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

Date of Last Act	**Requirements-**
Prior to 5/24/34:[1]	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 child's 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:	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 naturalized and s/he is not widowed or separated, the child must have 5 years lawful permanent residence in the U.S. commencing before the 21st birthday, unless the other parent is already a U.S. citizen;[5] c. Child must be lawful permanent resident before the child's 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;[4] f. Adopted child and stepchild cannot derive citizenship.
1/13/41 to 12/23/52: .	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 separated[6] and the naturalizing parent must have legal custody;[7] 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 child's 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]
12/24/52 to 10/5/78:[11]	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,[12] or be deceased, or the parents must be legally separated[6] and the naturalizing parent must have custody; [7] 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 begun to reside permanently in U.S. (defined in most places as having been admitted for lawful permanent residence) before the child's 18th birthday;[16] e. Child must be unmarried;[17] f. Adopted child and stepchild cannot derive citizenship [18]
10/5/78 to 2/26/01:	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,[19] or be deceased,[20] or the parents must be legally separated[6] and the naturalizing parent must have legal custody;[7] 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;[9] c. Parent or parents must have been naturalized prior to the child's 18th birthday;[15] d. Child must have begun to reside permanently in U.S. (defined in most places as having been admitted for lawful permanent residence) before the 18th birthday;[16] e. Child must be unmarried;[17] 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,[21] is in the legal of the adoptive parent(s), is a lawful permanent resident and adoption occurred before s/he turned 18.[22] Stepchild cannot derive citizenship.[23]
Anyone who, on or after 2/27/01, meets the following requirements, is a U.S. citizen:[24] 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.[25] b. In the case of a child who was born out of wedlock, the mother must be the one who is or becomes a citizen[26] OR, if the father is a U.S. citizen through naturalization or other means then the child must have been legitimated by the father under either the law of the child's or fathers' residence or domicile and the legitimation must take place before the child reaches the age of 16.[27] c. Child is under 18 years old.[28] d. Child must be unmarried.[29] e. Child is a lawful permanent resident.[30] f. Child is residing in the U.S. in the legal and physical custody of the citizen parent.[31] 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.[32] An adopted child who qualifies as an orphan under INA § 101(b)(1)(F) also will qualify for derivation.

Produced by ILRC (March 2014) - 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* Levy *U.S. Citizenship and Naturalization* § 5:12 (ed. 2013–14).

[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 Duarte-Ceri v. Holder*, 630 F.3d 83 (2d Cir 2010); *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; ***but, see also*** INS Interpretations 320.2. Yet, CIS officers may not agree.

[3] Prior to 1907 the child could take up residence in the U.S. after turning 21 years of age. *See* Levy, *U.S. Citizenship and Naturalization* § 5:12 (ed. 2013–14) (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* 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 U.S. v. Casasola*, 670 F.3d 1023 (9th Cir. 2012) (rejecting equal protection challenge that "legal separation" requirement irrationally distinguished between married and legally separated parents). Circuit courts have split on what constitutes a "legal separation." *See Morgan v. A.G.*, 432 F.3d 226, 231–32 (3d Cir. 2005) (reviewing cases); 12-11 Bender's Immigr. Bull. 2 (2007). The 4th, 5th, and 7th Circuits have required judicial decrees of limited or absolute divorce or separation. *See Afeta v. Gonzales*, 467 F.3d 402 (4th Cir. 2006); *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000); *see also Matter of H-*, 3 I&N Dec. 742 (BIA 1949), requiring some sort of limited or absolute divorce through judicial proceedings. The 2nd, 3rd, and 9th circuits have required only a legal alteration which can occur through nonjudicial procedures. *See Lewis v. Gonzales*, 481 F.3d 125, 130–32 (2d Cir. 2007); *Bagot v Ashcroft*, 398 F.3d 252 (3d Cir. 2005); *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005). Note that in *Henry v. Quarantillo*, 684 F. Supp. 2d 298 (E.D.N.Y. 2010), although the district court noted the possibility of "legal separation" of unwed parents according to a change to Jamaican law in 2005, it viewed eligibility for derivative citizenship by examining the state of affairs at the time that an applicant's parent naturalized, which in this case was 1972.

[7] *See* 7 FAM 1156.8. 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* Passport Bulletin 96-18 (Nov. 6, 1996). Yet, in the 9th and 5th Circuits, the courts of appeals ruled that the naturalizing parent must have sole legal custody for the child to derive citizenship and thus, at least in the 9th and 5th Circuits, a joint legal custody decree will not be sufficient to allow a child to derive citizenship. *See U.S. v. Casasola***,** 670 F.3d 1023 (9th Cir. 2012) and *Bustamante-Barrera v. Gonzales*, 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. App'x 166 (3d Cir. 2009).

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 that the child lives with that parent), the child can derive citizenship through that parent provided all the other conditions are met. *See* Passport Bulletin 96-18 (Nov. 6, 1996) (referencing Passport Bulletin 93-2 (Jan. 8, 1993)). The Fifth Circuit has held that a nunc pro tunc order retroactively awarding the naturalized parent custody is not sufficient to show legal custody for purposes of derivation. *See U.S. v. Esparza*, 678 F.3d 389 (5th Cir. 2012). 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 Dec. 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 (BIA 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. For more on this topic, please see *Bagot v. Ashcroft*, 398 F.3d 252 (3d 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* 7 Gordon, Mailman, and Yale-Lohr, *Immigration Law and Procedure*, § 98.03[4](e) (ed. 2012).

