

**MADE IN AMERICA --  
OR AS GOOD AS...**

**DERIVATIVE CITIZENSHIP  
AND AUTOMATIC NATURALIZATION**

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## Derivative Citizenship

There are two paths to United States citizenship. Citizenship is acquired under the Constitution or by federal statute. Anyone born in the United States automatically becomes a citizen under the Fourteenth Amendment. A person born outside the United States may have a statutory right to derivative citizenship through a citizen parent under the Immigration and Nationality Act, INA § 301 *et seq.*; 8 U.S.C. § 1401 *et seq.*

The various statutes governing derivative citizenship have been amended, revised, repealed, replaced and renamed over the years. Originally, only a father could transmit citizenship to his foreign born child. Revised Statutes § 1993. This was amended in 1934 to include the children of citizen mothers. Act of Congress of May 24, 1934. This Act was subsequently repealed and replaced by the Nationality Act of 1940. The Nationality Act of 1940 was in its turn repealed and replaced with the Immigration and Nationality Act of 1952. The Act of 1952 in its turn was amended in 1986, 1994 and 2000.

The multiple revisions of statutes governing derivative citizenship have, for the most part, been prospective. The various statutory changes and revisions have not effected eligibility for citizenship under prior law. A change in the law does not act to deprive a person of citizenship granted under previous law, nor does it benefit one ineligible for citizenship under the old law. Thus, the applicable statute governing derivative citizenship is the law that was in effect at the time a person claiming citizenship was born.

There are two unchanging prerequisites for transmitting U.S. citizenship to children born abroad. At least one parent must have been a U.S. citizen at the time the child was born and the U.S. citizen parent(s) must have resided or been physically present in the United States or an

outlying possession for a specified time prior to the child's birth. The length of residency or presence has varied over time and depends on the date of birth of the child and whether the claimant's parents were married or the claimant was born out of wedlock. However, the foreign born child of two citizen parents is a citizen if one parent resided in the United States or one of its possessions at any time prior to the child's birth.

A foreign born child may also gain citizenship through the naturalization of a parent. If a parent naturalizes and various conditions are met, the child automatically naturalizes through the parent. The requirements for automatic naturalization, like derivative citizenship, depend on the child's date of birth and the marital status of the child's parents.

Persons born abroad who acquire U.S. citizenship by statute are considered to be citizens at birth. Person who become citizens through automatic naturalization, on the other hand, become citizens only when the last statutory condition has been met.

As should be clear by now, there is nothing simple or clear when wading through the revised, renamed and repealed provisions governing derivative citizenship. Fortunately, Ira Kurzban, in *Kurzban's Immigration Law Sourcebook* has compiled a series of charts outlining the dates and requirement for transmission of citizenship over time. (Appendix) This chart is a starting point to determine if your client has a possible claim to citizenship. However, one can derive citizenship only as provided by statute. The statutes are strictly interpreted and adhered to. There are no equitable or reasonable exceptions to requirements. Moreover, the derivative citizenship statutes have withstood all constitutional challenges with the exception of § 1993 R.S. which originally allowed only citizen fathers to transmit citizenship to their children.

### **The Child Citizenship Act of 2000 (CCA)**

Title 8 U.S.C. § 1431; INA § 320

The Child Citizenship Act provides for automatic acquisition of citizenship for natural or adopted children born on or after February 28, 1983. The Act's effective date is February 27, 2001 and all conditions must be met before the child reaches his eighteenth birthday.

Requirements:

1. One parent must be a citizen of the United States (by birth or naturalization).
2. The child must be under eighteen years of age
3. The child must be residing in the United States in the legal and physical custody of the citizen parent
4. The child must be lawfully admitted as a permanent resident.

When all of the conditions have been met, regardless of the order in which they occurred, the child automatically becomes a citizen. No further action is required on the part of the parent or the child. However, it would be wise to apply for a certificate of citizenship or a passport as evidence of citizenship.

Under the CCA documentation to establish citizenship should be relatively straight forward once it is established that there is a citizen parent. The difficulty may arise in determining legal custody of the child. The INS will presume that the citizen parent has "legal custody" and lawful authority over the child absent evidence to the contrary if the child is the biological child of married parents; is a biological child currently residing with a surviving natural parent; or a biological child born out of wedlock who has been legitimated and currently resides with the natural parent. 8 C.F.R. 320.1. In the case of a child of divorced or legally separated parents, the INS will find a citizen parent to have legal custody of a child where there

has been an award of primary care, control and maintenance of a minor child by a court of law. The INS will consider a citizen parent who has “joint custody” to have legal custody of a child. PLIREF-IMMIG § 11:2.5, 11-21. Despite this, the Fifth Circuit recently interpreted “legal custody” to mean “sole” custody as opposed to “joint” custody, even though the naturalized mother had physical custody and the alien father was granted only visitation rights under the joint custody order. *Bustamante-Barrera v. Gonzalez*, 2006 WL 1030325 (5<sup>th</sup> Cir.2006); *but see Bagot v. Ashcroft*, 398 F.3d 252 (3<sup>rd</sup> Cir. 2005)(legal custody should be taken to mean custody under state law).

