Are You a United States Citizen?

A Guide to Understanding the Rules of Citizenship

The Florence Immigrant & Refugee Rights Project is a nonprofit legal services organization that works with adults and children in immigration custody in Arizona. The staff of the Florence Project prepared and updated this guide for immigrant detainees who represent themselves in their removal proceedings. We do not charge for our services. To see our guides, go to: www.firrp.org.

This guide is not intended to provide legal advice. It is not a substitute for legal counsel.

Contents

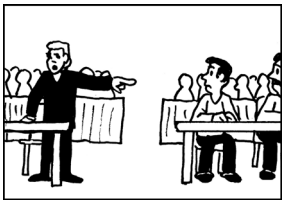
Important Words to Know

Immigration law has a lot of technical words. Here is a list of some words you will see in this guide and a short explanation of what they mean.

- **Deportation:** ICE has put you in deportation proceedings, which are also called removal proceedings. If the judge orders you deported or "removed" from the United States, officials will send you back to the country where you are a citizen. You will not be able to legally return to the U.S. for at least 10 years.

- **Florence Project:** A group of lawyers and legal assistants who provide free legal help to people who do not have lawyers. The Florence Project wrote this guide to help you understand your case.

- **Government Attorney:** The lawyer who represents ICE when you go to your court hearings. This lawyer sits at the table next to you and talks to the judge. Government attorneys should see that justice is done. Usually, they ask the judge to order to deport you.



- **Immigration and Customs Enforcement (ICE):** The agency that has put you in deportation proceedings and detained you. ICE is part of the Department of Homeland Security, or DHS.

- **Immigration Judge (judge):** The person who will decide your case. Judges hold hearings in the courtroom and wear black robes. They should look at the facts of your case and apply the law fairly. Judges do not work for ICE.

Who Should Read this Guide?

By law, Immigration and Customs Enforcement (ICE) cannot detain or deport U.S. citizens. But the question of whether someone is a U.S. citizen can be complicated.

This guide from the Florence Project will help you determine if you may claim to be a U.S. citizen, and if you can, how to prove it.

Who Is a U.S. Citizen?

People who were born in the U.S. or its territories are automatically U.S. citizens. But even if you were not born in the U.S., you may still be a U.S. citizen. That means you may be able to avoid deportation if you can prove to ICE or an immigration judge that you are a U.S. citizen.

Under the law, a person may be a U.S. citizen in several ways.

You may be a U.S. citizen if:

- **You were born in the U.S. or one of its possessions,**
- **You became a naturalized citizen of the U.S.,**
- **One of your parents naturalized before you turned 18 years old**,
- **One of your parents or grandparents were born in the U.S. or one of its possessions**, or
- **One of your parents naturalized before you were born**.

Who Qualifies as a *Parent*?

Under immigration law, the term *parent* has a specific meaning.

Parents normally refers to your biological mother or father. But depending on the year you were born, in certain circumstances an adoptive parent may qualify as your *parent*.

Except in rare situations, a stepparent who never formally adopted you does not qualify as a parent under citizenship rules.

In each type of case, this guide will discuss if you can make a claim through anyone other than your biological parents.

Are You a U.S. Citizen by Your Own Birth?

You are a U.S. citizen if you were born:

- **In one of the 50 U.S. states** (unless your parent is a foreign diplomat), or
- **In one of the following areas** considered to be part of the U.S. (called *possessions*) after the specific dates listed:
  - Puerto Rico after January 13, 1941;
  - Virgin Islands after January 13, 1941;
  - Guam after December 24, 1952; and
  - Northern Mariana Islands after November 4, 1986.

If you were born in Puerto Rico, Virgin Islands, Guam, or the Northern Mariana Islands before the dates listed, you might still be a U.S. citizen, but the law is complicated. Check with a lawyer if possible and tell the judge and ICE officer that you think you might be a U.S. citizen.

People who are not U.S. citizens but are U.S. nationals who are born in certain specified U.S. territories also cannot be deported.

You can prove you are a U.S. citizen by birth with a certified copy of your birth certificate. If you do not have a birth certificate because you were not born in a hospital and your birth was not registered, try to get these documents:

- Baptismal certificate,
- Certification of your birth by the doctor who attended the birth, or
- Affidavit from someone who attended your birth. An *affidavit* is a written statement by a witness. This statement should include the exact date and place of your birth and how the person knows these facts. The affidavit should be signed and notarized. Since an affidavit of this type may not be enough proof, try to gather as much proof as you can that you were born in the U.S.

If you were a foundling

You may be a U.S. citizen if:

- You were found in the U.S. before you were 5 years old,
- Your parents are not known, and
- ICE cannot disprove that you were born in the U.S. before you turn 21 years old.

If this is your situation, tell ICE or the judge and try to get a lawyer to help you.

Are You a U.S. Citizen by Naturalization?

Who is a naturalized U.S. citizen?

You may be a naturalized U.S. citizen if you were a legal permanent resident in the U.S. and you:

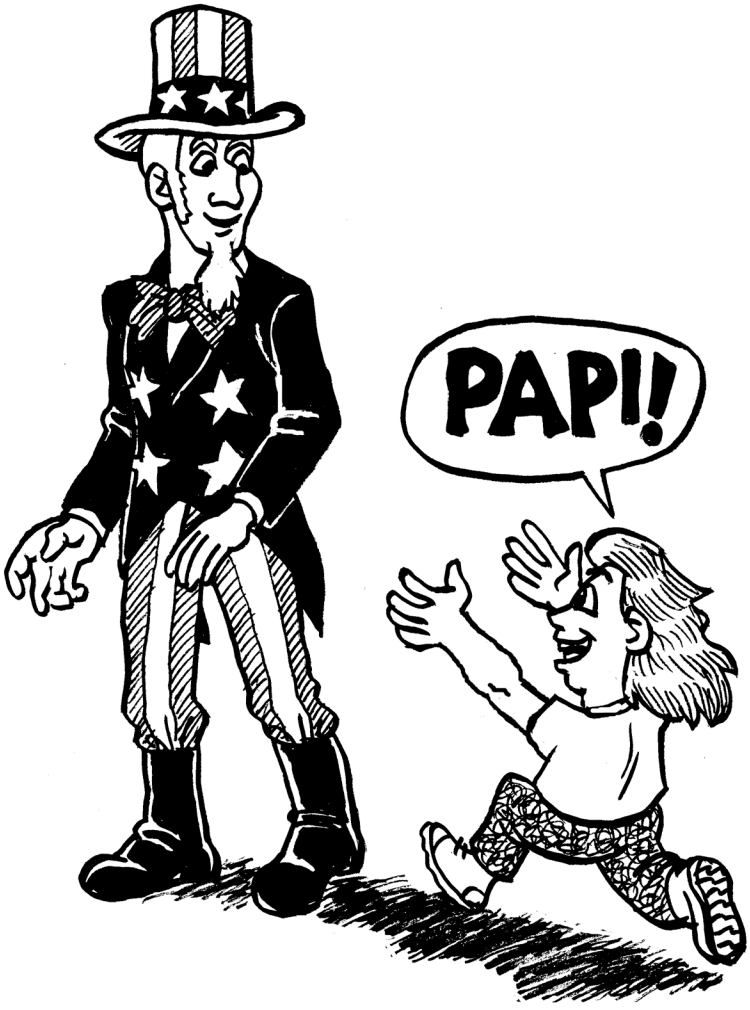
- Filled out an application,
- Took a test on your knowledge of the English language and U.S. history,

- Had an interview with Immigration and Naturalization Service (INS) or ICE, and
- Took an oath of allegiance to the U.S. at a swearing-in ceremony.

If you went through this process, you should have received a naturalization certificate. If you do not have a copy but believe you are a naturalized U.S. citizen, tell ICE and the judge. ICE can check your immigration records to see if proof exists in your file that you were naturalized.

Are You a U.S. Citizen Through Someone Else?

If a parent became a naturalized U.S. citizen



You might be a citizen of the U.S. if one of your parents became naturalized U.S. citizens before you turned 18. This type of citizenship is called *derivative citizenship*. It means that when your parents became citizens, you "derived" your citizenship or got it through them.

If you qualify for derivative citizenship, you should have become a citizen automatically when your parent naturalized. You did not have to fill out any forms. You may have been a U.S. citizen since your parent naturalized and you never even knew it.

If you were born AFTER February 27, 1983

Throughout the years the laws about deriving and acquiring citizenship from parents have changed. At the end of this guide are a number of charts that can help you determine the specific requirements that apply to you depending on the year in which you were born.

Here is a simplified list of the *normal* requirements for you to derive citizenship:

Before you turned 18 years old:

- You become a *lawful permanent resident*,
- One or both of your parents was a U.S. citizen by either birth or naturalization, AND
- Your U.S. citizen parent had custody of you.

But it usually is not this simple unless you were born AFTER February 27, 1983.

If you were born BEFORE February 27, 1983 **then the following general rules would apply to you:**

- **BOTH of your parents naturalized before you turned 18 years old** (or before you turned 21 if you were born before 1941);
- **Your parents were divorced or legally separated, and you were in the physical and legal custody of a parent who naturalized**;
- **One parent was deceased, and you were in the physical and legal custody of the surviving parent who naturalized**; OR
- **Your mother became a naturalized U.S. citizen, and your father did not "establish paternity by legitimation" before your mother naturalized**

If you derived U.S. citizenship through one of these ways, then you should obtain copies of your birth certificate, your parents naturalization certificates, and your legal permanent residency card. Give the copies to ICE and the immigration judge.

If you became a legal permanent resident after your parent naturalized

It does not matter in what order you meet the requirements for derivative citizenship.

As long as before your 18th birthday there was a single moment in which you were a lawful permanent resident living in the physical and legal custody of your U.S. citizen parent, you are a derivative citizen.

If you were adopted by someone who was born in the U.S.

If you were born *before* February 27, 1983 and you were adopted by one or more people who were born in the U.S., you are not a derivative citizen.

If you were born *after* February 27, 1983 and you were adopted by one or more people who were born in the U.S., you are a derivative citizen. But you may have to show that you were adopted before age 16.

If you were adopted by parents who naturalized before you turned 18, you may be a U.S. citizen if all the necessary events occurred before October 5, 1978.

Note: If you were adopted, you might be able to claim derivative citizenship either through your adoptive parents or through your natural parents or a combination of the two.

If your parents were "legally separated"

Legally separated means that your parents went to a court of law and asked the court to recognize that they no longer wished to be together. It is a step that some couples take before getting a divorce.

If your parents were legally separated, a document from the court would show the separation. Also, if your parents got a divorce, they should have a document from a court usually called a *divorce decree*. If you were born before February 27, 1983, you must have a copy of these documents to prove your case.

How to show that your parents had custody of you

When your parents separated, a family court decided who should have custody over you.

Ask your family if they have a copy of a document showing who had *legal custody* of you. When requesting the documents, ask for a *certified copy*. A *certified copy* is better than a regular copy because it has a stamp showing that it is a true copy.

How to apply for derivative citizenship

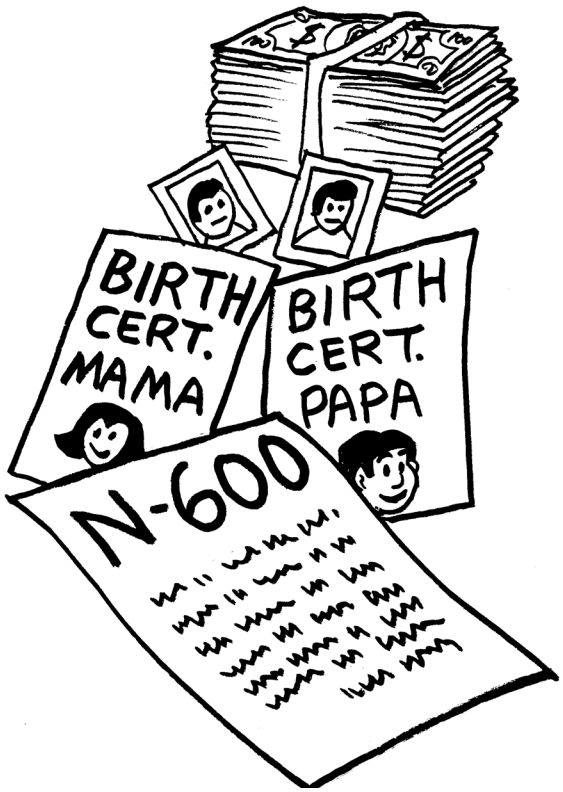
If you qualify for derivative citizenship through any of the ways listed above, you are already a U.S. citizen and you do not need to apply for it. But you must prove your citizenship to end your immigration proceedings.