The Administrative Appeals Office (AAO) has found that a Rabbinical Court decree awarding custody of a child to the child's mother can establish that the mother had legal custody of the child for purposes of INA § 321. *See Matter of [redacted]*, A18 378 029 (AAO Sept. 27, 2010); *see also* 87 *Interpreter Releases* 2120 (Nov. 1, 2010).

[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 Matter of M-*, 3 I.&N. Dec. 850 (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.

[10] Although both 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* Levy, *U.S. Citizenship and Naturalization* § 5:14 (ed. 2013–14).

[11] 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 Fuentes-Martínez*, 21 I&N Dec. 893 (BIA 1997)*; Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008); CIS, Dep't of Homeland Sec., Adjudicators' Field Manual, ch. 71, § 71.1(d)(2) (Feb. 2008). But in *Jordon 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. The BIA has repeatedly criticized the 3rd Circuit, arguing that it did not matter whether the naturalized parent obtained legal custody of the child before or after naturalization, so long as the statutory requirements were satisfied before the child turned 18 years old. *See Matter of Douglas*, 26 I&N Dec. 197 (BIA 2013); *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008). Also, the Adjudicators' Field Manual, cited above, explains that "[s]ince the order in which the requirements [of former § 321(a)] were satisfied was not stated in the statute, as long as the applicant meets the requirement of the statute before age 18 the applicant derives U.S. citizenship." *Jordon* is only in effect in the Third Circuit, and the BIA has declined to follow it, even in the Third Circuit. Levy, *U.S. Citizenship and Naturalization*, § 5:3 (ed. 2013–14);*Matter of Douglas*, 26 I&N Dec. 197.

[12] *See* 7 FAM 1156.9 and 1156.10 (Foreign Affairs Manual) for a general description of the law.

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

[14] *See* INS Interpretations 320.1(c). In *Flores-Torres v. Holder*, 680 F. Supp. 2d 1099 (N.D. Cal. 2009), the court found that an individual qualified as an out-of-wedlock child, even though the father signed a certification in El Salvador acknowledging his paternity, because Congress intended that paternity could be established "by legitimation" through marriage of the child's parents after the child's birth, and not just through any method at all, like the written acknowledgement in this case. But note that the Fifth Circuit recently 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). In *Tavares v. AG*, 398 Fed. App'x 773 (3d Cir. 2010), the 3rd Circuit found that the applicant derived citizenship from his mother because he was not legitimated by his father under either Massachusetts or Cape Verde law.

[15] 1952–1978 law stated prior to "**16th** birthday." The 1978 law stating prior to the "**18th** birthday" is retroactively applied to 12/24/52. *See In re Fuentes-Martínez*, 21 I.&N. Dec. 893 (BIA 1997), citing Passport Bulletin 96-18.

[16] There is currently a circuit split on whether INA § 321(a)(5)'s requirement that a child "reside permanently" in the United States means that the child must be a lawful permanent resident. The Ninth Circuit, the Eleventh Circuit, and the BIA have all held that this language requires the child to become a lawful permanent resident before she turned 18 in order to obtain derivative citizenship. *See Romero-Ruiz v. Mukasey*, 538 F.3d 1057 (9th Cir. 2008); *U.S. v. Forey-Quintero*, 626 F.3d 1323 (11th Cir. 2010); *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008). But the Second Circuit reversed *Nwozuzu*, holding that a child may derive citizenship if both parents naturalized while the child was still under 18 years old and was unmarried <u>even if the child was not a lawful permanent resident</u>. The Second Circuit found that "reside permanently" could include "something lesser." *Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013); *see also United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012) (declining to interpret "reside permanently" but recognizing multiple interpretations). .

[17] *See* INA § 101(c)(1).

[18] *See* endnote 11 above. In *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009), the Ninth Circuit held that an individual could not derive U.S. citizenship from his stepfather by virtue of the state's legitimation statute.

[19] *See* 7 FAM 1156.11 (Foreign Affairs Manual) for a general description of the law.

[20] "Death" includes "brain death" but not comas or persistent vegetative states. *See Ayton v. Holder*, 686 F.3d 331 (5th Cir. 2012).

[21] 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.

[22] 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)].

[23] *See Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA 2009) (holding that a child born outside the United States cannot obtain derivative citizenship by virtue of his or her relationship to a nonadoptive stepparent).

[24] 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. Note that the law is not retroactive, so individuals who are 18 years or older on February 27, 2001 do not qualify for citizenship under this law. *See, e.g.*, *Guzman v. U.S. Dep't Homeland Sec.*, 679 F.3d 425 (6th Cir. 2012).

[25] INA § 320 as amended by the Child Citizenship Act of 2000.

[26] 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, 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."

[27] The text of INA § 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 § 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.

[28] INA § 320 as amended by the Child Citizenship Act of 2000.

[29] INA § 320 as amended by the Child Citizenship Act of 2000.

[30] INA § 320 as amended by the Child Citizenship Act of 2000. In *Walker v. Holder*, 589 F.3d 12 (1st Cir. 2009), the First Circuit held that an individual has not satisfied the requirement for "lawful admission for permanent residence" if that person obtained a green card through fraud or misrepresentation, even if the individual was a child when he first entered the United States with no control over the actions of his guardians.

[31] INA § 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, 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 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, 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, 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, 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, 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, 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 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 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.

[32] INA § 320 as amended by the Child Citizenship Act of 2000 and INA § 101(b)(1).