U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20664177

Date: SEP. 12, 2022

Appeal of Hialeah Field Office Decision

Form N-600, Application for Certificate of Citizenship

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

The Director of the Hialeah, Florida Field Office denied the Form N-600, Application for Certificate of Citizenship (Form N-600), concluding that the Applicant did not establish she automatically derived citizenship from her naturalized U.S. citizen father pursuant to section 320 of the Act because she did not demonstrate she was residing in the United States in his legal and physical custody during the statutory period prior to her eighteenth birthday, as required.

The matter is now before us on appeal. The Applicant claims that the Director's decision was erroneous and submits evidence previously submitted in the record. We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LAW

The applicable law for derivative citizenship purposes is "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). In the present matter, the Applicant was born in Cuba in [redacted] 2004, to married foreign national parents. The Applicant's parents divorced in [redacted] 2012, her father became a U.S. citizen in December 2012, and she had been admitted to the United States as a lawful permanent resident (LPR) in March 2007. Accordingly, section 320 of the Act, as amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000) (CCA), which is effective after February 27, 2001, applies to her case.

Section 320 of the Act, as amended in February 2001 and currently in effect, provides 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.

Moreover, applicants must meet the definition of a "child" in section 101(c)(1) of the Act, 8 U.S.C. § 1101(c)(1), which defines the term "child" in pertinent part to mean "an unmarried person under twenty-one years of age.

The regulation at 8 C.F.R. § 320.1 defines "legal custody" as "refer[ring] to the responsibility for and authority of child." It further provides that, for purposes of the CCA, U.S. Citizenship and Immigration Services (USCIS) will presume that a U.S. citizen parent has legal custody of child, and will recognize that U.S. citizen parent as having lawful authority over the child, absent evidence to the contrary, in the case of:

(i) A biological child who currently resides with both natural parents (who are married to each other, living in marital union, and not separated),

(ii) A biological child who currently resides with a surviving natural parent (if the other parent is deceased), or

(iii) In the case of a biological child born out of wedlock who has been legitimated and currently resides with the natural parent.

The regulation at 8 C.F.R. § 320.1 further provides that, in the case of a child of divorced or legally separated parents, that the agency will:

> [F]ind a U.S. citizen parent to have legal custody of a child, for the purpose of the CCA, where there has been an award of primary care, control, and maintenance of a minor child to a parent by a court of law or other appropriate government entity pursuant to the laws of the state or country of residence. The Service will consider a U.S. citizen parent who has been awarded "joint custody," to have legal custody of a child. There may be other factual circumstances under which [USCIS] will find the U.S. citizen parent to have legal custody for purposes of the CCA.

Generally, to derive U.S. citizenship, a foreign-born child must satisfy certain statutory conditions before turning 18 years of age. A child's acquisition of citizenship on a derivative basis occurs by operation of law and not by adjudication. *Matter of Fuentes-Martinez*, 21 I&N Dec. 893, 896 (BIA 1997). Thus, a child who satisfies requisite conditions will derive U.S. citizenship automatically, even though the actual determination of derivative citizenship may occur after the fact, in the context of a passport application or a claim to citizenship. *Id.*

Applicants born abroad are presumed to be foreign nationals and bear the burden of establishing their claim to U.S. citizenship by a preponderance of credible evidence. *See Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008). The "preponderance of the evidence" standard requires that the Applicant establish that their claim is "probably true," based on the specific facts of their case. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

II. ANALYSIS

The Applicant is seeking a Certificate of Citizenship indicating that she derived U.S. citizenship from her U.S. citizen father. The Applicant was born in Cuba in [redacted] 2004, to married foreign national parents. The Applicant's parents divorced in [redacted] 2012, in the state of Florida. The Applicant was admitted to the United States as an LPR in March 2007 and her father became a U.S. citizen through naturalization in December 2012.

