U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-A-R-

DATE: APR. 19, 2017

APPEAL OF MOUNT LAUREL, NEW JERSEY FIELD OFFICE DECISION

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

The Applicant, who was born in India in seeks a Certificate of Citizenship indicating he derived U.S. citizenship from his father. *See* Immigration and Nationality Act (the Act) section 320, 8 U.S.C. § 1431. An individual born outside the United States who acquired U.S. citizenship at birth, or 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 legal and physical custody in the United States as a lawful permanent resident before 18 years of age.

The Director of the Mount Laurel, New Jersey, Field Office denied the application, concluding that the record did not establish, as required, that the Applicant resided in the United States in his U.S. citizen father's custody because the court awarded legal custody to the Applicant's mother in divorce proceedings.

On appeal, the Applicant submits a brief and asserts that the decision was in error because pursuant to the stipulation of settlement, incorporated by reference in the divorce decree, the parents agreed that they would jointly parent their two children. The Applicant argues that this settlement agreement remains controlling with regard to joint custody, independent of the divorce judgment, and that his U.S. citizen father therefore had legal custody for the purposes of derivative citizenship under section 320 of the Act.

Upon *de novo* review, we will dismiss the appeal. The Applicant has not established that his father had legal and physical custody.

I. FACTS AND PROCEDURAL HISTORY

The Applicant was born in India on to married foreign national parents. He was initially admitted to the United States with his parents as a nonimmigrant visitor in June 2009. In 2010, the Applicant's mother obtained a divorce from his father based on abandonment by the

father for a period of one or more years.[1] The divorce court awarded the custody of the Applicant and his brother to the mother, and granted visitation rights to the father in accordance with the parents' stipulation of settlement. This stipulation, signed by the parents a few months before the divorce, stated that the mother shall have primary residential custody of the children, and that "the parties shall jointly parent the child as the parties shall otherwise mutually agree." However, the divorce decree also provided that the agreement "shall survive and shall not be merged into [the divorce] judgment. . . ." Three months after the divorce, the Applicant's father married a U.S. citizen and obtained permanent resident status as her spouse in 2011. He subsequently filed Form I-130, Petition for Alien Relative, on the Applicant's behalf in December 2014. The petition was approved after the Applicant's father became a U.S. citizen through naturalization in February 2015. In March 2016, when the Applicant was years old, his status was adjusted to that of a lawful permanent resident based on the father's petition. The Applicant does not claim or submit evidence that his mother is a U.S. citizen.

II. LAW

To determine whether the Applicant derived U.S. citizenship from his father based on these facts, we apply "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 last critical event in this case is the Applicant's 18th birthday in Accordingly, his citizenship claim must be considered under section 320 of the Act, as amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (CCA), which applies to individuals who, like the Applicant, were under the age of 18 on February 27, 2001, when the law went into effect. Section 320 of the Act provides, in pertinent part that:

> (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:
>
> (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.

[1] The claimed basis for the divorce appears inconsistent with the information the Applicant's father provided on the Form I-539, Application to Extend/Change Nonimmigrant Status, he filed in October 2009. On this form, filed approximately months before the divorce, he indicated the Applicant's mother and their children were his dependents residing with him.

III. ANALYSIS

The record reflects the Applicant has satisfied some of the above-listed conditions as he was under the age of 18 when his father naturalized, and when he was admitted to the United States for permanent residence. The remaining issue is whether the Applicant has also established that he was residing in the United States in the father's legal and physical custody after he obtained permanent resident status in March 2016, and before he turned 18 years of age in

The Director determined that the Applicant did not show his father had legal custody because the court awarded custody to his mother, and the parents' informal settlement agreement did not supersede the court's custody order.

The Applicant argues on appeal that pursuant to the court's order, the stipulation of settlement survives the divorce judgment and is controlling with regard to custody. He claims that because the parents agreed to jointly parent the Applicant, his father should be recognized as having legal custody for the purposes of derivative citizenship under section 320 of the Act.

We disagree and find, upon review of the entire record, that the Applicant has not established his father had legal custody. Moreover, we conclude that the Applicant is also ineligible to derive U.S. citizenship from his father because he has not submitted sufficient evidence to show that he resided in the United States in his father's physical custody before turning 18 years of age.

A. Legal Custody

The evidence is insufficient to conclude that the Applicant's father had legal custody as required in section 320(a)(3) of the Act.

The regulation at 8 C.F.R. § 320.1 defines the term "legal custody" in section 320 of the Act as responsibility for and authority over a child. The regulation further provides that if, like in this case, the child's parents are divorced, USCIS will find a U.S. citizen parent to have legal custody of a child 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. 8 C.F.R. § 320.1(2). USCIS will also consider a U.S. citizen parent who has been awarded "joint custody," to have legal custody of a child. *Id.* However, the Applicant has not demonstrated that his father was awarded either sole or joint legal custody by the court or other government entity.

