

CHART A: DETERMINING WHETHER CHILDREN BORN OUTSIDE THE U.S. ACQUIRED CITIZENSHIP AT BIRTH¹

(If child born out of wedlock, see Chart B) -- **Please Note: A child cannot acquire citizenship at birth through an adoption.²**

STEP 1: Select period in which child was born	STEP 2: Select applicable parentage and immigration status of parents	STEP 3: Measure citizen parent’s residence or physical presence, whichever is required, PRIOR to the child’s birth against the requirements for the period in which child was born. The child acquired U.S. citizenship at birth if, at time of child’s birth, citizen parent had already met applicable requirements.	STEP 4: Determine whether child has since lost U.S. citizenship. Citizenship was lost on the date it became impossible to meet necessary requirements—never before age 26. Individuals who have failed to meet the requirements can regain citizenship by taking an oath of allegiance.
PERIOD	PARENTS	RESIDENCE / PHYSICAL PRESENCE REQUIRED FOR USC PARENT	RESIDENCE / PHYSICAL PRESENCE REQUIRED FOR CHILD³
Born prior to 5/24/34	Father or mother citizen	Citizen parent had resided in the U.S.	None
Born on/after 5/24/34 and prior to 1/14/41	Both parents citizens	One had resided in the U.S.	None
	One citizen and one alien parent	Citizen had resided in the U.S.	Either: 1) 2 years continuous physical presence ⁴ between the ages of 14 and 28, ⁵ or 2) if begun before 12/24/52, 5 years residence in U.S. or its outlying possessions between the ages 13 and 21, or 3) if begun before 10/27/72, 5 years continuous physical presence between the ages 14 and 28. ⁶ Individuals unaware of potential U.S. citizenship may fulfill the retention requirement through constructive physical presence. ⁷ No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. Individuals who failed to meet physical presence requirements can regain citizenship by taking an oath of allegiance. ⁸
Born on/after 1/14/41 and prior to 12/24/52	Both parents citizens; or one citizen and one national ⁹	One had resided in the U.S. or its outlying possessions.	None
	One citizen and one alien parent	Citizen had resided in U.S. or its outlying possessions 10 years, at least 5 of which were after age 16. If citizen parent served honorably in U.S. Armed Forces between 12/7/41 and 12/31/46, 5 of the required 10 years may have been after age 12. ¹⁰ If the citizen parent served honorably in U.S. Armed Services between 1/1/47 and 12/24/52, the requirement consists of 10 years of physical presence, 5 of which may have been after age 14. ¹¹	If begun before 10/27/72, 2 or 5 years continuous physical presence ¹² between ages 14 and 28. ¹³ If begun after 10/27/72, 2 years continuous physical presence between ages 14 and 28. Individuals unaware of potential U.S. citizenship may fulfill the retention requirement through constructive physical presence. ¹⁴ No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. (This exemption is not applicable if parent transmitted under the Armed Services exceptions). Individuals who failed to meet physical presence requirements can regain citizenship by taking an oath of allegiance. ¹⁵
Born on/after 12/24/52 and prior to 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possessions.	None ¹⁶
	One citizen, one national parent	Citizen had been physically present ¹⁷ in U.S or its outlying possessions for a continuous period of one year.	None ¹⁸
	One citizen, one alien parent	Citizen had been physically present ¹⁹ in U.S. or its outlying possessions 10 years, at least 5 of which were after age 14.	None ²⁰
Born on/after 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possessions. ²¹	None ²²
	One citizen and one national parent	Citizen had been physically present ²³ in U.S. or its outlying possessions for continuous period of 1 year. ²⁴	None ²⁵
	One citizen, one alien parent	Citizen had been physically present ²⁶ in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14. ²⁷	None ²⁸

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This Chart is intended as a general reference guide.

The ILRC recommends practitioners research the applicable laws and guidance for additional information.

The information in these charts comes from case law, statutory language, the USCIS policy manual, the Adjudicator's Field Manual, the Foreign Affairs Manual, and INS interpretations. Although the USCIS policy manual supersedes previous policy memos and the Adjudicator's Field Manual, the USCIS policy manual is silent on many subjects discussed at length in prior USCIS policy statements and INS Interpretations. In the absence of guidance to the contrary from the USCIS policy manual, the ILRC believes advocates should continue to use helpful clarification and guidance from prior USCIS policy statements and INS Interpretations.

¹ Congress has passed many laws governing the acquisition of citizenship at birth, including the Act of May 24, 1934, the Nationality Act of 1940, the Act of March 16, 1956, and the Immigration and Nationality Amendments of 1986.

² See *Marquez-Marquez v. Gonzales*, 455 F.3d 548 (5th Cir. 2006) (holding that petitioner did not obtain citizenship at birth based on adoption by U.S. citizen since INA § 301(g) did not address citizenship through adoption); *Colaiani v. INS*, 490 F.3d 185 (2d Cir. 2007) (same); see also *Cabrera v. Att'y Gen.*, 921 F.3d 401, 404 (3d Cir. 2019) (finding that the disparate treatment of adopted children vis-à-vis biological children under INA § 309 does not violate the Constitution). But a number of federal courts have found that a biological relationship is not required where the child's legal parents were married at the time of the child's birth. 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*, F.Supp.3d 293 (D. Md. 2020) (finding the statute 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).

