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Presented:
35th ANNUAL IMMIGRATION AND NATIONALITY LAW

October 20-21, 2011
Austin, Texas

MIDWIFE BIRTHS, DELAYED BIRTH CERTIFICATES, AND FEDERAL COURT REMEDIES FOR REFUSAL TO RECOGNIZE ONE'S UNITED STATES CITIZENSHIP

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I. BACKGROUND

A. Once Upon a Time

Within recent memory, in fact, all a native-born Texan needed to live and work in the U.S., and cross freely back and forth from Mexico, was a baptismal certificate showing baptism at an early age, with his/her place of birth shown as xxxxx, Texas. And with a Texas birth certificate, even one showing birth with a midwife, or filed decades after the birth, such persons could obtain U.S. passports, immigrate close relatives, and transmit citizenship to their children, usually without serious difficulty. The fact that their births had also been incorrectly registered in Mexico [1] did not necessarily cause problems, particularly if the Mexican birth certificate was filed after the birth had been registered in Texas, or the person had been baptized, with birthplace shown as in Texas.

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[1] It used to be common for Mexican nationals with children born in the U.S. to register their births in Mexico, particularly if they intended to raise the child in Mexico. This occurred regardless of whether the child was born with a midwife, or in a hospital. Mexican law was recently changed to provide Mexican citizenship for children of Mexican nationals born abroad. But the practice of dual registration persists, although less pervasive.

In determining citizenship, the former Immigration and Nationality Service ("INS") (now part of the Department of Homeland Security) ("DHS"), and the Executive Office for Immigration Review, ("EOIR"), previously sought out and relied upon the "oldest public document," including both birth and baptismal certificates, as the most reliable evidence of the place and date of birth. This practice was reflected in pre-printed language in INS requests for evidence where birth facts were at issue. *See, e.g., In re Pagan,* 22 I&N Dec. 547,548 (BIA 1999); *In re Bueno-Almonte*, 21 I&N Dec. 1029,1030 (BIA 1997). In fact, baptismal certificates were previously considered by the Board of Immigration Appeals ("BIA") to carry almost the same degree of evidentiary weight as birth certificates. *See, In re Matter of S.S. Florida*, 3 I&N Dec. 111,116 (BIA 1948).

Similarly, the Department of State, ("DOS"), issued passports to most applicants with valid state birth certificates. They used similar criteria, in terms of relying on the oldest public document, and the same list of "suspicious" midwives as INS. Probably because they did not conduct face-to-face interviews, such as were routine where INS questioned a person's birth in the U.S., DOS was somewhat more strict in following the above guidelines. DOS also tended to discount the results of hearings before a Hearing Examiner for the Texas Department of Health, finding that the person was born in Texas, and ordering the issuance of a new birth certificate. But cases challenged in federal court were handled by the local Assistant United States Attorney, ("AUSA"), who would depose the applicant's parents and/or other relevant witnesses, and if s/he deemed them credible, s/he was usually able to convince DOS to issue the passport. This occurred even, for example, in a case where a convicted midwife had been slow to register the child's birth, and his parents had registered him first in Mexico. [2]

B. Times Have Changed

Now, those times feel like the good old days. Not only are they long gone, but many who had lived happily under that regimen, but lack a disposable nest egg of thousands of dollars to bring an action in federal court, are now unable to conduct cross-border business, or visit friends or family in Mexico, because they cannot obtain U.S. passports. Many people with birth certificates filed within days of their birth, not to mention those with delayed birth certificates, find themselves in the same quandary. Many people who have transmitted U.S. citizenship to their children, and immigrated relatives, some of whom have since become naturalized citizens, find that they are no longer able to produce the type of documents the Department of State demands, in order to issue them a passport.

Although a person seeking a U.S. passport has always borne the

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[2] *E.g., Arrieta v. Powell*, CA B-02-106 (S.D.Tx).

burden of establishing U.S. citizenship by a preponderance of the evidence, and the law surrounding this burden has not changed, at some point in the past ten years, DOS stopped relying on the *oldest* public document in adjudicating claims to citizenship. [3] Instead, DOS considers even a much later filed Mexican birth certificate to effectively "cancel out" a timely filed Texas birth certificate showing non-institutional (midwife) birth. DOS also considers that a delayed Texas birth certificate constitutes evidence both of birth in Texas, and evidence that the bearer was *not* born in Texas.

Where there is a delayed Texas birth certificate, and an earlier filed Mexican birth certificate, DOS often just denies the passport application on the grounds that the Mexican certificate predates the one from Texas, without considering other evidence, such as an early baptismal certificate, or the parents' repatriation document, showing that they took the child to Mexico at the age of a few months, from some hamlet in north Texas. In sum, DOS applies the preponderance of the evidence standard extremely arbitrarily.

Further, in dual birth registration cases, and regardless of when the Mexican registration occurred, DOS ignores affidavits and other evidence explaining the Mexican registration. They also ignore Mexican proceedings, even court proceedings, amending such a birth certificate. Nonetheless, in denying an application, DOS has been known to comment on the parents' failure to bring such an action Consistency is not DOS' strong suit. Generally, if the Mexican registration occurred prior to the U.S. birth registration, DOS takes it as conclusive of birth in Mexico, even ignoring evidence predating the Mexican registration, such as baptismal certificates. But the converse is not true: if the U.S. registration occurred first, DOS still requires corroborating "public" documents, in the absence of which, the passport application is almost always denied.

The U.S. Citizenship and Immigration Services, ("CIS"), the successor to INS, has recently followed suit. Midwife and delayed birth certificate cases are subjected to far more scrutiny than previously, although much depends on the individual officer, and personal interviews of parents and other witnesses still count with most officers. Moreover, and notwithstanding *Matter of Villanueva*, 19 I&N Dec. 101 (BIA 1984) (Unless void on its face, a valid United States passport issued to an individual as a citizen of the United States is not subject to collateral attack in administrative immigration proceedings but constitutes conclusive proof of such person's United States citizenship), [4] DOS has enlisted CIS as its

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[3] Unless, of course, the oldest public document shows birth in Mexico, in which case DOS essentially deems it to be conclusive.

[4] *See also*, 22 U.S.C. §2705 Documentation of citizenship:

> The following documents shall have the same force and effect as proof of United States citizenship as certificates of

Title search: Midwife Births, Delayed Birth Certificates, and Federal Court Remedies for Refusal to Recognize One's United States Citizenship

First appeared as part of the conference materials for the
35th Annual Immigration and Nationality Law session
"Citizenship: Exploring the Advanced Issues"