

**CHART B: ACQUISITION OF CITIZENSHIP<sup>1</sup>**

**DETERMINING IF CHILDREN BORN ABROAD AND OUT OF WEDLOCK<sup>2</sup> 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.<sup>3</sup>**

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

<b>Date of Child’s Birth:</b>	<b>Residence / Physical Presence Requirements:<sup>4</sup></b>	
Prior to 12/24/52: <sup>5</sup>	Mother was citizen who resided in U.S. or its outlying possessions at some point prior to birth of child. <b>EXCEPTION:</b> The child will not acquire citizenship through the U.S. citizen mother if s/he was legitimated by the father under the following circumstances: <sup>6</sup> 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): <sup>7</sup>	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): <sup>8</sup>	Both parents citizens	Either 1) father meets paternity requirements in Part 2 and one citizen parent resided in the U.S. or outlying possessions before the birth of the child; or 2) citizen mother was physically present in U.S. or its outlying possessions for a continuous period of 1 year; or 3) citizen mother had been physically present in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14. <sup>9</sup>
	One citizen, one national parent	According to State Dep’t, father must meet paternity requirements in Part 2 and citizen parent must have been physically present in U.S. or its outlying possessions for a continuous period of 1 year. If father doesn’t meet Part 2 requirements, treat as one citizen, one noncitizen parent (see box below). <sup>10</sup>
	One citizen, one noncitizen parent	U.S. citizen mother had been physically present in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14. <sup>11</sup>

**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,<sup>12</sup> WHO WAS A U.S. CITIZEN WHEN CHILD WAS BORN<sup>13</sup>**

<b>Date of Child’s Birth:</b>	<b>Requirements:</b>
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. Legitimation requirement does not apply if child acquired from a parent with honorable service in the U.S. Armed Forces. <sup>14</sup> 2. If so, use CHART A unless paternity established through court proceeding. <sup>15</sup>
On/after 12/24/52 and prior to 11/15/68:	1. Child legitimated before age 21 <sup>16</sup> under law of father’s or child’s domicile. <sup>17</sup> 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:	<p align="center"><b>OPTION A:</b></p> 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.
	<p align="center"><b>OPTION B:<sup>18</sup></b></p> 1. Child/father blood relationship established by clear and convincing evidence; <sup>19</sup> 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; <sup>20</sup> and 4. While child is under age 18, child must be legitimated under law of child’s residence or domicile, <sup>21</sup> <u>or</u> father must acknowledge paternity in writing under oath, <u>or</u> 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: <sup>22</sup>	1. Child/father blood relationship established by clear and convincing evidence; <sup>23</sup> 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; <sup>24</sup> and 4. While child is under age 18, child must be legitimated under law of child’s residence or domicile, <u>or</u> father must acknowledge paternity in writing under oath, <u>or</u> paternity established by competent court. 5. If #s 1–4 are met, use CHART A to determine if child acquired citizenship at birth. <sup>25</sup>

## Endnotes for Chart B

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, 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. USCIS recently added charts summarizing acquisition laws to its Policy Manual. 12 USCIS-PM H.3 App'x.

### This chart is intended as a general reference guide only.

<sup>1</sup> 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.

<sup>2</sup> 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.” Former 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. The State Department has clarified that the new decision is retroactive to the date the statute went into effect, December 24, 1952. Individuals ineligible under the previous definition can reapply for a passport or, if applicable, a consular report of birth abroad, assuming they fit within the new definition of birth “in wedlock.” 8 FAM 301.7-6. If the mother has sufficient physical presence to transmit citizenship if the child were considered born out of wedlock under the prior definition (e.g., child has no genetic relationship with the father, and mother has one year physical presence), but not sufficient physical presence if the child were considered born in wedlock under the new definition, officers are instructed to seek guidance on adjudication. 8 FAM 301.7-9.

