

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

<p>ALLISON DAWN BLIXT and L. Z.-B.</p> <p style="text-align: right; padding-right: 100px;">Plaintiffs,</p> <p>v.</p> <p>The UNITED STATES DEPARTMENT OF STATE and MICHAEL POMPEO in his official capacity as Secretary, U.S. Department of State</p> <p style="text-align: right; padding-right: 100px;">Defendants.</p>	<p>:</p>	<p>Civ. No. 1:20-cv-02102-KM-JBC</p> <p style="text-align: center;">DEFENDANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT</p> <p>Motion Date: February 16, 2021</p>
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Defendants, by and through undersigned counsel, hereby move for partial summary judgment on Plaintiffs’ claim brought under 8 U.S.C. § 1503—which alleges that plaintiff L. Z.-B. is a U.S. citizen at birth—in accordance with Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1. The Court should grant the motion for the reason stated in the attached memorandum of points and authorities. Defendants’ statement of undisputed facts, exhibits in support of Defendants’ motion, and a proposed order is attached.

Dated: November 18, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Branch Director

/s/ Vinita B. Andrapalliyal
Vinita B. Andrapalliyal
Trial Attorney
United States Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 305-0845

vinita.b.andrapalliyal@usdoj.gov

**UNITED STATES DISTRICT COURT
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ALLISON DAWN BLIXT and L. Z.-B. :

Plaintiffs, :

v. :

The UNITED STATES DEPARTMENT
OF STATE and MICHAEL POMPEO in
his official capacity as Secretary, U.S.
Department of State

Defendants. :

Civ. No. 1:20-cv-02102-KM-JBC

**DEFENDANTS' MOTION FOR
PARTIAL SUMMARY
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Memorandum of Points and Authorities

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

 I. Constitutional and Statutory Framework for Acquisition and Transmission of U.S. Citizenship at Birth 2

 II. The Department of State’s Administration of the At-Birth Citizenship Statutes 4

 III. Factual Background and Procedural History 7

LEGAL STANDARD 8

ARGUMENT 9

 I. The State Department appropriately interprets Section 1401 to require a biological relationship between a child and his parents seeking to transmit citizenship. 10

 II. The common-law presumption of parentage does not invalidate the statutory biological-relationship requirement. 14

 III. This Court should defer to the Department’s interpretation. 15

 IV. Public policy concerns do not override the Department’s statutory interpretation. 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)..... 8, 9

Colaiani v. INS,
490 F.3d 185 (2d Cir. 2007)..... 12, 13

Comparelli v. Republica Bolivariana De Venezuela,
891 F.3d 1311 (11th Cir. 2018) 2

Delmore v. Brownell,
236 F.2d 598 (3d Cir. 1956)..... 9

Dolan v. U.S. Postal Serv.,
546 U.S. 481 (2006)..... 11

E. J. D.-B. v. United States Dep’t of State,
825 F. App’x 479 (9th Cir. 2020) 13, 14

E.E.O.C. v. GEO Group, Inc.,
616 F.3d 265 (3d Cir. 2010)..... 8

EarthLink, Inc. v. FCC,
462 F.3d 1 (D.C. Cir. 2006)..... 18

Edwards v. Bryson,
578 F. App’x 81 (3d Cir. 2014) 9

Federal Express Corp. v. Holowecki,
552 U.S. 389 (2008)..... 15

Fiallo v. Bell,
430 U.S. 787 (1977)..... 17, 19, 21

Hayes v. Harvey,
903 F.3d 32 (3d Cir. 2018)..... 15

Jaen v. Sessions,
899 F.3d 182 (2d Cir. 2018)..... 12

Kasten v. Saint-Gobain Performance Plastics Corp.,
563 U.S. 1 (2011)..... 15, 18

Kiviti v. Pompeo,
No. TDC-19-2665, 2020 WL 3268221 (D. Md. June 17, 2020) 10

L. Xia v. Tillerson,
865 F.3d 643 (D.C. Cir. 2017)..... 9

Mathin v. Kerry,
782 F.3d 804 (7th Cir. 2015) 9

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986)..... 8

McGill v. Attorney Gen. U.S.,
623 F. App'x 49 (3d Cir. 2015)..... 9

Michael H. v. Gerald D.,
491 U.S. 110 (1989)..... 14

Miller v. Albright,
523 U.S. 420 (1998)..... 2, 3, 12

Mize v. Pompeo,
No. 19-cv-03331, 2020 WL 5059253 (N.D. Ga. Aug. 27, 2020)..... 10

