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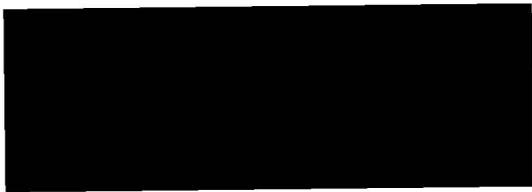
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE:



Office: NEW YORK, NY

Date: JAN 04 2010

IN RE:

Applicant:



APPLICATION:

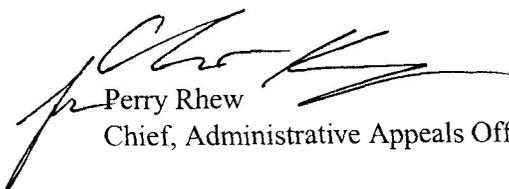
Application for Certificate of Citizenship under Section 322 of the Immigration
and Nationality Act, 8 U.S.C. § 1433.

ON BEHALF OF APPLICANT:



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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born in Canada on May 8, 1994. The applicant's birth certificate indicates that his parents are [REDACTED] and [REDACTED]. The applicant's mother is a native-born U.S. citizen, born in Missouri on March 21, 1961. The applicant's grandmother, [REDACTED] also a native-born U.S. citizen, was physically present in the United States from birth until 1961. The applicant presently seeks a certificate of citizenship pursuant to section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433, claiming to derive U.S. citizenship through his mother and maternal grandmother.

The district director denied the applicant's citizenship claim upon finding that he had failed to establish that he was in his mother's physical custody. The application was accordingly denied.

On appeal, the applicant, through counsel, maintains that he is residing in his mother's physical custody. *See* Applicant's Counsel's Letter Accompanying Appeal. The applicant cites to the definition of "physical custody" in New York law and similar sources, and to a previous AAO decision, in support of his claim that he is residing in his mother's physical custody in Canada despite his attendance at a boarding school in Israel. *Id.*

The Child Citizenship Act of 2000 (CCA), Pub. L. 106-395, 114 Stat. 1631 (Oct. 30, 2000), amended sections 320 and 322 of the Act, and repealed section 321 of the Act. The provisions of the CCA took effect on February 27, 2001, are not retroactive, and apply only to persons who were not yet 18 years old as of February 27, 2001. *See* CCA § 104. The applicant was born in 1994. Because the applicant was under the age of 18 on February 27, 2001, he is eligible for the benefits of the amended Act. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

Section 322 of the Act, 8 U.S.C. § 1433, applies to children born and residing outside of the United States, and provides 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 shall issue a certificate of citizenship to such applicant upon proof, to the satisfaction of the Attorney General, 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 [citizen parent] (or, if the citizen parent is deceased, an individual who does not object to the application).

(5) The child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

(b) Upon approval of the application (which may be filed from abroad) and, except as provided in the last sentence of section 337(a), upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

The applicant's mother was born in Missouri in 1961. Her mother, the applicant's grandmother, was also born in Missouri and resided in the United States until 1961. The applicant's parents have been married since 1992. The applicant has thus established that he is the child of a U.S. citizen whose citizen parent has the required physical presence in the United States. It is also established that the applicant is in his mother's legal custody.¹ At issue in this case is whether the applicant, who attends boarding school, is in his U.S. citizen mother's physical custody.

The AAO finds that the applicant is residing in Canada in his mother's physical custody despite his attendance at a boarding school in Israel. The AAO notes that neither the Act nor the regulations define the term "physical custody." Nevertheless, it is well understood that a parent who elects to enroll his or her child in a boarding school, whether in the same state or abroad, does not relinquish physical custody of the child by so doing. The record in this case establishes

¹ Legal custody vests by virtue of "either a natural right or a court decree." *Matter of Harris*, 15 I&N Dec. 39, 41 (BIA 1970). The regulations, at 8 C.F.R. § 320.1, provide, in pertinent part, that legal custody will be presumed in the case of a "biological child who currently resides with both natural parents (who are married to each other, living in marital union, and not separated)."

that the applicant is absent from his parents' home in Canada only during the school months, that he is considered to be his parents' dependent, and that the applicant's parents have not transferred physical custody of the applicant to the school or anyone else. The AAO thus finds that the applicant is residing outside of the United States in the legal and physical custody of his U.S. citizen mother.

8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The applicant has met his burden to prove that he is residing in Canada in his mother's physical custody. The AAO therefore finds that the applicant has established his eligibility for U.S. citizenship under section 322 of the Act, 8 U.S.C. § 1433. The appeal will be sustained.

ORDER: The appeal is sustained.