Although the INA does not define "wedlock," the State Department interprets "birth in wedlock" as birth when the parents are "legally married to each other at the time of the person's conception or birth or within 300 days of the end of the marriage by death or divorce." Dep't of State, *Acquisition of U.S. Citizenship at Birth by a Child Born Abroad* (May 18, 2021), <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Acquisition-US-Citizenship-Child-Born-Abroad.html>. This is a recent, welcome change that replaces the prior, narrower interpretation that defined birth in wedlock as "birth during the marriage of the biological parents to each other." 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 be born "in wedlock" under the prior definition.

³ If an individual acquired citizenship but did not retain it, that person was a U.S. citizen until they failed to comply with the retention requirements. See 7 FAM 1133.2-2. If the individual regained U.S. citizenship by taking an oath of allegiance at a later date, that citizenship is not retroactive. This means that the person could not transmit citizenship to any children born between the time they lost citizenship and regained it. See 7 FAM 1140 App. L.

⁴ Physical presence refers to the time that a person actually spent in the United States, even if they were only visiting. Nevertheless, this requirement has been interpreted generously in the retention context. Absences totaling fewer than 60 days in the aggregate will not break physical presence for the 2-year requirement. Former INA § 301(b), Pub. L. 92-582, 86 Stat. 1289. For a discussion of continuous physical presence related to the retention provisions, see 7 FAM 1133.3 and INS Interpretations 301.1(b)(6).

⁵ In 1972, Congress liberalized the retention requirements, reducing the period of continuous physical presence from 5 years to 2 years. Act of Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1289. While the statute did not address retroactivity, INS Interpretations 301.1(b)(6)(vii) extended the 1972 2-year requirement to those born between 5/24/1934 and 1/13/1941. See also Kurzban, *Immigration Law Sourcebook*, Appx B (ed. 2019-20). Per the interpretations, if someone lost citizenship having failed to satisfy the 5-year requirement but had satisfied the amended language for the 2-year requirement, the individual was regarded as never having lost citizenship, nor as having interrupted citizenship status. INS Interpretations 301.1(b)(6)(vii).

⁶ Absences totaling less than 12 months in the aggregate will not break physical presence for the 5-year physical presence retention requirement. Former INA § 301(b), Pub. L. 85-316, 71 Stat. 639.

⁷ In some cases, applicants will be able to fulfill their retention requirements even though they were not physically present in the U.S. Naturalization law allows for applicants to "constructively" meet the retention requirement when they did not know earlier they had a claim to U.S. citizenship. This essentially waives the retention requirement. INS Interpretations 301.1(b)(6)(iii); 7 FAM 1120 App. K (detailed overview of unawareness). In order to meet this exception, the applicant must:

- Be provided with a reasonable opportunity to enter the United States after becoming aware of the claim of U.S. citizenship. *Matter of Yanez-Carrillo*, 10 I&N Dec. 366 (BIA 1963); and
- Enter the United States promptly. See *Matter of Farley*, 11 I&N Dec. 51, 53 (BIA 1965).

If the applicant satisfies these conditions, they are deemed present in the United States from a date immediately prior to their 23rd birthday (if under the 5-year requirement) or 26th birthday (if under the 2-year requirement) until their date of admission. See *Matter of Farley*, 11 I & N Dec. 51 (BIA 1965). This means that an applicant can be found to have constructive presence retroactively even if they are currently too old to fulfill the retention requirements. See *Matter of Navarrete*, 12 I&N Dec. 138, 141 (BIA 1967) (finding that someone over the age of 28 had had constructive presence and thus retained citizenship). The State Department also provides that constructive physical presence may apply in cases where an applicant presents a defense of impossibility of performance or official misinformation. See 7 FAM 1130 App. K; 7 FAM 1140 App. K.

⁸ Under the 1994 Immigration and Nationality Technical Corrections Act, those who failed to meet the physical presence retention requirement may regain their citizenship by taking an oath of allegiance to the United States. See INA § 324(d)(1). This procedure does not apply citizenship retroactively for any period in which the person was not a citizen. *Id.* The person regains citizenship as of

the date that the oath is taken. Since the oath does not restore citizenship retroactively, persons will be unable to transmit citizenship to their children born during the period between loss and resumption of U.S. citizenship. See 7 FAM 1140 App. L.

⁹ For a definition of “national,” see INA § 308 and § 101(a)(29).

¹⁰ To meet the continuous residence requirement, the person must show that the U.S. was their principal dwelling place for the requisite period of time. Nationality Act § 104. A person can meet the continuous residence requirement despite brief absences if the person maintained their domicile in the U.S.; however time spent in the U.S. while not living here, such as during visits, will not count. 7 FAM 1134.3-2. For a discussion of the residence requirements for parents who served in the U.S. Armed Forces between 12/7/41 and 12/31/46, see 7 FAM 1134.3; INS Interpretations 301.1(b)(3)(ii).

