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Acquisition of Citizenship: Practical Problems and Solutions

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ACQUISITION OF CITIZENSHIP: PRACTICAL PROBLEMS AND SOLUTIONS

by Kathrin S. Mautino

Have you ever had someone walk into your office with one problem, and realize that there was another solution? Whether it is the individual who wants a PERM but qualifies as an Outstanding Researcher, or an individual who is entitled to an earlier priority date attached to a new immigrant petition, it is an awesome feeling. Proving that someone is really a United States citizen opens up a world of possibilities, not just for that one person, but also for their family—spouses and children have the chance to immigrate, the person may avoid Removal from the United States, and above all, the individual does not ever again need a nonimmigrant visa or go through the expense and effort of an immigrant petition.

This article will look at how one establishes 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. Some of these cases may have walked into your office; others may in the future. In any event, a knowledge of United States citizenship law is another tool in an immigration lawyer's toolbox.

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 country³ 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.

Adoption

Facts

Rodrigo is from Mexico. Rodrigo was born in Texas in 1981 and adopted by Mexican citizens. His adoptive parents obtained a birth certificate showing that Rodrigo was born in Guadalajara and all of his official Mexican documents (*e.g.*, marriage certificate, baptismal certificate, school records, etc.) show Guadalajara as his birthplace.

Legal Analysis

Adoption by foreign citizens does not affect U.S. citizenship of the child. The child is an American citizen at the moment of his birth in this country⁴, and under present law cannot lose his citizenship unless

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 CFR §101.3(a)(1).

² INA §§320, 322, 8 USC §§1431, 1432.

³ *See* INA §301(g).

⁴ Some individuals have argued that the legal status of the parent should impact the citizenship of a child born in the US, notably attorney John Eastman: <https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483> With the exception of those with diplomatic immunity, established law says that the parent's status does not—and should not—impact the acquisition of citizenship by birth, see *United States v. Wong Kim Ark*, 169 US 649 (1898); <https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-3>, specifically carving out children of diplomats from the general rule, and more generally <https://theintercept.com/2020/08/18/trump-said-2-years-ago-deny-citizenship-americans-like-kamala-harris/>

he later voluntarily and with the intention to relinquish U.S. citizenship does some expatriating act.⁵ That Rodrigo is recognized as a Mexican citizen does not change this. Even if Rodrigo became a Mexican citizen through a form of naturalization in Mexico, since that act occurred before he was 18, it would not be considered an expatriating act resulting in a loss of U.S. citizenship.

Similarly, adoption of foreign-born children by U.S. citizen parents does not result in automatic U.S. citizenship, whether the adoption occurs overseas or within the United States.⁶

Practical Analysis

Rodrigo's U.S. birth certificate listed his adoptive parents as his birth parents. Our office submitted a passport application with the birth certificate; however, given the high incidence of individuals obtaining false birth certificates in order to get U.S. passports, the Passport Agency requested school transcripts and other documents to show that Rodrigo was the child listed on the birth certificate. This presented a problem because Rodrigo's parents had used the Mexican birth certificate to obtain benefits for him. Since the issue was Rodrigo's identity, we were able to satisfy the Passport Agency by submitting grammar school and high school diplomas, as well as the original court adoption order.

Note that the United States Passport Office now actively investigates whether or not a passport applicant has a Mexican birth certificate in addition to a US birth certificate. Passports are denied where two birth certificates exist, unless there is evidence to show that the US birth certificate is the true one. The passport office will look at which birth certificate was issued first, and request hospital records and other documents issued within two years of the date of birth.

Facts

Emily was born in Mexico in 1980. When she was a few months' old, she was carried across the border by a US citizen couple, who presented Emily to the Border officer as their daughter. In 1985, at age 5, Emily was adopted by the couple in California and as part of the process, the Court ordered the state of California to issue a birth certificate. A careful reading of the birth certificate shows Emily's place of birth is listed as Mexico, but the paper and format are the same as that used for births within California.

The adoption attorney told Emily's parents that the adoption made Emily a United States citizen. Emily has voted, served on juries, and otherwise acted as a United States citizen ever since.

Practical Analysis

Emily is not a United States citizen, as the legal analysis above makes clear. In fact, Emily is in the United States illegally has virtually no options to become legal in the United States under the present system. Although her adoptive parents can file a visa petition for her it is not clear that she would be eligible to immigrate based upon her multiple claims to United States citizenship and voting in Federal elections.⁷

Children Born Out of Wedlock

Facts

Jose was born in Mexico in 1980. His mother was born in Texas in 1959 and died last year. Jose tells you that his mother was not married when he was born, although some years later she married a man not

⁵ INA §349. The law has not always required that expatriation be voluntary. For a more in-depth discussion of involuntary expatriation and the possibilities of resumption of U.S. citizenship, see *Nationality and Citizenship Handbook* (AILA 1996).

⁶ US citizen parents adopting foreign born children overseas can follow an immigration process where the children upon entry or shortly thereafter acquire US citizenship, see generally: <https://www.uscis.gov/policy-manual/volume-5-part-a-chapter-2>

⁷ See INA 212(a)(10)(D), barring unlawful voters and 212(a)(6)(C)(ii) barring false claims to US citizenship

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"Acquired Citizenship: If Your Client Has Acquired Citizenship, The Rest of This Conference is MOOT"