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U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

*26*

FILE: [REDACTED] Office: PHILADELPHIA, PA Date: **MAR 10 2005**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under Section 322 of the Immigration and Nationality Act; 8 U.S.C. § 1433.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Interim District Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Kenya on May 10, 1992. The applicant's father, [REDACTED] was born in Eritrea, and he became a naturalized U.S. citizen on October 2, 2003, when the applicant was eleven years old. The applicant's mother, Rahel Abbadi, is not a U.S. citizen. The applicant's parents married in Ethiopia on June 9, 1990. They divorced in Ethiopia on October 3, 1994. The applicant presently resides in Kenya and she has not been admitted into the United States. She seeks a certificate of citizenship pursuant to section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433.

The interim district director concluded the applicant had failed to establish that she resided outside of the United States in the legal and physical custody of her U.S. citizen father, as required by section 322 of the Act. The interim district director additionally found that the applicant had failed to establish she resided in the United States pursuant to a lawful admission for permanent residence, and that she was in the legal and physical custody of her U.S. citizen father, as required by section 320 of the Act; 8 U.S.C. § 1431. The application was denied accordingly.

On appeal, the applicant, through her father, concedes that she resides and attends school in Kenya. The applicant's father asserts, however, that he has legal and physical custody of his daughter in Kenya, and that she is therefore eligible for U.S. citizenship.

Section 322 of the Act applies to children born and residing outside of the United States and states, in pertinent part, that:

(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 Attorney General [now Secretary, Homeland Security "Secretary"] shall issue a certificate of citizenship to such applicant upon proof, to the satisfaction of the Attorney General [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 parent--
  - (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 applicant
- (5) The child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

The evidence in the record reflects that the applicant's father resides in the United States and that the applicant resides in the physical custody of her paternal grandmother in Kenya. The applicant thus does not meet the section 322(a)(4) requirement that she reside outside of the U.S. in the physical custody of her U.S. citizen parent.

The AAO finds further that the applicant has failed to establish that she resides in the legal custody of her U.S. citizen father, as set forth in section 322(a)(4) of the Act. The divorce decree contained in the record fails to address legal custody over the applicant. The AAO notes that legal custody vests "by virtue of either a natural right or a court decree". *See Matter of Harris*, 15 I&N Dec. 39 (BIA 1970). In the absence of a judicial determination or grant of custody in a case of a legal separation of the naturalized parent, the parent having actual, uncontested custody of the child is to be regarded as having legal custody. *See Matter of M*, 3 I&N Dec. 850, 856 (BIA 1950). The applicant has failed to establish that she resides with her father, or that he has actual, uncontested custody over the applicant. The applicant has additionally failed to establish that she is temporarily present in the United States pursuant to a lawful admission, as required by section 322(a)(5) of the Act.

The applicant also does not qualify for citizenship under section 320 of the Act. Section 320 of the Act states 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 applicant has failed to establish that she resides in the United States in the legal and physical custody of her U.S. citizen father, or that she has been admitted into the U.S. pursuant to a lawful admission for permanent residence (as an immigrant visa holder).

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met her burden and the appeal will be dismissed.<sup>1</sup>

**ORDER:** The appeal is dismissed.

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<sup>1</sup> As noted in the interim district director's decision, the present AAO decision is also made without prejudice to the U.S. citizen parent filing an Immigrant Visa petition on behalf of the applicant, or to the applicant's filing a new application for a Certificate of Citizenship if she becomes eligible.