U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30367128

Date: DEC. 11, 2023

Appeal of Jacksonville, 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 citizenship from his naturalized U.S. citizen father under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432. To derive U.S. citizenship from a U.S. citizen parent or parents an individual born abroad must satisfy certain statutory conditions before turning 18 years of age.

The Director of the Jacksonville, Florida Field Office denied the Form N-600 and a subsequent motion to reopen and reconsider, concluding that the Applicant did not establish he derived citizenship solely from his father because he did not show that his parents were legally separated before he turned 18 years old and his father had legal custody. The matter is now before us on appeal.[1]

On appeal, and in response to our notice of intent to dismiss (NOID) the Applicant reiterates that he derived U.S. citizenship from his father because his parents were divorced and continued to share legal custody over him after the divorce.

The Applicant bears the burden of proof to demonstrate eligibility for the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *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 Applicant was born in Jamaica in [redacted] 1967 to unmarried noncitizen parents. The parents married in 1972, when the Applicant was five years old. In November 1975, at the age of eight years, the Applicant was admitted to the United States as a lawful permanent resident. His parents divorced in New York two years later, in [redacted] 1977. The Applicant's father naturalized as a U.S. citizen in March 1982, shortly before the Applicant's 15th birthday; his mother naturalized in June 1986, when the Applicant was over 18 years of age.

[1] We initially dismissed the appeal, but later reopened the proceedings to give the Applicant an opportunity to provide additional evidence concerning his father's custody.

As stated, the Applicant claims derivative citizenship solely through his father. To adjudicate his citizenship claim, 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). The last critical event before the Applicant's 18th birthday is the 1982 naturalization of his father. At that time, former section 321 of the Act governed derivative citizenship.[2] It provided, in relevant part that:

> (a) A child born outside of the United States of [noncitizen] 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
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> (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-
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> (4) Such naturalization takes place while such child is under the age of 18 years; and
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> (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.

Because the Applicant was born abroad, he is presumed to be a noncitizen 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).

II. ANALYSIS

There is no dispute that the Applicant was under the statutory age of 18 years when he began to reside in the United States as a lawful permanent resident, when his father naturalized as a U.S. citizen, and when his parents divorced.[3] The remaining issue is whether the Applicant has met his burden of proof to show that his father had legal custody following the divorce and before his 18th birthday, as required to establish derivative citizenship under the first clause of former section 321(a)(3) of the Act.[4]

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[2] Former section was repealed by Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat. 1631 (2000), effective on February 27, 2001.

[3] The term "legal separation" in the context of derivative citizenship means either a limited or absolute divorce obtained through judicial proceedings. *See Matter of H*, 3 I&N Dec. 742 (BIA 1949).

[4] The Applicant does not claim eligibility to derive citizenship under any of the remaining provisions of former section 321 of the Act.

We have reviewed the entire record as supplemented on appeal and conclude that the Applicant has not met this burden.

Legal custody "implies either a natural right or a court decree." *Matter of Harris*, 15 I&N 39, 41 (BIA 1970). The first step in ascertaining whether a naturalizing parent has "legal custody" of a child for purposes of derivative citizenship is to determine whether a judicial decree or statutory grant awards custody to the naturalizing parent. *Matter of M-*, 3 I&N Dec. 850, 850-51 (BIA 1950); *Garcia v. USICE*, 669 F.3d 91, 95 (2d Cir. 2011). In the absence of such judicial or statutory custody grant, the parent having "actual uncontested custody" is the one with "legal custody" for the purposes of derivative citizenship under former section 321(a)(3) of the Act. *Garcia* at 96. Two predominant indicators of "actual uncontested custody" are (1) child's physical residence and (2) consent to custody by non-custodial parent. *Id.* at 97.

The Applicant asserts that his father met the legal custody requirement because a New York court granted his parents joint legal custody in the divorce, but the record does not support this assertion. Rather, the divorce decree indicates that the mother was granted both legal and physical custody of the Applicant and his younger brother, and the father was granted visitation rights. According to the decree, the Applicant's father abandoned the mother in or about [redacted] 1973. The court adjudged and decreed that the mother "be awarded custody of [the Applicant and his brother]," and further ordered that the father "*may* have custody of [the children] on the weekends; that [he] must pick up [the children] on Friday, between the hours of 5:00 P.M. and 6:00 P.M., and return [the children] to [the mother's] residence on Sunday, between 4:00 P.M. and 5:00 P.M." In addition, the court decreed that the father "*may* have [the children] on alternate holidays, including but not limited to, Father's Day, Easter, Christmas, and Independence Day." (Emphases added). The decree provides further that "pursuant to the Stipulation of the parties" the father was ordered to pay child support to the mother "in check or money order at her residence . . . or at any such other place she may designate," and that the stipulation was incorporated in the divorce judgement.