Understand that proving that you are a U.S. citizen may mean that you are no longer in immigration proceedings, but it does not necessarily give you proof of your U.S. citizenship to work or leave the U.S.

When you have proof of your citizenship, file an application for a certificate of citizenship. You can apply with U.S. Citizenship and Immigration Services (USCIS). Fill out Form N-600, *Application for Certification of Citizenship.* Go to: https://www.uscis.gov/n-600.

To file the N-600 form you must provide USCIS with the following:

- The original N-600 form;
- Two identical, passport-style photographs of yourself;
- Your and your U.S. citizen parent's birth certificates;
- A fee of $1,170; and
- Proof of your claim to citizenship.



If you are claiming U.S. citizenship through your own birth in the U.S., you do not need to file Form N-600.

You can also apply for a U.S. passport as proof of citizenship, but it is usually difficult to apply for a passport if you are detained.

Did You Acquire Citizenship?

Did you acquire U.S. citizenship at birth?

Acquired citizenship may occur if one or both of your parents was a U.S. citizen when you were born. Even though your parents may have become citizens in a variety of ways, the key to claiming that you have acquired citizenship is to prove that a parent was a U.S. citizen at the time of your birth.

Whether you acquired citizenship at birth depends on many factors. You must know the answers to the following questions:

- What is your date of birth?
- Was one or both of your parents a U.S. citizen at the time of your birth?
- Is your *parent* your adopted parent, your stepparent who never adopted you, or your natural parent?
- Were your parents married when you were born?
- Did your U.S. citizen parent live in the U.S. before you were born? For how many years?

Acquired Citizenship
1st Question: What is your date of birth?

Over the years, the law on U.S. citizenship has changed many times. To figure out if you are a U.S. citizen through a parent, you must look at the requirements that were in place when you were born.

At the back of this guide, you will find a few charts to help you determine what you will need to prove your citizenship.

Acquired Citizenship
2nd Question: Was one or both of your parents a U.S. citizen at the time of your birth?

If one or both of your parents was a U.S. citizen BEFORE you were born, you *might* be a U.S. citizen.

Remember, your parent could be U.S. citizen under any type of U.S. citizenship described in this guide. So, they could have citizenship by birth, by naturalization, by derivation, or by acquisition.

If your parents do not know if they are U.S. citizen through your grandparents, they should follow the same process that you are going through to determine if they qualify for acquired citizenship. That means, answering these questions and checking the charts at the end of the guide.

If one or both of your grandparents was a U.S. citizen when your parent was born, perhaps your parent is a U.S. citizen. If so, that parent would be a U.S. citizen at birth. Then you could see if you are a U.S. citizen through your parent.

Acquired Citizenship
3rd Question: Is your parent your adoptive parent, your stepparent, or your natural parent?

Like many people, you may have more than one set of parents. For example, you may have a biological mother and father plus a stepmother or stepfather. Your stepparent may not have officially adopted you.

In acquired citizenship, when we mention the word *parent*, we mean *biological parents*. In other words, we mean your parents by blood.

Note: If you were adopted by U.S. citizen parents, you are only a U.S. citizen through the adoption if you were born after February 27, 1983 *or* if your adoptive parents obtained a certificate of citizenship for you before your 18th birthday.

Acquired Citizenship
4th Question: Were your parents married when you were born?

If your natural or biological parents were not married when you were born, the requirements for citizenship are different depending on whether your mother was a

U.S. citizen, your father was a U.S. citizen, or both of your parents were U.S. citizens.

The charts at the end of this guide will help you determine what proof you must show depending on if your mother or father was the U.S. citizen.

Note: If your father was a U.S. citizen but your parents never married, it may be difficult to show that you acquired citizenship through him. It helps if your father's name is on your birth certificate, but the court can still ask you to prove that he acknowledged you as his child in other ways, too.

If your parents were not married when you were born or afterward, and your father's name is not on your birth certificate, the law may require your father to take certain steps to show that he is your father. The steps he must take may depend on the law where he lived or where you lived and may also depend on your date of birth.

The law about legitimation is complicated and we cannot fully explain it here. If you meet the above requirements, talk to an attorney or legal agency if possible.

Acquired Citizenship

5th Question: Did your U.S. citizen parent live in the U.S. before you were born? For how many years?

Now you should look at the charts at the end of this guide to see how long your U.S. citizen parent or parents had to live in the U.S. before your birth for you to acquire citizenship. We call this part of the law, *residency requirements*. In most cases, you must show that your parent lived in the U.S. anywhere from a few days to 10 years.

After you answer the above questions, review the charts at the back of this guide to see if you might be a U.S. citizen.

How Do You Get Evidence of Your Claim to U.S. Citizenship?

Proof for derivative citizenship claims

To prove your claim to derivative citizenship you will need proof of your parent or parents' naturalization and a copy of your birth certificate to show that you are the child of your parent or parents.

If you were born before February 27, 1983 and you are claiming through one parent rather than two, get copies of divorce, legal separation and custody documents or the death certificate if your parent passed away.

Also, you will need proof of your lawful permanent residence in the U.S.

Proof for acquired citizenship claims

If you believe that you have a claim to acquired citizenship because one or both of your parents was a U.S. citizen when you were born, you will need proof that your parent was a U.S. citizen then.

Proof of your parent's citizenship could be:

- **Birth certificate** — Your parent's birth certificate,
- **Naturalization certificate** — Certificate of your parent's naturalization,
- **Passport** — Your parent may have gotten a U.S. passport before you were born, OR
- **Certificate of citizenship** — Certificate which your parent obtained by proving a claim to U.S. citizenship through a parent, perhaps similar to the claim you are making now.

You also may need proof that your parent lived in or was physically present in the U.S. for a certain period of time. Look at the charts at the end of this guide to figure out what time period you must prove your parent was in the U.S.

Proof of your parent's residency or physical presence in the U.S. is difficult but not impossible to gather. The following are suggested types of proof.

FOIA request

It might be helpful to submit a Freedom of Information Act (FOIA) Request about your U.S. citizen parent or parents.

Ask an Immigration Officer for a Form G-639: *Freedom of Information/Privacy Act Request* and the address of where to send the request.

If you are mailing the FOIA request, write a cover letter and send it with the form.

- If you are in ICE custody, in your cover letter tell the FOIA officer that you are in custody and ask the FOIA office to respond quickly.
- If you are not detained, you can submit your FOIA requests online at https://www.uscis.gov/g-639.

A parent's school records

Before you were born, your parent may have attended elementary, junior high, high school or college in the U.S.

Ask your parent or members of your family where they went to school.

- If your parent is alive, have the parent write or call the schools to find out the process for requesting records.
- If your parent is not alive, you or your family members can request the records.

A parent's records from churches or other religious institutions

Before you were born, your parents may have attended a church, temple, synagogue, mosque, etc. They may have been members of a church or other institution and they may have records of baptism, communion or other religious ceremonies.

Ask your parents for records of their religious involvement or ask them to write to the religious organization for those records. Also, someone at the church or institution may remember your parents and can write a letter about their attendance or membership. Ask the person who writes the letter to be as specific as possible about the dates your parents were involved in the church or institution and how the author of the letter knows this. Also, the letter should be notarized.

A parent's work records

If your parents worked in the U.S., they may have records of their employment, such as check receipts. They should ask the Social Security Administration for a copy of their social security records.

- If your parent is no longer alive, an immediate family member can ask for the records.
- If they are still alive, only they can ask for the records.

To request social security records, fill out and mail Form SSA-7004: *Request for Social Security Statement*. If you are not detained or if your parents can submit the form, go to: https://www.ssa.gov/hlp/global/hlp-statement-7004.htm.

If you cannot get a copy of Form SSA-7004, then write to:

Social Security Administration
Wilkes-Barre Data Operations Center
P.O. Box 7004
Wilkes-Barre, PA 18767-7004

We strongly recommend that you or your parent request these records. They can be good proof of the years your parent was in the U.S.

A parent's tax returns

If your parents worked in the U.S. during the years you need to prove that they were in the U.S., they may have filed income tax forms. In that case, your parent or family may have copies of those forms. If not, your parent can ask the Internal Revenue Service (IRS) for a copy.

To ask for tax returns, fill out and send IRS the Form 4506; *Request for Copy of Tax Return* and Form 4506-T: *Request for Transcript of Tax Return*. For a copy of these forms, go to: https://www.irs.gov/forms-pubs/about-form-4506 and https://www.irs.gov/forms-pubs/about-form-4506-t.

It is best if your parent submits these requests if possible because the IRS recently made it more difficult to ask for the tax returns of another person.

Census records

At some point in their lives before you were born, your U.S. citizen parent may have been counted in a census survey in the U.S. Every 10 years, the U.S. Census Bureau conducts a census survey to count the number of people in the country.

If your U.S. citizen parent was ever counted in a survey, proof of the survey is some evidence that the parent was present in the U.S. in the year counted. Census records can be very difficult to obtain. Sometimes you must pay for copies of the records. For these reasons, you may want to concentrate on getting the other forms of proof.

Census records are confidential and are only available to the public after 72 years have passed. That means records from the 1940 census were made publicly available in 2012, and records from the 1950 census should be available after 2022. The public census records can be found at https://www.archives.gov/research/genealogy but your parents can ask for confidential census records about themselves.

If your parent is deceased and if you are the legal heir, you can request the records yourself. But you must pay for them. A particular year could cost $65 or more. Also, you must say which year you want to know about. If you are not sure when your parent was in the U.S., you may be need records from several years. You must then pay for each year that the Census Bureau searches its records.

Finally, you must know your parent's address at the time your parent may have been counted in a census.

To ask for confidential census records with Form BC-600: *Application for Search of Census Records*:

Go to: https://www2.census.gov/library/publications/2013/demo/BC-600.pdf

OR

Write to: U.S. Census Bureau
Box 1545
Jeffersonville, IN 47131
(812) 218-3046

OR

History Staff
U.S. Census Bureau
Washington, DC 20233
(301) 457-1167

While census records may help, remember it is not certain that your parent was ever included in a census survey. It may take a lot of resources to request the information.

Rent records or home ownership records

Your parents may have paid rent or owned a house during the years you are interested in proving that they were living in the U.S. For good proof of a parent's presence in the U.S., get copies of:

- Rental agreements,
- Leases,
- Rent receipts,
- House payments, or
- Home ownership documents.

If your parent rented a place but has no records of this, perhaps the landlord is still alive and could write a letter stating that your parent did rent. In the letter, the landlord should state the exact years your parent paid rent. Again, the letter should be signed and notarized.

Military or draft records

Perhaps a parent served in the U.S. military during the years you want to prove U.S. citizenship. To ask for military records, use Form 180: *Request Pertaining to Military Records*.

- If your parent is alive, that person must ask for copies of the military records.
- If your parent is no longer alive, you or an immediate family member can ask for the records.

For a copy of Form 180 or more information about how to request military personnel records:

Go to: https://www.archives.gov/veterans/military-service-records/standard-form-180.html.

OR

Write to: National Personnel Records Center
1 Archives Drive
St. Louis, Missouri 63138

If you want to prove citizenship through your father, he may have registered for the Selective Service. All men who are U.S. citizens or legal permanent residents and are over 18 years old must register to serve in the military. Your father might have registered only once, or he may have registered several times.

- If your father is alive, he can ask for his records.
- If he is no longer alive, you can ask for copies of his records.

To see if your father registered, you must know his birthdate and social security number. You or a family member can:

Call: 1-847-688-6888

Affidavits from witnesses

Perhaps your parents have friends or community members who knew them during the years you want to prove they were in the U.S. You or your family could ask those witnesses to write "affidavits" stating:

- The exact years they knew your parent,
- How they knew your parent,
- Where your parent was during those years (city, state, address, if known), and

- Any other specific information they remember such as your parent's type and place of employment, school attendance, or church attendance.

The affidavit must be signed and notarized. It also must be written in English.

Remember, all the documents you send to ICE and the judge must be in English. If you receive documents in another language, you can translate them. Just put your translation in with the original letter and attach a signed copy of the *Certificate of Translation*.

Certificate of Translation

I, _____
(Write your name)

certify that I am competent to translate this document from its original language into English and that the translation is true and accurate to the best of my abilities.

Signed by translator:	
Date:	_____ / _____ / _____ Day / Month / Year

What is the best kind of proof?

