

**Chart A: Determining Whether Children Born outside the U.S. Acquired Citizenship at Birth<sup>1</sup> (if child born out of wedlock, see Chart B) -- Please Note: A child cannot acquire citizenship at birth through an adoption.<sup>2</sup>**

<b>STEP 1</b>	<b>STEP 2</b>	<b>STEP 3</b>	<b>STEP 4</b>
Select period in which child was born	Select applicable parentage and immigration status of parents	Measure citizen parent's residence or physical presence, whichever is required, <b><u>PRIOR</u></b> 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.	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.
<b>PERIOD</b>	<b>PARENTS</b>	<b>RESIDENCE / PHYSICAL PRESENCE REQUIRED FOR USC PARENT</b>	<b>RESIDENCE / PHYSICAL PRESENCE REQUIRED FOR CHILD<sup>3</sup></b>
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 <sup>4</sup> between the ages of 14 and 28, <sup>5</sup> 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. <sup>6</sup> Individuals unaware of potential U.S. citizenship may fulfill the retention requirement through constructive physical presence. <sup>7</sup> 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. <sup>8</sup>
Born on/after 1/14/41 and prior to 12/24/52	Both parents citizens; or one citizen and one national <sup>9</sup>	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. <sup>10</sup> 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. <sup>11</sup>	If begun before 10/27/72, 2 or 5 years continuous physical presence <sup>12</sup> between ages 14 and 28. <sup>13</sup> 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. <sup>14</sup> 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. <sup>15</sup>
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 <sup>16</sup>
	One citizen, one national parent	Citizen had been physically present in U.S or its outlying possessions for a continuous period of one year. <sup>17</sup>	None <sup>18</sup>
	One citizen, one alien parent	Citizen had been physically present in U.S. or its outlying possessions 10 years, at least 5 of which were after age 14. <sup>19 &amp; 20</sup>	None <sup>21</sup>
Born on/after 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possessions.	None <sup>22</sup>
	One citizen and one national parent	Citizen had been physically present in U.S. or its outlying possessions for continuous period of 1 year. <sup>23</sup>	None <sup>24</sup>
	One citizen, one alien parent	Citizen had been physically present in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14. <sup>25</sup>	None <sup>26</sup>

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**Please Note: This Chart is intended as a general reference guide and the ILRC recommends practitioners research the applicable laws and INS Interpretations for additional information. Please see notes on next page.**

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

<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> If an individual acquired citizenship but did not retain it, that person was a U.S. citizen until s/he 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 s/he lost citizenship and regained it. See 7 FAM 1140 App. L.

<sup>4</sup> Physical presence refers to the time that a person actually spent in the United States, even if s/he was only visiting. Nevertheless, this requirement has been interpreted generously in the retention context. Absences totaling less 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 these provisions, see INS Interpretations 301.1(b)(6).

<sup>5</sup> In 1972, Congress liberalized 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. 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).

<sup>6</sup> 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.

<sup>7</sup> 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); see also 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, she is deemed present in the United States from a date immediately prior to her 23rd birthday (if under the 5-year requirement) or 26th birthday (if under the 2-year requirement) until her 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 she is 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.

<sup>8</sup> 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. 61 FR 29651 (June 12, 1996).

<sup>9</sup> For a definition of "national," please see INA § 308 and § 101(a)(29) and Chapter 4 of the ILRC's manual, *Naturalization and U.S. Citizenship: The Essential Legal Guide*.

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

<sup>11</sup> INS Interpretations 301.1(b) and the 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. 7 FAM 1133.3-3(d); INS Interpretations; § 301.1(b)(4)(ii).

<sup>12</sup> See Note 4, *supra*.

<sup>13</sup> 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 INS Interpretations 301.1(b)(6)(x). Individuals may prefer the longer requirement due to the more lenient absence standard: the 2-year

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requirement allows for absences of fewer than 60 days in aggregate; the 5-year requirement allows for absences less than 1 year in aggregate.

<sup>14</sup> 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*.

<sup>15</sup> See Note 8, *supra*.

<sup>16</sup> People born on or after 10/10/52 have no retention requirements. INS Interpretations 301.1(b)(6)(xii). Retention requirements were repealed by Act of 10/10/78 (Pub. L. 95-432, 92 Stat 1046).

<sup>17</sup> See Note 14, *supra*.

<sup>18</sup> See Note 16, *supra*.

<sup>19</sup> See INA § 301(g) for exceptions to the physical presence requirements for people who served honorably in the U.S. military, were employed with the U.S. Government or with an intergovernmental international organization; or who were the dependent unmarried sons or daughters and member of the household of a parent in such military service or employment.

<sup>20</sup> Several recent cases have challenged the less favorable physical presence requirement for an unwed U.S. citizen father (which, after certain legitimation criteria are met, mirrors the requirements here of 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 recently 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*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 4887462 (W.D. Tex. 2015) (same). The Ninth Circuit earlier 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).

<sup>21</sup> See Note 16, *supra*.

<sup>22</sup> See Note 16, *supra*.

<sup>23</sup> See Note 14, *supra*.

<sup>24</sup> See Note 16, *supra*.

<sup>25</sup> See Note 20, *supra*.

<sup>26</sup> See Note 16, *supra*.