## II

### **Derivative Citizenship for Legitimate Children**

**A.** The Immigration and Nationality Act of 1952(INA) As Amended in 1986  
Title 8 U.S.C. 1401(g); INA 301

This version of the INA applies to anyone born on or after November 14, 1986. Unlike the Child Citizenship Act, persons deriving citizenship under this act are citizens at birth if they fall within the statutory constraints. Title 8 U.S.C. 1401(g) applies only to children born to a legal marriage with one parent a citizen and the other an alien.

To transmit citizenship the citizen parent, prior to the child’s birth, must have been physically present in the United States or a possession for a total of five years. Two of those years must be after the age of fourteen. If the citizen parent lived in the United States for the first fourteen years of his/her life and then left the country, married and had children, he or she would not be able to transmit citizenship because the parent did not have the two years presence after the age of fourteen. *In the Matter of S—F—*, *In the Matter of G—*, 2 I. & N. Dec.182, 1944 WL

5179 (B.I.A. 1944).

To prove presence for five years, documentary proof is always best, but this often is in short supply with our clients and their families. If there are no employment records, school records, dated receipts, witness testimony can establish presence, but it is more difficult to convince a INS officer without verifiable documents.

It is much easier for a citizen father of a legitimate child to transmit citizenship, therefore establishing a valid marriage is critical. To establish that the child is legitimate, the INS accepts the validity of a marriage that is recognized as valid in the jurisdiction where celebrated., *Matter of G.*— 6 I & N. Dec. 337 (B.I.A. 1954); *In the Matter of Kwan* , 11 I. & N. Dec. 205, 208 (B.I.A. 1965); *See also Solis-Espinoza v. Gonzalez*, 232 F.3d. 1090 (9<sup>th</sup> Cir. 2005)(finding child legitimate under California law, thus derived citizenship). If the parents of the putative citizen can prove up a common law marriage in a state where it is recognized, the child will be deemed legitimate. By the same reasoning, a marriage that is not considered legal where celebrated, will not be recognized by the INS. For example, a religious marriage in Mexico is not legally valid in Mexico and will not be recognized in the United States.

#### **B. The Immigration and Nationality Act of 1952(INA) As Enacted in 1952.**

From December 24, 1952 until November 14, 1986, a citizen parent could only transmit citizenship if prior to the birth of the child the parent had been physically present in the United States for a total of ten years. Five of those years must have been after the age of sixteen.

#### **C. The Nationality Act of 1940**

This Act applies to persons born after January 13, 1941 but before December 24, 1952.

The Nationality Act of 1940 introduced the requirement that a citizen parent must have a significant connection to the United States before transmitting citizenship to a foreign born child. This Act also continued to require that the child claiming citizenship established a real connection to the United State to retain derived citizenship.

Prior the the birth of the child, the citizen parent had to have resided in the United states for ten years, five of those years after the age of sixteen. Although similar to the later acts, the residency requirement is actually less onerous. Residency does not imply continuous residency nor physical presence during the entire statutory period. Place of residence is defined as general abode. *Alcaraz-Garcia v. Ashcroft*, 293 F.3d. 1155 (9<sup>th</sup> Cir. 2002)(citizen father who worked in U.S. nine months out of the year and spent remainder with family in Mexico had U.S. as principal place of dwelling); *Lee You v. Acheson*, 109 F.Supp. 98 (S.D. Tex 1952).

Although a child born to a citizen parent who met the residency requirement is deemed to be a citizen at birth, to retain citizenship the child must have come to the United States and remained continuously in the United States for either two or five years. The purpose of the retention requirements was to ensure that the persons deriving citizenship would be exposed to American influences and regard themselves as Americans. To this end, the derivative citizen's presence was required rather than the more flexible residence requirement for the parent.

To keep citizenship, a person who acquired under the 1940 act was required to be physically present in the United States continuously for five years between the ages of 14 and 28. In 1972 a two year retention requirement was substituted retroactively. In 1978 the retention requirement was repealed for all persons born on or after October 10, 1952. The 1978 repeal of the retention requirement did not restore citizenship to those who had failed to comply with it

prior to 1952. However, on March 1, 1995 persons who had lost their citizenship were allowed to regain citizenship upon taking an oath of allegiance to the United States. 8 U.S.C. 1435(d); INA 324.

#### **D. Revised Statutes § 1993**

Section 1993 applies to persons born at or after noon Eastern Standard Time May 24, 1934 and before January 13, 1941.

A citizen parent who prior to the birth of the child had resided in the United States could transmit citizenship to his/her children. There was no specified length of time required for residency.