ICE may say that affidavits from friends, family members, or acquaintances who knew your parents when they lived in the U.S. before you were born are not enough proof. For this reason, try to get some "official" proof of the years that your parents lived in the U.S. For example, the best kinds of proof are social security records, military records, work records, and school records.

How much proof is enough?

You can never have enough proof. Gather as much proof as you can.

Remember, you only need proof of your parent's years in the U.S. that are required for your case. Your parent may have been in the U.S. for a very long time — longer than you need to prove.

You must show that your U.S. citizen parent was here for a number of years before you were born. Proving the years that your parent was here after you were born will not help you!

By looking at the charts at the end of this guide, you should be able to figure out which years you must prove that your parent was in the U.S.

Remember: **The years that your U.S. citizen parent was in the U.S. do not have to be continuous or all in a row**. You can use a period of years, skip some years, and use portions of years and add them all together. For example, if your parent spent 5 months in the U.S. every year before your birth, add up the months from each year and see if they meet the total amount of time required. The ultimate question is what is the total number of years they lived in or were physically present in the U.S. before you were born?

What Happens After You Submit Proof of Citizenship?

Once you give the immigration judge proof of your citizenship claim, the judge will decide if your claim is strong enough to *terminate* (or end) your immigration proceedings. This means ICE can no longer try to remove you from the U.S.

If you are in immigration proceedings and the judge ends the proceedings against you, immediately ask the judge to release you from ICE custody on your own recognizance. In that case, you will not have to pay a bond.

If the Judge Rules Against You, What Should You Do?

If the judge rules against you, you have 3 possible options:

- **You can accept the judge's decision and accept an order of removal**,
- **You can accept the judge's decision but ask for voluntary departure**, or
- **You can decide not to accept the judge's decision and "reserve" your right to file an appeal.** See the Florence Project's guide to Board of Immigration Appeals and Ninth Circuit appeals if you decide to continue fighting your case.

Even if the judge rules against you, **you can always renew your claim** to U.S. citizenship if you get more proof to support your claim.

If you make a claim for U.S. citizenship, can you apply for other relief from deportation?

To avoid being deported from the U.S., it is usually a good idea to apply for (or raise) every possible defense that you can. For instance, you may think you have a great case for citizenship, but you could be wrong. You might lose your case but you may be able to win another type of relief from deportation. So you should try to find out other processes you may qualify for.

If you are in immigration proceedings, take a look at the Florence Project's other guides about how to avoid deportation, also available at https://firrp.org/resources/prose/.

What Happens if You Get Out of Detention Before your Case Is Decided?

If you are allowed to leave the detention center before your case is over, your case will continue.

If you are in Immigration Court proceedings, you will have future court dates. Even though if you are released ICE must notify the court of your address, you should file a change of address form to notify them of your new address.

To find out when and where your next court date will be held, you can either:

Call: 1-800-898-7180 or
Go to: https://portal.eoir.justice.gov/InfoSystem/.

Remember, even if you have a claim to U.S. citizenship if you miss a hearing, the judge will order you removed from the U.S.

These Cases Are Complicated, But Do not Be Afraid!

Preparing your case is a lot of work, but the more you prepare, the better chance you have of winning your case.

Winning these cases is hard, but not impossible. People who are in immigration proceedings do get issued *Certificates of Citizenship* or have the immigration proceedings against them ended. We wish you the best of luck!

Charts About Derivative Citizenship

CHART A: Determining Whether Children Born Outside the U.S. Acquired Citizenship at Birth

CHART B: Acquisition of Citizenship: Determining if Children Born Abroad and Out of Wedlock Acquired U.S. Citizenship at Birth

CHART C: Derivative Citizenship -- Lawful Permanent Resident Children Gaining Citizenship Through Parents' Citizenship

CHART A: DETERMINING WHETHER CHILDREN BORN OUTSIDE THE U.S. ACQUIRED CITIZENSHIP AT BIRTH[1]

(If child born out of wedlock, see Chart B) -- **Please Note: A child cannot acquire citizenship at birth through an adoption.**[2]

STEP 1: Select period in which child was born	**STEP 2:** Select applicable parentage and immigration status of parents	**STEP 3:** Measure citizen parent's residence or physical presence, whichever is required, ***PRIOR*** to the child's birth against the requirements for the period in which child was born. The child acquired U.S. citizenship at birth if, at time of child's birth, citizen parent had already met applicable requirements.	**STEP 4:** Determine whether child has since lost U.S. citizenship. Citizenship was lost on the date it became impossible to meet necessary requirements—never before age 26. Individuals who have failed to meet the requirements can regain citizenship by taking an oath of allegiance.

PERIOD	**PARENTS**	**RESIDENCE / PHYSICAL PRESENCE REQUIRED FOR USC PARENT**	**RESIDENCE / PHYSICAL PRESENCE REQUIRED FOR CHILD**[3]
Born prior to 5/24/34	Father or mother citizen	Citizen parent had resided in the U.S.	None
Born on/after 5/24/34 and prior to 1/14/41	Both parents citizens	One had resided in the U.S.	None
	One citizen and one alien parent	Citizen had resided in the U.S.	Either: 1) 2 years continuous physical presence[4] between the ages of 14 and 28,[5] or 2) if begun before 12/24/52, 5 years residence in U.S. or its outlying possessions between the ages 13 and 21, or 3) if begun before 10/27/72, 5 years continuous physical presence between the ages 14 and 28.[6] Individuals unaware of potential U.S. citizenship may fulfill the retention requirement through constructive physical presence.[7] No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. Individuals who failed to meet physical presence requirements can regain citizenship by taking an oath of allegiance.[8]
Born on/after 1/14/41 and prior to 12/24/52	Both parents citizens; or one citizen and one national[9]	One had resided in the U.S. or its outlying possessions.	None
	One citizen and one alien parent	Citizen had resided in U.S. or its outlying possessions 10 years, at least 5 of which were after age 16. If citizen parent served honorably in U.S. Armed Forces between 12/7/41 and 12/31/46, 5 of the required 10 years may have been after age 12.[10] If the citizen parent served honorably in U.S. Armed Services between 1/1/47 and 12/24/52, the requirement consists of 10 years of physical presence, 5 of which may have been after age 14.[11]	If begun before 10/27/72, 2 or 5 years continuous physical presence[12] between ages 14 and 28.[13] If begun after 10/27/72, 2 years continuous physical presence between ages 14 and 28. Individuals unaware of potential U.S. citizenship may fulfill the retention requirement through constructive physical presence.[14] No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. (This exemption is not applicable if parent transmitted under the Armed Services exceptions). Individuals who failed to meet physical presence requirements can regain citizenship by taking an oath of allegiance.[15]
Born on/after 12/24/52 and prior to 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possessions.	None[16]
	One citizen, one national parent	Citizen had been physically present[17] in U.S or its outlying possessions for a continuous period of one year.	None[18]
	One citizen, one alien parent	Citizen had been physically present[19] in U.S. or its outlying possessions 10 years, at least 5 of which were after age 14.	None[20]
Born on/after 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possessions.[21]	None[22]
	One citizen and one national parent	Citizen had been physically present[23] in U.S. or its outlying possessions for continuous period of 1 year.[24]	None[25]
	One citizen, one alien parent	Citizen had been physically present[26] in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14.[27]	None[28]

Produced by the ILRC (August 2021) -- Adapted from the INS Chart

This Chart is intended as a general reference guide.

The ILRC recommends practitioners research the applicable laws and guidance for additional information.

The information in these charts comes from case law, statutory language, the USCIS policy manual, the Adjudicator's Field Manual, the Foreign Affairs Manual, and INS interpretations. Although the USCIS policy manual supersedes previous policy memos and the Adjudicator's Field Manual, the USCIS policy manual is silent on many subjects discussed at length in prior USCIS policy statements and INS Interpretations. In the absence of guidance to the contrary from the USCIS policy manual, the ILRC believes advocates should continue to use helpful clarification and guidance from prior USCIS policy statements and INS Interpretations.

[1] Congress has passed many laws governing the acquisition of citizenship at birth, including the Act of May 24, 1934, the Nationality Act of 1940, the Act of March 16, 1956, and the Immigration and Nationality Amendments of 1986.

[2] See *Marquez-Marquez v. Gonzales*, 455 F.3d 548 (5th Cir. 2006) (holding that petitioner did not obtain citizenship at birth based on adoption by U.S. citizen since INA § 301(g) did not address citizenship through adoption); *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007) (same); see also *Cabrera v. Att'y Gen.*, 921 F.3d 401, 404 (3d Cir. 2019) (finding that the disparate treatment of adopted children vis-à-vis biological children under INA § 309 does not violate the Constitution). But a number of federal courts have found that a biological relationship is not required where the child's legal parents were married at the time of the child's birth. See *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018) (finding that a child acquired citizenship, where his biological mother was married to a U.S. citizen at the time of his birth even though neither of his biological parents were U.S. citizens); *Solis-Espinoza v. Gonzales*, 401 F.3d 1091 (9th Cir. 2005) (holding that a child acquired citizenship through biological father's wife when they were married at time of birth, father acknowledged child, and mother accepted her as her own); *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) (explaining that a child acquired U.S. citizenship at birth even though neither of his biological parents were citizens, but at the time of his birth his mother was married to a U.S. citizen); see also *Kiviti v. Pompeo*, F.Supp.3d 293 (D. Md. 2020) (finding the statute unambiguously does not require a blood relationship to transmit citizenship from a U.S. parent to a child where the parents are married at the time of the child's birth); *Sabra v. Pompeo*, 453 F.Supp.3d 291 (D.D.C. Apr. 2, 2020) (same); *Dvash-Banks v. Pompeo*, 2019 WL 911799 (C.D. Cal. 2019) (same).

Although the INA does not define "wedlock," the State Department interprets "birth in wedlock" as birth when the parents are "legally married to each other at the time of the person's conception or birth or within 300 days of the end of the marriage by death or divorce." Dep't of State, *Acquisition of U.S. Citizenship at Birth by a Child Born Abroad* (May 18, 2021), https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Acquisition-US-Citizenship-Child-Born-Abroad.html. This is a recent, welcome change that replaces the prior, narrower interpretation that defined birth in wedlock as "birth during the marriage of the biological parents to each other." 7 FAM 1140 App'x E. The prior definition was challenged in court as ultra vires, and as having a discriminatory impact on same sex couples because children of legally married same sex couples would never be considered to be born "in wedlock" under the prior definition.

On August 5, 2021, USCIS similarly updated its Policy Manual to account for assisted reproductive technology, instructing that a child is born in wedlock when "the legal parents are married to one another at the time of the child's birth and at least one of the legal parents has a genetic or gestational relationship to the child." 12 USCIS-PM H.3(b).

[3] If an individual acquired citizenship but did not retain it, that person was a U.S. citizen until they failed to comply with the retention requirements. See 7 FAM 1133.2-2. If the individual regained U.S. citizenship by taking an oath of allegiance at a later date, that citizenship is not retroactive. This means that the person could not transmit citizenship to any children born between the time they lost citizenship and regained it. See 7 FAM 1140 App. L.

[4] Physical presence refers to the time that a person actually spent in the United States, even if they were only visiting. Nevertheless, this requirement has been interpreted generously in the retention context. Absences totaling fewer than 60 days in the aggregate will not break physical presence for the 2-year requirement. Former INA § 301(b), Pub. L. 92-582, 86 Stat. 1289. For a discussion of continuous physical presence related to the retention provisions, see 7 FAM 1133.3 and INS Interpretations 301.1(b)(6).

[5] In 1972, Congress liberalized the retention requirements, reducing the period of continuous physical presence from 5 years to 2 years. Act of Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1289. While the statute did not address retroactivity, INS Interpretations 301.1(b)(6)(vii) extended the 1972 2-year requirement to those born between 5/24/1934 and 1/13/1941. See also Kurzban, Immigration Law Sourcebook, Appx B (ed. 2019-20). Per the interpretations, if someone lost citizenship having failed to satisfy the 5-year requirement but had satisfied the amended language for the 2-year requirement, the individual was regarded as never having lost citizenship, nor as having interrupted citizenship status. INS Interpretations 301.1(b)(6)(vii).

[6] Absences totaling less than 12 months in the aggregate will not break physical presence for the 5-year physical presence retention requirement. Former INA § 301(b), Pub. L. 85-316, 71 Stat. 639.

