



**U.S. Citizenship  
and Immigration  
Services**

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

MATTER OF E-F-S-

DATE: MAY 5, 2017

APPEAL OF MIAMI, FLORIDA FIELD OFFICE DECISION

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

The Applicant's father, a citizen of the United States, seeks a Certificate of Citizenship on behalf of his child who was born on [REDACTED]. See Immigration and Nationality Act (the Act) section 322, 8 U.S.C. § 1433. A U.S. citizen parent may apply for a Certificate of Citizenship on behalf of a child residing outside the United States if the child is residing in the U.S. citizen parent's custody, and that parent, or their U.S. citizen parent, had been physically present in the United States for 5 years, 2 of which were after the parent turned 14 years old.

The Director of the Miami, Florida, Field Office denied the application. The Director concluded that the record contained insufficient evidence to demonstrate that the Applicant's U.S. citizen parent or grandparent was physically present in the United States for 5 years, at least 2 after turning 14 years of age, as required under section 322 of the Act.

On appeal, the Applicant submits additional evidence and claims that the Director erred in not approving her Form N-600K, Application for Citizenship and Issuance of Certificate under Section 322. She asserts she has shown that her U.S. citizen paternal grandfather was physically present in the United States for over 5 years, at least 2 after turning 14 years of age, and consequently she satisfied requirements for issuance of a Certificate of Citizenship.

Upon *de novo* review, we find the Applicant has met her burden of proof on the physical presence requirements, and we remand the matter to the Director for further proceedings consistent with this decision.

**I. LAW**

As amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 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 [Secretary of Homeland Security] shall issue a

certificate of citizenship to such applicant upon proof, to the satisfaction of the [Secretary], that the following conditions have been fulfilled:

- (1) At least one parent . . . is a citizen of the United States, whether by birth or naturalization.
- (2) The United States citizen--
  - (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; or
  - (B) has . . . a citizen parent who 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.

(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 [Secretary] with a certificate of citizenship.

The regulation at 8 C.F.R. § 322.1(1) provides 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. Absent evidence to the contrary, one such presumption occurs 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).”

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 “preponderance of the evidence” standard requires that the record demonstrate that the Applicant’s claim is “probably true,” based on the specific facts of his case. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r. 1989)).

## II. ANALYSIS

The primary issue in this case is whether the Applicant has demonstrated, by a preponderance of the evidence, that her U.S. citizen paternal grandfather was physically present in the United States for at least 5 years, at least 2 of which occurred after turning 14, as required under section 322(a)(2)(B) of the Act.<sup>1</sup> A secondary issue is whether the Applicant has established that she resides outside of the United States in her citizen father's legal and physical custody, which is a condition under section 322(a)(4) of the Act.<sup>2</sup>

The Applicant asserts she has demonstrated that her grandfather was physically present in the United States for the period required under the Act. In support, she submits birth, marriage, and death certificates; military and social security earnings records; employment, income, and home mortgage documentation; medical records; and Department of State documentation related to her father's birth abroad. We find upon review, including review of the new evidence submitted on appeal, that the Applicant has sufficiently established that her paternal grandfather met U.S. physical presence requirements set forth in section 322(a)(2)(B) of the Act. However, the record still lacks sufficient evidence that the Applicant resides in her U.S. citizen parent's legal and physical custody.

### A. Physical Presence of the U.S. Citizen Grandparent in the United States for 5 Years, at Least 2 of Which Were After Attaining the Age of 14

The cumulative evidence in the record now establishes that the Applicant's U.S. citizen grandparent was physically present in the United States for 5 years, at least 2 of which were after he turned 14 on [REDACTED]. A Form FS-240, Report of Birth Abroad of a Citizen of the United States of America, reflects that in October 1972, the Applicant's grandfather told Department of State officials that he was physically present in the United States between December 18, 1944, and January 1965, and that he served in the [REDACTED] abroad from [REDACTED] 1965 until [REDACTED] 1967. He then provided a United States address in [REDACTED] Missouri, and a French address as of October 1972. To corroborate these claims, the record contains a birth certificate showing the Applicant's paternal grandfather was born a U.S. citizen in Virginia on [REDACTED]. United States military records show further that in [REDACTED] 1964, the Applicant's grandfather began active service in the [REDACTED] in [REDACTED] Missouri, and that he was honorably discharged in Germany in [REDACTED] 1967. Information on the grandfather's social security earnings statement shows pre-military U.S. earnings beginning in 1960 and continuing every year through 1965. This combined documentation sufficiently demonstrates that the Applicant's grandfather was physically present in the United States in [REDACTED] and for at least four years between 1960 and 1964. The grandfather's second wife and their

<sup>1</sup> The Applicant does not claim that her U.S. citizen father was physically present in the United States, as required under section 322(a)(2)(A) of the Act, and the record does not contain evidence to demonstrate physical presence.

