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ACQUISITION OF CITIZENSHIP: TIPS, TRICKS AND ISSUES

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ACQUISITION OF CITIZENSHIP: TIPS, TRICKS AND ISSUES

by Kathrin S. Mautino

Anti-immigrant sentiment in the United States has always meant that U.S. citizens who do not have primary documentation (U.S. birth certificate or passport) are suspect. Over the last several years, the US Passport Agency (part of the Department of State) and USCIS have, in their separate ways, made it more difficult to document citizenship claims and to become a citizen in the first place.

This at a time where, increasingly, U.S. citizens are asked to provide proof of citizenship prior to receiving benefits ranging from some state's driver's licenses to Social Security retirement benefits. In addition, the world is a scarier place; U.S. Immigration and Customs Enforcement (ICE) may raid your place of work; E-verify may claim that you are not legally entitled to work in the United States. Many citizens are unpleasantly surprised to learn that benefits or rights can be withheld until proof of citizenship is established, especially when they have not had to establish their citizenship before. In other, more pleasant situations, individuals who believe they are foreigners turn out to be U.S. citizens.

This article will outline the major ways to establish U.S. citizenship and explore some of the changes that have occurred over the past few years. It will take an anecdotal approach, exploring issues raised by real cases.

BASIC LAW

An individual may be a citizen of the United States through any number of avenues. The most common way is by birth in the United States. This principal of *jus solis* applies to all those born in the United States or certain territories and subject to U.S. jurisdiction.[1] An individual fulfilling certain requirements may apply for naturalization and become a U.S. citizen, and the children of certain naturalized parents may automatically become citizens as well.[2] However, the situation most likely to appear in a practitioner's office is that of an individual born outside of the United States, but who nonetheless is a U.S. citizen due to the citizenship of his or her ancestors. This principal of *jus sanguinis* has long existed in the statutes of this country[3] but has never been guaranteed by the U.S. Constitution. In fact, over the years, congress has changed the requirements for citizenship by descent, adding layers of confusion to the issue.

BIRTH IN THE UNITED STATES—MORE COMPLICATED THAN IT APPEARS

If a person is lucky enough to be born in the United States, and have the birth registered promptly by the doctor who delivered the baby, and whose parents were "subject to U.S. jurisdiction" at the time of the birth, then the person probably will never have a problem getting a U.S. passport, or otherwise convincing a government agency of his or her American citizenship. Generally, the U.S. birth certificate is considered primary proof of US citizenship.

Real life is not always so neat, as the following examples drawn from real cases show.

1. **Dueling birth certificates.** Individuals with a U.S. birth certificate and a foreign one will have issues, especially in obtaining a U.S. passport. Depending on the country, the U.S. Department of State may check the foreign civil registry for birth certificates issued to the same person, or to similarly named children with the same parents. Where there

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[1] U.S. Constitution Amendment XIV, §1; INA §301(a). Note that not all persons physically within the United States are subject to its jurisdiction. Some high-level diplomats avoid U.S. jurisdiction, and hence, their children may not be U.S. citizens. *See generally*, 8 Code of Federal Regulations (CFR) §101.3(a)(1).

[2] Immigration and Nationality Act (INA) §§320, 322, 8 USC §§1431, 1432.

[3] *See* INA §301(g).

are conflicting birth certificates, the reaction is to deny the U.S. passport unless there is extensive evidence of birth in the United States.

2. **Children not born in a hospital.** Births at home, with or without the assistance of a midwife, are viewed with suspicion.[4] In order to issue a U.S. passport, extensive documentation of birth in the U.S. is required. Children born on tribal reservations often face a similar issue.
3. **Children born to foreign diplomats.** As mentioned in the introduction, some diplomats are "not subject to U.S. jurisdiction". The children of these diplomats, although born in the United States, are not U.S. citizens. Any U.S. passport issued in error can be revoked or not renewed. Some individuals go many years believing themselves to be U.S. citizens, before being told that they are not.
4. **Delayed United States birth certificates.** In general, any birth certificate issued more than a few weeks after the child's birth will be viewed with suspicion. Although every state has a procedure requiring proof of birth in order to issue the delayed birth certificate, the Department of State does not necessarily feel bound to accept it as true.
5. **Birth certificates issued as part of an adoption.** Many parents believe that the state birth certificate issued as part of the adoption process makes their foreign-born child a U.S. citizen. It does not.

BIRTHS OUTSIDE THE UNITED STATES—BASED ON CITIZENSHIP OF PARENTS

Children born outside of the United States may yet be citizens on the day of their birth, if one or both parents is a U.S. citizen who resided in the United States for a certain period of time before the birth of the child. As discussed in the introduction, the right of children born outside the United States to be U.S. citizens is not guaranteed by the Constitution. Congress and the Courts have changed the rules over time, and the law at the time of birth of the child is what controls. The best approach is to review the citizenship transmission charts produced by USCIS[5] and others[6] rather than trying to memorize the requirements.

The simplest example would be a child born to a heterosexual couple married to each other, where both parents were U.S. citizens, and the parents both went to high school or college in the United States. In that case, their children, no matter where born, would be U.S. citizens.[7] This is the simple example because there is a requirement is to show that at least one parent "resided" in the United States and going to high school or college generally means that it is easy to get proof of that residence. Below are some common situations that make problems of proof more difficult.

1. **Parent's physical presence in the United States before school-age.** The transmission of citizenship rules generally requires the parent to live in the U.S. for some time after a certain age, generally 14 or 16. Some of the physical presence can be before that age, but it is often difficult to prove before the parent was school age.
2. **Parent's physical presence is "close, but no cigar".** The required physical presence is absolute, and many individuals are upset to learn that a difference of a few weeks or months can mean the difference between a child getting a U.S. passport or not.
3. **Parent "commuted" between the US and a second country.** In most cases, the parent has to show a certain amount of physical presence in the U.S. Visits to the U.S., no matter how short, count towards the total required. However, documenting the summer spent visiting cousins, or

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[4] See, e.g., https://www.latimes.com/nation/la-na-passports-20180829-story.html discussing the denial of passports to individuals born along the international border.

[5] https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-3

[6] https://www.ilrc.org/acquisition-derivation-quick-reference-charts

[7] INA 301(g)

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