New Jersey Bd. of Pub. Utilities v. F.E.R.C.,
744 F.3d 74 (3d Cir. 2014)..... 18

Tuan Anh Nguyen v. I.N.S.,
533 U.S. 53 (2001)..... 11, 21

Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.,
514 U.S. 122 (1995)..... 19

Rogers v. Bellei,
401 U.S. 815 (1971)..... 2, 3

Rucker v. Saxbe,
552 F.2d 998 (3d Cir. 1977)..... 3

Sabra as next friend of Baby M v. Pompeo,
453 F. Supp. 3d 291 (D.D.C. 2020)..... 17

Scales v. INS,
232 F.3d 1159 (9th Cir. 2000) 13

Sessions v. Morales-Santana,
132 S. Ct. 1678 (2017)..... 3

Skidmore v. Swift & Co.,
323 U.S. 134 (1944)..... 10, 15, 16

Solis-Espinoza v. Gonzales,
401 F.3d 1090 (9th Cir. 2005) 13

United States v. Mead Corp.,
533 U.S. 218 (2001)..... 15, 16, 18

Zivotofsky ex rel. Zivotofsky v. Kerry,
135 S. Ct. 2076 (2015)..... 4, 5, 7, 8

Statutes

5 U.S.C. § 706..... 7

8 U.S.C. § 1101(b)(1)(C) 20

8 U.S.C. § 1104(a) 4

8 U.S.C. § 1151(b)(2)(A)(i) 20

8 U.S.C. § 1401..... 3, 9

8 U.S.C. § 1401(a)(7)..... 3

8 U.S.C. § 1401(c) 12, 16

8 U.S.C. § 1401(g) 1, 3, 13

8 U.S.C. § 1409..... 3, 9

8 U.S.C. § 1409(c) 7

8 U.S.C. § 1430(a) 20

8 U.S.C. § 1431(a) 20

8 U.S.C. § 1431(b) 21

8 U.S.C. § 1503..... 7

8 U.S.C. § 1503(a) 1, 8, 9, 13

22 U.S.C. § 211a..... 4

22 U.S.C. § 2705..... 1, 4

Rules

Fed. R. Civ. P. 56(a) 8

Regulations

22 C.F.R. § 50.7 4

22 C.F.R. § 51.21 4

Other Authorities

Abrams & Piacenti, *Immigration's Family Values*,
100 Va. L. Rev. 629 (2014) 15

INTRODUCTION

U.S. citizenship at birth is acquired in one of two ways: a child can either be born on U.S. soil, or, if born abroad, be “born . . . of” a U.S. citizen parent who satisfies the applicable residency and other statutory requirements. Plaintiffs Allison Blixt (“Allison”) and L. Z.-B. (collectively, “Plaintiffs”) challenge the decisions by the U.S. Embassy in London—acting under the authority of defendants the U.S. Department of State and the Secretary of State (collectively, “Defendants”)—to decline to issue a Consular Report of Birth Abroad (“CRBA”)¹ and a U.S. passport to L. Z.-B., who was born abroad and lacks a biological relationship with a U.S. citizen parent. L. Z.-B. was born in Lambeth, England, in January 2015, and his biological parents are Allison’s wife Stefania—an Italian citizen—and an unknown sperm donor. Allison and Stefania, meanwhile, are L. Z.-B.’s legal parents.

Plaintiffs, in part, seek a declaration of U.S. citizenship for L. Z.-B. under 8 U.S.C. § 1503(a). The parties are cross-moving for summary judgment on Plaintiffs’ Section 1503 claim and do not dispute the material facts. This Court should enter judgment in favor of Defendants on this claim because Defendants appropriately interpret 8 U.S.C. § 1401(g), the statute under which Plaintiffs claim applies, to require a biological relationship between a child born abroad and the “parents” through whom he seeks citizenship. In doing so, this Court should conclude that L. Z.-B. did not acquire U.S. citizenship at birth.

