



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

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

In Re: 22744806

Date: OCT. 20, 2022

Appeal of New York, New York Field Office Decision

Form N-600, Application for Certificate of Citizenship

The Applicant seeks a Certificate of Citizenship to reflect that he derived U.S. citizenship from his U.S. citizen father under former section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1430.

The Director of the New York, New York Field Office denied the application, concluding that the Applicant did not establish that he derived citizenship under section 320 of the Act because he did not show that he was physically residing in the United States with his U.S. citizen father at some point during the statutory period that began with his father's date of naturalization, as required.

The matter is now before us on appeal. On appeal, the Applicant claims, through his father, that he has satisfied the conditions at section 320 of the Act and is eligible for a Certificate of Citizenship, and submits additional evidence.

Upon *de novo* review, we will remand the matter for proceedings consistent with this decision.

I. LAW

The Applicant seeks a Certificate of Citizenship indicating that he derived U.S. citizenship from his father. The Applicant was born in the Dominican Republic in [REDACTED] 2011 to unmarried foreign national parents and adjusted his status to that of a lawful permanent resident in 2012. His parents married each other in [REDACTED] 2013, and the Applicant's father subsequently naturalized in September 2019. The Applicant does not claim that his mother is a U.S. citizen; therefore he seeks a Certificate of Citizenship solely through his father.

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). Here, section 320 of the Act, as amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (CCA), applies to the Applicant's derivative citizenship claim, as he was born after the CCA was enacted on February 27, 2001, and his father also became a U.S. citizen after the provision went into effect. This section provides, in pertinent part, 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, the Applicant must meet the definition of a “child” in section 101(c)(1) of the Act, 8 U.S.C. § 1101(c)(1), which requires, in pertinent part, that during the relevant timeframe he must be an unmarried person under twenty-one years of age.

Because the Applicant was born abroad, he is presumed to be a foreign national and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. *Matter of Baires*, 24 I&N Dec. 467, 468 (BIA 2008). Under the preponderance of the evidence standard, the Applicant must demonstrate that his claim is “probably true,” or “more likely than not.” *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

The Applicant has established that he meets several conditions for derivative citizenship under section 320 of the Act. Specifically, his 2011 birth certificate, his father’s 2019 Certificate of Naturalization, and his lawful permanent resident card evidence collectively show that the Applicant was born outside of the United States, admitted to the United States as a lawful permanent resident in 2012, and has a naturalized U.S. citizen parent. Moreover, all of these requirements have been satisfied while the Applicant remains under the age of eighteen. Therefore, he has satisfied the born outside of the United States, U.S. citizen parent, and the lawful admission for permanent residence conditions at sections 320(a)(1), (2), and (3) of the Act.

The Applicant must also establish that he is or was residing in the legal and physical custody of his naturalized U.S. citizen father at some point on or after the father’s date of naturalization in September 2019 (and before he attains 18 years of age) in order to show that he automatically acquired U.S. citizenship under the remaining statutory conditions at section 320(a)(3) of the Act. In this case, the Director found that the Applicant had not shown that he “physically resides” with his U.S. citizen parent.

A. Physical Custody under Section 320 of the Act

Neither the Act nor the regulations define the term “physical custody.” However, the Second Circuit Court of Appeals, within whose jurisdiction this matter resides, has considered physical custody in the context of derivative citizenship proceedings and interpreted it to mean actual residence with the parent. *Khalid v. Sessions*, 904 F.3d 129, 140 (2d Cir. 2018) (finding that physical custody was

established despite a “brief, temporary separation” from the parent – while in a specific, pretrial juvenile detention program - because it was uncontested that the child had lived with his parent prior to the pretrial detention); *see also 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). Thus, the Applicant must establish he resided in the United States in his father’s actual physical custody at some point on or after the date the father became a naturalized U.S. citizen in September 2019.

