U.S. Citizenship and Immigration Services

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

MATTER OF O-E-C-L-

DATE: JULY 19, 2017

APPEAL OF HIALEAH, FLORIDA FIELD OFFICE DECISION

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

The Applicant, who was born in Mexico in seeks a Certificate of Citizenship indicating that he derived U.S. citizenship from his mother. *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. An individual who, like the Applicant, was born after February 27, 1983, and is claiming automatic derivative U.S. citizenship, must establish that he or she had at least one U.S. citizen parent and was residing in that parent's legal and physical custody in the United States as a lawful permanent resident before turning 18 years of age.

The Director of the Hialeah, Florida, Field Office denied the application, concluding that the Applicant did not provide required documentation to establish eligibility for a Certificate of Citizenship.

On appeal, the Applicant resubmits some of the evidence to overcome the reason for the denial.

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

## I. LAW

The Applicant was born in in Mexico to foreign national parents. He came to the United States with his mother and obtained lawful permanent resident status as her derivative in November 2010, when he was years old. The Applicant's parents were subsequently divorced in Florida in 2015. A year later, when the Applicant was years old, his mother became a U.S. citizen through naturalization.

To determine whether the Applicant derived U.S. citizenship based on the above 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 naturalization of the Applicant's mother in 2016. His citizenship claim must therefore 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, and currently in effect. Section 320 of the Act states, 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.

Section 101(c)(1) of the Act, 8 U.S.C. § 1101(c)(1), provides that the term "child," as used in section 320 of the Act, means "an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere . . ., if such legitimation . . . takes place before the child reaches the age of 16 years . . ., and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation."

The regulation at 8 C.F.R. § 320.1 defines the term "legal custody" in section 320(a)(3) of the Act as responsibility for and authority over a child. The regulation further provides that if the child's parents are divorced, U.S. Citizenship and Immigration Services 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).

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).

## II. ANALYSIS

There is no dispute that the Applicant has satisfied some of the above conditions for derivative citizenship, as the record reflects he is currently under the age of [redacted] he has a U.S. citizen mother, and he is residing in the United States as a lawful permanent resident. The remaining issues are whether the Applicant has demonstrated that he is a "child" for derivative citizenship purposes and, if so, whether he is residing in his mother's legal and physical custody.

To establish that he derived citizenship from his mother, the Applicant initially submitted copies of his birth certificate, his mother's naturalization certificate, and the mother's tax and social benefits documents, on which he was listed as her dependent household member. He also provided a copy of the 2015 Florida court judgment of dissolution of his parents' marriage, which awarded sole parental

responsibility for the Applicant to his mother. The judgment further states that the mother was granted full "time-sharing"[1] with the Applicant.

The Director determined that these documents were insufficient, and requested the Applicant to submit additional evidence, including the parents' marriage certificate and a divorce decree with marital settlement agreement and custody order, as well as passport-style photographs which were required, but not provided with the application. Because the Applicant did not respond to the request, the Director concluded the Applicant did not establish eligibility for a Certificate of Citizenship.[2]

On appeal, the Applicant resubmits the documents pertaining to his residence in Florida with the mother. We find that the evidence originally provided is sufficient to demonstrate that the Applicant has satisfied the substantive requirements of section 320 of the Act to derive U.S. citizenship from his mother.

A. Definition of a Child for the Purposes of Derivative Citizenship

The Applicant has demonstrated that he is a "child" for the purposes of derivative citizenship under section 320 of the Act despite the fact he has not submitted a copy of his parents' marriage certificate requested by the Director.

The definition of a child in section 101(c)(1) of the Act encompasses children born to married parents, as well as those who have been born out of wedlock but legitimated prior to reaching the age of 16 years. The Applicant's birth certificate, which identifies his parents and shows they jointly registered his birth, establishes he is his mother's biological child. While the certificate does not indicate the parents' marital status, and the Applicant has not submitted proof of their marriage, the Florida court marriage dissolution judgment is in itself evidence that the parents were married.[3] Thus, even if the Applicant was born out of wedlock, he was subsequently legitimated by his parents' marriage, which must have occurred before their divorce in 2015. Because the Applicant was under 16 years of age then, he meets the statutory definition of a "child" in section 101(c)(1) of the Act regardless of whether he was born to married parents, or legitimated by their marriage after birth.

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[1] In 2008, the Florida Legislature abolished the concept of custody and replaced it with the concept of parenting plans and time-sharing. *Schwieterman v. Schwieterman*, 114 So. 3d 984, 986 (Fla. 4th DCA 2012), citing *Bainbridge v. Pratt*, 68 So. 3d 310 (Fla. 1st DCA 2011). *See also* Fla. Stat. Ann. § 61.13(2)(c).

[2] The regulations at 8 C.F.R. § 103.2(b)(13)(i) provide that if material necessary for processing and approval of a case, such as photographs, is not submitted by the requested date, the application may be summarily denied as abandoned. This reason for denial has been overcome, as the Applicant provided passport-style photographs in response to our request for evidence.

[3] *See generally* Fla. Stat. Ann § 60.052, which provides that no judgment of dissolution of marriage may be granted unless the court finds that the marriage is irretrievably broken. Thus, dissolution of marriage presupposes existence of a valid marriage.

Based on the above, we find that although the Applicant did not submit primary evidence of the parents' marriage, he has nevertheless sufficiently demonstrated that he is his mother's "child" for the purposes of derivative citizenship under section 320 of the Act.

B. Legal Custody

The Applicant has also established that his mother has legal custody. As stated above, the regulations provide that legal custody is presumed in case of a divorced U.S. citizen parent, where there has been an award of primary care, control, and maintenance of a minor child to that parent by a court of law pursuant to the laws of the state or country of the parent's residence. Here, the circuit court in Florida, where the Applicant's mother resided and continues to reside, issued a judgment dissolving her marriage to the Applicant's father, and awarded her sole parental responsibility for the Applicant. There is nothing in the record to suggest that this custody award was subsequently changed or modified. We conclude, therefore, that the Applicant has demonstrated his mother has legal custody.

C. Physical Custody

Moreover, the evidence is sufficient to show that the Applicant is residing in the United States in the physical custody of his mother. First, the court's judgment reflects that the mother was to have one hundred percent "time-sharing" with the Applicant. Further, the Applicant's representations on various immigration forms, including the instant application, indicate that he has been residing with his mother in Florida since 2009. In addition, the Applicant has submitted evidence that in 2016 he was included as his mother's household member eligible to receive benefits under the Florida Department of Children & Families assistance program, and that his mother claimed him as a dependent on her 2015 federal tax return. This evidence is sufficient for us to conclude that the Applicant has satisfied the physical custody requirement through judicial award and also through actual residence with his mother.[4]

## III. CONCLUSION

The Applicant has demonstrated by a preponderance of the evidence that he has satisfied all requirements to derive citizenship from his U.S. citizen mother. The Applicant is therefore eligible for a Certificate of Citizenship.

**ORDER:** The appeal is sustained.

Cite as *Matter of O-E-C-L-*, ID# 353729 (AAO July 19, 2017)

[4] 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 (3d Cir. 2005).