U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-P-H-

DATE: APR. 25, 2018

APPEAL OF TAMPA, FLORIDA FIELD OFFICE DECISION

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

The Applicant, who was born to foreign national parents in Taiwan in 1979, seeks a Certificate of Citizenship indicating that he derived U.S. citizenship when his father naturalized. Immigration and Nationality Act (the Act) section 321, 8 U.S.C. § 1432, *repealed by* Sec. 103(a), title I, Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000). To establish derivative citizenship under former section 321 of the Act, an individual who was born to foreign national parents between December 24, 1952, and February 27, 1983, must show that he or she resided in the United States as a lawful permanent resident, and both parents became U.S. citizens through naturalization while the individual was under the age of 18 years. If only one parent naturalized before the individual's 18th birthday, the individual may still derive citizenship provided one of the following conditions is met: that individual's non-naturalized parent is deceased; the naturalized parent has custody over the individual after a legal separation or divorce; or, if the individual was born to unmarried parents and is claiming to be a U.S. citizen through a naturalized mother, the father must not have made the individual his legitimate child.

The Director of the Tampa, Florida Field Office denied the Form N-600, concluding that Applicant did not derive U.S. citizenship under former section 321 of the Act because there was no evidence that his mother naturalized prior to his 18th birthday, nor did the record show that his naturalized U.S. citizen father had legal custody over the Applicant after the parents divorced.[1]

On appeal, the Applicant asserts that the Director failed to consider his primary residence in making a legal custody determination and generally misinterpreted the provisions of former section 321 of the Act.

Upon *de novo* review, we will sustain the appeal. The preponderance of the evidence indicates that the Applicant satisfied all of the conditions to derive U.S. citizenship solely from his father under former section 321 of the Act before he turned 18 years of age.

[1] The Director also found that the Applicant did not derive citizenship from his father pursuant to section 320 of the Act, 8 U.S.C. § 1431, because he was over 18 years old when the law went into effect on February 27, 2001. The Applicant does not contest this determination on appeal, and the record does not indicate that it was incorrect. Accordingly, we do not address the Applicant's eligibility for derivative citizenship under section 320 of the Act.

I. LAW

The record reflects that the Applicant was admitted to the United States for permanent residence in 1982, at the age of 3 years, his parents divorced in 1992, and his father naturalized in 1995, when the Applicant was 16 years old.

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 last relevant critical event in this case is the naturalization of the Applicant's father, which occurred when he was under the age of 18 years, and when former section 321 of the Act was in effect. Accordingly, we must consider the Applicant's derivative citizenship claim under former section 321 of the Act, which provided in pertinent part that:

> (a) A child born outside of the United States of alien parents . . . becomes a citizen of the United States upon fulfillment of the following conditions:
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> (1) The naturalization of both parents; or
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> (2) The naturalization of the surviving parent if one of the parents is deceased; or
>
> (3) *The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents* or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if-
>
> (4) Such naturalization takes place while such child is under the age of 18 years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years (emphasis added).

For derivative citizenship purposes, the term "child" includes children who were born to married parents, as well as those who have been 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. Section 101(c)(1) of the Act, 8 U.S.C. § 1101(c)(1).

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 fulfilled several conditions to derive U.S. citizenship from his father[2] under former section 321 of the Act, as he was under the age of 18 years when he began residing in the United States as a lawful permanent resident, when his parents divorced, and when his father became a U.S. citizen through naturalization. The remaining issues, therefore, are whether the Applicant has demonstrated that prior to his 18th birthday in 1997 he qualified as his father's "child," and that his father had legal custody after the parents divorced.

The Director determined that the Applicant did not derive U.S. citizenship from his father because the court designated his mother as a "primary residential parent" and awarded legal custody to both parents, and the father therefore was not the *only* parent with legal custody.

The Applicant asserts generally that the Director misinterpreted the provisions of former section 321 of the Act and erred by denying the application without considering his primary residence.

We have reviewed the entire record, and find the evidence sufficient to establish that prior to his 18th birthday the Applicant was his father's "child," resided in the United States as a lawful permanent resident, and the father had qualifying legal custody following the parents' divorce. The Applicant has therefore demonstrated that he satisfied all of the requirements to derive U.S. citizenship solely from his father under former section 321 of the Act.

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

As stated above, the definition of a "child" for the purposes of derivative citizenship encompasses children born in wedlock, as well as those born out of wedlock and legitimated while under the age of 16 years. Although the evidence is insufficient to determine whether the Applicant was born in wedlock, it shows that he was legitimated through his parents' marriage before he was 16 years old.

The Applicant represented on the Form N-600 that his parents were married at the time he was born in [redacted] 1979, but he has not submitted a copy their marriage certificate and the evidence is insufficient to determine the actual date they were married. Specifically, the parents' 1992 Florida divorce judgment states that their marriage took place in [redacted] 1979, a few months after the Applicant's birth, while the accompanying separation agreement indicates that they were married prior to his birth, in [redacted] 1967. Nevertheless, the Taiwanese household certificate issued in [redacted] 1979 refers to the Applicant's parents as "spouses," which indicates that they were married at

[2] The Applicant does not claim derivative citizenship under former section 321(a)(1), (a)(2), or (a)(3) (second clause) of the Act, and the evidence does not show that his mother naturalized, or that she passed away before he was 18 years old.

the time. This evidence is sufficient to show that the parents were married before the Applicant turned 16 years of age.[3] Under the Civil Code of the Republic of China, in effect since 1931, a child born out of wedlock whose natural father and mother have concluded a marriage to each other is deemed to be legitimate.[4] The Applicant therefore qualifies as a "child" regardless of whether he was born in wedlock, or if he was born out of wedlock and subsequently legitimated through the parents' marriage.

