File: (b) (6) Date: JUN 0 9 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lawrence Gatei, Esquire

ON BEHALF OF DHS: Gwendylan E. Tregerman
Senior Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

In an April 26, 2007, decision, the Immigration Judge terminated removal proceedings, finding that the respondent had automatically acquired United States citizenship under the Child Citizenship Act of 2000 ("CCA"), section 320 of the Immigration and Nationality Act, 8 U.S.C. § 1431. The Department of Homeland Security ("DHS") subsequently appealed, and on July 23, 2007, this Board found that the respondent was not a United States citizen because the requirements of the CCA had not been satisfied. In remanded proceedings, the Immigration Judge ordered the respondent removed from the United States to Cape Verde. Thereafter, the respondent petitioned for review with the United States Court of Appeals for the (b) (6) the controlling federal jurisdiction in this case. In a (b) (6) published decision, the (b) (6) vacated the removal order and remanded for further proceedings. (b) (6) *v. Mukasey*, (b) (6) For the following reasons, the DHS's appeal will be dismissed.

We assume the parties' familiarity with the factual record. (b) (6) *v.* (b) (6) *supra*, a (b) (6) *see also* Immigration Judge's 4/26/07 decision. In sum, the respondent was born in Cape Verde on November 11, 1983. His parents never married, and his father signed his birth certificate in 1988. The respondent's father came to the United States in 1985, while the respondent resided in Cape Verde with his mother. In November 1994, the respondent and his mother were admitted to the United States as lawful permanent residents. They resided in Massachusetts, first in (b) (6) then in (b) (6), where the respondent's father lived. The respondent's father became a citizen in 1996, when the respondent was 13 years old.

On November 20, 2002, the respondent was convicted under Massachusetts law of receiving a stolen vehicle. Consequently, in 2007, he was placed in removal proceedings and charged with removability under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony. The respondent moved to terminate removal proceedings based on his claim to derivative citizenship under the CCA. The CCA provides:

> (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.

Section 320 of the Act. To be eligible for citizenship under section 320 of the Act, a person must establish that the above-cited conditions have been met after February 26, 2001. 8 C.F.R. § 320.2(a).

There is no dispute here that the respondent meets the first two requirements of the CCA. The dispute, rather, is centered on the third requirement of "legal and physical custody." In our July 23, 2007, decision, this Board reversed the Immigration Judge and found that the respondent did not satisfy the "legal custody" requirement. However, the (b) (6) disagreed, finding that under relevant Massachusetts state law, the informal agreement between the respondents' parents "to share legal custody of him is entitled to effect."[1] (b) (6) *v. Mukasey, supra*, at (b) (6) *see also Fierro v. Reno*, 217 F.3d 1 (1st Cir. 2000).

The only outstanding issue is whether the Immigration Judge correctly determined that the respondent's father had the requisite "physical custody" (I.J. at 7-8). The (b) (6) did not address the Immigration Judge's finding in this regard because this Board had not addressed the issue. (b) (6) *v. Mukasey, supra*, at (b) (6) As the DHS continues to challenge the finding, we will examine the legal issue of "physical custody" *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (the Board reviews questions of law *de novo*).

Both parties have filed supplemental briefings. The respondent argues that his parents' arrangement was akin to the kind of shared physical custody arrangements recognized under Massachusetts law (Respondent's br. at 7). The DHS argues that the respondent did not demonstrate that his father had "physical custody" because that term is best understood as "sole custody," and the record is clear that the mother, not the father, had "sole custody" of respondent during the relevant

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[1] Under Massachusetts law, "shared legal custody" is defined as "continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development." M.G.L.A. ch. 208 § 31.

time period (DHS's br. at 7). The DHS further argues that the respondent failed to provide sufficient corroborating evidence to demonstrate the relationship between himself and his father (*Id.* at 7, 9).

"Legal relationships between parents and children are typically governed by state law." *Fierro v. Reno*, *supra*, at 4. We therefore look to the definition of "physical custody" under state law for guidance.[2] Massachusetts law provides for both "sole physical custody" and "shared physical custody." M.G.L.A. ch. 208 § 31. "Sole physical custody" is where a child resides with and is under the supervision of one parent, "subject to reasonable visitation by the other parent, unless the court determines that such visitation would not be in the best interest of the child." *Id.* In a "shared physical custody" arrangement, "a child shall have periods of residing with and being under the supervision of each parent; provided, however, that physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents." *Id.*

We concur with the Immigration Judge's reasoning that the CCA's "physical custody" requirement is satisfied in this case if the arrangement of the respondent's parents is akin to "shared physical custody" under Massachusetts law (I.J. at 7-8).[3] We note that conversely, if the arrangement is more akin to "sole physical custody" of the mother, with the father's rights characterized as "reasonable visitation" rights, then the CCA's "physical custody" requirement is not satisfied.

The Immigration Judge found that the arrangement was akin to "shared physical custody" (I.J. at 7). We agree. As determined by the Immigration Judge, the respondent resided with his father "on a weekly or semi-weekly" basis "throughout his childhood," and on these occasions, treated his father's home as his own (I.J. at 8).[4] The respondent "entered and exited the home at will, shared a bedroom with his step-brother, and frequently ate mea[l]s at the home" (I.J. at 8). Moreover, the respondent's father "established rules of behavior, provided the respondent with advice, and remained actively involved in both the major and minor aspects of the respondent's life" (I.J. at 8). We reject the DHS's arguments that the evidentiary record is insufficient, noting that the Immigration Judge accepted the testimonial evidence of the respondent and his parents as credible (I.J. at 5). In sum, we find that the nature of rights accorded to the respondent's father was not merely the "reasonable visitation" rights associated with a "sole physical custody" arrangement, but rather, was akin to a "shared physical custody" arrangement where each parent had frequent and continued contact with the respondent. We therefore find no reversible error in the Immigration Judge's decision terminating proceedings for lack of jurisdiction, as the respondent automatically acquired United States citizenship under the CCA.

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[2] Neither the CCA, nor the federal regulations, define "physical custody."

[3] In this regard, we note that the respondent does not argue that his father had "sole physical custody."

[4] On remand, the DHS argues that the Immigration Judge's factual finding – that the respondent resided with his father on a weekly or semi-weekly basis through his entire childhood and treated that residence at his home – is clearly erroneous (DHS's br. at 8). However, as noted by the First Circuit, the DHS stipulated that the facts of this case are not in dispute (b) (6) *v. Mukasey*, *supra*, at (b) (6) We therefore will not address the DHS's argument with regard to the Immigration Judge's factual findings.

Accordingly, the following order is entered.

ORDER: The DHS's appeal is dismissed.

FOR THE BOARD