

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

| Date of Last Act | Requirements- [Please note that it is the ILRC's position that all advocates should argue that the definition of "prior to the 18 th birthday" or "prior to the 21 st birthday" means prior to or on the date of the birthday. (<i>See Matter of L-M- and C-Y-C-</i> , 4 I. & N. Dec. 617 (1952) which supports this proposition with respect to retention requirements for acquisition of citizenship; <i>however, see also</i> , INS Interpretations 320.2.) Yet, INS officers may not agree with the ILRC's position that the definition of "prior to the 18 th birthday" or "prior to the 21 st birthday" means "prior to or on the 18 th birthday" or "prior to or on the 21 st birthday."] |
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| Prior to 5/24/34: ¹ | <ul style="list-style-type: none"> a. Either one or both parents must have been naturalized prior to the child's 21st birthday;² b. Child must be lawful permanent resident before the 21st birthday;³ c. Illegitimate child may derive through mother's naturalization only; d. A legitimated child must have been legitimated according to the laws of the father's domicile;⁴ e. Adopted child and stepchild may not derive citizenship. |
| 5/24/34 to 1/12/41: | <ul style="list-style-type: none"> a. Both parents must have been naturalized and begun lawful permanent residence in the U.S. prior to the child's 21st birthday; b. If only one parent is being naturalized and s/he is not widowed or separated, the child must have 5 years lawful permanent residence in the U.S. commencing during minority, unless the other parent is already a U.S. citizen;⁵ c. Child must be lawful permanent resident before the 21st birthday; d. Illegitimate child may derive through mother's naturalization only, 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 domicile⁶ f. Adopted child and stepchild cannot derive citizenship. |
| 1/13/41 to 12/23/52: | <ul style="list-style-type: none"> a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen or deceased, or the parents must be legally separated⁷ and the naturalizing parent must have custody; b. Parent or parents must have been naturalized prior to the child's 18th birthday; c. Child must have been lawfully admitted for permanent residence before the 18th birthday; d. Illegitimate child can only derive if while s/he was under 16, s/he became a lawful permanent resident and his/her mother naturalized and both of those events (naturalization of mother and permanent residence status of child) occurred on or after 1/13/41 and before 12/24/52;⁸ 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;⁹ f. Adopted child and stepchild cannot derive citizenship.¹⁰ |

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| 12/24/52 to 10/5/78: ¹¹ | <ul style="list-style-type: none"> a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen or deceased, or the parents must be legally separated¹² and the naturalizing parent must have custody. b. In the case of a child who was illegitimate at birth, the child must <u>not</u> be legitimated, and it must be the mother who naturalizes.¹³ If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead.¹⁴ c. Parent or parents must have been naturalized prior to the child's 18th birthday;¹⁵ d. Child must have been lawfully admitted for permanent residence before the 18th birthday;¹⁶ e. Child must be unmarried;¹⁷ f. Adopted child and stepchild cannot derive citizenship. |
| 10/5/78 to 2/26/01: ¹⁸ | <ul style="list-style-type: none"> a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen or deceased, or the parents must be legally separated¹⁹ and the naturalizing parent must have custody. b. In the case of a child who was illegitimate at birth, the child must <u>not</u> be legitimated, and it must be the mother who naturalizes. If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead.²⁰ c. Parent or parents must have been naturalized prior to the child's 18th birthday;²¹ d. Child must have been lawfully admitted for permanent residence before the 18th birthday;²² e. Child must be unmarried;²³ f. Adopted child may derive citizenship if the child is residing in the U.S. at the time of the adoptive parent(s)'s naturalization,²⁴ is in the legal custody of the adoptive parent(s), entered the U.S. as a lawful permanent resident and adoption occurred before s/he turned 18.²⁵ Stepchild cannot derive citizenship. |
| Anyone who, on or after 2/27/01, meets the following requirements, is a U.S. citizen: ²⁶ | <ul style="list-style-type: none"> a. At least one parent is a U.S. citizen either by birth or naturalization.²⁷ b. If the child is illegitimate at birth, the child must have been legitimated by the father under either the law of the child's residence or domicile or the law of the father's residence or domicile and the legitimation must take place before the child reaches the age of 16.²⁸ c. Child is under 18 years old.²⁹ d. Child must be unmarried.³⁰ e. Child is a lawful permanent resident.³¹ f. Child is residing in the U.S. in the legal and physical custody of the citizen parent.³² 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.³³ An adopted child who qualifies as an orphan under INA §101(b)(1)(f) also will qualify for derivation. |

¹ Prior to 1907 a mother could transmit citizenship only if she was divorced or widowed. See Page 217 of *U.S. Citizenship and Naturalization Handbook* by Daniel Levy (2000 Edition, West Group).

² 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 *Matter of L-M- and C-Y-C-*, 4 I. &N. Dec. 617 (1952) which supports this proposition with respect to retention requirements for acquisition of citizenship; *however, see also* INS Interpretations 320.2. Yet, INS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."

³ Prior to 1907 the child could take up residence in the U.S. after turning 21 years of age. See Page 217 of *U.S. Citizenship and Naturalization Handbook* by Daniel Levy (2000 Edition, West Group), citing Sec. 5, Act of March 2, 1907.

⁴ 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 Page 218 of *U.S. Citizenship and Naturalization Handbook* by Daniel Levy (2000 Edition, West Group), citing Sec. 4, Act of 1802 as supplemented by Sec. 5, Act of 1907. See also INS Interpretations 320.1.