This stipulation, which the Applicant's father provided as evidence in his naturalization proceedings, was signed by the parents and their respective attorneys on [redacted] 1976. It reflects that the parents agreed that the mother would have custody of the Applicant and his younger brother, "subject to the rights and visitation", as well as child support payments described above and incorporated in the final divorce judgement.

We advised the Applicant in the NOID that the parents' divorce decree, considered with their stipulation concerning custody and child support, indicated that his mother was awarded primary responsibility for his care and the sole authority to make decisions about his place of residence, while his father was allowed visitation rights on weekends and alternate holidays. We also noted that the Applicant did not provide evidence that this limited custody award to the father encompassed a right to make decisions about the Applicant's residence, upbringing, education, medical care, and other major decisions about his life, or that it was otherwise equivalent to joint legal custody under New York law at the time his parents divorced.

In response, the Applicant reiterates that his parents shared legal custody before he turned 18 years old, and that he therefore derived U.S. citizenship from his father. He states that even if his mother

was granted legal custody and his father had only visitation rights, in the jurisdiction of the U.S. Court of Appeals for the Second Circuit (Second Circuit), where his citizenship claim arose:

> [D]ecisions about legal custody, "in contrast" to "[d]ecisions about the marital relationship [which] tend to be final" are instead "fluid and frequently change depending on the parents' situations and well-being." Although we still look first at any relevant state judicial determinations of legal custody in a given case, we are not bound by those initial determinations. Indeed, we have stated that state judicial determinations of custody may be modified even without going to state court. In determining legal custody for INA purposes, we do not "[r]equir[e] a formal act to change custody." Instead, we look to the circumstances – including "mere agreement[s]" – at the time that the alleged custodial parent naturalized.

Allen v. Barr, 788 F. App'x 812, 813 (2d Cir. 2020) (citing *Garcia v USICE*, 669 F.3d at 96) (cleaned up).

Thus, the Applicant avers that although the court may have initially awarded legal custody to his mother subsequent custody modifications would not have required a formal act or acts and that pursuant to *Garcia* "mere agreements" as to shared custody arrangement between his parents following the initial judicial order is sufficient for his father to pass on his citizenship. He states that the affidavits from his mother and brother he previously provided show that his parents shared parental authority and decision-making responsibility and that his father therefore had legal custody. We are not persuaded.

In adjudicating the Applicant's citizenship claim we are bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals where the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987).

As an initial matter, the Second Circuit's holding in *Garcia* is not dispositive on the legal custody issue in these proceedings, because it does not address legal custody determinations where, like in this case, there is a judicial grant of custody; rather, the Second Circuit found only that where a foreign custodial decree was unenforceable in the State of New York, the parent with "actual uncontested custody" would be considered the parent with "legal custody" for the purposes of evaluating derivative citizenship under the first clause of former section 321(a)(3) of the Act.[5] Here, the Applicant does not claim that the judicial custody award to his mother by the New York court in the 1977 divorce decree was unenforceable or otherwise not valid under New York law, and that an evaluation of his father's "actual uncontested custody" is therefore required.

We acknowledge the Second Circuit's determination in *Allen v. Barr* that the legal custody requirement under former section 321(a)(3) of the Act was satisfied through an out-of-court transfer of custody from an individual's custodial noncitizen mother to his naturalized U.S. citizen father.

[5] Specifically, the Second Circuit held that New York would not recognize a custodial award by a court in the Dominican Republic where the children resided with their mother in New York and no jurisdictional basis for the custodial award was present. *Garcia v. USICE*, 669 F.3d at 97. The Second Circuit ultimately found that there was a genuine factual dispute over which parent (if either) had "actual uncontested custody" when the individual's father naturalized, and remanded the matter to the district court.

However, *Allen* is an unpublished decision, and we are not bound to follow it in these proceedings. Furthermore, the facts and circumstances in *Allen* were different than in the instant case. Specifically, the Second Circuit found in *Allen* that the individual derived citizenship from his father because he began physically residing with his father within weeks of his father's naturalization, and the parents' "agreement, notarized in New York County effectively abrogated any earlier custody order (including the 1976 divorce decree which had initially given [the individual's] mother custody)." 817 F.2d at 813. Here, the Applicant does not provide evidence that his parents executed a written agreement concerning his custody after they divorced, or that he lived with his father following the father's naturalization and before he turned 18 years of age in [redacted] 1985, aside from his own, his mother's, and his brother's statements.