On the Form N-600, which the Applicant filed in October 2020, the Applicant claimed that he and his father were residing at a residence on [redacted] Avenue in [redacted] New York. However, the Applicant’s initial evidence, including copies of his permanent resident card, his birth certificate and passport from the Dominican Republic, his parents’ marriage certificate, and his father’s Certificate of Naturalization, predate the relevant period that began in September 2019, when his father naturalized, and otherwise lack information to corroborate his claim to have resided in the physical custody of his father in the United States at some point on or after his father’s date of naturalization. Consequently, in a request for evidence (RFE), the Director requested that the Applicant provide evidence to show that he had resided in the physical custody of his U.S. citizen parent at some point on or after the father’s September 2019 date of naturalization. In response, the Applicant provided a partial copy of his father’s 2018 Internal Revenue Service (IRS) Form 1040, U.S. Individual Tax Return, reflecting that his father claimed to be the head of household, that the Applicant was his dependent, and listing the residential address on [redacted] Avenue in [redacted] New York. He also included a copy of his father’s 2018 New York State Form IT-215, Claim for Earned Income Credit, reflecting that the Applicant’s father claimed that they had resided together for the entire year. However, because these documents relate to the year 2018, the Director denied the Form N-600, concluding that the Applicant’s evidence did not show that he had resided in his U.S. citizen parent’s physical custody on or after the father’s September 2019 date of naturalization for purposes of satisfying section 320(a)(3) of the Act.

On appeal, the Applicant claims that he has satisfied the eligibility conditions at section 320 of the Act, and submits new evidence, including an IRS tax transcript for 2019 that reflects that the father declared on his tax return that the Applicant was his dependent, that the Applicant had resided with his father for the entire 12 months of 2019, and that they resided together at the [redacted] Avenue address. The Applicant includes other evidence, such as statements from family friends who attest that they know the Applicant and his father and that the Applicant has been residing with his father, which support the information in the tax transcript. Consequently, on appeal, the Applicant has submitted evidence that, collectively, is sufficient to satisfy his burden in these proceedings to show he was residing in the United States in the U.S. citizen parent’s physical custody through actual residence with his father at some point after the father’s naturalization in September 2019. He therefore has shown on appeal that he satisfies the section 320(a)(3) of the Act physical custody conditions.

B. Legal Custody under Section 320 of the Act

The regulations provide that legal custody “refers to the responsibility for and authority over a child.” *See* 8 C.F.R. § 320.1 (defining “legal custody”). When the child’s parents are married to each other, legal custody is presumed when a U.S. citizen parent has legal custody 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. § 320.1(1)(i).¹ In the event of divorced or legally separated parents, a U.S. citizen parent will be presumed to have legal custody for CCA purposes where there has been “an award of primary care, control, and maintenance” of the minor child to the 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. § 320.1(2).

The Applicant’s evidence shows that his parents married in 2013. Although, the federal and state tax documents he submitted below and on appeal reflect that his father was filing as head of household, they do not include his spouse’s (the Applicant’s mother’s) name or otherwise show that she was residing with the father in marital union at some point during the relevant period after the father’s naturalization in September 2019. The Applicant has not claimed that his mother is deceased. Given the fact that the Applicant’s evidence does not reflect that his mother resides with him and his father, the record is not clear as to whether the Applicant’s parents are legally separated or divorced. The Applicant has the burden of proof to establish that his parents are not legally separated or divorced or if they are legally separated or divorced, that his father was granted legal custody of the Applicant pursuant to the laws of the location of his parents’ legal separation or divorce. *See* 8 C.F.R. § 320.3(b)(vi) (providing that an applicant must provide documentation of legal custody).

Because the record does not show that the Applicant’s parents are still married to and residing in marital union with each other (and the Applicant), we cannot determine whether the Applicant has been residing in the legal custody of his U.S. citizen parent for purposes of meeting the legal custody presumption at 8 C.F.R. § 320.1(1)(i). As the Director’s decision did not address the legal custody requirement under section 320(a)(3) of the Act, this matter will be returned to the Director to address this issue in the first instance and allow the Applicant an opportunity to supplement the record with additional evidence to establish his eligibility.

IV. CONCLUSION

The Applicant has overcome the Director’s conclusion that he did not show that he was residing in the physical custody of his U.S. citizen father at some point on or after his father’s naturalization in September 2019. The remaining issue is whether the Applicant meets the remaining section 320(a)(3) of the Act condition, which requires that the Applicant be residing in the United States in the *legal* custody of his U.S. citizen father at some point on or after the father’s naturalization. Accordingly, we will remand the matter to the Director to address this issue in the first instance.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis.

¹ The Applicant has not claimed that his mother is deceased or that his parents are legally separated.