[7] In some cases, applicants will be able to fulfill their retention requirements even though they were not physically present in the U.S. Naturalization law allows for applicants to "constructively" meet the retention requirement when they did not know earlier they had a claim to U.S. citizenship. This essentially waives the retention requirement. INS Interpretations 301.1(b)(6)(iii); 7 FAM 1120 App. K (detailed overview of unawareness). In order to meet this exception, the applicant must:

- Be provided with a reasonable opportunity to enter the United States after becoming aware of the claim of U.S. citizenship. *Matter of Yanez-Carrillo*, 10 I&N Dec. 366 (BIA 1963); and
- Enter the United States promptly. See *Matter of Farley*, 11 I&N Dec. 51, 53 (BIA 1965).

If the applicant satisfies these conditions, they are deemed present in the United States from a date immediately prior to their 23rd birthday (if under the 5-year requirement) or 26th birthday (if under the 2-year requirement) until their date of admission. See *Matter of Farley*, 11 I & N Dec. 51 (BIA 1965). This means than an applicant can be found to have constructive presence retroactively even if they are currently too old to fulfill the retention requirements. See *Matter of Navarrete*, 12 I&N Dec. 138, 141 (BIA 1967) (finding that someone over the age of 28 had had constructive presence and thus retained citizenship). The State Department also provides that constructive physical presence may apply in cases where an applicant presents a defense of impossibility of performance or official misinformation. See 7 FAM 1130 App. K; 7 FAM 1140 App. K.

[8] Under the 1994 Immigration and Nationality Technical Corrections Act, those who failed to meet the physical presence retention requirement may regain their citizenship by taking an oath of allegiance to the United States. See INA § 324(d)(1). This procedure does not apply citizenship retroactively for any period in which the person was not a citizen. *Id.* The person regains citizenship as of the date that the oath is taken. Since the oath does not restore citizenship retroactively, persons will be unable to transmit citizenship to their children born during the period between loss and resumption of U.S. citizenship. See 7 FAM 1140 App. L.
[9] For a definition of "national," see INA § 308 and § 101(a)(29).
[10] To meet the continuous residence requirement, the person must show that the U.S. was their principal dwelling place for the requisite period of time. Nationality Act § 104. A person can meet the continuous residence requirement despite brief absences if the person maintained their domicile in the U.S.; however time spent in the U.S. while not living here, such as during visits, will not count. 7 FAM 1134.3-2. For a discussion of the residence requirements for parents who served in the U.S. Armed Forces between 12/7/41 and 12/31/46, see 7 FAM 1134.3; INS Interpretations 301.1(b)(3)(ii).
[11] Act of March 16, 1956, Public Law 84-430, 70 Stat. 50. Periods of honorable military service abroad may satisfy the physical presence requirement in the United States. INA § 301(a)(7) (1952); 7 FAM 1133.3-3(d); INS Interpretations; § 301.1(b)(4)(ii).
[12] See Note 4, *supra*.
[13] Under the 1972 Amendment, persons who entered before October 27, 1972 were allowed to comply with the original 5-year requirement for a period extending beyond October 27, 1972 as long as the 5-year period began on or before October 26, 1972. See Kurzban, Immigration Law Sourcebook, Appx B (ed. 2019-20); INS Interpretations 301.1(b)(6)(x). Individuals may prefer the longer requirement due to the more lenient absence standard. The 2-year requirement allows for absences of fewer than 60 days in aggregate; the 5-year requirement allows for absences less than 1 year in aggregate.
[14] Although "physical presence" is not defined in the INA, it has been interpreted as actual bodily presence. This means that any time a person spends in the U.S. counts towards the physical presence requirement, even if it was time spent while visiting or before naturalizing. Conversely, any absence from the United States, no matter how short, cannot be counted as physical presence for transmission purposes. See 7 FAM 1133.3-4 for a discussion of physical presence requirements for transmission of citizenship. Note that physical presence is defined more leniently in the retention context. See Note 4, *supra*.
[15] See Note 8, *supra*.
[16] People born on or after 10/10/52 have no retention requirements. USCIS-PM 12(H)(3)(a) n.4. Retention requirements were repealed by Act of 10/10/78 (Pub. L. 95-432, 92 Stat 1046).
[17] See Note 14, *supra*.
[18] See Note 16, *supra*.
[19] Any period of honorable service in the U.S. Armed Forces or employment with the U.S. Government or with certain international organizations by the citizen parent (or where the citizen parent is abroad as the dependent unmarried son or daughter of a parent in such service or employment) is considered "physical presence" for purposes of this requirement. INA § 301(g).
[20] See Note 16, *supra*.
[21] The government may take the position that unwed U.S. citizen parents have to establish paternity first under INA § 309(a) to benefit from this provision. If father does not meet paternity requirements but one or both parents resided in U.S., USCIS and DOS advise officers to seek internal review. See Note 24, *infra*; see also CHART B.
[22] See Note 16, *supra*.
[23] See Note 14, *supra*.
[24] See Note 14, *supra*. The statutes apply this provision to married parents and, if the father proves paternity under INA § 309(a) [see CHART B, Part 2], unwed U.S. citizen fathers. It is the ILRC's opinion that the Supreme Court's principal of equal protection would extend this provision to unwed U.S. citizen mothers as well. In *Sessions v. Morales-Santana*, the Supreme Court found that the more lenient physical presence requirement for unwed U.S. citizen mothers and alien fathers violated the Equal Protection Clause of the U.S. Constitution, as compared with the longer requirements for unwed U.S. citizen fathers and alien mothers. 137 S.Ct. 1678 (2017). The Supreme Court did not address this provision governing where one parent is a U.S. citizen and the other parent is a national. Now that the Supreme Court has struck down the preferential treatment of unwed U.S. citizen mothers, the ILRC's opinion is that this one-year physical presence requirement for situations where one parent is a U.S. citizen and one parent is a national would extend to all parents, including unwed U.S. citizen mothers. If it is unconstitutional to give unwed U.S. citizen mothers a more lenient requirement where the father is an alien, it would also be unconstitutional to deny them equal treatment where the father is a national. However, because the statutory scheme regarding U.S. citizen mothers is now unclear, this may have to be resolved by further guidance or litigation. The USCIS and the Department of State may argue that the father must first establish paternity under INA § 309(a) [see CHART B, Part 2] before this requirement would apply to unwed U.S. citizen mothers, or that unwed U.S. citizen mothers simply cannot benefit from this modified provision even where the other parent is a national.
[25] See Note 16, *supra*.
[26] See Note 14, *supra*.
[27] Several cases have challenged the statute's less favorable physical presence requirement for an unwed U.S. citizen father (which, after certain legitimation criteria are met, mirrors the requirements here of 5 years, with 2 years after the age of 14) compared to the requirement for an unmarried U.S. citizen mother (1 year of previous physical presence). On June 12, 2017, the Supreme Court resolved a circuit split and found that the differing physical presence requirements violated the Equal Protection Clause of the U.S. Constitution. *Sessions v. Morales-Santana*, 137 S.Ct. 1678 (2017). The Supreme Court held that going forward, unwed mothers would be subject to the same physical presence requirement in INA § 301(g) as unwed fathers and married couples, where one parent is a U.S. citizen and one is an alien. *Id*., at *28.
[28] See Note 16, *supra*.

CHART B: ACQUISITION OF CITIZENSHIP[1]
DETERMINING IF CHILDREN BORN ABROAD AND OUT OF WEDLOCK[2] ACQUIRED U.S. CITIZENSHIP AT BIRTH

PART 1: Mother was a U.S. citizen at the time of the child's birth.
PART 2: Mother was not a U.S. citizen at the time of child's birth, and child was legitimated or acknowledged by a U.S. citizen father.
A child cannot acquire citizenship at birth through an adoption.[3]

PART 1: MOTHER IS A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH

Date of Child's Birth:	**Requirements:**	
Prior to 12/24/52:[4]	Mother was a U.S. citizen who resided in the U.S. or its outlying possessions at some point prior to birth of child. **EXCEPTION:** The child will not acquire citizenship through the U.S. citizen mother if s/he was legitimated by the father under the following circumstances:[5] 1. The child was born before 5/24/34; 2. The child was legitimated before turning 21; AND 3. The legitimation occurred before 1/13/41.	
On/after 12/24/52 and prior to 6/12/17 (or 6/13/17):[6]	Mother was U.S. citizen physically present in the U.S. or its outlying possessions for a continuous period of 1 year at some point prior to birth of child.	
On/after 6/12/17 (or 6/13/17):[7]	Both parents citizens	One had resided in the U.S. or its outlying possessions, and father meets paternity requirements in Part 2. If father does not meet paternity requirements but one or both parents resided in U.S., USCIS and DOS advise officers to seek internal review.[8]
	One citizen and one national parent	Citizen had been physically present in U.S. or its outlying possessions for continuous period of 1 year. Note USCIS and DOS might have different view.[9]
	One citizen, one alien parent	Citizen had been physically present in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14.[10]

PART 2: MOTHER WAS NOT A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH AND THE CHILD WAS LEGITIMATED OR ACKNOWLEDGED BY FATHER,[11] WHO WAS A U.S. CITIZEN WHEN CHILD WAS BORN[12]

Date of Child's Birth:	**Requirements:**
Prior to 1/13/41:	1. Child legitimated at any time after birth, including adulthood, under law of father's domicile. 2. If so, use CHART A to determine if child acquired citizenship at birth.
On/after 1/13/41 and prior to 12/24/52:	1. Child legitimated before age 21 under law of father's domicile, or paternity established through court proceedings before 12/24/52. 2. If so, use CHART A to determine if child acquired citizenship at birth unless paternity established through court proceeding.[13]
On/after 12/24/52 and prior to 11/15/68:	1. Child legitimated before age 21[14] under law of father's or child's domicile.[15] 2. If so, use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/68 and prior to 11/15/71:	**OPTION A:** 1. Child legitimated before age 21 under law of father's or child's domicile. 2. If so, use CHART A to determine if child acquired citizenship at birth. **OPTION B:**[16] 1. Child/father blood relationship established by clear and convincing evidence;[17] 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18;[18] and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile,[19] or father must acknowledge paternity in writing under oath, or paternity established by competent court. 5. If #s 1–4 are met, use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/71:[20]	1. Child/father blood relationship established by clear and convincing evidence;[21] 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18;[22] and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, or father must acknowledge paternity in writing under oath, or paternity established by competent court. 5. If #s 1–4 are met, use CHART A to determine if child acquired citizenship at birth.[23]

Produced by the ILRC (August 2021). This Chart is intended as a general reference guide.

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[1] Congress has passed many laws governing the acquisition of citizenship at birth, including the Act of May 24, 1934, the Nationality Act of 1940, the Act of March 16, 1956, and the Immigration and Nationality Amendments of 1986.

[2] Although the INA does not define "wedlock," the State Department interprets "birth in wedlock" as birth when the parents are "legally married to each other at the time of the person's conception or birth or within 300 days of the end of the marriage by death or divorce." Dep't of State, *Acquisition of U.S. Citizenship at Birth by a Child Born Abroad* (May 18, 2021), https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Acquisition-US-Citizenship-Child-Born-Abroad.html. This is a recent, welcome change that replaces the prior, narrower interpretation that defined birth in wedlock as "birth during the marriage of the biological parents to each other." 7 FAM 1140 App'x E. The prior definition was challenged in court as ultra vires, and as having a discriminatory impact on same sex couples because children of legally married same sex couples would never be considered to be born "in wedlock" under the prior definition.

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Even before these agency definitions, many courts found that a biological relationship is not required where the child's legal parents were married at the time of the child's birth. See *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018) (finding that a child acquired citizenship, where his biological mother was married to a U.S. citizen at the time of his birth even though neither of his biological parents were U.S. citizens); *Solis-Espinoza v. Gonzales*, 401 F.3d 1091 (9th Cir. 2005) (holding that a child acquired citizenship through biological father's wife when they were married at time of birth, father acknowledged child, and mother accepted her as her own); *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) (explaining that a child acquired U.S. citizenship at birth even though neither of his biological parents were citizens, but at the time of his birth his mother was married to a U.S. citizen); see also *United States v. Marguet-Pillado*, 560 F.3d 1078 (9th Cir. 2009) (recognizing that a blood relationship is not required, but distinguishing plaintiff's claim because his father was not married to his U.S. citizen mother at the time of his birth); *Kiviti v. Pompeo*, 467 F.Supp.3d 293 (D. Md. 2020) (finding the statute unambiguously does not require a blood relationship to transmit citizenship from a U.S. parent to a child where the parents are married at the time of the child's birth); *Sabra v. Pompeo*, 453 F.Supp.3d 291 (D.D.C. 2020) (same); *Dvash-Banks v. Pompeo*, 2019 WL 911799 (C.D. Cal. 2019) (same).