Under § 1401(g), Allison and her wife, Stefania, must have a biological relationship, not just a legal relationship, with L. Z.-B. for him to acquire U.S. citizenship at birth. Congress enacted the Immigration and Nationality Act (INA) against the backdrop of the historical

¹ A Consular Report of Birth Abroad “is a formal document certifying the acquisition of U.S. citizenship at birth by a person born abroad to a U.S. citizen parent(s).” 8 FAM 101.1-2; *see also* 22 U.S.C. § 2705.

doctrine of *jus sanguinis*, a general principle of citizenship law that requires a biological relationship to pass on citizenship to a child born outside of the country, and neither the text of the statute nor any other principle of statutory interpretation provides a basis to believe Congress meant to depart from that longstanding principle. This requirement is not met here. Plaintiffs' Section 1503 claim accordingly fails as a matter of law, and summary judgment should be entered for Defendants.

BACKGROUND

I. Constitutional and Statutory Framework for Acquisition and Transmission of U.S. Citizenship at Birth

There are two “universally accepted” ways to establish citizenship, which reflect genuine links between the country and the individual: *jus soli* and *jus sanguinis*. See *Comparelli v. Republica Bolivariana De Venezuela*, 891 F.3d 1311, 1322 (11th Cir. 2018). *Jus soli* means “right of land or ground—conferral of nationality based on birth within the national territory.” Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 15 (6th ed. 2008). *Jus sanguinis* literally means “right of blood—the conferral of nationality based on descent, irrespective of the place of birth.” *Id.*

In the United States, citizenship by virtue of birth in the country is guaranteed by the Constitution, whereas citizenship through descent is only recognized by statute. The Fourteenth Amendment provides that “[a]ll persons born ... in the United States, and subject to the jurisdiction thereof, are citizens of the United States[.]” U.S. Const. amend. XIV, § 1. Since the Amendment’s enactment, “the transmission of American citizenship from parent to child, *jus sanguinis*, has played a role secondary to that of the transmission of citizenship by birthplace, *jus soli*.” *Miller v. Albright*, 523 U.S. 420, 478 (1998) (Breyer, J., dissenting) (citing *Rogers v. Bellei*, 401 U.S. 815, 828 (1971)). While a foreign-born child’s acquisition of citizenship through

a U.S. citizen parent may be referred to colloquially as “birthright citizenship,” *see, e.g.*, Am. Compl. ¶¶ 1, 24, 73, 74, ECF No. 1, “the [Supreme] Court has specifically recognized the power of Congress *not* to grant a United States citizen the right to transmit citizenship by descent.” *Rogers*, 401 U.S. at 830 (emphasis added); *see also Miller*, 523 U.S. at 424 (1998) (“Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress.”); *Rucker v. Saxbe*, 552 F.2d 998, 1001 (3d Cir. 1977) (“The Supreme Court has held that . . . Congress has the power to withhold citizenship entirely from individuals born abroad of one alien parent and one citizen parent; and that Congress may impose conditions precedent and subsequent to the award of citizenship based upon statute.” (citing *Rogers*, 401 U.S. at 831)).

The general rules for acquiring United States citizenship through a relationship to a U.S. citizen parent are set forth in 8 U.S.C. § 1401, or Section 301 of the INA, which “establish[es] a range of residency and physical-presence requirements calibrated primarily to the parents’ nationality and the child’s place of birth.” *Sessions v. Morales-Santana*, 132 S. Ct. 1678, 1686 (2017). Section 1401(g) provides for the citizenship of

A person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years[.]

Meanwhile, 8 U.S.C. § 1409, or Section 309 of the INA, identifies the circumstances under which a child born overseas may acquire U.S. citizenship at birth when born “out of wedlock.” Section 1409(c) provides an avenue for at-birth citizenship in the case of a U.S. citizen mother in an out of wedlock birth, provided the U.S. citizen mother meets the physical presence

requirements contained within the statute.² Section 1409(a), meanwhile, is the counterpart to 1409(c) for children born of U.S. citizen fathers, and explicitly requires that “a blood relationship between the person and the father is established by clear and convincing evidence” for the child to acquire U.S. citizenship through the unmarried father.