B. Legal Custody

To establish that he derived U.S. citizenship solely from his father, however, the Applicant must also show that his parents were legally separated, and that his father had legal custody, as required under former section 321(a)(3) of the Act.

The Director's found that the Applicant did not meet this requirement because the divorce court awarded *joint*, rather than *sole* legal custody to his father. We find, however, that in the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit where these proceedings arise, an award of joint legal custody by the court is sufficient to satisfy the naturalized parent's legal custody requirement in former section 321(a)(3) of the Act.

The term, "legal separation" means "either a limited or absolute divorce obtained through judicial proceedings." *Matter of H*, 3 I&N Dec. 742, 744 (BIA 1949). The divorce judgment in the record issued by a Florida court is evidence that the Applicant's parents were divorced in 1992, when the Applicant was 13 years old. Accordingly, the "legal separation" condition in former section 321(a)(3) of the Act has been met.

The next question is whether the Applicant's father had legal custody after his parents legally separated and before he turned 18 years old in 1997. Legal custody vests "[b]y virtue of either a natural right or a court decree." *Matter of Harris*, 15 I&N Dec. 39, 41 (BIA 1970). The divorce decree in this case includes the following order regarding custody:

> The Husband and Wife shall share parental responsibility for the minor child [the Applicant]. Each party will continue to have a full and active role in providing a sound moral, social, economic and educational environment for the child. Each will consult with the other on substantial questions relating to living arrangements, travel and transportation, educational programs, financial, moral, social and recreational matters, and medical and dental care. Each will exert his or her best efforts to work cooperatively in the future plans consistent with the best interest of the child and in

[3] USCIS records show that the Applicant's father was admitted to the United States as a derivative spouse of the Applicant's mother in 1982, which further indicates that his parents were married before he turned 16 years of age.

[4] Article 1064 of the Republic of China Civil Code, available at Ministry of Justice, Taiwan, *Laws & Regulations Database of the Republic of China*, http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=B0000001.

> amicably resolving any disputes that arise. The Wife shall be the Primary Residential Parent. The Husband shall have visitation. . . .

Pursuant to section 61.13(2)(b) of the Florida Statutes, as in effect at the time of the divorce, the court was obligated to order shared parental responsibility for a minor child unless it found that such shared parental responsibility would be detrimental to the child. "Shared parental responsibility" meant a court-ordered relationship in which both parents retained *full parental rights and responsibilities with respect to their child* and in which both parents conferred with each other so that major decisions affecting the welfare of the child were determined jointly. Fla. Stat. Ann. § 61.046(11) (West 1992)(emphasis added).

Accordingly, as the court granted shared parental responsibility, the Applicant's father had "full parental rights and responsibilities" and, thus, legal custody over the Applicant under Florida law. Under those circumstances, the award of joint legal custody to the Applicant's father, satisfies the legal custody condition in former section 321(a)(3) of the Act.[5]

We recognize that the U.S. Fifth and Ninth Circuit Courts of Appeals held in *Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006), and *U.S. v. Casasola*, 670 F.3d 1023 (9th Cir. 2012) that a grant of "joint" legal custody is insufficient to satisfy the legal custody requirement in former section 321(a)(3) of the Act. However, outside of the Fifth and Ninth Circuit the naturalized parent is not required to have *sole* legal custody over a child subsequent to a legal separation in order to satisfy the custody condition in former section 321(a)(3) of the Act. *See e.g., Fierro v. Reno*, 217 F.3d 1, 4 (1st Cir. 2000) (providing that the requirement of legal custody in former section 321 of the Act "should be taken presumptively to mean legal custody under the law of the state in question.") Because the Applicant's derivative citizenship proceedings arise within the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit, *Bustamante-Barrera and Casasola* are not binding in his case. While the Eleventh Circuit has not interpreted the legal custody requirement under former section 321(a)(3) of the Act, the plain language of that section does not indicate that the naturalized parent must have *sole* legal custody. Rather, a child will derive U.S. citizenship under that section upon "the naturalization of the parent having legal custody of the child when there has been a legal separation of the parents."[6]

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[5] In cases where legally separated parents have no formal judicial custody order, the parent having actual, uncontested custody will be regarded as having "legal custody" of the child. *Matter of M-*, 3 I&N Dec. 850, 856 (BIA 1950). We acknowledge the Applicant's claim that his primary residence after the divorce was with his father; however, the child's actual residence is relevant only in the analysis of legal custody under actual, uncontested custody criteria. Because there is a judicial custody order in this case, the Applicant's residence following the divorce has no bearing on the legal custody determination.

[6] U.S. Department of State's guidance reflects the same interpretation, and provides that "[s]ection 321 does not require sole or exclusive legal custody. If the parents have a joint custody decree, then both parents have legal custody." Passport Bulletin 96-18, U.S. Department of State (Nov. 6,1996), reprinted at 2 Bender's Immigr. Bull. 544 (July 1, 1997).

III. CONCLUSION

Based on the above, we conclude that the father had legal custody of the Applicant following the legal separation of the parents, as required in former section 321(a)(3) of the Act. Because the Applicant has also satisfied the remaining conditions under that section concerning age and lawful permanent residence in the United States, we find that he has established he derived U.S. citizenship from his father. He is therefore eligible for issuance of a Certificate of Citizenship.

ORDER: The appeal is sustained.

Cite as *Matter of C-P-H-*, ID# 1501653 (AAO Apr. 25, 2018)