[3] See *Marquez-Marquez v. Gonzales*, 455 F.3d 548 (5th Cir. 2006) (holding that petitioner did not obtain citizenship at birth based on adoption by U.S. citizen since INA § 301(g) did not address citizenship through adoption); *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007) (same); see also *Cabrera v. Att'y Gen.*, 921 F.3d 401, 404 (3d Cir. 2019) (finding that the disparate treatment of adopted children vis-à-vis biological children under INA § 309 does not violate the Constitution); but see Note 2, *supra*.

[4] A qualifying child born before 5/24/34 acquired U.S. citizenship when the Nationality Act of 1940, effective 1/13/41, bestowed citizenship upon the child retroactively to the date of birth.

[5] *Matter of M-*, 4 I&N Dec. 440, 443–44 (BIA 1951).

[6] On June 12, 2017, the Supreme Court changed the rules applicable to unwed U.S. citizen mothers "prospectively." Although the Court did not define at which precise point this decision will apply, USCIS updated its policy manual in April of 2018 to say that this decision applies to persons born on or after June 12, 2017. 12 USCIS-PM H.3(C)(2). Immigration counsel should argue USCIS's interpretation of the effective date contravenes case law, and the decision applies to persons born starting June 13, not June 12. See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535-38 (1991) ("A judicial decision can be said to apply 'prospectively' when it is applied to conduct or events occurring after the date of that decision").

[7] *Id*.

[8] DOS and DHS policy is that when a child is born out of wedlock to two U.S. citizen parents, the child can claim citizenship through either parent. However, DOS and DHS both interpret *Sessions v. Morales,* 137 S.Ct. 1678 (2017), which held that all claims through unwed mothers and unwed fathers must be treated equally, to mean that the paternity requirements under INA § 309(a) apply to births on or after June 12, 2017 regardless of whether the child is seeking citizenship through the U.S. citizen mother or father. Nevertheless, both agencies advise their officers to seek further review if the father does not meet the paternity requirements but one or both parents had resided in the U.S. at some point. 7 FAM 1133.4-5(A); 12 USCIS-PM H.3 App. Chart 2. Adding such a paternity requirement to claims through U.S. citizen mothers would seem to violate the Equal Protection Clause and contradict *Sessions*. The Supreme Court ruled that the physical presence and residency requirements must be equal between mothers and fathers. Nowhere did the Supreme Court suggest that paternity requirements should now be imposed upon claims to citizenship made through unwed mothers; in fact, it has upheld the separate paternity requirements in Part 2 as justifiable when applied to unwed U.S. citizen fathers. 137 S.Ct. at1694; see also *Nguyen v. INS*, 533 U.S. 53 (2001).

[9] See INA § 301(d). The statutes apply this provision to married parents and, if the father proves paternity under INA § 309(a) [see CHART B, Part 2], unwed U.S. citizen fathers. It is the ILRC's opinion that the Supreme Court's principal of equal protection would extend this provision to unwed U.S. citizen mothers as well. In *Sessions v. Morales-Santana*, the Supreme Court found that the more lenient physical presence requirement for unwed U.S. citizen mothers and alien fathers violated the Equal Protection Clause of the U.S. Constitution, as compared with the longer requirements for unwed U.S. citizen fathers and alien mothers. 137 S.Ct. 1678 (2017). The Supreme Court did not address this provision governing where one parent is a U.S. citizen and the other parent is a national. Now that the Supreme Court has struck down the preferential treatment of unwed U.S. citizen mothers, the ILRC's opinion is that this one-year physical presence requirement for situations where one parent is a U.S. citizen and one parent is a national would extend to all

parents, including unwed U.S. citizen mothers. If it is unconstitutional to give unwed U.S. citizen mothers a more lenient requirement where the father is an alien, it would also be unconstitutional to deny them equal treatment where the father is a national. However, because the statutory scheme regarding U.S. citizen mothers is now unclear, this may have to be resolved by further guidance or litigation. The USCIS and the Department of State may argue that the father must first establish paternity under INA § 309(a) [see CHART B, Part 2] before this requirement would apply to unwed U.S. citizen mothers, or that unwed U.S. citizen mothers simply cannot benefit from this modified provision even where the other parent is a national.

[10] The Supreme Court found that the more lenient one-year physical presence requirement for unwed U.S. citizen mothers in INA § 309(c) in comparison with that in INA § 309(a) (incorporating INA § 301(g)) for unwed U.S. citizen fathers violated the Equal Protection Clause of the U.S. Constitution. *Sessions v. Morales-Santana*, 137 S.Ct. 1678 (2017). The Supreme Court held that going forward, unwed mothers would be subject to the same five-year physical presence requirement in INA § 301(g) as unwed fathers and married couples. *Id*., at 1701.

[11] Many of the criteria for "legitimation" look to the law of the child's or father's domicile. See 7 Fam 1130, at 59-69 for summaries of legitimation requirements for U.S. states and territories. The Fifth Circuit held that a child was "legitimated" under Mexican law when his father "acknowledged" him by placing his name on the child's birth certificate. *Iracheta v. Holder*, 730 F.3d 419 (5th Cir. 2013) (reversing more than three decades of previous interpretation of Mexican requirements).

[12] The statutes state that if the child did not acquire citizenship through her mother, but was legitimated by a U.S. citizen father under the listed conditions, apply the acquisition law pertinent to legitimate children born in a foreign country. See CHART A. Several cases have challenged the more onerous requirements for unwed fathers as opposed to unwed mothers. The Supreme Court has upheld the paternal-acknowledgment requirement as justifiable for unwed U.S. citizen fathers. See *Nguyen v. INS*, 533 U.S. 53 (2001). However, recently the Supreme Court struck down the differing physical presence requirements between unwed fathers and unwed mothers, finding that a more lenient physical presence requirement for unwed mothers violated the U.S. Constitution. *Sessions v. Morales-Santana*, 137 S.Ct. 1678 (2017). Both unwed fathers and unwed mothers are now subject to the same physical presence requirements under INA § 301(g). See also Note 7, *supra*. It is the ILRC's opinion that for physical presence purposes on or after June 13, 2017, unwed fathers, unwed mothers, and married couples are now treated equally.

[13] The patchwork of amended laws in this period, some of which did not cross-reference existing laws, has produced several avenues for fulfilling the residency requirements during this period for legitimated children. If the father legitimates the child before the age of 21, the applicant can apply either the residency requirements set by § 201(g) of the Nationality Act or set by § 301(a)(7) of the former INA. 7 FAM 1134.5-3. Under the INA, one can qualify if 1) the father has 10 years residence in the U.S., 5 of which are after the age of 16; and 2) the child resided in the U.S. for a period or periods totaling 5 years between the ages of 13 and 21. See 7 FAM 1134.2 (NA). If the father served honorably in the U.S. Armed Services after December 7, 1941 and before December 31, 1946, then the father must have 10 years in the U.S., 5 of which are after the age of 12. In this scenario the child need not be legitimated but must satisfy the INA's retention requirements. See INA § 201(i). Under the INA, one can qualify if 1) the father has 10 years residence in the U.S., 5 after the age of 14; and 2) the child has been physically present in the U.S. for 5 years between ages 14 and 28. 7 FAM 1133.2-2 (former INA). However, if the paternity is established through court proceedings, the child may only comply with the residence requirements of § 201(g) of the Nationality Act of 1940. Additionally, children of U.S. veterans born in this period may be eligible for citizenship under either the NA or the INA. *Y.T. v. Bell*, 478 F. Supp. 828 (W.D. Pa. 1979); 7 FAM 1134.4.

[14] The INA requires that the legitimation occur "while such child is under the age of twenty-one years." INA § 309(a). This timing requirement has been interpreted strictly by several courts. *See, e.g.*, *Gonzalez-Segura v. Lynch*, 882 F.3d 127 (5th Cir. 2018) (rejecting a citizenship claim where the person was legitimated by an amended birth certificate and court order naming his U.S. citizen father because the legitimating acts did not occur before he turned 21); *Miller v. Christopher*, 96 F.3d 1467, 1473 (D.C. Cir. 1996) (rejecting a citizenship claim where, among other reasons, the state court paternity decree of her U.S. citizen father was obtained after the person turned 21).

[15] For children born out of wedlock, legitimation under the statute in effect during this period, 8 USC § 1409(a) (1952), must be by the biological father. See *U.S. v. Marguet-Pillado*, 560 F.3d 1078 (9th Cir. 2009) (holding that a child born out of wedlock, neither of whose natural parents was a U.S. citizen at the time of his birth, cannot acquire citizenship at birth because of a subsequent action by a U.S. citizen); *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009) (explaining that a person born out of wedlock who claims citizenship by birth must share a blood relationship with the U.S. citizen).

[16] Individuals born in this range can elect whether to establish citizenship either under Option A, "old" INA § 309, or Option B, "new" INA § 309, amended by the INAA, Pub. L. 99-653 (Nov. 14, 1986). The decision can be based on which requirements are easier for the individual to prove. See 7 FAM 1133.4-2(a)(3).

[17] INA § 309 does not require a blood test or any other specific type of evidence. See *Miller v. Albright*, 523 U.S. 420, 437 (1997). But under the clear and convincing standard, the fact-finder must come to "a firm belief in the truth of the facts asserted." 7 FAM 1131.4-2. Generally the child's birth certificate will be sufficient proof. In some instances, the child's U.S. citizen parent might not be listed on the birth certificate, the birth certificate might not be available, and/or USCIS might question the authenticity or veracity of the birth certificate. Under any of these circumstances, ILRC encourages the clients to submit additional documentation including medical records, religious records such as baptismal certificates, other birth records, and witness affidavits. If the parents are still alive, a blood test or DNA test can show the parent-child relationship.

[18] USCIS updated its policy manual in April of 2018 to explain that the statutory language requiring that the father write a letter agreeing to provide financial support is interpreted broadly "to mean that there must be documentary evidence that supports a finding that the father accepted the legal obligation to support the child until the age of 18." 12 USCIS-PM H.3(C)(1). If the child is still under age 18 at the time of filing the N-600, the father can write the letter at any time prior to, or concurrently with, the filing. If the child is over the age of 18, USCIS will accept documents showing that the father accepted his legal obligation to support the child. *Id*. For further discussion and a list of suggested documents, see the USCIS Policy Manual.

[19] If a legitimation occurred, Option A is more favorable than Option B for acquisition of citizenship. See Note 11, *supra*.

[20] If a child was already legitimated before 1986 (i.e. legitimated before age 21 under the law of the father or child's domicile, described as Option A above), that child had already become a U.S. citizen when the new laws went into effect. Thus the more stringent laws enacted in 1986 (described as Option B above) are irrelevant to those children because they had already become U.S. citizens, and the new laws acknowledge that they cannot revoke that citizenship. Pub. L. 100-525, § 8(r), (Oct. 24, 1988).
[21] See Note 17.
[22] See Note 18.
[23] If the child was born on or after 11/15/86, the residence requirement for the U.S. citizen father under CHART A changes.