⁵ 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 and INS Interpretations 320.1(a)(3).

⁶ See footnote 4 above.

⁷ "Legal separation" of the parents as used in the 1940 statute means either a limited or an absolute divorce obtained through judicial proceedings. Where the actual "parents" of the child were never lawfully married, there can be no legal separation. See INS Interpretations 320.1(a)(6), citing, *In the Matter of H-*, 3 I.&N. Dec. 742 (1949).

⁸ See INS Interpretations 320.1(c).

⁹ See INS Interpretations 320.1(a)(6), explaining that in the absence of a state law or adjudication of a court 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; see also INS Interpretations 320.1(b). **Please note**, the only way that an illegitimate child can derive citizenship through a father's naturalization is if 1) the father legitimates the child, and 2) 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. The definition of "child" in INA § 101(c)(1) requires that the legitimated child be legitimated under the law of the father's or child's domicile before turning age 16.

¹⁰ Although both the INS 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 Chapter 5 of the *U.S. Citizenship and Naturalization Handbook*]

¹¹ As long as all the conditions in this section are met before the child's 18th birthday, the child derived citizenship regardless of the order in which the event occurred. *See* Department of State Passport Bulletin 96-18, issued November 6, 1996, entitled "New Interpretation of Claims to Citizenship Under Section 321(a) of the INA." The BIA cited this Passport Bulletin in *In Re Julio Augusto Fuentes-Martínez*, Interim Decision 3316 (BIA, April 25, 1997).

¹² *See* footnote 7 above.

¹³ In order for an illegitimate child to derive citizenship through her mother s/he must not have been legitimated prior to obtaining derivation of citizenship. *See* INA § 321(a)(3) as amended by Pub. L. No. 95-417. However, if the father legitimated the child before derivation, then both parents must naturalize in order for the child to qualify unless one parent 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.

¹⁴ *See* footnote 9 above.

¹⁵ 1952-1978 law stated prior to "16th birthday." The new law stating prior to the "18th birthday" is retroactively applied to 12/24/52. *See In Re Julio Augusto Fuentes-Martínez*, Interim Decision 3316 (BIA, April 25, 1997), citing Passport Bulletin 96-18.

¹⁶ A small minority of practitioners believes that a strict reading of INA § 321(a)(5) would allow a child to 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 – but only if the child began to reside permanently in the United States while under the age of 18 and after his or her parents naturalized. The argument is that there is a difference between being a lawful permanent resident and to "reside permanently." The INS and most practitioners, however, are of the opinion that the child must be a lawful permanent resident to derive citizenship no matter the circumstances. Although there is no authoritative case law on a national level, there is some case law agreeing with the INS' opinion on this issue. [*See* Gordon and Mailman § 98.03(3)(f)]

¹⁷ *See* INA § 101(c)(1).

¹⁸ *See* footnote 11 above.

¹⁹ *See* footnote 7 above.

²⁰ *See* footnote 9 above.

²¹ *See* footnote 15 above

²² *See* footnote 16 above.

²³ See footnote 17 above.

²⁴ 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 Passport Bulletin 96-18. Thus, in derivation cases for adopted children, the sequence of events can be important. This is different than the practice in derivation cases for biological children. See footnote 11.

²⁵ Between 10/5/78 and 12/29/81, adopted children could only derive citizenship if adoption occurred before the child turned 16. [See INS Interp.320.1 (d)(2)]

²⁶ 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.

²⁷ INA section 320 as amended by the Child Citizenship Act of 2000.

²⁸ The text of INA section 320 as amended by the Child Citizenship Act of 2000 does not mention illegitimacy, but INA section 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. It would seem that this would be the case whether it is the mother or the father who is the U.S. citizen.

²⁹ INA section 320 as amended by the Child Citizenship Act of 2000.

³⁰ INA section 320 as amended by the Child Citizenship Act of 2000.

³¹ INA section 320 as amended by the Child Citizenship Act of 2000.

³² INA section 320 as amended by the Child Citizen Act of 2000. Legal custody may be obtained by judicial or statutory award. In the absence of judicial or statutory grant of custody, the parent having actual uncontested custody is to be regarded as having legal custody. In *Matter of M-*, 3 I&N 850 (1950) (interpreting section 314(c) of the 1940 Act, which is identical to the now repealed INS section 321 (a)(3)- the reasoning should remain valid, though the law it is interpreting has been repealed); INS Interpretations 320.1(a)(6) and 320.1(b). Advocates could also use the argument the BIA made in *In Re Rivers*, 17 I&N 419 (BIA 1980). This was a case about qualifying for a visa that found that unless there is a legal decree granting legal custody to one parent or there is a local law that says otherwise, there is a presumption that an unwed mother has legal custody unless the father has legitimated the child. If the father has legitimated the child then the presumption is that both have legal custody.

Practitioners should be aware that the INS may consider the issue of legal custody problematic in some instances where the parents were never legally married. See INS Interpretations 320.1(a)(6), which explains that in the absence of state law or adjudication of court 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; see also INS Interpretations 320.1(b). In the past the INS has taken the position that if the parents were never legally married, there can be no "legal separation." Practitioners should argue, through "naturalization of the parent having legal custody of the child when there has been a legal separation of the parents." Under INS section 320 as amended by the Child Citizenship Act of 2000, legal separation should no longer be a prerequisite for legal custody. But see footnote 28.

³³ INA section 320 as amended by the Child Citizenship Act of 2000 and INA section 101(b)(1).