C. § 1431. An individual born outside the United States, who automatically derived U.S. citizenship after birth but before the age of 18, may apply to receive a Certificate of Citizenship. Generally, for an individual claiming automatic U.S. citizenship after birth and who was born after February 27, 1983, the individual must have at least one U.S. citizen parent and be residing in that parent's custody in the United States as a lawful permanent resident before 18 years of age.

The Field Office Director, Los Angeles, California, denied the application. The Director concluded the Applicant did not demonstrate that she resided in the legal and physical custody of her U.S. citizen father, as required under section 320 of the Act.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and she claims the record demonstrates that she resided in the United States in her citizen father's legal and physical custody, and that the Director erred in not approving her Form N-600, Application for Certificate of Citizenship.

Upon *de novo* review, we will dismiss the appeal.

## I. LAW

The Applicant is seeking a Certificate of Citizenship indicating that she derived citizenship from her U.S. citizen father. The Applicant was born in the Philippines on [redacted] to married foreign national parents. Her parents divorced on [redacted] 1999, when the Applicant was [redacted] years old, and her father became a U.S. citizen through naturalization on December 16, 2006, when the Applicant was [redacted] years old. There is no evidence that the Applicant's mother is a U.S. citizen. The Applicant was admitted to the United States as a lawful permanent resident on August 30, 2011, when she was [redacted] years old.

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). The Applicant was born on [redacted] and she turned 18 on [redacted]

Accordingly, section 320 of the Act, as amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (CCA), which was in effect on September 16, 2013, applies to her case.

Section 320 of the Act provides, in pertinent part:

> (a) 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:
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> (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
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> (2) The child is under the age of eighteen years.
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> (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 regulation at 8 C.F.R. § 320.1 states the circumstances under which a U.S. citizen parent may be presumed to have legal custody of a child, that is, to have 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),
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> (ii) A biological child who currently resides with a surviving natural parent (if the other parent is deceased), or
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> (iii) In the case of a biological child born out of wedlock who has been legitimated and currently resides with the natural parent.
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> (2) [I]n the case of a child of divorced or legally separated parents, the Service will find a U.S. citizen parent to have legal custody of a child, for the purpose of the CCA, 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. The Service will consider a U.S. citizen parent who has been awarded "joint custody," to have legal custody of a child. There may be other factual

circumstances under which the Service will find the U.S. citizen parent to have legal custody for purposes of the CCA.

## II. ANALYSIS

The Director concluded the Applicant did not demonstrate that she resided in the legal and physical custody of her U.S. citizen father, and that she therefore did not derive citizenship from her father under section 320 of the Act. On appeal, the Applicant claims that she resided in her citizen father's legal and physical custody after she was admitted into the United States as a lawful permanent resident on August 30, 2011, and prior to her 18th birthday, on To support her claim, she submits affidavits of consent and special power of attorney documents from her mother authorizing her to live with her father in the United States, and authorizing her father to have custody, support, and responsibility over her. The entire record was reviewed and considered in rendering a decision on the appeal.

The Applicant was born on in the Philippines. As stated above, to derive U.S. citizenship after birth, an individual born after February 27, 1983, must have at least one U.S. citizen parent and be residing in that parent's legal and physical custody in the United States as a lawful permanent resident before the age of 18.

Because the Applicant was born abroad, she is presumed to be a foreign national 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).

The Applicant has established that she meets several requirements for derivative citizenship under section 320 of the Act. The record demonstrates that the Applicant's father became a naturalized U.S. citizen on December 15, 2006, when the Applicant was years old. The Applicant has therefore satisfied the requirement contained in section 320(a)(1) of the Act. In addition, the Applicant was admitted into the United States as a lawful permanent resident on August 30, 2011, when she was years old, as required by the last clause in section 320(a)(3) of the Act. At issue is whether the Applicant has shown that she resided in her U.S. citizen father's legal and physical custody as a lawful permanent resident before she turned 18, on We find that she has not demonstrated this, as she has not provided sufficient documentation indicating the initial award of legal custody to her mother was legally modified.

A. Residence in the United States in the legal custody of the citizen parent

As discussed in the law section above, for purposes of derivative citizenship under section 320 of the Act, legal custody is presumed in cases where a court awards primary care, control, and maintenance of a minor child to the citizen parent pursuant to a legal separation or divorce. In the present matter, the record contains a copy of the Applicant's parents' divorce decree showing that they obtained a divorce judgement from the Illinois on 1999. The divorce decree reflects, in section B, that only the Applicant's mother was awarded care, custody and

control over the Applicant. A marital settlement agreement attached to the Applicant's parents' divorce judgment and approved by the [redacted] on [redacted] 1999, also shows, in section 3, that only the Applicant's mother was awarded care, custody, and control of the Applicant. Legal custody over the Applicant was therefore awarded to the Applicant's mother.