CHART C: DERIVATIVE CITIZENSHIP[1] -- LAWFUL PERMANENT RESIDENT CHILDREN GAINING CITIZENSHIP THROUGH PARENTS' CITIZENSHIP

Date of Last Act[2]	Requirements
Prior to 5/24/34:[3]	a. Either one or both parents must have naturalized prior to the child's 21st birthday;[4] b. Child must be lawful permanent resident residing in U.S.[5] with parent(s) before the child's 21st birthday;[6] c. Illegitimate child generally may derive through mother's naturalization only;[7] d. Legitimated child must have been legitimated according to the laws of the father's domicile;[8] e. Adopted child and stepchild cannot derive citizenship.
5/24/34 to 1/12/41:[9]	a. Both parents must have naturalized and begun lawful permanent residence in the U.S. prior to the child's 21st birthday; b. If only one parent naturalized and s/he is not widowed or separated, the child must have 5 years lawful permanent residence in the U.S.[10] commencing before the 21st birthday, unless the other parent is already a U.S. citizen;[11] c. Child must be lawful permanent resident before the child's 21st birthday; d. Illegitimate child generally may derive through mother's naturalization only,[12] in which case the status of the other parent is irrelevant; e. Legitimated child must have been legitimated according to the laws of the father's domicile;[13] f. Adopted child and stepchild cannot derive citizenship.
1/13/41 to 12/23/52:[14]	a. Both parents must naturalize, or if only one parent naturalizes, the other parent must 1) be a U.S. citizen at the time of the child's birth and remain a U.S. citizen, 2) be deceased, or 3) the parents must be legally separated[15] and the naturalizing parent must have legal custody;[16] b. Parent or parents must have naturalized prior to the child's 18th birthday; c. Child must have been lawfully admitted for permanent residence and residing in U.S.[17] before the child's 18th birthday;[18] d. Illegitimate child generally can derive only if, while s/he was under 16, and on or after 1/13/41 and before 12/24/52, s/he 1) became a lawful permanent resident, and 2) the mother naturalized;[19] e. Legitimated child must be legitimated under the law of the child's residence or place of domicile before turning 16 and be in the legal custody of the legitimating parent;[20] f. Adopted child and stepchild cannot derive citizenship.[21]
12/24/52 to 10/5/78:[22]	a. Both parents must naturalize,[23] or if only one parent naturalizes, the other parent must 1) be a U.S. citizen at the time of the child's birth and remain a U.S. citizen,[24] 2) be deceased, or 3) the parents must be legally separated[25] and the naturalizing parent must have custody;[26] OR in the case of a child who was born out of wedlock and has <u>not</u> been legitimated,[27] it must generally be the mother who naturalizes;[28] b. Parent or parents must have naturalized prior to the child's 18th birthday;[29] c. Child must be a lawful permanent resident or have begun to reside permanently in U.S.[30] (check circuit for whether that also means lawful permanent residence, or something lesser) before the child's 18th birthday;[31] d. Child must be unmarried;[32] f. Adopted child and stepchild cannot derive citizenship.[33]
10/5/78 to 2/26/01:[34]	a. Both parents must naturalize, or if only one parent naturalizes, the other parent must 1) be a U.S. citizen at the time of the child's birth and remain a U.S. citizen, 2) be deceased,[35] or 3) the parents must be legally separated[36] and the naturalizing parent must have legal custody;[37] OR in the case of a child who was born out of wedlock and has <u>not</u> been legitimated,[38] it must generally be the mother who naturalizes;[39] b. Parent or parents must have naturalized prior to the child's 18th birthday;[40] c. Child must be a lawful permanent resident or have begun to reside permanently in U.S. (check circuit for whether that also means lawful permanent residence, or something lesser) before the 18th birthday;[41] d. Child must be unmarried;[42] f. Adopted child may derive citizenship if the child is residing in the U.S. at the time of the adoptive parent(s)' naturalization,[43] is in the custody[44] of the adoptive parent(s), is a lawful permanent resident, and adoption occurred before s/he turned 18.[45] Stepchild cannot derive citizenship.[46]
Anyone who, on or after 2/27/01, meets the following requirements, is a U.S. citizen.[47] Another way to look at it is anyone born on/after 2/28/83 and meets the following requirements is a U.S. citizen.[48]	a. At least one parent is a U.S. citizen either by birth or naturalization;[49] b. In the case of a child who was born out of wedlock, the mother must be the one who is or becomes a citizen,[50] OR if the father is a U.S. citizen through naturalization or other means then the child generally must have been legitimated by the father under either the law of the child's or father's residence or domicile and the legitimation must take place before the child reaches the age of 16;[51] c. Child is under 18 years old;[52] d. Child must be unmarried;[53] e. Child is a lawful permanent resident[54] or national;[55] f. Child is residing in the U.S.[56] in the legal and physical custody of the citizen parent;[57] g. Adopted children qualify so long as s/he was adopted before the age of 16 and has been in the legal custody of, and has resided with, the adopting parent(s) for at least two years.[58] An adopted child who qualifies as an orphan under INA § 101(b)(1)(F) also will qualify for derivation.

Endnotes for Chart C: *The information in these charts comes from case law, statutory language, the USCIS policy manual, the Adjudicator's Field Manual, the Foreign Affairs Manual, and INS interpretations. Although the USCIS policy manual supersedes previous policy memos and the Adjudicator's Field Manual, the USCIS policy manual is silent on many subjects discussed at length in prior USCIS policy statements and INS Interpretations. In the absence of guidance to the contrary from the USCIS policy manual, the ILRC believes advocates should continue to use helpful clarifications and guidance from prior USCIS policy statements and INS Interpretations.*

[1] Congress has passed many laws on derivation of citizenship, including the Act of May 24, 1934, the Nationality Act of 1940, the Immigration and Nationality Act sections 320 and 321, the Act of October 5, 1978, the Act of December 29, 1981, the Act of November 14, 1986, and the Child Citizenship Act of 2000. In any claim for derivative citizenship, the burden is on the applicant to show that she is a citizen by a preponderance of the evidence. 8 C.F.R. § 341.2(c); see, e.g., *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001); *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969). Note that a finding of derivation by the immigration court may not preclude a re-determination of citizenship in a subsequent proceeding. *Miranda v. Sessions*, 853 F.3d 69 (1st Cir. 2017) (finding that the application of res judicata to a derivation claim was moot because the court had to assess if the petitioner was an alien in order to determine if it had jurisdiction to review the case).

[2] Traditionally, the view has been that as long as all the conditions in this section are met before the child's 21st birthday (for claims based on conditions that occurred before January 13, 1941), or the child's 18th birthday (for claims based on conditions that occurred on or after January 13, 1941), the child derived citizenship regardless of the order in which the events occurred. See 8 FAM 301.9-3; Department of State Passport Bulletin 96-18, *New Interpretation of Claims to Citizenship Under Section 321(a) of the INA*, (Nov. 6, 1996); INS Interpretations 320.1(a)(1) ("The sequence in which these elements came into being was immaterial."); see also *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008); *In re Fuentes-Martínez*, 21 I&N Dec. 893 (BIA 1997); USCIS, Adjudicators' Field Manual, ch. 71, § 71.1(d)(2) (Feb. 2008) ("Since the order in which the requirements [of former § 321(a)] were satisfied was not stated in the statute, as long as the applicant meets the requirement of the statute before age 18 the applicant derives U.S. citizenship."). But in *Jordon v. Att'y Gen.*, 424 F.3d 320 (3d Cir. 2005), the Third Circuit disagreed. In analyzing a derivation claim under former INA § 321, the Third Circuit found that where the separation occurred after the parent naturalized, the child did not derive citizenship. The BIA has repeatedly criticized and declined to follow the Third Circuit, arguing that it did not matter whether the naturalized parent obtained legal custody of the child before or after naturalization, so long as the statutory requirements were satisfied before the child turned 18 years old. See *Matter of Douglas*, 26 I&N Dec. 197 (BIA 2013); *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008). *Jordon* is only in effect in the Third Circuit, and advocates should argue that its holding is further limited only to former INA § 321. Levy, *U.S. Citizenship and Naturalization*, § 5:3 (ed. 2016–17). Although the order of the events does not matter outside of the Third Circuit, there still has to be a point in time when all of the requirements are satisfied. See *Joseph v. Holder*, 720 F.3d 228 (5th Cir. 2013) (finding that when a U.S. citizen mother was divorced and had sole custody, but withdrew her divorce decree before she naturalized, the child did not derive citizenship because at no point was the mother a citizen with sole custody of the child).

[3] Prior to 1907 a mother could transmit citizenship only if she was divorced or widowed. See Levy, *U.S. Citizenship and Naturalization* § 5:13 (ed. 2016–17). The order in which the events occurred does not matter for the laws in effect prior to 1934. 8 FAM 301.9-3; see also Note 2, *supra*, for further discussion.

[4] It is the ILRC's position, and the ILRC believes that all advocates should argue, that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means prior to or on the date of the birthday. See *Duarte-Ceri v. Holder*, 630 F.3d 83 (2d Cir 2010); *Matter of L-M- and C-Y-C-*, 4 I&N Dec. 617 (BIA 1952) (finding that "prior to" included "prior to or on" the date with respect to retention requirements for acquisition of citizenship). Although the USCIS Policy Manual is silent on the subject, USCIS officers may not agree. See, e.g., INS Interpretations 320.2 (stating that an individual is 18 for derivation purposes at 12:01 on the 18th birthday); see also *In re [Redacted]*, (May 21, 2007) (finding that the individual did not derive citizenship when his mother naturalized on his 18th birthday because he was already 18 as of 12:01 on that day). A small number of courts have considered the possibility of derivation when the naturalization delay was caused by the government. See e.g., *Calix-Chavarria v. Att'y Gen. of the U.S.*, 182 Fed. App'x. 72, 76 (3d Cir. 2006) (remanding the case to determine if an inexplicable delay by INS in processing a parent's citizenship application should not defeat a child's claim for derivative citizenship); *Rivas v. Ashcroft*, No. 01 Civ.5871, 2002 WL 2005797 (S.D.N.Y. Aug. 29, 2002) (transferring to the Court of Appeals to decide whether a child could derive even though his mother naturalized after his eighteenth birthday because due to factors beyond his mother's control, the mother's citizenship interview had been rescheduled to a date past the child's eighteenth birthday); *Harriott v. Ashcroft*, 277 F.Supp.2d 538 (E.D. Pa. 2003) (issuing writ of *mandamus* to grant derivation *nunc pro tunc* when INS took fourteen times the average amount of time to process the application); *but see Brown v. Lynch*, 831 F.3d 1146 (9th Cir. 2016) (finding that petitioner could not show that INS violated his constitutional rights when its delays and misinformation prevented him from deriving citizenship through his parents).

[5] The Department of Homeland Security (DHS) issued guidance in August 2019 stating that for all applications filed on or after October 29, 2019, children of U.S. government employees, including members of the armed forces, who live with parents who are stationed outside the United States were not considered to be "residing in" the United States for purposes of deriving citizenship. On March 26, 2020, President Donald Trump signed H.R. 4803, the Citizenship for Children of Military Members and Civil Servants Act, which reversed this policy and established that foreign-born children of a U.S. citizen member of the armed forces or a government employee may still derive U.S. citizenship even if the child is not residing in the United States.

[6] Prior to 1907 the child could take up residence in the U.S. after turning 21 years of age. See Levy, *U.S. Citizenship and Naturalization* § 5:13 (ed. 2016–17). See also Note 55, *infra*, for an argument that a U.S. national may derive without proving status as a lawful permanent resident.

[7] Courts have generally upheld legitimation requirements for claims through U.S. citizen fathers. See, e.g., *Nguyen v. I.N.S.*, 533 U.S. 53 (2001); *Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003); see also *Roy v. Barr*, 960 F.3d 1175 (9th Cir. 2020) (denying an equal protection challenge to the requirement that a child born out of wedlock and claiming citizenship through a U.S. citizen parent not be legitimated by the other parent, because there are situations where mothers may also have to legitimate their child). But the Third Circuit recently found that former INA § 320's requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son. In that case, the only legal way to legitimate the child was to marry the mother and the mother was deceased. *Tineo v. Att'y Gen.*, 937 F.3d 200 (3d Cir. 2019). The ILRC encourages advocates to make this argument in other circuits as well.

[8] Legitimation could take place before or after the child turns 21. The child derives citizenship upon the naturalization of the parent(s) or upon the child taking up residence in the U.S. See 7 FAM 1135.3-1; INS Interpretations 320.1(b).

[9] The order in which the events occurred does not matter for the laws in effect during this time period. INS Interpretations 320.1(a)(3); see also Note 2, *supra*, for further discussion.

[10] See Note 5, *supra*.

[11] The five-year period can commence before or after the naturalization of the parent and can last until after the child turns 21 and until after 1941. See Sec. 5, Act of March 2, 1907 as amended by Sec. 2, Act of May 24, 1934; INS Interpretations 320.1(a)(3). See Note 2, *supra*. See also Note 55, *infra*, for an argument that a U.S. national may derive without proving status as a lawful permanent resident.

[12] See Note 7, *supra*.

[13] See Note 8, *supra*.

[14] See Note 2, *supra*.

[15] See *U.S. v. Casasola*, 670 F.3d 1023 (9th Cir. 2012) (rejecting equal protection challenge that "legal separation" requirement irrationally distinguished between married and legally separated parents).