As stated above, the Applicant's mother was awarded legal custody by the court in the divorce proceedings, while the father was granted visitation rights. The Applicant asserts on appeal that the parents' agreement to "jointly parent" the children, referenced, but not incorporated in the divorce judgment, is equivalent to "joint custody," and that pursuant to the regulations his father should be considered as having "legal custody" within the meaning of section 320(a)(3) of the Act. We do not find the Applicant's argument persuasive.

First, the Applicant has not submitted evidence to show that his mother and father's agreement to "jointly parent" their children is the same as an agreement to share legal custody. The term "parent" commonly means "to be or act as a parent"; the term "parenting" denotes "the rearing of children, the care, love, and guidance given by a parent."[2] The stipulation of settlement does not include information to indicate that those terms should be interpreted differently in the context of the parents' divorce proceedings, nor does it provide details about the extent of legal authority and responsibilities of each parent with regard to their children. Moreover, the divorce judgment states, in part, that "the custodial parent shall enroll the minor children" in a health insurance plan, thus indicating that the court recognized only one parent, the Applicant's mother, as having legal custody.

Furthermore, both the stipulation of settlement and the divorce judgment clearly state that the settlement is a voluntary agreement between the Applicant's parents and that it will not be incorporated in the divorce judgment. Thus, the stipulation of settlement is a document separate from the divorce judgment entered by the court. While the stipulation may be binding on both parties, for the purposes of derivative citizenship the divorced parent must be awarded custody by a court of law or other appropriate government entity to be recognized as having legal custody. Here, the court of law granted sole custody to the Applicant's mother. We conclude therefore that the father did not have legal custody of the Applicant despite the parents' out-of-court agreement to co-parent the children.

B. Physical Custody

We also find the evidence insufficient to show that the Applicant met the physical custody requirement of section 320(a)(3) of the Act through actual residence with his father.

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).

The record in this case does not establish that the Applicant resided with his father as a lawful permanent resident. While the Applicant stated on the Form N-600, Application for Certificate of Citizenship, filed in April 2016 that he lived with his father in [redacted] New Jersey, the Applicant has not submitted evidence, such as identity documents, school, tax, lease, mortgage, or other records to support this statement. Furthermore, the Applicant's previous representations regarding his residence with the father contradict the information the father provided in naturalization

[2] Webster's New College Dictionary (3rd ed. 2008).

proceedings concerning his residence during the same time period, and other documents in the record.

Specifically, the Applicant and his father submitted separate Forms G-325A, Biographic Information, in connection with the Applicant's adjustment of status. They both represented that they have been residing together in [redacted] New Jersey, since June 2014, through the date they signed the forms in June 2015. However, USCIS records show that on the Form N-400, Application for Naturalization, he filed in October 2014, the Applicant's father claimed that he had been residing with his U.S. citizen spouse in [redacted] New Jersey, since January 2014 and as of the time of his naturalization in February 2015. Moreover, on the Form I-130 the father filed on the Applicant's behalf in December 2014, he also represented he resided in [redacted] while the Applicant lived in [redacted] Finally, the information on the father's 2014 Form 1040A, U.S. Individual Income Tax Return indicates he claimed that he and his spouse lived together in [redacted] in 2014.[3]

Accordingly, their representations about the common residence between June 2014 and June 2015 are inconsistent with his father's claims regarding residence with his spouse between January 2014 and February 2015 in naturalization proceedings. The Applicant must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* The Applicant has not addressed the contradictory information about his claimed residence with his father in the application or on appeal, nor has he provided documentation to support assertions of shared residence. The information on the instant Form N-600 indicates that as of the time it was filed in April 2016, the father was still married to his U.S. citizen spouse, and that she continued to live in [redacted] The Applicant has not provided information about the timing of the father's claimed residence in [redacted]

We conclude, therefore, that the Applicant has not shown he resided with his father from the time he obtained permanent resident status in March 2016 until his 18th birthday in [redacted]

IV. CONCLUSION

The Applicant has not established that he derived U.S. citizenship from his father because he has not demonstrated that he resided in his father's legal and physical custody in the United States as a lawful permanent resident before he turned 18 years of age. Accordingly, the Applicant is not eligible for a Certificate of Citizenship.

[3] The record also includes copies of the father's 2015 payroll records listing another address in [redacted] New Jersey, where the father claimed to have previously resided with his U.S. citizen spouse. The father indicated on the Form N-400 and the 2015 Form G-325A that he had not resided at that address since December 2013.

ORDER: The appeal is dismissed.

Cite as *Matter of S-A-R-*, ID# 224102 (AAO Apr. 19, 2017)