The Applicant submits affidavits of consent and special power of attorney documents executed in the Philippines in 2013, reflecting that her mother authorized the Applicant to live with her father in the United States, and indicating that her mother transferred custody over her to the Applicant's father; however, modification of the Applicant's child custody order must be done by the Illinois court. *See* 750 Ill. Comp. Stat. § 5/610, as in effect in 1999, when the Applicant's parents' divorced, and as in effect on [redacted] when the Applicant turned [redacted] (Repealed on January 1, 2016, by

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[1] 750 Ill. Comp. Stat. § 5/610, as in effect in 1999, stated, in relevant part:

> (a) Unless by stipulation of the parties, no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.
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> (b) The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child. In the case of joint custody, if the parties agree to a termination of a joint custody arrangement, the court shall so terminate the joint custody and make any modification which is in the child's best interest. The court shall state in its decision specific findings of fact in support of its modification or termination of joint custody if either parent opposes the modification or termination. . . .

750 Ill. Comp. Stat. § 5/610, as in effect in 2013, provided, in relevant part

> (a) Unless by stipulation of the parties or except as provided in subsection (a-5), no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.
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> (a-5) A motion to modify a custody judgment may be made at any time by a party who has been informed of the existence of facts requiring notice to be given under Section 609.5.
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> (b) The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child. The existence of facts requiring notice to be given under Section 609.5 of this Act shall be considered a change in circumstance. In the case of joint custody, if the parties agree to a termination of a joint custody arrangement, the court shall so terminate the joint custody and make any modification which is in the child's best interest. The court

Public Act 99-90, § 5-20.) Illinois law, as in effect in 1999 and in 2013, provided that the state of Illinois retained exclusive, continuing jurisdiction over the Applicant's custody determination unless the Illinois court conceded jurisdiction to a foreign state or none of the parties to the action, including the child, remained in Illinois. *See* 750 Ill. Comp. Stat. § 35/4(b), as in effect in 1999 (Repealed on January 1, 2004, by Public Act 93-108, § 404.) *See also,* 750 Ill. Comp. Stat. § 36/202, as in effect since January 1, 2004.[2]

The Applicant submitted no evidence to show that jurisdiction over her custody determination was transferred to a foreign state, and evidence in the record reflects that the Applicant's father has continued to reside in the state of Illinois since 1999. Jurisdiction over the Applicant's legal custody therefore remained with the court in Illinois. The affidavits of consent and special power of attorney documents contained in the record are private documents that do not constitute an Illinois court ordered modification to the custody provisions contained in the Applicant's parents' 1999

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> shall state in its decision specific findings of fact in support of its modification or termination of joint custody if either parent opposes the modification or termination.
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> . . . .
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> (e) A party's absence, relocation, or failure to comply with the court's orders on custody, visitation, or parenting time may not, by itself, be sufficient to justify a modification of a prior order if the reason for the absence, relocation, or failure to comply is the party's deployment as a member of the United States Armed Forces.

[2] 750 Ill. Comp. Stat. § 35/4(b) provided that the "court, once having obtained jurisdiction over a child, shall retain such jurisdiction unless it concedes jurisdiction to a foreign state or none of the parties to the action, including the child, remain in Illinois."

750 Ill. Comp. Stat. § 36/202 provides, in pertinent part:

> (a) Except as otherwise provided in Section 204, a court of this State which has made a child-custody determination consistent with Section 201 or 203 has exclusive, continuing jurisdiction over the determination until:
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> > (1) a court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
> >
> > (2) a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.
>
> (b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this Section may modify that determination only if it has jurisdiction to make an initial determination under Section 201.

divorce judgment. Accordingly, the Applicant has not demonstrated that she resided in the legal custody of her citizen father after her admission into the country as a permanent resident and prior to her 18th birthday.

B. Residence in the United States in the physical custody of the citizen parent

Neither the Act nor the regulations define the term "physical custody." However, "physical custody" has been considered in the context of "actual uncontested custody" in 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); *Matter of M-,* 3 I&N Dec. 850, 856 (BIA 1950) (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). Under section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33), "[t]he term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent."

The record contains affidavits of consent and special power of attorney documents from the Applicant's mother, authorizing the Applicant to live with her father in the United States. However, the statements are general and do not, on their own, establish that the Applicant resided in her father's physical custody after she was admitted as a lawful permanent resident and prior to her 18th birthday on [redacted] The record contains no independent corroborative evidence demonstrating that the Applicant resided with her father during the relevant time period. The Applicant therefore did not demonstrate that she resided in the physical custody of her U.S. citizen father after her admission into the country as a permanent resident and prior to her 18th birthday.

## III. CONCLUSION

In view of the above, the Applicant did not demonstrate that she resided in her U.S. citizen father's legal custody as a lawful permanent resident before she turned 18. Accordingly, the Applicant has not established that she derived U.S. citizenship pursuant to section 320 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). The Applicant has not met that burden. Accordingly, we dismiss the appeal.

**ORDER:** The appeal is dismissed.

Cite as *Matter of C-M-S-D-R-*, ID# 16088 (AAO June 22, 2016)