The case law governing what constitutes a "legal separation" is complicated, and courts differ both on what is required for a "legal separation" as well as how much weight to give to the law of the state or country with jurisdiction over the marriage. 12-11 Bender's Immigr. Bull. 2 (2007). The Third, Fourth, Fifth, and Seventh Circuits, as well as the BIA, all seem to require a judicial decree of limited or absolute divorce or separation. See *Afeta v. Gonzales*, 467 F.3d 402 (4th Cir. 2006); *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000); see also *Matter of H-*, 3 I&N Dec. 742 (BIA 1949) (requiring some sort of limited or absolute divorce through judicial proceedings). The Second, Third, and Ninth Circuits have held that other legal actions may suffice to show "legal separation." *Morgan v. Attn'y Gen.*, 432 F.3d 226, 231–32 (3d Cir. 2005); *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005); *Brissett v Ashcroft*, 363 F.3d 130 (2d. Cir. 2004). Still other circuits have explicitly declined to weigh in. *Claver v. U.S. Attn'y Gen.*, 245 Fed. App'x. 904 (11th Cir. 2007) (finding it unnecessary to "resolve-or add to-this disagreement among circuits" about what constitutes a "legal separation" because even under the most lenient standard, petitioner's parents were not legally separated); *Batista v. Ashcroft*, 270 F.3d 8 (1st Cir. 2001) (transferring case to district court to hold a hearing on whether Dominican Republic "Divorce Sentence" raised an issue of material fact as to whether petitioner's parents obtained a "legal separation").

The circuit courts also differ on the role that the governing state or foreign law should play in the determination. The Third, Seventh, Ninth, and Eleventh Circuits look to the law of the state or country with jurisdiction over the marriage to determine whether a "legal separation" has occurred. *Claver v. U.S. Attn'y Gen.*, 245 Fed. App'x. 904 (11th Cir. 2007) (holding that "whether Petitioner's parents were 'legally separated' should be informed by the law of the state or country with jurisdiction over Petitioner's parents' marriage"; because the petitioner's parents were not legally separated under Jamaican law, he did not derive citizenship); *Morgan v. Attn'y Gen.*, 432 F.3d 226, 231–32 (3d Cir. 2005) (finding that a "legal separation" for derivation purposes did not occur because there was no formal governmental action under the laws of Pennsylvania or Jamaica that altered the parties' marital status); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000) (finding that although "legal separation" is a federal term, courts should look to the governing state or foreign law for its meaning; because the parties were not separated under Jamaican law, the petitioner did not derive citizenship). It is unclear based on current case law whether the Seventh Circuit would recognize something lesser than a formal judicial decree if it constituted "legal separation" under the applicable state or foreign law. In *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005), the Ninth Circuit viewed state law as dispositive; where a marriage dissolution order issued in 2001 said that the legal separation took place in 1993, the Court found the petitioner derived citizenship because the effective date of separation as a matter of state law was 1993. In an unpublished case, the Ninth Circuit found that under California law, a "legal separation occurs when spouses have come to a parting of ways with no present intention of resuming marital relations," even if they did not notify the court of their intention to terminate the marriage until years later. *Romo-Jimenez v. Holder*, 539 Fed. App'x. 759 (9th Cir. 2013)

By contrast, the Second, Fourth, and Fifth Circuits have a more flexible view of the role of state or foreign law and interpret "legal separation" as a distinct federal term. See *Afeta v. Gonzales*, 467 F.3d 402 (4th Cir. 2006) (finding that a voluntary legal separation agreement did not constitute "legal separation" for

derivation purposes even though it may have been recognized under Maryland law); *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001) (rejecting the notion that state law is determinative and holding that the parties needed a formal, judicial alteration to constitute "legal separation"). In *Brissett v Ashcroft*, 363 F.3d 130, 133-134 (2d. Cir. 2004), the Second Circuit found that "legal separation" for derivation purposes is a federal term and may include more situations than state law recognizes; the Court rejected the notion that a formal judicial decree is required and reasoned that there may be some formal acts that may not constitute legal separation under state law, but may effect a sufficiently drastic alteration in the marital status of the parties to be "legal separation" for derivation.

The BIA and every circuit court to confront the issue have all found that where the actual parents of the child were never lawfully married, there could be no legal separation. See, e.g., *Lewis v. Gonzales*, 481 F.3d 125, 130–32 (2d Cir. 2007); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000); *Matter of H-*, 3 I&N Dec.742 (BIA 1949). Some state or foreign law may permit de facto marriages, however. See *Espichan v. Att'y Gen.*, 945 F.3d 794 (3d Cir. 2019) (remanding to determine whether an individual's parents were de facto married under Peruvian law where they had never legally been married but had filed a declaration of separation); *Henry v. Quarantillo*, 684 F. Supp. 2d 298 (E.D.N.Y. 2010) (assuming arguendo the possibility of "legal separation" of unwed parents according to a change to Jamaican law in 2005, but finding a *nunc pro tunc* order insufficient to establish such legal separation for derivation purposes).

[16] See 7 FAM 1156.8. Until recently, the general rule was that if the parents have a joint custody decree (legal document), then both parents have legal custody for purposes of derivative citizenship. See Passport Bulletin 96-18 (Nov. 6, 1996). Yet the Ninth and Fifth Circuits ruled that the naturalizing parent must have sole legal custody for the child to derive citizenship; thus, at least in the Ninth and Fifth Circuits, a joint legal custody decree will not be sufficient to allow a child to derive citizenship. See *U.S. v. Casasola*, 670 F.3d 1023 (9th Cir. 2012); *Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006) (requiring naturalized citizen parent to have sole legal custody of the child for derivative citizenship); *Rodrigues v. Att'y Gen.,* 321 F. App'x 166 (3d Cir. 2009); but see *In Re: Rabanal Puertas*, 2010 WL 4500862 (BIA 2010) (finding that joint custody is sufficient to show legal custody pre-CCA and specifically declining to follow the reasoning of *Bustamante*).

Although the USCIS Policy Manual is silent on the subject, numerous authorities have found that in the absence of a state law or court adjudication determining legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for derivation purposes, provided the required "legal separation" of the parents has taken place. See *Kamara v. Lynch*, 786 F.3d 420 (5th Cir. 2015) (clarifying that in the absence of a custody order, "actual uncontested custody" is the standard across all circuits); *Matter of M-*, 3 I&N Dec. 850 (BIA 1950); INS Interpretations 320.1(a)(6); Passport Bulletin 96-18 (Nov. 6, 1996) (referencing Passport Bulletin 93-2 (Jan. 8, 1993)). Several circuits have held that a *nunc pro tunc* order retroactively awarding the naturalized parent custody is not necessarily sufficient to show legal custody for purposes of derivation. See *Carino v. Garland*, 997 F.3d 1053 (9th Cir. 2021); *Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006); *Fierro v. Reno*, 217 F.3d 1 (1st Cir. 2000).

Where the actual parents of the child were never lawfully married, there can be no legal separation. See *In the Matter of H-*, 3 I&N Dec. 742 (BIA 1949); Note 15, *supra* Thus, children born out of wedlock cannot derive citizenship through a father's naturalization unless the father has legitimated the child, the child is in the father's legal custody, and the mother was either a citizen (by birth or naturalization) or the mother has died. For more on this topic, see Note 27, *infra*; *Bagot v. Ashcroft*, 398 F.3d 252 (3d Cir. 2005), *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001).

Citizenship derived through the mother by a child who was illegitimate at birth will not be lost due to a subsequent legitimation. See 7 Gordon, Mailman, and Yale-Loehr, *Immigration Law and Procedure*, § 98.03[4](e) (ed. 2015).

The Administrative Appeals Office (AAO) has found that a Rabbinical Court decree awarding custody of a child to the child's mother can establish that the mother had legal custody of the child for purposes of INA § 321. See *Matter of [redacted]*, A18 378 029 (AAO Sept. 27, 2010); see also 87 *Interpreter Releases* 2120 (Nov. 1, 2010).

[17] See Note 5, *supra*.

[18] See also Note 55, *infra*, for an argument that a U.S. national may derive without proving status as a lawful permanent resident.

[19] See INS Interpretations 320.1(c). See Note 7, *supra*, and *Tineo v. Att'y Gen.*, 937 F.3d 200 (3d Cir. 2019) (finding that former INA § 320's requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son). Note 27, *infra*, for an argument for why children born out of wedlock should still be able to derive if they are subsequently legitimated and are in the legal custody of the U.S. citizen parent after a legal separation.

[20] See INS Interpretations 320.1(a)(6) (explaining that in the absence of a state law or court adjudication dealing with the issue of legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for derivation purposes, provided the required "legal separation" of the parents has taken place); *Matter of M-*, 3 I&N Dec. 850 (BIA 1950); see also Note 16, *supra*. The only way that an illegitimate child can derive citizenship through a father's naturalization is if 1) the father legitimates the child, 2) the child is in the father's legal custody, and 3) both parents naturalize (unless the mother is already a citizen, or the mother is dead). Under any other circumstances, an illegitimate child never derives from a father's naturalization. In 2015, the BIA found that a person born abroad to unmarried parents in a jurisdiction that has eliminated all legal distinctions between children based on the marital status of their parents or who has a residence or domicile in that jurisdiction is considered a legitimate "child" under INA § 101(c)(1). *Matter of Cross*, 26 I&N Dec.

485 (BIA 2015). The definition of a legitimate "child" under the Nationality Act of 1940, the law in effect from 1/13/41 to 12/23/52, is nearly identical to INA § 101(c)(1), and advocates should argue (when it would be beneficial) that this holding applies to the Nationality Act of 1940 as well.

[21] Although both USCIS and the State Department take the position that adopted children during this period could not derive citizenship, an argument can be made that children who were adopted before turning 16 and who were in the custody of the adopting parent(s) could derive citizenship. See Levy, *U.S. Citizenship and Naturalization* § 5:15 (ed. 2016–17).

[22] See Note 2, *supra*.

[23] Courts have repeatedly upheld the requirement prior to the Child Citizenship Act that one parent must have naturalized, as opposed to obtained citizenship through other means. See, e.g., *Lopez Ramos v. Barr*, 942 F.3d 376 (7th Cir. 2019) (finding rational basis for former INA § 320 where a child can derive citizenship when a parent naturalizes but not when the parent acquired citizenship at birth); *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007) (finding rational basis for former INA § 321 where an adopted child can derive citizenship when a parent naturalizes but not when the parent was a native born U.S. citizen).

[24] See 7 FAM 1156.9 and 1156.10 for a general description of the law.

[25] See Note 15, *supra*.

[26] See Note 16, *supra*.

[27] The plain language of the statute provides two separate ways in which a child can derive citizenship: "The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents OR the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation." Former INA § 321(a)(3) (emphasis added). The first clause is only for children where there has been a legal separation. The second clause is only for non-legitimated children (where there could not have been a legal separation because there was no marriage to begin with). It is the ILRC's position that the first clause applies BOTH to children born in wedlock, as well as to children born out of wedlock whose parents later married and subsequently separated. Under this interpretation, if a child was legitimated, she could only derive if both parents naturalize, or if only one parent naturalizes, the other parent must be a U.S. citizen at the time of the child's birth and remain a U.S. citizen, be deceased, or the parents must be legally separated and the naturalizing parent must have custody. We are unaware of any agency guidance on point, but this interpretation seems consistent with the plain language of INA § 321(a)(3) and the USCIS policy manual, see 12 USCIS-PM H.4 (stating that a child derives simply if "one parent naturalizes who has legal custody of the child if there is a legal separation of the parents"). The Administrative Appeals Office (AAO) has issued contradictory unpublished opinions on the issue. See *In Re [Redacted]*, (AAO May 6, 2013) (analyzing whether individual derived citizenship when he was born out of wedlock and his parents later married and then divorced; *In re [Redacted]*, (AAO May 21, 2007) (same); but see *In re [Redacted]*, (AAO Jan. 21, 2010) (finding that the individual could not derive through his father because he was born out of wedlock, even though his parents later married and then divorced). In *Lewis v. Gonzales*, 481 F.3d 125 (2d Cir. 2007), the Second Circuit found that an individual did not derive through his father when there was no legal separation, but then went on to surmise that it would not have been possible even if the parents had married because the only way a child born out of wedlock could derive would be through his mother. ILRC urges practitioners in the Second Circuit to argue that this language is dicta and that the plain language of the statute and unpublished AAO cases provide that children born out of wedlock can derive if their parents subsequently married and later divorced, and they are living in the legal custody of the U.S. citizen parent. See also Note 7, *supra*, and *Tineo v. Att'y Gen.*, 937 F.3d 200 (3d Cir. 2019) (finding that former INA § 320's requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son).