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). USCIS has affirmed that applicants who already filed an N-600 application and were denied, but became eligible following this change in policy may file a motion to reopen the prior denial of their application. 12 USCIS-PM H.2(A) n.5. Note that USCIS uses the law of the relevant jurisdiction to assess whether the non-genetic parent is the legal parent and will not adjudicate cases involving children whose legal parentage remains in dispute unless there has been a determination by a proper authority. 12 USCIS-PM H.2 n. 10.

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).

<sup>3</sup> 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*.

<sup>4</sup> U.S. citizen parents may count time towards this requirement regardless of their citizenship status at the time they were present in the U.S. See *Matter of M*, 7 I&N Dec. 643 (BIA 1958) (holding that the parent’s presence as a student, before he naturalized and became a U.S. citizen, counted towards the required period of residence before the child’s birth); 12 USCIS-PM H.2(E).

<sup>5</sup> 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.

<sup>6</sup> *Matter of M-*, 4 I&N Dec. 440, 443–44 (BIA 1951).

<sup>7</sup> 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”).

<sup>8</sup> *Id.*

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<sup>9</sup> 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. DOS and DHS recently both issued new guidance to address confusion that resulted from *Sessions v. Morales*, 137 S.Ct. 1678 (2017), which held that all claims through unwed mothers and unwed fathers must be treated equally. DOS and DHS both apply the paternity requirements under INA § 309(a) to births on or after June 12, 2017, regardless of whether the child is seeking citizenship through the U.S. citizen mother or father. This means that if the paternity requirements are met, the child need only show one parent resided in the U.S. or outlying possessions at some point. DOS and DHS further clarified that a child born out of wedlock to two U.S. citizen parents can still acquire through the mother if the paternity requirements are not met, but only if the mother was physically present in the U.S. or its outlying possessions for 1 continuous year. 8 FAM 301.7-10; 12 USCIS-PM H.3(C)(3).

<sup>10</sup> 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. DOS recently clarified that paternity requirements apply to claims brought by a child with a citizen parent and national parent, regardless of whether the citizen is the mother or father. If the father cannot meet the paternity requirements and the father is the citizen, the child does not acquire; if the father does not meet the paternity requirements and the mother is the citizen, DOS instructs its officers to adjudicate the application as a birth abroad out of wedlock to a citizen mother and a noncitizen father. 8 FAM 301.7-10(B). USCIS does not have guidance on how to treat these claims.

<sup>11</sup> 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.

<sup>12</sup> Many of the criteria for “legitimation” look to the law of the child’s or father’s domicile. 8 FAM 301.7-5. 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).

<sup>13</sup> 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 8, *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.

<sup>14</sup> If the father served honorably in the U.S. Armed Services after December 7, 1941, and before December 31, 1946, the child need not be legitimated but must satisfy the INA’s retention requirements. See INA § 201(i); 12 USCIS-PM H.3 App’x Chart 2; *Y.T. v. Bell*, 478 F. Supp. 828 (W.D. Pa. 1979).

<sup>15</sup> 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. 8 FAM 301.7-5. Under the NA, 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 8 FAM 301.7-5 (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); 12 USCIS-PM H.3 App’x Chart 2. 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. 8 FAM 301.7-5. 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).

<sup>16</sup> 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).

<sup>17</sup> 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).

<sup>18</sup> 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). 8 FAM 301.7-5. The decision can be based on which requirements are easier for the individual to prove.

<sup>19</sup> 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 the blood relationship between the individual and the father must be established by clear and convincing evidence. 8 FAM 304.202.

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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.

<sup>20</sup> 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.

<sup>21</sup> If a legitimation occurred, Option A is more favorable than Option B for acquisition of citizenship. See Note 12, *supra*.

<sup>22</sup> 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. 8 FAM 301.7-5. 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).

<sup>23</sup> See Note 18.

<sup>24</sup> See Note 19.

<sup>25</sup> If the child was born on or after 11/15/86, the residence requirement for the U.S. citizen father under CHART A changes.