As discussed further below, the Department applies Section 1409 when the child’s biological parents were not married at the time of the child’s birth or conception.

II. The Department of State’s Administration of the At-Birth Citizenship Statutes

The Secretary of State is “charged with” administering the INA to determine the “nationality of a person not in the United States.” 8 U.S.C. § 1104(a). When a child is born overseas, the child’s parents may apply at one of the State Department’s consulates for a Consular Report of Birth Abroad (CRBA) that reflects the Department’s determination that the child acquired U.S. citizenship at birth. 22 C.F.R. § 50.7. The Secretary of State is also authorized to issue U.S. passports. 22 U.S.C. § 211a. If applying for a passport domestically, applicants may submit an application to a designated passport agent in the United States for adjudication. 22 C.F.R. §§ 51.21, 51.28. CRBAs and passports “have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction.” 22 U.S.C. § 2705.

To allow passport adjudicators and consular officers to uniformly apply the citizenship statutes around the world, the State Department has interpreted the provisions in its Foreign

² See also *Morales-Santana*, 137 S.Ct. 1678 (holding that the difference in physical presence requirements in 8 U.S.C. § 1409 (a) and (c) for unwed fathers and mothers was unconstitutional and ordering that, until Congress enacted a “uniform prescription,” 8 U.S.C. § 1401(a)(7)’s “now-five-year [physical presence] requirement should apply, prospectively, to children born to unwed U. S.-citizen mothers”).

Affairs Manual (FAM).³ *Cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082 (2015) (discussing the FAM as a reflection of State Department policy). The FAM explains the Department's understanding that, "[s]ince 1790," "[a]t least one biological parent" of a child born abroad "must have been a U.S. citizen when the child was born" in order for that parent to "transmit[] U.S. citizenship at birth" to the child. 8 FAM § 301.4-1(B); *see also id.* § 301.4-1(D)(1)(a) ("The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed."). Genetic relationships are the usual form of biological relationship between parents and children. 8 FAM § 301.4-1(D)(1)(c). The Department also recognizes gestation by a legal mother as a type of biological relationship, even without a genetic relationship. *Id.* The Department regards the citizenship of a surrogate who gestates a child as "irrelevant to the child's citizenship analysis." 8 FAM § 304.3-2(a).

For the purpose of determining citizenship, the Department applies Section 1409 when the child's biological parents were not married at the time of the child's birth or conception, regardless of the parents' legal marital status, sex, or sexual orientation. 8 FAM 304.1-2.

Although the law of the jurisdiction where a child is born may sometimes create a presumption that children born during the marriage of their legal parents are "the issue of that marriage," 8 FAM § 301.4-1(D)(1)(d), the FAM explains that any such "presumption is not determinative in citizenship cases, . . . because an actual biological relationship to a U.S. citizen parent is required." *Id.*; *see also id.* § 301.4-1(D)(1)(a) ("It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child

³ The current public version of the FAM is available at <https://fam.state.gov/>.

was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired.”).

The FAM requires agents “to investigate carefully” whenever a “doubt arises that [a] U.S. citizen” through whom a child claims citizenship—including a legal parent of the child—“is biologically related to the child.” 8 FAM § 301.4-1(D)(1)(d). Such doubts may arise, for example, “when either of the alleged biological parents was married to another person during the relevant time period” or when “the child was conceived at a time when the alleged father had no physical access to the mother.” *Id.* They also arise whenever a “child was born through surrogacy or other forms of assisted reproductive technology.” *Id.*

These rules apply to opposite-sex couples exactly as they do to same-sex couples. Thus, “[a] child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and anonymous sperm donor,” can acquire citizenship only under Section 1409(c)—not under Section 1401—“regardless of whether the woman is married and regardless of whether her spouse is the legal parent of the child at the time of birth.” 8 FAM § 304.3-2(c). Likewise, “[a] child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor,” can acquire citizenship only if the father satisfies the requirements of Section 1409(a) and Section 1401(g), “regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth.” 8 FAM § 304.3-2(f).