¹¹ Act of March 16, 1956, Public Law 84-430, 70 Stat. 50. Periods of honorable military service abroad may satisfy the physical presence requirement in the United States. INA § 301(a)(7) (1952); 7 FAM 1133.3-3(d); INS Interpretations; § 301.1(b)(4)(ii).

¹² See Note 4, *supra*.

¹³ Under the 1972 Amendment, persons who entered before October 27, 1972 were allowed to comply with the original 5-year requirement for a period extending beyond October 27, 1972 as long as the 5-year period began on or before October 26, 1972. See Kurzban, *Immigration Law Sourcebook*, Appx B (ed. 2019-20); INS Interpretations 301.1(b)(6)(x). Individuals may prefer the longer requirement due to the more lenient absence standard. The 2-year requirement allows for absences of fewer than 60 days in aggregate; the 5-year requirement allows for absences less than 1 year in aggregate.

¹⁴ Although “physical presence” is not defined in the INA, it has been interpreted as actual bodily presence. This means that any time a person spends in the U.S. counts towards the physical presence requirement, even if it was time spent while visiting or before naturalizing. Conversely, any absence from the United States, no matter how short, cannot be counted as physical presence for transmission purposes. See 7 FAM 1133.3-4 for a discussion of physical presence requirements for transmission of citizenship. Note that physical presence is defined more leniently in the retention context. See Note 4, *supra*.

¹⁵ See Note 8, *supra*.

¹⁶ People born on or after 10/10/52 have no retention requirements. USCIS-PM 12(H)(3)(a) n.4. Retention requirements were repealed by Act of 10/10/78 (Pub. L. 95-432, 92 Stat 1046).

¹⁷ See Note 14, *supra*.

¹⁸ See Note 16, *supra*.

¹⁹ Any period of honorable service in the U.S. Armed Forces or employment with the U.S. Government or with certain international organizations by the citizen parent (or where the citizen parent is abroad as the dependent unmarried son or daughter of a parent in such service or employment) is considered “physical presence” for purposes of this requirement. INA § 301(g).

²⁰ See Note 16, *supra*.

²¹ The government may take the position that unwed U.S. citizen parents have to establish paternity first under INA § 309(a) to benefit from this provision. If father does not meet paternity requirements but one or both parents resided in U.S., USCIS and DOS advise officers to seek internal review. See Note 24, *infra*; see also CHART B.

²² See Note 16, *supra*.

²³ See Note 14, *supra*.

²⁴ See Note 14, *supra*. The statutes apply this provision to married parents and, if the father proves paternity under INA § 309(a) [see CHART B, Part 2], unwed U.S. citizen fathers. It is the ILRC’s opinion that the Supreme Court’s principal of equal protection would extend this provision to unwed U.S. citizen mothers as well. In *Sessions v. Morales-Santana*, the Supreme Court found that the more lenient physical presence requirement for unwed U.S. citizen mothers and alien fathers violated the Equal Protection Clause of the U.S. Constitution, as compared with the longer requirements for unwed U.S. citizen fathers and alien mothers. 137 S.Ct. 1678 (2017). The Supreme Court did not address this provision governing where one parent is a U.S. citizen and the other parent is a national. Now that the Supreme Court has struck down the preferential treatment of unwed U.S. citizen mothers, the ILRC’s opinion is that this one-year physical presence requirement for situations where one parent is a U.S. citizen and one parent is a national would extend to all parents, including unwed U.S. citizen mothers. If it is unconstitutional to give unwed U.S. citizen mothers a more lenient requirement where the father is an alien, it would also be unconstitutional to deny them equal treatment where the father is a national. However, because the statutory scheme regarding U.S. citizen mothers is now unclear, this may have to be resolved by further guidance or litigation. The USCIS and the Department of State may argue that the father must first establish paternity under INA § 309(a) [see CHART B, Part 2] before this requirement would apply to unwed U.S. citizen mothers, or that unwed U.S. citizen mothers simply cannot benefit from this modified provision even where the other parent is a national.

²⁵ See Note 16, *supra*.

²⁶ See Note 14, *supra*.

²⁷ Several cases have challenged the statute’s less favorable physical presence requirement for an unwed U.S. citizen father (which, after certain legitimation criteria are met, mirrors the requirements here of 5 years, with 2 years after the age of 14) compared to the requirement for an unmarried U.S. citizen mother (1 year of previous physical presence). On June 12, 2017, the Supreme Court resolved a circuit split and found that the differing physical presence requirements violated the Equal Protection Clause of the U.S. Constitution. *Sessions v. Morales-Santana*, 137 S.Ct. 1678 (2017). The Supreme Court held that going forward, unwed mothers would be subject to the same physical presence requirement in INA § 301(g) as unwed fathers and married couples, where one parent is a U.S. citizen and one is an alien. *Id.*, at *28.

²⁸ See Note 16, *supra*.