

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; INS Interpretations 320.2.) Yet, CIS 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."] Note that in at least one federal district court case, the court held that a child derived citizenship automatically even though his mother naturalized after his 18 th birthday because due to factors beyond his mother's control, the mother's citizenship interview had been rescheduled to a date past the child's 18 th birthday. <i>Rivas v Ashcroft</i> , F. Supp. 2d ___, U.S. Dist. Lexis (16254) (S.D.N.Y. 2002). See also <i>Harriott v. Ashcroft</i> , 2003 U.S. Dist Lexis 12135 (E.D. Pa.).
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 cannot 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 domicile;⁶ 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 at the time of the child's birth and remain a U.S. citizen, or, be deceased, or the parents must be legally separated⁷ and the naturalizing parent must have legal custody;⁸ 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;⁹ 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;¹⁰ f. Adopted child and stepchild cannot derive citizenship.¹¹
12/24/52 to 10/5/78: ¹²	<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 at the time of the child's birth and remain a U.S. citizen,¹³ or be deceased, or the parents must be legally separated¹⁴ and the naturalizing parent must have custody.¹⁵ 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.¹⁶ If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead.¹⁷ c. Parent or parents must have been naturalized prior to the child's 18th birthday;¹⁸ d. Child must have been lawfully admitted for permanent residence before the 18th birthday;¹⁹ e. Child must be unmarried;²⁰ f. Adopted child and stepchild cannot derive citizenship.²¹
10/5/78 to 2/26/01:	<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 at the time of the child's birth and remain a U.S. citizen,²² or be deceased, or the parents must be legally separated²³ and the naturalizing parent must have legal custody.²⁴ 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.²⁵ c. Parent or parents must have been naturalized prior to the child's 18th birthday;²⁶ d. Child must have been lawfully admitted for permanent residence before the 18th birthday;²⁷ e. Child must be unmarried;²⁸ 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,²⁹ is in the legal custody of the adoptive parent(s), is a lawful permanent resident and adoption occurred before s/he turned 18.³⁰ Stepchild cannot derive citizenship.

Anyone who, on or after 2/27/01, meets the following requirements, is a U.S. citizen.³¹ Another way to look at it is anyone born on/after 2/28/83 and meets the following requirements is a U.S. citizen.

- a. At least one parent is a U.S. citizen either by birth or naturalization.³²
- b. In the case of a child who was born out of wedlock, the mother must be the one who is or becomes a citizen³³ OR, if the father is a US citizen through naturalization or other means then 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 16.³⁴
- c. Child is under 18 years old.³⁵
- d. Child must be unmarried.³⁶
- e. Child is a lawful permanent resident.³⁷
- f. Child is residing in the U.S. in the legal and physical custody of the citizen parent.³⁸
- 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.³⁹ An adopted child who qualifies as an orphan under INA § 101(b)(1)(F) also will qualify for derivation.

Produced by ILRC (July 2009) - This Chart is intended as a general reference guide. ILRC recommends practitioners research the applicable law.

Endnotes for Chart C:

¹ Prior to 1907 a mother could transmit citizenship only if she was divorced or widowed. *See U.S. Citizenship and Naturalization Handbook by Daniel Levy* (Thomson West).

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, CIS 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 U.S. Citizenship and Naturalization Handbook by Daniel Levy* (Thomson West), 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 U.S. Citizenship and Naturalization Handbook by Daniel Levy* (Thomson West), 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* endnote 4 above.

⁷ "Legal separation" of the parents can be a complicated topic. In *Matter of H*, 3 I.&N. Dec.742 (BIA 1949), the BIA found that "Legal Separation" as used in the context of derivation of citizenship means some sort of limited or absolute divorce through judicial proceedings. Several appeals courts have weighed in on the issue as well and now there is a split in circuit courts regarding the definition of legal separation. Volume 11 of *Bender's Immigration Bulletin* has an excellent article on the definition of legal separation for derivation purposes. *See Bender's Immigration Bulletin*, Volume 11, Page 694 (June 1, 2007). *See also* *Wilson v. Mukasey*, 2008 U.S. App. LEXIS 681 (9th Cir. 2008); *Lewis v. Gonzales*, 481 F.3d 125, 130-32 (2nd Cir. 2007); *Afeta v. Gonzalez*, No. 05-1174 (4th Cir. 2006); *Bagot v Ashcroft*, 398 F.3d 252 (3rd Cir. 2005); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000); and *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001); *but see, Brissett v. Ashcroft*, 363 F. 3d 130, 132 (5th Cir. 2004) [while the court denied that Brissett derived citizenship, the court found that there could be an order that doesn't necessarily state it creates a legal separation, but "may nonetheless effect such a drastic change in the couple's marital existence that the couple may be considered legally separated" for the purposes of 8 USC §1432 (a)(3)."]

