

**CHART B: ACQUISITION OF CITIZENSHIP
DETERMINING IF CHILDREN BORN ABROAD AND
OUT OF WEDLOCK ACQUIRED U.S. CITIZENSHIP AT BIRTH¹**

PART 1: Mother was a U.S. citizen at the time of the child's birth.

PART 2: Mother was not a U.S. citizen at the time of the child's birth and the child was legitimated or acknowledged by a U.S. citizen father.

A child cannot acquire citizenship at birth through an adoption.²

PART 1: MOTHER IS A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH

Date of Child's Birth:	Requirements:
Prior to 12/24/52: ³	Mother was a U.S. citizen who resided in the U.S. or its outlying possessions at some point prior to birth of child. EXCEPTION: The child will not acquire citizenship through the U.S. citizen mother if s/he was legitimated by the father under the following circumstances: ⁴ 1. The child was born before 5/24/34; 2. The child was legitimated before turning 21; AND 3. The legitimation occurred before 1/13/41.
On/after 12/24/52:	Mother was U.S. citizen physically present in the U.S. or its outlying possessions for a continuous period of 1 year at some point prior to birth of child.

PART 2: MOTHER WAS NOT A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH AND THE CHILD WAS LEGITIMATED OR ACKNOWLEDGED BY FATHER,⁵ WHO WAS A U.S. CITIZEN WHEN CHILD WAS BORN⁶

Date of Child's Birth:	Requirements:
Prior to 1/13/41:	1. Child legitimated at any time after birth, including adulthood, under law of father's domicile. 2. If so, use CHART A to determine if child acquired citizenship at birth.
On/after 1/13/41 and prior to 12/24/52:	1. Child legitimated before age 21 under law of father's domicile, or paternity established through court proceedings before 12/24/52. 2. If so, use CHART A to determine if child acquired citizenship at birth unless paternity established through court proceeding. ⁷
On/after 12/24/52 and prior to 11/15/68:	1. Child legitimated before age 21 under law of father's or child's domicile. ⁸ 2. If so, use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/68 and prior to 11/15/71:	OPTION A: 1. Child legitimated before age 21 under law of father's or child's domicile. 2. If so, use CHART A to determine if child acquired citizenship at birth. OPTION B:⁹ 1. Child/father blood relationship established by clear and convincing evidence; ¹⁰ 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; ¹¹ and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, ¹² <u>or</u> father must acknowledge paternity of child in writing under oath, <u>or</u> paternity must be established by competent court. 5. If #s 1-4 are met, use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/71: ¹³	1. Child/father blood relationship established by clear and convincing evidence; ⁸ 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, <u>or</u> father must acknowledge paternity of child in writing under oath, <u>or</u> paternity must be established by competent court. 5. If #s 1-4 are met, use CHART A to determine if child acquired citizenship at birth. ¹⁴

Produced by the ILRC (October 2016)

This Chart is intended as a general reference guide.

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

Endnotes for Chart B

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 clarifications 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); see also *Colaiani v. INS*, 490 F.3d 185 (2d Cir. 2007) (same); 7 FAM 1131.4(a) (requiring an actual blood relationship; birth in wedlock insufficient to presume paternity for acquisition); but see *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).

³ A qualifying child born before 5/24/34 acquired U.S. citizenship when the Nationality Act of 1940, effective 1/13/41, bestowed citizenship upon the child retroactively to the date of birth.

⁴ *Matter of M-*, 4 I&N Dec. 440, 443-44 (BIA 1951).

⁵ Many of the criteria for "legitimation" look to the law of the child's or father's domicile. See 7 Fam 1130, at 59-69 for summaries of legitimation requirements for U.S. states and territories. The Fifth Circuit held that a child was "legitimated" under Mexican law when his father "acknowledged" him by placing his name on the child's birth certificate. *Iracheta v. Holder*, 730 F.3d 419 (5th Cir. 2013) (reversing more than three decades of previous interpretation of Mexican requirements).

⁶ The statutes state that if the child did not acquire citizenship through her mother, but was legitimated by a U.S. citizen father under the listed conditions, apply the acquisition law pertinent to legitimate children born in a foreign country. See CHART A. Several recent cases have challenged the less favorable physical presence requirement for an unwed U.S. citizen father (which can require 10 years, with 5 years after the age of 14) compared to the residence requirement for an unmarried U.S. citizen mother (1 year of previous continuous residence). The decisions have created a circuit split on the issue. The Second Circuit found that the differing requirements violated the equal protection clause and that the proper remedy was to replace the more stringent physical presence requirement for unwed fathers with the more lenient residence requirement for unwed mothers. *Morales-Santana v. Lynch*, 792 F.3d 256 (2d Cir. 2015); see also *Villegas-Sarabia v. Johnson*, 120 F. Supp. 3d 870(W.D. Tex. 2015) (same). The Ninth Circuit previously rejected this argument in *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008). The Supreme Court split 4-4 with Justice Kagan recused, leaving the Ninth Circuit ruling in effect. *Flores-Villar*, 559 U.S. 1005 (2011). The Second Circuit case is currently before the Supreme Court. *Lynch v. Morales-Santana*, No. 15-9911, cert granted June 28, 2016.

