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August 25, 2021

delivered via email to:

United States Citizenship and Immigration Services (USCIS)
USCISPolicyManual@uscis.dhs.gov

Re: 12 USCIS-PM H.3(b) - Assisted Reproductive Technology and In-Wedlock Determinations for Immigration and Citizenship Purposes

Dear USCIS:

We submit this comment in response to the recent update to the U.S. Citizenship and Immigration Services (USCIS) Policy Manual, entitled “Assisted Reproductive Technology and In-Wedlock Determinations for Immigration and Citizenship Purposes,” issued August 5, 2021, and effective immediately. We write to commend USCIS on this update and clarification, which was necessary to comport with evolving reproductive technology and address disparate treatment under previous guidance. The change will improve the fair interpretation of “wedlock” in acquisition of citizenship cases and help ensure access to citizenship for all who qualify.

The Immigrant Legal Resource Center (ILRC) is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC’s mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity. The ILRC has produced legal trainings, practice advisories, and other materials pertaining to the immigration law and processes.

The ILRC also leads the New Americans Campaign, a national non-partisan effort that brings together private philanthropic funders, leading national immigration and service organizations, and over 200 local services providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship.

Through our extensive networks with service providers, immigration practitioners, naturalization and other immigration benefits applicants, we have developed a

profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits and access citizenship.

1. ILRC Commends USCIS Policy Manual Guidance Regarding Assisted Reproductive Technology and In-Wedlock Determinations

ILRC welcomes USCIS's additions to the USCIS Policy Manual explaining the eligibility criteria for acquiring citizenship automatically at birth through a U.S. citizen parent. In particular, ILRC commends the agency's update to 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).

ILRC has been following this issue for years and was pleased to see USCIS join the Department of State in replacing 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 have been born "in wedlock" under the prior definition.

USCIS's recent Policy Manual changes are not only in line with the Department of State's current interpretation, but also comport with a growing number of federal courts that have addressed the issue. *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 Kiviti v. Pompeo*, 467 F.Supp.3d 293 (D. Md. 2020) (finding 8 USC § 1401 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. Apr. 2, 2020) (same); *Dvash-Banks v. Pompeo*, 2019 WL 911799 (C.D. Cal. 2019) (same).

Thank you for your consideration of these comments. If you have questions, please do not hesitate to reach out to Alison Kamhi at akamhi@ilrc.org

Sincerely,

/s/

Alison Kamhi

Supervising Attorney

Immigrant Legal Resource Center