⁸ *See* 7 FAM 1153.4-3 (Foreign Affairs Manual). Until recently, the general rule was that if the parents have a joint custody decree (legal document), then both parents have legal custody for purposes of derivative citizenship. *See U.S. Citizenship and Naturalization Handbook* (Daniel Levy, Thomson West Publications) citing Passport Bulletin 96-18 (November 6, 1996). Yet, in the 5th Circuit, the court of appeals recently ruled that the naturalizing parent must have sole legal custody for the child to derive citizenship and thus, at least in the 5th Circuit, a joint legal custody decree will not be sufficient to allow a child to derive citizenship. *See Bustamante-Barrera v. Gonzalez*, 447 F.3d 388 (5th Cir.2006) (requiring naturalized citizen parent to have sole legal custody of the child for

derivative citizenship). *See also Rodrigues v. Attorney General of U.S.*, 321 Fed. Appx. 16, 2009 WL 984511 (C.A. 3rd Cir.). The ILRC believes these two cases includes faulty reasoning and practitioners should be prepared to argue so if the CIS or other courts follow the Bustamante case.

When the parents have divorced or separated and the decree does not say who has custody of the child and the U.S. citizen parent has physical custody (meaning the child lives with that parent), the child can derive citizenship through that parent provided all the other conditions are met. *See* United States 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" which referenced Passport Bulletin 93-2, issued January 8, 1993.

According to INS Interpretations 320.1, 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* INS Interpretations 320.1(b), *Matter of M-* 3 I.&N. 850 (BIA 1950). 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). Thus, illegitimate children cannot derive citizenship through a father's naturalization unless the father has legitimated the child, the child is in the father's legal custody, and the mother was either a citizen (by birth or naturalization) or the mother has died. Where the actual "parents" of the child were never lawfully married, there could be no legal separation. For more on this topic, please see *Bagot v. Ashcroft*, 398 F.3d 252 (3rd Cir. 2005), and *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001).

Citizenship derived through the mother by a child who was illegitimate at birth will not be lost due to a subsequent legitimation. *See* Gordon, Mailman, and Yale-Lohr, Immigration Law and Procedure, Volume 7, Chapter 98, § 98.03[4](e).

⁹ *See* INS Interpretations 320.1(c).

¹⁰ *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 Matter of M-* 3 I.&N. (BIA 1950), INS Interpretations 320.1(b) and endnote 8 above. **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.

¹¹ Although both the CIS 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 U.S. Citizenship and Naturalization Handbook*.

¹² Traditionally, the view has been that 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); *Matter of Baires-Larios*, 24 I. & N. Dec. 467, Interim Decision, (BIA Mar. 10, 2008); U.S. Citizenship and Immigration Services, Dep't of Homeland Security, Adjudicators's Field Manual, ch. 71, §71.1(d)(2) (Feb. 2008). But in *Jordan v. Attorney General of the U.S.*, 424 F.3d 320 (3d Cir. 2005), the 3rd Circuit Court came out with a different position by finding that where the separation occurred after the parent naturalized, the child did not derive citizenship. Hopefully, the CIS and most circuit courts will not follow the 3rd Circuit's decision in *Jordan*.

¹³ *See* 7 FAM 1153.4-4 (Foreign Affairs Manual) for a general description of the law.

¹⁴ *See* endnote 7 above.

¹⁵ *See* endnote 8 above.

¹⁶ 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. *See* Gordon, Mailman, and Yale-Lohr, Immigration Law and Procedure, Volume 7, Chapter 98, §98.03[4](e).

¹⁷ *See* endnote 9 above.

¹⁸ 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.

¹⁹ 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 CIS 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 CIS’ opinion on this issue. [*See Gordon and Mailman* § 98.03(3)(f)]

²⁰ *See* INA § 101(c)(1).

