U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-M-S-M-

DATE: APR. 25, 2018

APPEAL OF EL PASO, TEXAS FIELD OFFICE DECISION

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

The Applicant, who was born to unmarried parents in Mexico in 2005, seeks a Certificate of Citizenship indicating that he derived citizenship from his naturalized U.S. citizen father. Immigration and Nationality Act (the Act) section 320, 8 U.S.C. § 1431. Generally, to establish derivative U.S. citizenship after birth an individual who was born abroad after February 27, 1983, must show 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 El Paso, Texas Field Office denied the application, concluding that the Applicant did not demonstrate he derived U.S. citizenship because he did not respond to a request for evidence (RFE) asking him to provide proof of a blood relationship between him and his U.S. citizen father.

On appeal, the Applicant submits additional evidence, including DNA test results, school, and residential records, and asserts that he is eligible to derive U.S. citizenship because he is residing in his father's custody in the United States.

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

I. LAW

For derivative citizenship purposes, 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 Applicant's father became a U.S. citizen through naturalization in 2013, the Applicant was admitted to the United States for permanent residence in 2016, when he was 10 years old, and he is currently under the age of 18 years. Accordingly, section 320 of the Act, as amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (CCA), governs his derivative citizenship claim. 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.

The term "child" means a person who meets the requirements of section 101(c)(1) of the Act, 8 U.S.C. § 1101(c)(1). 8 C.F.R. § 320.1. Section 101(c)(1) of the Act defines "child," as an unmarried person under twenty-one years of age, including 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.

II. ANALYSIS

It is undisputed that the Applicant has fulfilled some of the conditions for derivative citizenship under section 320 of the Act, as he is a lawful permanent resident, and he is under the age of 18 years. The remaining issues, therefore, are whether the Applicant has demonstrated that he is his father's "child," residing in his legal and physical custody in the United States, as required under section 320(a)(3) of the Act.

The Director determined that the Applicant did not demonstrate he was eligible to derive citizenship from his father because he did not submit evidence to establish that there was a biological parent--child relationship between them.

The Applicant now submits DNA test results which establish paternity. He also provides school records and a residential lease affidavit to show that he is residing with his father in Texas.

We have reviewed the entire record, including the additional evidence the Applicant submits on appeal, and find it is sufficient to establish that he is his father's "child," residing in the United States in his physical and legal custody as a lawful permanent resident. The Applicant has therefore demonstrated that he satisfies the requirements for derivative citizenship under section 320 of the Act.

A. The Applicant is a "Child" as Defined in the Act

The record includes the Applicant's birth certificate, which identifies his father, and DNA test results confirm that he is his father's biological child. However, because the Applicant was born to unmarried parents, we must next determine whether he was legitimated before the age of 16, as

required to meet the definition of a "child" in section 101(c)(1) of the Act. The Board of Immigration Appeals (the Board) has held that a person born out of wedlock may qualify as a legitimated child of his or her biological parents under that section for purposes of derivative citizenship if he or she was born in a country or State that had eliminated legal distinctions between children based on the marital status of their parents or had residence or domicile in such country or State (including a State within the United States), if otherwise eligible. *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015). The evidence shows the Applicant was legitimated in Texas, where he resides. As such, it is not necessary to determine whether he was also legitimated in Mexico.

1. Legitimation in Texas

The Applicant represented on the Form N-600 that he is residing in Texas with his father, and the Texas school and residential records he submits on appeal support this representation. We find this evidence sufficient to establish that the Applicant was legitimated by virtue of his residence in Texas, as there are no legal distinctions between children born to married and unmarried parents under Texas law, and the Applicant is currently under 16 years of age. Specifically, section 160.202 of the Texas Family Code provides that "[a] child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other." For these reasons, we conclude he qualifies as his father's "legitimated child" under section 101(c)(1) of the Act pursuant to the provisions of Texas law and the Board's interpretation of that term in *Matter of Cross*, *supra*.

B. Legal Custody

The Applicant has also demonstrated that his father has legal custody. Pursuant to the regulation at 8 C.F.R. § 320.1(1)(iii), USCIS will presume that the U.S. citizen parent has legal custody of a child in the case of a biological child born out of wedlock who has been legitimated, and who currently resides with the natural parent. We find this presumption has been met here. As discussed above, the Applicant has been legitimated under Texas law through his residence in that State. Moreover, the evidence is sufficient to show that the Applicant has been residing in Texas with his U.S. citizen father since he was admitted to the United States as a lawful permanent resident in 2016. The Applicant indicated on his immigrant visa application that he was coming to United States to live with his father in Texas, at the address which is also listed on his Form N-600, his 2016 school records, and the lease affidavit confirming that he resides with his father. Accordingly, because the Applicant is his father's legitimated child and the record reflects they live together, the legal custody requirement under section 320(a)(3) of the Act has been satisfied.

C. Physical Custody

The same evidence is also sufficient to demonstrate that the Applicant is residing in Texas in his father's physical custody. Neither the Act nor the regulations define the term "physical custody." However, U.S. federal courts and the Board have considered physical custody in the context of "actual uncontested custody" in derivative citizenship proceedings, and interpreted it to mean actual

residence with the parent. *See Bagot v. Ashcroft*, 398 F.3d 252, 267 (3d Cir. 2005) (finding that a child was in the parent's "actual physical custody" where the child lived with the parent and no one disputed the parent's custody); *Matter of M-*, 3 I&N Dec. 850, 856 (BIA 1950) (holding that the parent had "actual uncontested custody" of a child where the parent lived with the child, took care of the child, and the other parent consented to his arrangement). Here, the Applicant's school and residential records referenced above indicate that he lives in Texas with his father. We conclude, therefore, that the Applicant has satisfied the physical custody requirement of section 320(a)(3) of the Act through actual residence with his father.

III. CONCLUSION

The Applicant has demonstrated by a preponderance of the evidence that he is under 18 years of age and has fulfilled all of the conditions for derivative U.S. citizenship in section 320 of the Act. Accordingly, he is eligible for a Certificate of Citizenship.

ORDER: The appeal is sustained.

Cite as *Matter of J-M-S-M-*, ID# 1151992 (AAO Apr. 25, 2018)