<sup>2</sup> Birth, marriage, and Department of State report of birth abroad evidence shows the biological and legitimate parent-child relationships between the Applicant and her father, and between the Applicant's father and paternal grandfather. The Applicant meets section 322(a)(1) of the Act requirements, as U.S. passport and Department of State report of birth abroad evidence demonstrate her father is a U.S. citizen. In addition, the Applicant's birth certificate demonstrates she is a minor, born in [REDACTED]. She therefore also satisfies section 322(a)(3) of the Act age requirements.

daughter state further, in affidavits, that they lived together with the grandfather in Florida from 1993 until his death in [REDACTED]. In support, the record contains a social security earnings statement showing the grandfather earned the following salaries between 1993 and 1996:

1993 - \$6847	1994 - \$22, 586
1995 - \$5021	1996 - \$5000.00

In addition, mortgage statements, property tax, and home insurance documentation reflect the couple owned a home in Florida in 1999 and in 2004. The record also contains medical documentation and disability pension evidence showing the Applicant's grandfather received pension payments at his home in Florida in 2002, and that he received ongoing medical care in Florida from January 2001 through at least December 2003. Death certificate evidence, showing the grandfather passed away in Pennsylvania in [REDACTED] also refers to his Florida residence.

Upon review we find the record now demonstrates, by a preponderance of the evidence, that the Applicant's U.S. citizen paternal grandfather was physically present in the United States for 5 years, at least 2 years of which occurred after he turned 14, on [REDACTED]. Accordingly, the Applicant has satisfied the conditions set forth in section 322(a)(2)(B) of the Act.

#### B. Residence Outside the United States in the Legal and Physical Custody of the U.S. Citizen Parent

The Applicant has not, however, shown she meets requirements that she reside abroad in the legal and physical custody of her U.S. citizen father. Again, the regulation at 8 C.F.R. § 322.1(1)(i) provides that 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)." 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 Applicant's birth certificate identifies her biological parents, and marriage certificate evidence for her parents shows they married in 2002. However, to fulfill the physical and legal custody conditions, she must also demonstrate she currently resides with his U.S. citizen father.

#### C. Temporary Presence in the United States Pursuant to a Lawful Admission, and Maintenance of Such Lawful Status

Section 322(a)(5) of the Act requires the child to be temporarily present in the United States pursuant to a lawful admission. The regulation at 8 C.F.R. § 322.4 provides that the U.S. citizen parent and the child must appear in person before a U.S. Citizenship and Immigration Services

Officer for examination on the application under section 322 of the Act. Here, the record reflects that the Applicant and her father are in France. This matter will therefore be returned to the Miami, Florida Field Office to schedule an interview on the Applicant's Form N-600K application.

### III. CONCLUSION

The Applicant has demonstrated that her U.S. citizen paternal grandfather was physically present in the United States for over 5 years, at least 2 years of which occurred after he turned 14, as required under section 322(a)(2)(B) of the Act. Therefore, she has overcome the Director's ground for denying the N-600K. However, she must also show that she resides outside the United States in her U.S. citizen father's legal and physical custody to fulfill section 322(a)(4) of the Act conditions. If she can meet her burden of proof on this issue, upon lawful admission into the United States, and maintenance of such status, she may be eligible for issuance of a Certificate of Citizenship pursuant to section 322 of the Act. Accordingly, we remand the matter to the Director for scheduling of an interview to fulfill the requirements under section 322(a)(4) and 322(b) of the Act.

**ORDER:** The decision of the Director of the Miami, Florida Field Office is withdrawn. The matter is remanded to the Director of the Miami Field Office for further proceedings consistent with the foregoing opinion and for entry of a new decision.

Cite as *Matter of E-F-S-*, ID# 287709 (AAO May 5, 2017)