U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23478874

Date: JAN. 6, 2023

Appeal of Houston, Texas Field Office Decision

Form N-600K, Application for a Certificate of Citizenship Under Section 322

The Applicant's U.S. citizen father seeks a Certificate of Citizenship on the Applicant's behalf under section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433.

The Director of the Houston, Texas Field Office denied the application, concluding that the record did not establish as required that the Applicant and his father resided together outside the United States and that the father satisfied the overall five-year U.S. physical presence condition. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Applicant's father bears the burden of proof in these proceedings to demonstrate eligibility 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 record reflects that the Applicant was born in Nigeria in 2012 to married parents. The Applicant's father filed the instant Form N-600K indicating that the Applicant is currently residing there. Section 322 of the Act provides 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 [of the Act], [8 U.S.C. § 1432].[1] The [Secretary of Homeland Security] shall issue a certificate of citizenship to such applicant upon proof, to the satisfaction of the [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--

[1] That section provides for derivative citizenship of foreign-born children who are under 18 years of age and residing in the United States as lawful permanent residents in the legal and physical custody of their U.S. citizen parent or parents.

(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. . . .

. . .

(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 [citizen parent]*. . . .

(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 . . . 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 [Secretary] with a certificate of citizenship.

(Emphasis added).

Because the Applicant was born abroad, he is presumed to be a noncitizen and his father bears the burden of establishing eligibility for a Certificate of Citizenship on the Applicant's behalf by a preponderance of credible evidence. *See Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008).

II. ANALYSIS

The issues on appeal are whether the Applicant's father has established that the Applicant is residing outside of the United States in his legal and physical custody, as required in section 322(a)(4) of the Act, and whether he has also shown that he meets the U.S. physical presence requirement in section 322(a)(2)(A) of the Act.

The Director determined that the Applicant's father did not demonstrate he satisfied the legal and physical custody conditions, because the evidence, including the father's and his spouse's employment letters and the Applicant's school records, indicated that the father is residing in Texas, while the Applicant is residing in Nigeria. The Director further found that the father's 1999 Certificate of Naturalization and a 2021 letter confirming his employment in Texas were not sufficient to demonstrate that the father met the overall five-year U.S. physical presence requirement.

On appeal, the Applicant's father confirms that he resides and is employed in Texas. He asserts, however, that he also maintains a residence in Nigeria and often travels there to spend time with his children. In support, he submits documentation including family photographs, two utility bills listing his Nigerian address, an updated employment letter for his spouse, and evidence related to his and spouse's international travel. We have reviewed the entire record, as supplemented on appeal and for

the following reasons conclude that it remains insufficient to demonstrate that the Applicant meets the requirement of residing abroad in his father's legal and physical custody. Because the Applicant is ineligible for a Certificate of Citizenship on that basis alone, we do not reach the issue of his father's physical presence in the United States.

A. Physical Custody

While not defined in the statute and regulations, the term "physical custody" has been interpreted in the context of derivative citizenship proceedings to mean actual residence with the parent. *See Matter of M-*, 3 I&N Dec. 850, 856 (BIA 1950). The term "residence" means "the place of general abode," which in turn means a person's "principal, actual dwelling place in fact, without regard to intent." Section 101(a)(33) of the Act. Here, the Applicant's father represented on the Form N-600K that he is residing in Texas and provided evidence that he has been employed there since at least 2017. The father also represented that the Applicant is residing in Nigeria, and submitted the Applicant's Nigerian school record[2] in support of this representation. We acknowledge the father's claim that he maintains residences both in the United States and Nigeria, as well as the submission of two utility bills addressed to him at his Nigerian address and family photographs; however, they are insufficient to establish that his "principal, actual dwelling place" is in Nigeria in view of the previously provided evidence pointing to his continued residence and employment in Texas.

We conclude therefore that the Applicant's father has not demonstrated that the Applicant is residing in his physical custody outside of the United States, as required under section 322(a)(4) of the Act.

B. Legal Custody

For the same reason, the Applicant's father has not shown that the Applicant is residing abroad in his legal custody.

Legal custody refers to responsibility for and authority over a child. 8 C.F.R. § 322.1. U.S. Citizenship and Immigration Services (USCIS) will presume that a U.S. citizen parent has legal custody of a 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 a biological child *who currently resides with both natural parents* (who are married to each other, living in marital union, and not separated. 8 C.F.R. § 322.1(1)(i) (emphasis added).

As stated, the Applicant's father indicated that he and his spouse reside in Texas, while the Applicant resides in Nigeria. We recognize that the Applicant's father and mother have a second residence in Nigeria, that the mother has been working in Texas only "on and off" since 2015, and that both parents recently traveled to Nigeria to spend time with the Applicant and his siblings. However, this is not sufficient to establish that the Applicant's parents' principal residence is in fact in Nigeria, or that they are currently residing there together in marital union. We also note that the Applicant's school record does not include any information about his parents or legal guardians, and the Applicant's father does not explain who has authority over the Applicant and is responsible for his care when he and his spouse

[2] The school record is undated.

are in the United States. Consequently, the record does not establish that the legal custody presumption described in 8 C.F.R. § 322.1(1)(i) and applicable to children of married parents has been met.

In view of the above, we conclude that the Applicant's father has not demonstrated that the Applicant meets the legal custody requirement in section 322(a)(4) of the Act.

III. CONCLUSION

The Applicant's father has not met his burden of proof to establish that the Applicant is residing outside of the United States in his legal and physical custody. Because the Applicant is ineligible for issuance of a Certificate of Citizenship on that basis alone, we need not address at this time whether he satisfies the remaining conditions in section 322 of the Act, including his father's five-year physical presence in the United States, and his own temporary presence in the United States pursuant to a lawful admission and maintenance of lawful status.[3]

ORDER: The appeal is dismissed.

[3] Instead, we reserve those issues. Our reservation of the issues is not a stipulation that those requirements have been met and should not be interpreted as such. Rather, addressing the father's physical presence and the Applicant's temporary presence and maintenance of status in the United States would serve no constructive purpose at this time, as it would not change the outcome.