U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-R-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 out of wedlock in Mexico in 2007, seeks a Certificate of Citizenship indicating that she derived citizenship from her 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 evidence was insufficient to establish that the Applicant resided in the United States in the legal and physical custody of her U.S. citizen father.

On appeal, the Applicant submits additional evidence, including school and medical records, and asserts that she has satisfied the custody requirement.

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, she was admitted to the United States for permanent residence in 2016, when she was eight years old, and she 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 her 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 several conditions for derivative citizenship under section 320 of the Act, as she is under the age of 18 years, has a U.S. citizen father, and was admitted to the United States as a lawful permanent resident. The remaining issues, therefore, are whether the Applicant has demonstrated that she is her 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 has not shown she met the custody requirement, because the notarized statement from her mother was insufficient to establish that the father had legal custody, and she also did not provide evidence to show she was in his physical custody.

The Applicant now submits her Texas school and vaccination records, and indicates that she has been residing with her father in Texas, and has been in his custody since she was admitted to the United States as a lawful permanent resident.

We have reviewed the entire record, including the additional evidence the Applicant submits on appeal, and find it is sufficient to establish that she is her father's "child," and that she is residing in the United States as a lawful permanent resident in his legal and physical custody.

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

There is no dispute that the Applicant is her father's biological child, as the record includes her birth certificate, which identifies her father, and DNA test results, which further confirm paternity. However, because the Applicant was born to unmarried parents, we must next determine whether she 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 she resides. As such, it is not necessary to determine whether she was also legitimated in Mexico.

1. Legitimation in Texas

The Applicant represented on the Form N-600 that she is residing in Texas with her father and the Texas school and medical records she submits on appeal support this representation. We find this evidence sufficient to establish that the Applicant was legitimated by virtue of her 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." Thus, we conclude she qualifies as her 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 her 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 her residence in that State. Moreover, the evidence is sufficient to show that she has been residing in Texas with her U.S. citizen father since she was admitted to the United States as a lawful permanent resident in 2016. The Applicant indicated on her immigrant visa application that she was coming to United States to live with her father in Texas, at the address which is also listed on her Form N-600 and her 2016 school and vaccination records. In addition, the previously-submitted copies of her father's 2015 Texas driver's license and voter registration certificate show the same address. Accordingly, because the Applicant is her 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 her 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, as discussed above the Applicant's school and medical records as well as her father's identification documents referenced above indicate that she lives with her father in Texas. We conclude, therefore, that the Applicant has satisfied the physical custody requirement of section 320(a)(3) of the Act through actual residence with her father.

III. CONCLUSION

The Applicant has demonstrated by a preponderance of the evidence that she 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, she is eligible for a Certificate of Citizenship.

ORDER: The appeal is sustained.

Cite as *Matter of M-R-S-M-*, ID# 1152118 (AAO Apr. 25, 2018)