



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 27445125

Date: JULY 19, 2023

Appeal of Fresno, California Field Office Decision

Form N-600K, Application for Citizenship and Issuance of Certificate 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. Section 322 of the Act allows a U.S. citizen parent to apply for naturalization of their child born and residing outside of the United States in their legal and physical custody, if certain additional requirements are also met.

The Director of the Fresno, California Field Office denied the Form N-600K, indicating that because the Applicant was previously admitted to the United States as a lawful permanent resident in 2015 she was not residing outside of the United States and was therefore ineligible for a Certificate of Citizenship. The matter is now before us on appeal.

On appeal, the Applicant submits additional evidence and explains that she departed from the United States in 2017 and has been residing abroad since that time.

The Applicant bears the burden of proof 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

The record reflects that the Applicant was born in Azerbaijan in 2006 to married noncitizen parents. In May 2015, at the age of nine years, the Applicant was admitted to the United States with her parents as a lawful permanent resident in DV-3 immigrant classification (dependent child of a diversity visa immigrant). The record further shows that in 2017 the Applicant returned to Azerbaijan with her mother, while her father remained in the United States. The parents eventually divorced in 2018. In April 2021, when the Applicant was 14 years old, her father naturalized as a U.S. citizen. The Applicant's father filed the instant Form N-600K indicating that he is currently residing in Azerbaijan with the Applicant.

Section 322 of the Act, as amended by the Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat. 1631 (2000), and in effect since 2001 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. § 1431].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--

(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. . . .

Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33), defines *residence* as “the place of general abode . . . of a person . . . [their] principal, actual dwelling place in fact, without regard to intent.”

Legal custody refers to the responsibility for and authority over a child. 8 C.F.R. § 322.1. In the case of a child of divorced or legally separated parents, U.S. Citizenship and Immigration Services (USCIS) will find 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. 8 C.F.R. § 322.1(2). USCIS will consider a U.S. citizen parent who has been awarded “joint custody,” to have legal custody of a child. *Id.* 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. *Id.*

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. The record does not establish that the Applicant was eligible to derive U.S. citizenship under that section of the Act, as there is no evidence that she resided in the United States in her father’s legal and physical custody as a lawful permanent resident when he naturalized as a U.S citizen in 2021, or thereafter.

Although not defined in the Act 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).

If the application for Certificate of Citizenship is approved, and after the applicant takes the oath of allegiance (unless the oath is waived), USCIS will issue a Certificate of Citizenship. The child is a citizen as of the date of approval and administration of the oath of allegiance. Section 322(b) of the Act; 8 C.F.R. § 322.5(a).

II. ANALYSIS

There is no dispute that the Applicant meets some of the conditions in section 322 of the Act, as she is currently under the age of 18 years and her father is a U.S. citizen. The issue on appeal is whether the Applicant has established that she is residing outside of the United States, as required under section 322(a)(4) of the Act. We have reviewed the entire record, as supplemented on appeal, and conclude that she has shown she is. The sole reason for the denial therefore has been overcome, and we will return the matter to the Director to determine in the first instance whether the Applicant satisfies the remaining requirements for a Certificate of Citizenship under section 322 of the Act.

As stated, the Director determined that the Applicant did not meet the condition of residing outside the United States in section 322(a)(4) of the Act, because she was lawfully admitted to the United States for permanent residence in 2015. The Director further found that for the same reason the Applicant did not satisfy the requirement of being *temporarily* present in the United States pursuant to a lawful admission in section 322(a)(5) of the Act.

On appeal, the Applicant submits a copy of an airline ticket to support her claim that she and her mother returned to their former place of residence in Azerbaijan in January 2017, when she was 10 years old, as well as a copy of her school record, which shows that as of 2021 (when the Form N-600K was filed) she was attending a school in [redacted] Azerbaijan on a full-time basis. The Applicant also submits a declaration from her father, who confirms that the Applicant left the United States with her mother in 2017, and that they have been living in Azerbaijan since that time. Absent evidence to the contrary, these documents are sufficient to show that the Applicant's "principal, actual dwelling place in fact, without regard to intent" at this time is in Azerbaijan, and that she is therefore residing outside of the United States, as required in section 322(a)(4) of the Act.

Furthermore, the Director improperly determined that the Applicant does not meet the requirement of being temporarily present in the United States in section 322(a)(5) of the Act to receive a Certificate of Citizenship without first evaluating whether she satisfies the substantive eligibility criteria in section 322 of the Act for issuance of such a certificate. As an initial matter, there is nothing in the record to indicate that the Applicant is currently present in the United States, temporarily or otherwise. Moreover, while section 322(a)(5) of the Act requires a child to be temporarily physically present in the United States to complete the citizenship process and take the Oath of Allegiance,² lawful

² See section 341(a) of the Act, 8 U.S.C. § 1452(a) (stating that USCIS may issue a Certificate of Citizenship "[u]pon proof to the satisfaction of the [Secretary of Homeland Security] that the applicant is a citizen . . . and upon taking and subscribing

admission *in any status* is sufficient to satisfy this requirement. *See generally* 12 USCIS Policy Manual H.5(D)(1), <https://www.uscis.gov/policy-manual> (stating in relevant part that a child is required to be lawfully admitted to the United States in any status and to maintain the lawful status under which they were admitted while in the United States).

As the preponderance of the evidence in this case indicates that the Applicant is currently residing in Azerbaijan, we will return the matter to the Director to determine in the first instance whether the evidence is also sufficient to establish that she is residing there in her father's legal and physical custody, as required under section 322(a)(4) of the Act, and if her father meets the U.S. physical presence requirements under section 322(a)(2)(A) of the Act. If the Director concludes that these requirements have been met, the Director shall schedule an interview on the Form N-600K, so the Applicant can fulfill the condition in section 322(a)(5) of the Act of being temporarily present in the United States pursuant to a lawful admission. *See* 8 C.F.R. § 322.4 (providing that the U.S. citizen parent and the child must appear in person before a U.S. Citizenship and Immigration Services officer for examination on the application). Conversely, if the Director determines that the Applicant does not meet either of these requirements and is not eligible for a Certificate of Citizenship under section 322 of the Act, the Director shall enter a new decision explaining the specific reasons for such determination.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

before a member of the Service within the United States to the oath of allegiance required . . . *only if such individual is at the time within the United States.*" (Emphasis added). We note, however, that certain children of U.S. citizen members of the U.S. armed forces are not required to be lawfully admitted to or physically present in the United States to take the Oath of Allegiance and receive a Certificate of Citizenship. *See* section 322(d)(2) of the Act.