[28] In order for child born out of wedlock to derive citizenship through her mother she must not have been legitimated prior to deriving citizenship. See INA § 321(a)(3), as amended by Pub. L. No. 95-417. If a child was legitimated, she can only derive if both parents naturalize, or if only one parent naturalizes, the other parent must be a U.S. citizen at the time of the child's birth and remain a U.S. citizen, be deceased, or the parents must be legally separated and the naturalizing parent must have custody. See Note 20, *supra*. Courts have generally rejected equal protection challenges to this requirement. *United States v. Mayea-Pulido*, 946 F.3d 1055 (9th Cir. 2020) (upholding as rational the requirement that both parents have to be U.S. citizens for a child to derive when the parents are married, but only one parent has to be a U.S. citizen for a child born out of wedlock); *Roy v. Barr*, 960 F.3d 1175 (9th Cir. 2020) (holding that the fact that a child can derive when born to a U.S. citizen mother and not legitimated by the father, but not when born to a U.S. citizen father where the mother relinquished parental rights, does not violate equal protection because the two groups are not similarly situated); *Pierre v. Holder*, 738 F.3d 39 (2d Cir. 2013) (upholding as rational the requirement that a child can derive through one parent when the parents had married and then legally separated, but not when the parents had not married so could not legally separate); *Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003) (same); *but see Tineo v. Att'y Gen.*, 937 F.3d 200 (3d Cir. 2019) (finding that former INA § 320's requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son). The Fifth Circuit held that a child was "legitimated" under Mexican law when his father "acknowledged" him by placing his name on the child's birth certificate. *Iracheta v. Holder*, 730 F.3d 419 (5th Cir. 2013) (reversing more than three decades of previous interpretation of Mexican requirements). In *Tavares v. AG*, 398 Fed. App'x 773 (3d Cir. 2010), the Third Circuit found that the applicant derived citizenship from his mother because he was not legitimated by his father under either Massachusetts or Cape Verde law. If the father legitimated the child before derivation, then both parents must naturalize in order for the child to qualify unless the mother is a U.S. citizen or is deceased. See INA § 321(a)(1) as amended by Pub. L. No. 95-417. If

legitimation occurs after the child has derived citizenship, the child remains a U.S. citizen even if the father did not naturalize. See 7 Gordon, Mailman, and Yale-Loehr, *Immigration Law and Procedure*, § 98.03[4](e). The BIA held in *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015), that although Jamaican law has eliminated any difference between the rights of children born in and out of wedlock, and thus all children born out of wedlock are considered "legitimate" for purposes of being a "child" in INA § 101(b)(1) and § (c)(1), "legitimation" for purposes of former INA § 321(a)(3) is defined differently. Because Jamaican law nonetheless provides a way to legitimate a child, a child will not be considered "legitimate" for former INA § 321(a)(3) absent an affirmative act by the parent. *Id*. It is unclear how this interpretation of former INA § 321(a)(3) will apply in jurisdictions that have eliminated all legal distinctions between children born in and out of wedlock where there is no way to legitimate the child.

[29] The 1952–1978 law required the naturalization of the parent(s) prior to the child's 16th birthday. The 1978 law requiring the naturalization of the parent(s) prior to the 18th birthday is retroactively applied to 12/24/52. See *In re Fuentes-Martínez*, 21 I&N Dec. 893 (BIA 1997) (citing Passport Bulletin 96-18).

[30] See Note 5, *supra*.

[31] There is currently a circuit split on whether INA § 321(a)(5)'s requirement that a child "reside permanently" in the United States means that the child must be a lawful permanent resident. The Eleventh Circuit and the BIA have held that this language requires the child to have become a lawful permanent resident before she turned 18 in order to obtain derivative citizenship. See *U.S. v. Forey-Quintero*, 626 F.3d 1323 (11th Cir. 2010); *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008). But there are a growing number of circuits holding that a child may derive citizenship if both parents naturalized while the child was still under 18 years old and was unmarried *even if the child was not a lawful permanent resident*. The Second Circuit, reversing the BIA's decision in *Nwozuzu*, found that "reside permanently" could include "something lesser." *Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013). The Ninth Circuit recently agreed. *Cheneau v. Garland*, __F.3d__, 2021 WL 1916947 (9th Cir. 2021). See also *Thomas v. Lynch*, 828 F.3d 11 (1st Cir. 2016) (discussing the issue without deciding, finding that the non-LPR client before the court had not shown that he had begun to "reside permanently" even if it were interpreted to include something other than lawful permanent residence); *United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012) (declining to interpret "reside permanently" but recognizing multiple interpretations). The Ninth Circuit also agreed with the Second Circuit that the child must still demonstrate an "objective official manifestation of the child's permanent residence." *Id*. at *7 (quoting *Nwozuzu*, 726 F.3d at 333). Both courts found that the act of applying for adjustment of status to lawful permanent resident status was sufficient but did not discuss what else might constitute "reside permanently."
See also Note 55, *infra*, for an argument that a U.S. national may derive without proving status as a lawful permanent resident.

[32] See INA § 101(c)(1).

[33] See Note 21, *supra*. In *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009), the Ninth Circuit held that an individual could not derive U.S. citizenship from his stepfather by virtue of the state's legitimation statute.

[34] See Note 2, *supra*.

[35] "Death" includes "brain death" but not comas or persistent vegetative states. See *Ayton v. Holder*, 686 F.3d 331 (5th Cir. 2012).

[36] See Note 15, *supra*.

[37] See Note 16, *supra*.

[38] See Note 27, *supra*; see also Note 7, *supra*, and *Tineo v. Att'y Gen.*, 937 F.3d 200 (3d Cir. 2019) (finding that former INA § 320's requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son).

[39] See Notes 19, 28 *supra*.

[40] See Note 29, *supra*; see also 7 FAM 1156.11 (Foreign Affairs Manual) for a general description of the law.

[41] See Note 31, *supra*.

[42] See Note 32, *supra*.

[43] Adopted children must be residing in the U.S. pursuant to a lawful admission for permanent residence at the time of the adoptive parent(s)' naturalization. See the Act of October 5, 1978, Pub. L. 95-417, § 5; Passport Bulletin 96-18. Thus, in derivation cases for adopted children, the sequence of events can be important. See *Smart v. Ashcroft*, 401 F.3d 119 (2d Cir. 2005). This is different than the practice in derivation cases for biological children. See Note 2, *supra*.

[44] The 1978 amendment provided adopted children the opportunity to derive citizenship when they met the above criteria and were in the "custody" of the adoptive parent. In other amendments, Congress has specified whether the custody had to be legal, physical, or both. Given that Congress did not specify here whether legal custody or physical custody is required, advocates should argue that either should suffice. How "custody" is defined in this context will likely only come up where the adoptive parents are legally separated, or where the child has been living with someone other than the parents.

[45] Between 10/5/78 and 12/29/81, adopted children could only derive citizenship if the adoption occurred before the child turned 16. See 12 USCIS-PM H(4)(C) n.10; INS Interp. 320.1(d)(2).

[46] See *Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA 2009) (holding that a child born outside the United States cannot obtain derivative citizenship by virtue of her relationship to a nonadoptive stepparent).

[47] People born between 2/27/83 and 2/26/01 may derive citizenship by satisfying the requirements of either this row or the "10/5/78 to 2/26/01" row. Note that the law is not retroactive, so individuals who are 18 years or older on February 27, 2001 do not qualify for citizenship under this law. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

[48] See Note 2, *supra*.

[49] INA § 320 as amended by the Child Citizenship Act of 2000.

[50] See USCIS, *Eligibility of Children Born out of Wedlock for Derivative Citizenship* (Sept. 26, 2003). The memo mentions only that naturalized mothers can confer citizenship upon their not yet legitimated children born out of wedlock under INA § 320. ILRC assumes that mothers who are U.S. citizens by other means also can confer citizenship under INA § 320 to such children.

[51] The text of INA § 320 as amended by the Child Citizenship Act of 2000 does not mention illegitimacy, but INA § 101(c)(1) excludes illegitimate children from the definition of "child," unless legitimated by the father under either the law of the child's domicile or the law of the father's domicile. A person born abroad to unmarried parents in a jurisdiction that has eliminated all legal distinctions between children based on the marital status of their parents or has a residence or domicile in that jurisdiction is considered a legitimate "child" under INA § 101(c)(1). *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015). In jurisdictions where legal distinctions remain, the legitimation requirement is a hurdle for two reasons. First, the legitimation must take place before the child turns 16. Once s/he turns 16, it is too late for the legitimation to count for § 320 citizenship purposes. (Note that there is an argument, based on the fact that neither INA § 320 nor 8 CFR § 320.1 states the legitimation must occur before the 16th birthday, that such a legitimation could take place even between the 16th and 18th birthdays; however, this argument may be undermined by the definition of child found in INA §101(c), which applies to the citizenship and naturalization contexts.) Second, the legitimation process can be complicated. The USCIS Memo *Eligibility of Children Born out of Wedlock for Derivative Citizenship*, (Sept. 26, 2003), mentions only that naturalized mothers can confer citizenship upon their non-legitimated children born of wedlock under INA § 320. ILRC assumes that mothers who are U.S. citizens by other means such as birth in the U.S. also can confer citizenship under INA § 320 to such children. See also Note 7, *supra*, and *Tineo v. Att'y Gen.*, 937 F.3d 200 (3d Cir. 2019) (finding that former INA § 320's requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son).

[52] INA § 320 as amended by the Child Citizenship Act of 2000.

[53] *Id*.

[54] *Id*. In *Walker v. Holder*, 589 F.3d 12 (1st Cir. 2009), the First Circuit held that an individual has not satisfied the requirement for "lawful admission for permanent residence" if that person obtained a green card when he was not eligible, even if he was a child at the time and committed no fraud himself. See also *Ampe v. Johnson*, 157 F.Supp.3d 1 (D.D.C. 2016) (remanding to determine whether naturalization applicant was an LPR when her adjustment application had an omission, and collecting cases on how other circuits have treated misrepresentations in LPR adjudications).

[55] USCIS updated its policy manual in August of 2018 to explain that U.S. national children can derive citizenship under the Child Citizenship Act if they meet the criteria established by statute, except they do not have to prove LPR status to derive. 12 USCIS-PM H.4(A). The authority for this analysis is unclear, as the statute does not mention U.S. nationals at all in the context of derivation. It is also unclear whether this policy will also be applied to U.S. nationals with claims prior to the effective date of the Child Citizenship Act.

[56] Based on a law passed in March 2020, children, who live with parents who are stationed outside the United States as U.S. government employees and members of the armed forces are considered to be "residing in" the United States by DHS for purposes of deriving citizenship. H.R. 4803-116th Congress (2019-2020). This bill reversed a brief policy that had interpreted "reside" to require an actual dwelling place in the United States. See Note 5, *supra*.

[57] INA § 320 as amended by the Child Citizenship Act of 2000. It is the ILRC's interpretation that for purposes of the Child Citizenship Act of 2000, USCIS will presume that a child who was born out of wedlock and has not been legitimated and whose mother has naturalized or is a U.S. citizen through any other means (i.e., birth in U.S, acquisition or derivation) would be considered to be in the legal custody of the mother for § 320 citizenship. See USCIS, *Eligibility of Children Born out of Wedlock for Derivative* Citizenship (Sept. 23, 2003). Additionally, 8 CFR § 320.1 sets forth several different scenarios in which USCIS presumes, absent evidence to the contrary, that the parent has the necessary legal custody to apply for § 320 citizenship for her child: 1) both parents have legal custody where their biological child currently resides with them and the parents are married, living in marital union, and not separated; 2) a parent has legal custody where her biological child lives with her, and the child's other parent is dead; 3) a parent has legal custody if the child was born out of wedlock, the parent lives with the child, and the parent has legitimated the child while the child was under 16 and according to the laws of the legitimating parent or child's domicile; 4) both parents have legal custody where the child's parents are legally separated or divorced and a court or other appropriate governmental entity has legally awarded the parents joint custody of the child; 5) a parent has legal custody of the child where the parents of the child have divorced or legally separated and there has been an award of primary care, control, and maintenance of a minor child to a parent by a court or other appropriate government agency pursuant to the laws of the state or county of residence; and 6) the regulations state there may be other factual circumstances under which USCIS will find that a U.S. citizen parent has legal custody for purposes of § 320 citizenship. Advocates and their clients should be creative in thinking of other ways to prove that USCIS should determine that a U.S. citizen parent has legal custody if the parent-child relationship does not fit into one of the categories listed above.

For determining physical custody, the Fourth Circuit held that "whether a foreign-born child was in the 'physical custody' of her parent under the CCA is a mixed question of fact and law," and that state law is binding for this analysis. *Duncan v. Barr*, 919 F.3d 209 (4th Cir. 2019) (remanding to consider whether a child was in the "physical custody" of an incarcerated parent under Maryland law for purposes of derivation).

[58] INA § 320 as amended by the Child Citizenship Act of 2000; INA § 101(b)(1).