The Applicant submits copies of his parents' respective naturalization applications as evidence that he lived with his father when his father naturalized. However, the Applicant's residence is not relevant to determination of legal custody in this case. Because the court awarded legal custody to his mother, and the Applicant provides no evidence that the custody order was subsequently modified, we need not evaluate whether his father had "actual uncontested custody." We also note that the information the father provided in his naturalization proceedings does not support the Applicant's claim that they resided together. Although the father represented on his Form N-400, Application to File Petition for Naturalization, which he filed in January 1981, that he was still married to the Applicant's mother (despite their 1977 divorce) and that the Applicant lived with him, he testified under oath during his July 1981 naturalization interview that the Applicant and his brother lived with their mother, as indicated by the interviewing officer's annotation on the Form N-400. Moreover, the Applicant's mother represented on her two Forms N-400, filed in March 1982 and in April 1985, that the Applicant and his brother resided with her.

The Applicant also submits a partial copy of an undated Form N-604, Child's Personal Description Form, which he claims he obtained from his father's personal records. The Applicant avers that although it is not clear whether his father actually filed this Form N-604 on his behalf, the fact that it was completed is a strong indicator that he should be issued a Certificate of Citizenship. He requests us to closely examine his father's immigration file to determine if his father filed the Form N-604 and, if so, to issue him a Certificate of Citizenship. However, the filing of a Form N-604 (if it was filed) is not sufficient to establish that the Applicant was eligible to derive U.S. citizenship upon his father's naturalization.[6] Furthermore, by misrepresenting his marital status in naturalization proceedings,[7] the Applicant's father in effect foreclosed an inquiry into the Applicant's derivative citizenship under the first clause of former section 321(a)(3) of the Act, which pertains to children of legally separated parents, and which the Applicant is now claiming.

We acknowledge the Applicant's alternative request for abeyance until he is able to obtain his parents' complete records under the Freedom of Information Act (FOIA) and provide additional evidence in

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[6] *See* 8 C.F.R. § 341.1(b) (1984) (providing in relevant part that an applicant for naturalization who believes that, upon naturalization, his children under 18 years of age will derive United States citizenship under section 321 of the Act, may make application for a certificate or citizenship on behalf of any such children in advance of naturalization. The application shall be made on Form N–400, Application to File Petition for Naturalization, at the same time that the parent files his application for naturalization, by completing therein the item relating to a certificate of citizenship and submitting therewith the fee specified).

[7] The father's 1982 Certificate of Naturalization reflects his civil status as "married."

support of his citizenship claim. We also recognize his statement that he has had difficulties in gathering the necessary documentation because he does not have a good relationship with his parents and, as he did not previously have an attorney, he did not know what documents to submit with his Form N-600. Nevertheless, the burden of proof to establish the claimed derivative citizenship ultimately rests with the Applicant, and neither the Act nor the regulations allow us to withhold adjudication of a benefit request until such time that an applicant may gather evidence of eligibility for such benefit.[8]

Lastly, the Applicant suggests that because his mother initially applied for naturalization in March 1982, when he was 14 years old, we should conduct a review of her immigration file to determine what happened to that initial filing, and whether he may be eligible to derive citizenship pursuant to the doctrine of equitable estoppel due to the agency's processing delays.

Again, the burden of proof to establish the claimed U.S. citizenship is on the Applicant, and not on the U.S. Citizenship and Immigration Services. Furthermore, there is no delegation of authority, statute, regulation, or other law that would permit us to apply the doctrine of equitable estoppel to the cases before us; rather, estoppel is an equitable form of relief that is available only through the courts. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338-39 (BIA 1991). Consequently, we are without authority to address the Applicant's equitable estoppel claim.

III. CONCLUSION

The Applicant has not met his burden proof to show that his naturalized U.S. citizen father had legal custody after his parents divorced and before he turned 18 years of age. The Applicant therefore has not established that he derived U.S. citizenship from his father under former section 321(a)(3) of the Act. As such, he is ineligible for a Certificate of Citizenship, and his Form N-600 remains denied.

ORDER: The appeal is dismissed.

[8] We note that the Applicant filed the instant Form N-600 in September 2018, over five years ago.