²¹ *See* endnote 11 above.

²² *See* 7 FAM 1153.4-4 (Foreign Affairs Manual) for a general description of the law.

²³ *See* endnote 7 above.

²⁴ *See* endnote 8 above.

²⁵ *See* endnote 10 above.

²⁶ *See* endnote 18 above.

²⁷ *See* endnote 19 above.

²⁸ *See* endnote 20 above.

²⁹ 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* endnote 11.

³⁰ 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)]

³¹ 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.

³² INA section 320 as amended by the Child Citizenship Act of 2000.

³³ Please see U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship. Although the ILRC believes this Citizenship and Immigration Service memo should apply to mothers who naturalized or who became U.S. citizens by birth in the U.S., derivation, or acquisition of citizenship, the CIS may successfully argue that it only applies to naturalized mothers because the memo specifically states “Assuming an alien child meets all other requirements of Section 320 and 322, an alien child who was born out of wedlock and has not been legitimated is eligible for derivative citizenship when the mother of such a child becomes a naturalized citizen.”

³⁴ 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. The legitimation requirement will be a hurdle for some people for two reasons. First, the legitimation must take place before the child turns 16. Once s/he turns 16, it is too late for the legitimation to count for § 320 citizenship purposes. Please note that neither INA §320 nor 8 CFR 320.1 state the legitimation must occur before the 16th birthday. Thus, some argue that such a legitimation could take place even between the 16th and 18th birthdays. This argument appears weak because of the definition of child found in INA §101(c), which applies to the citizenship and naturalization contexts. Second, many people do not think about or know about the legitimation process. It is important to note that according to the U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship only naturalized mothers can confer citizenship upon their unlegitimated children born of wedlock under INA section 320. ILRC assumes that mothers who are U.S. citizens by other means such as birth in the U.S. also can confer citizenship under INA §320 to such children.

³⁵ INA section 320 as amended by the Child Citizenship Act of 2000.

³⁶ INA section 320 as amended by the Child Citizenship Act of 2000.

³⁷ INA section 320 as amended by the Child Citizenship Act of 2000.

³⁸ INA section 320 as amended by the Child Citizenship Act of 2000. It is the ILRC's interpretation that for purposes of the Child Citizenship Act of 2000, the CIS will presume that a child who was born out of wedlock and has not been legitimated and whose mother has naturalized or is a U.S. citizen through any other means (i.e., birth in U.S, acquisition or derivation) would be considered to be in the legal custody of the mother for section 320 citizenship. See U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship. Additionally, 8 CFR §320.1 sets forth several different scenarios in which the CIS presumes, absent evidence to the contrary, that the parent has the necessary legal custody to apply for §320 citizenship for his/her child. First, the CIS will presume, absent evidence to the contrary, that both parents have legal custody for purposes of §320 citizenship where their biological child currently resides with them and the parents are married, living in marital union, and not separated. Second, the CIS will presume, absent evidence to the contrary, that a parent has legal custody for purposes of §320 citizenship where his/her biological child lives with him/her and the child's other parent is dead. Third, the CIS will presume, absent evidence to the contrary, that a parent has legal custody for purposes of §320 citizenship if the child was born out of wedlock, the parent lives with the child, and the parent has legitimated the child while the child was under 16 and according to the laws of the legitimating parent or child's domicile. Fourth, where the child's parents are legally separated or divorced and a court or other appropriate governmental entity has legally awarded that the parents have joint custody of the child, the CIS will presume, absent evidence to the contrary, that such joint custody means that both parents have legal custody of the child for purposes of §320 citizenship. Fifth, in a case where the parents of the child have divorced or legally separated, the CIS will find that for the purposes of citizenship under INA §320 a parent has legal custody of the child where there has been an award of primary care, control, and maintenance of a minor child to a parent by a court or other appropriate government agency pursuant to the laws of the state or county of residence. Sixth, the regulations state there may be other factual circumstances under which the CIS will find that a U.S. citizen parent has legal custody for purposes of §320 citizenship. Advocates and their clients should be creative in thinking of other ways to prove that the CIS should determine that a U.S. citizen parent has legal custody if the parent - child relationship does not fit into one of the categories listed above.

³⁹ INA section 320 as amended by the Child Citizenship Act of 2000 and INA §101(b)(1).