It was §1993 that first introduced retention requirement for a derivative citizen. As a result of the retroactive application of revisions to the Nationality Act of 1940 and the INA derivative citizens have three options for fulfilling the retention requirements: 1) 5 years residence between the ages of 13-21; 2) two years continuous presence between the ages of 14-28; or 3) 5 years continuous presence if begun before October 27, 1972. Here too, citizenship may be restored to anyone who failed to fulfill the retention requirement upon application and taking an oath of allegiance.

### III

#### **Derivative Citizenship For Out of Wedlock Children**

##### **A. Citizen Mother**

Title 8 U.S.C. 1409(c); INA 309

It has always been relatively easy for the out of wedlock child of a citizen mother to meet the requirements for derivative citizenship.

Prior to May 24, 1934 a citizen mother transmitted citizenship to her out of wedlock child if the mother resided in the United States or a possession prior to the birth of the child, and the child was not legitimated by its alien father prior to January 13 1941. There have never been retention requirements for the child.

Subsequent to May 24, 1934 and prior December 24, 1952, a child derived citizenship if the mother resided in the United States prior to the child's birth. If the child was legitimated after birth by its father, the child's claim to citizenship is unaffected. *In the Matter of M—D—*, 3 I. & N. Dec. 585, 489 (1949).

The Immigration and Nationality Act of 1952 added the requirement that the citizen mother must have been continuously physically present in the United States or a possession for twelve months prior to the child's birth.

## **B. Citizen Father**

Title 8 U.S.C. 1409(a) INA § 309

An out of wedlock child born to a citizen father has a more difficult time establishing his citizenship than the child born out of wedlock to a citizen mother, primarily because paternity must be established.

Section 309 of the INA was substantively amended effective November 14, 1986 by the Immigration and Nationality Act Amendments of 1986. (INAA) As originally passed, the INNA did not provide effective dates for the amendments to §309. This was cured in 1988 by retroactively apply effective dates. As a result of this there are three categories of persons for purposes of INA § 309. These categories are persons covered by the “new” §309 (November 14, 1986 to present), persons covered by the “old” § 309 (December 24, 1952 to November 14,

1968), and those who may elect either “new” or “old” § 309 (November 14, 1968 to November 14, 1986).

The current law, “new” § 309, in effect as of November 14, 1986, requires the citizen father to have been physically present in the United States for a total of five years, with two of those years after the age of fourteen prior to the birth of the child. A blood relationship between the citizen father and the child must be established by clear and convincing evidence. The father (unless deceased), must agree in writing to provide financial support for the child until the age of eighteen. While the child is under the age of eighteen the child is legitimated under the law of the child’s residence or domicile or the father acknowledges paternity or paternity is adjudicated.

After December 24, 1952 and prior to November 14, 1986, with out regard to the application of “new” or “old” § 309, the citizen father of the child, had to have been physically present in the United States for a total of ten years, five of which were after the age of fourteen before the birth of the child.

The election of “new” § 309 and “old” §309, established the age by which legitimation must have occurred. Between November 14, 1968 and November 11, 1971, legitimation had to have occurred before the age of twenty-one under old § 309 or before the age of eighteen under the new section. Between November 14, 1971 until November 14, 1986, legitimation had to have occurred before the age of 15 under old § 309 or age eighteen under new § 309.

Before 1941 and after 1934 a citizen father must have resided in the United States for an unspecified period of time prior to the child’s birth and legitimated the child. There is not an age limit on when legitimation must have occurred. As with legitimate children, the out of wedlock child was required to either be physically present or establish residency in the United States to

retain citizenship.

Prior to May 24, 1934 the child must have been legitimated under the law's of the fathers domicile and the father must have resided in the United States.

#### IV.

##### **Other Routes to Citizenship or Nationality**

The child of a United States citizens and a national of the United States derives citizenship if the citizen parent has been physically present in the United States or an outlying possession for a continuous period of one year prior to the child's birth. 8 U.S.C. 1401(e).

A foundling if found in the United States before the age of five is a citizen unless it is shown that the child was not born in the United States before the child reaches twenty on years of age. 8 U.S.C. 1401(f).

Through the operation of treaties or legislation certain people are nationals but not citizens of the United States. Currently only people from the Swain Islands and American Samoa fall into this category. Children of nationals can derive nationality from their parents as well. As with derivative citizenship, the date of the child's birth governs the requirements for deriving. 8 U.S.C. §§ 1408 and 1409. While a national does not enjoy all of the rights of a citizen, a nation is entitle to the protection of the U.S. Government. More important, a national is protected from the U.S. Government – a national cannot be deported.

#### V

The preceding merely hits the high points of derivative citizenship and some issues that are likely to arise. For a more complete review of the subject see the State Department's Foreign Affairs Manual. It is available on line at [foia.state.gov](http://foia.state.gov).