⁷ The patchwork of amended laws in this period, some of which did not cross-reference existing laws, has produced several avenues for fulfilling the residency requirements during this period for legitimated children. If the father legitimates the child before the age of 21, the applicant can apply either the residency requirements set by § 201(g) of the Nationality Act or set by § 301(a)(7) of the former INA. 7 FAM 1134.5-3. Under the INA, one can qualify if 1) the father has 10 years residence in the U.S., 5 of which are after the age of 16; and 2) the child must reside in the U.S. for a period or periods totaling 5 years between the ages of 13 and 21. See 7 FAM 1134.2 (NA). If the father served honorably in the U.S. Armed Services after December 7, 1941 and before December 31, 1946, then the father must have 10 years in the U.S., 5 of which after the age of 12. In this scenario the child need not be legitimated but must satisfy the INA's retention requirements. See INA § 201(i). Under the INA, one can qualify if 1) the father has 10 years residence in the U.S., 5 after the age of 14; and 2) the child has been physically present in the U.S. for 5 years between ages 14 and 28. 7 FAM 1133.2-2 (former INA). However, if the paternity is established through court proceedings, the child may only comply with the residence requirements of § 201(g) of the Nationality Act of 1940. Additionally, children of U.S. veterans born in this period may be eligible for citizenship under either the NA or the INA. *Y.T. v. Bell*, 478 F. Supp. 828 (W.D. Pa. 1979); 7 FAM 1134.4.

⁸ For children born out of wedlock, legitimation under the statute in effect during this period, 8 USC § 1409(a) (1952), must be by the biological father. See *U.S. v. Marguet-Pillado*, 560 F.3d 1078 (9th Cir. 2009) (holding that a child born out of wedlock, neither of whose natural parents was a U.S. citizen at the time of his birth, cannot acquire citizenship at birth because of a subsequent action by a U.S. citizen); *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009) (explaining that a person born out of wedlock who claims citizenship by birth must share a blood relationship with the U.S. citizen).

⁹ Individuals born in this range can elect whether to establish citizenship either under Option A, "old" INA § 309, or Option B, "new" INA § 309, amended by the INAA, Pub. L. 99-653 (Nov. 14, 1986). The decision can be based on which requirements are easier for the individual to prove. See 7 FAM 1133.4-2(a)(3).

¹⁰ INA § 309 does not require a blood test or any other specific type of evidence. See *Miller v. Albright*, 523 U.S. 420, 437 (1997). But under the clear and convincing standard, the fact-finder must come to "a firm belief in the truth of the facts asserted." 7 FAM 1131.4-2. Generally the child's birth certificate will be sufficient proof. In some instances, the child's U.S. citizen parent might not be listed on the birth certificate, the birth certificate might not be available, and/or USCIS might question the authenticity or veracity of the birth certificate. Under any of these circumstances, ILRC encourages the clients to submit additional documentation including medical records, religious records such as baptismal certificates, other birth records, and witness affidavits. If the parents are still alive, a blood test or DNA test can show the parent-child relationship.

¹¹ Although FAM guidelines say that the letter has to be dated before the child turned 18, see 7 FAM 1133.4-2, the statutory language does not technically require that the letter be written before the child was 18. See 8 USC § 1409(a)(3). Advocates can try to argue that

a letter written by the father after the child reaches 18, coupled with proof of actual support while the child was under 18, should still satisfy this requirement. See *Miller v. Albright*, 523 U.S. 420, 432 (1998) (declining to interpret 8 USC § 1409(a)(3)); *U.S. v. Gomez-Orozco*, 188 F.3d 422 (7th Cir. 1999) (reversing to allow petitioner to explore claim to U.S. citizenship under, among others, 8 USC 1409(a) even where there was no written statement).

¹² If a legitimation occurred, Option A is the more favorable approach for acquisition of citizenship, not Option B. See Note 9, *supra*.

¹³ If a child was already legitimated before 1986 (i.e. legitimated before age 21 under the law of the father or child's domicile, described as Option A above), that child had already become a U.S. citizen when the new laws went into effect. Thus the more stringent laws enacted in 1986 (described as Option B above) are irrelevant to those children because they had already become U.S. citizens, and the new laws acknowledge that they cannot revoke that citizenship. Pub. L. 100-525, § 8(r), (Oct. 24, 1988).

¹⁴ Note that if the child was born on or after 11/15/86, the residence requirement for the U.S. citizen father under CHART A changes.