



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

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

In Re: 5168215

Date: DEC. 18, 2019

Appeal of Oakland Park, Florida Field Office Decision

Form N-600, Application for a Certificate of Citizenship

The Applicant seeks a Certificate of Citizenship to reflect that he derived U.S. citizenship from his mother under section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431.

The Director of the Oakland Park, Florida Field Office denied the application, concluding that the Applicant did not establish derivative citizenship under section 320 of the Act, because he did not respond to a request for evidence (RFE) that he resided in the United States in the legal and physical custody of his mother, as required under that section. The Applicant appealed the adverse decision to our office, asserting that that he did not receive the RFE and submitted additional documents in support of his citizenship claim. However, as he indicated that his parents separated before his mother naturalized, we issued another RFE to give him an opportunity to supplement the record and demonstrate that his mother had legal and physical custody over him following the separation. We have received the Applicant's response and consider the record complete.

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. *Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008). Upon *de novo* review, we will sustain the appeal because the Applicant has met this burden.

I. LAW

The Applicant was born abroad in 2003 to married foreign national parents. In 2008, he was admitted to the United States with his parents and siblings as a lawful permanent resident. The Applicant's parents separated in August 2013, when he was 10 years old. Shortly thereafter, in December 2013, his mother naturalized as a U.S. citizen; his father became a U.S. citizen through naturalization several months later, in March 2014. The Applicant filed the instant Form N-600 in 2018, indicating that he derived U.S. citizenship through his mother.

To determine whether the Applicant derived U.S. citizenship from his mother, we apply "the law in effect at the time the critical events giving rise to eligibility occurred." *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005). Because the Applicant is not yet 18 years old, we consider his derivative citizenship claim under section 320 of the Act, as amended by the Child Citizenship Act of

2000, Pub. L. No. 106-395, 114 Stat. 1631 (CCA), and currently in effect. This section 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.

II. ANALYSIS

In this case, the last critical event giving rise to the Applicant's eligibility for derivative citizenship is his mother's naturalization in December 2013. At that time, the Applicant was under the age of 18 years and a lawful permanent resident. The issue we must decide, therefore, is whether the Applicant has established that he had been residing in the United States as a lawful permanent resident in the legal and physical custody of his U.S. citizen mother at the time she naturalized or thereafter.

The Applicant represented on his Form N-600 that his parents were married in 1996, but no longer lived together. On appeal, he explains that in August 2013 he moved to Florida with his mother and has been living with her since. He further states that following the separation his mother took care of him and his siblings, as his father did not seek custody. The supporting evidence includes the Applicant's school records and the mother's federal income tax returns listing the same address. In response to our RFE, the Applicant submits additional school and financial documents, as well as a copy of his parents' divorce decree, which shows that their marriage was dissolved in 2019, and the court awarded sole parental responsibility over him to his mother.¹

We have reviewed the entire record and find the preponderance of the evidence sufficient to show that the Applicant was residing in the United States as a lawful permanent resident in the legal and physical custody of his mother when his mother naturalized. The Applicant has therefore demonstrated that he fulfilled all of the conditions in section 320 of the Act to derive U.S. citizenship upon his mother's naturalization.

¹ We note that the parents' divorce and the related judicial custody award occurred *after* the Applicant filed the instant Form N-600 asserting derivative citizenship through his mother. Pursuant to the regulation at 8 C.F.R. § 103.2(b)(1), an applicant for an immigration benefit must establish eligibility for the requested benefit *at the time of filing* the benefit request. Accordingly, we will consider the divorce decree only as it relates to the court's factual findings concerning the parents' separation.

A. Legal Custody

“Legal custody” refers to the responsibility for and authority over a child. 8 C.F.R. § 320.1. Legal custody is presumed where the child is residing with both natural parents who are married to each other and living in marital union. 8 C.F.R. § 320.1(1). However, U.S. Citizenship and Immigration Services may also consider other factual circumstances to find that a U.S. citizen parent has legal custody for purposes of section 320 of the Act. 8 C.F.R. § 320.1(2).

Here, although the marriage and divorce certificates show that the Applicant’s parents were married from 1996 through 2019, the Applicant states that they did not live together when his mother naturalized. Furthermore, the parents represented in their respective naturalization proceedings that they resided at different addresses, and the divorce court found that they separated in or about August 2013. Accordingly, as the Applicant was not living with both parents when his mother naturalized or thereafter, he does meet the legal custody presumption applicable to children of married parents. Nevertheless, other factual circumstances support a finding that his mother had legal custody within the meaning of section 320(a)(3) of the Act.

The preponderance of the evidence shows that after the Applicant moved to Florida with his mother in August 2013, his mother assumed primary responsibility for his care and education and the father did not object to this arrangement. Specifically, the Applicant’s school records reflect that his mother withdrew him from school in South Carolina in July 2013, and enrolled him in a Florida school later that year. In addition, the Applicant’s address on those records matches the residential address of his mother, identified as his parent and guardian.² The Applicant also submits his mother’s 2013-2018 federal income tax returns, which she filed as a head of household, and on which he and his siblings are included as her dependent household members. This evidence shows that although the Applicant’s parents continued to be married, his mother exercised principal control and authority over the Applicant and his siblings. The record further indicates that the father was aware of and consented to the Applicant’s residence under his mother’s care, as he represented on his own naturalization application filed in November 2013 that the Applicant resided with his mother in Florida. Lastly, the divorce decree reflects the parents agreed that the mother should have sole parental responsibility, which further supports the Applicant’s claim that his father did not seek custody and acquiesced to his residence with his mother after the separation.

Based on the above evidence and specific circumstances of this case, we find that the Applicant’s mother was the parent with primary control and authority over the Applicant and, thus, had legal custody over him when she naturalized in December 2013 and thereafter.³ The Applicant has therefore demonstrated that he meets the legal custody requirement in section 320(a)(3) of the Act.

² Another individual, who is not the Applicant’s father, is also listed as his “parent.”

³ We also note that one of the reasons behind the legal custody requirement in the context of derivative citizenship is to prevent the naturalizing parent from usurping the parental rights of the foreign national parent who may have reasons to prefer the child’s original citizenship. See *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1066 (9th Cir. 2003) (discussing the rationale for the legal separation and custody requirements under former section 321 of the Act, 8 U.S.C. § 1432). There is no such concern here, as both of the Applicant’s parents became naturalized U.S. citizens before his 18th birthday.

B. Physical Custody

The same evidence is also sufficient to establish the mother's physical custody, as it shows that the Applicant has been residing with his mother in Florida since August 2013.

Neither the Act nor the regulations define the term "physical custody." However, U.S. federal courts and the Board of Immigration Appeals 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 at 267 (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. at 856 (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). As stated above, the Applicant's school records and tax documents show that he has been living with his mother in Florida since August 2013. Based on this documentation, we conclude that the Applicant has shown he resided in the United States with his mother as a lawful permanent resident at the time the mother naturalized in December 2013. Thus, he also satisfies the physical custody requirement in section 320(a)(3) of the Act.

III. CONCLUSION

The Applicant has established by a preponderance of the evidence that he has fulfilled all relevant conditions to derive citizenship from his naturalized U.S. citizenship mother, including residence in his mother's legal and physical custody in the United States. Consequently, he has shown that he is eligible for a Certificate of Citizenship.

ORDER: The appeal is sustained.