The record reflects that the Applicant has established that she meets several requirements for derivative citizenship under section 320 of the Act. Specifically, birth and marriage certificates show the biological parent-child relationship between the Applicant and her father (and mother), and that she was born abroad. Further, the Applicant's father naturalized in December 2012, when she was eight years old, and the Applicant had been admitted to the United States as an LPR in March 2007, when she was three years old. The record additionally does not reflect that the Applicant is married. Therefore, the Applicant qualifies as her father's "child" under section 101(c) of the Act and satisfies the requirements of section 320(a)(1) and (2) of the Act. At issue is whether the Applicant has shown that she resided in the United States in the legal and physical custody of her U.S. citizen father between December 7, 2012, the date her father naturalized, and [redacted] 2022, her 18th birthday.

In denying the Form N-600, the Director specifically acknowledged the submission of the Mediated Settlement Agreement, but highlighted that it indicates that the Applicant's U.S. citizen parent did not have physical custody of the Applicant and that, in fact, he was ordered to pay child support each month to the parent who holds the physical custody. The Director's decision indicated that "[e]vidence of physical custody must show that you resided together with the U.S. citizen parent, and this may have included things like school records, medical records, insurance documents or/and lease/rental agreement showing both listed as tenants."

On appeal, the Applicant reiterates that the "Marital Settlement Agreement" between her parents provides that both parents have shared parental responsibility over the Applicant. The Applicant states that shared parental responsibility "means a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly." The Applicant continues that both parents were granted authority to make decisions on her behalf and were awarded equal responsibility for and authority over her care, education, religion, medical treatment, and general welfare. The Applicant contends that, based on the above, she does meet the requirements of section 320 of the Act because her U.S. citizen father does have legal and physical custody of the Applicant pursuant to Florida statutes.

Neither the Act nor the regulations define the term "physical custody." However, "physical custody" has been considered in the context of "actual uncontested custody" in derivative citizenship proceedings and interpreted to mean actual residence with the parent. *See Bagot v. Ashcroft,* 398 F.3d 252, 267 (3rd Cir. 2005) (father had actual physical custody of the child where the child lived with him and no one contested the father's custody); *Matter of M-,* 3 I&N Dec. at 56 (father had "actual uncontested custody" of a child where the father lived with the child, took care of the child, and the mother consented to his custody). Further, section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33), defines the term "residence" as "the place of general abode . . . of a person . . . his [or her] principal, actual dwelling place in fact, without regard to intent."

During our adjudication of the appeal, we issued a notice of intent to dismiss (NOID), which advised the Applicant of deficiencies in the record and requested additional evidence to demonstrate that she resided in the physical custody of the U.S. citizen parent during the statutory period. Specifically, we noted that while the Mediated Settlement Agreement grants both parents joint legal custody and awards time in the physical custody of the U.S. citizen parent, the record does not include any evidence that the Applicant has actually resided with the U.S. citizen parent at any time between the U.S. citizen parent's naturalization on December 7, 2012, and the Applicant's 18th birthday.

In the instant matter, the Applicant did not respond to the NOID and therefore the record remains deficient. The Applicant has not submitted any evidence to demonstrate that she has actually resided in the physical custody of her U.S. citizen father at any time between his naturalization on December 7, 2012, and the Applicant's 18th birthday. Again, while we acknowledge that the Mediated Settlement Agreement grants both parents joint legal custody and awards time in the physical custody of the U.S. citizen parent, the record does not include any evidence that the Applicant has actually resided in the physical custody of the U.S. citizen parent. The Applicant has not provided additional documents relevant to actual residence in the physical custody of her U.S. citizen father on appeal, such as residential, education, employment, medical, or other records. Accordingly, the record does not contain sufficient evidence to establish that her U.S. citizen father had actual physical custody over her prior to her 18th birthday, as required.

III. CONCLUSION

The Applicant has not shown that she automatically derived citizenship from her naturalized U.S. citizen father pursuant to section 320 of the Act because she did not demonstrate that her U.S. citizen father had actual physical custody over her at some point between December 2012 and [redacted] 2022. As such, the Applicant is ineligible for a Certificate of Citizenship and her Form N-600 remains denied.

ORDER: The appeal is dismissed.