A same-sex couple's use of surrogacy or other forms of assisted reproductive technology (“ART”) may more readily be apparent to agents than an opposite-sex couple's use of ART. Yet, in order for the rules to be applied evenhandedly and not just to those for whom a passport adjudicator or consular officer can readily ascertain that ART was used, the Department's CRBA

application form requires all parents to indicate whether they were married to the child's other biological parent when the child was born. CRBA Application, Defs.' Ex. A at 4.

III. Factual Background and Procedural History

Plaintiff Allison Blixt is a U.S. citizen. *See* Passport of Allison Blixt, Defs.' Ex. B. She is married to Stefania Zaccari, an Italian citizen, *See* Certificate of Marriage, Am. Compl., Ex. B, ECF No. 56-2; Passport of Stefania Zaccari, Defs.' Ex. C. Stefania conceived L. Z.-B. using assisted reproductive technology and a sperm donor and carried him to term. *See* CRBA Adjudication Notes, Defs.' Ex. C at 1; *see also* Stipulation of Facts ¶ 14, ECF No. 65. L. Z.-B. was born in 2015 in Lambeth, England, Am. Compl., L. Z.-B. Birth Certificate, Ex. C, ECF No. 56-3, during Allison's marriage to Stefania, *see* Am. Compl., Ex. B. Allison is listed on L. Z.-B.'s birth certificate as "parent." L. Z.-B. Birth Certificate. Allison was not L. Z.-B.'s egg donor, nor did she carry and give birth to L. Z.-B. CRBA Adjudication Notes at 1; *see also* Stipulation of Facts ¶ 15.

Allison and Stefania applied for a Consular Report of Birth Aboard ("CRBA") and a U.S. passport for L. Z.-B. in London, England. *See* CRBA Adjudication Notes. Their applications on behalf of L. Z.-B. were denied. *Id.*; Am. Compl., Ex. D, ECF No. 56-1. The Department of State's denial letter stated that L. Z.-B.'s application for a CRBA was denied under Section 309(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1409(c), because "[i]t has been determined that there is not a biological relationship . . . between the U.S. citizen mother and child." *See* Am. Compl., Ex. D. Specifically, Plaintiffs were informed that in addition to a legal relationship, either a genetic parental or gestational relationship needed to exist between Allison and L. Z.-B. for the applications to be approved. *Id.* Plaintiffs submitted a letter to the Embassy requesting reconsideration of the denial. Ex. E. In November 2017, the Embassy affirmed its decision. Embassy Letter, Am. Compl. Ex. E, ECF No. 51-5. The Embassy noted

that “L. Z.-B. may be able to pursue other paths to citizenship” and referred Plaintiffs, inter alia, to the procedures under 8 U.S.C. § 1503. *Id.*

Allison filed suit in the District of Columbia, on behalf of herself and L. Z.-B., against the Department and the Secretary of State, in his official capacity. Compl., ECF No. 1. Plaintiffs raised three claims in their original complaint: that Defendants’ denial of L. Z.-B.’s CRBA application violated (1) the Administrative Procedure Act (APA), 5 U.S.C. § 706; (2) the Equal Protection component of the Due Process Clause; and (3) substantive due process. Compl. ¶¶ 73–98. Defendants moved to dismiss those claims, ECF No. 31, and the court denied Defendants’ motion, Minute Order of May 15, 2019.

Thereafter, Plaintiffs moved from London to New Jersey, and the parties accordingly moved to transfer the action to the District of New Jersey. Jt. Mot. Transfer, ECF No. 48. Plaintiffs also moved to amend the Complaint, ECF No. 53. After the court granted the motion, ECF No. 55, Plaintiffs filed an Amended Complaint in July 2020. Am. Compl., ECF No. 56. The Amended Complaint added a claim under 8 U.S.C. § 1503(a), which seeks a judicial declaration that L. Z.-B. is a U.S. citizen, and removes Plaintiffs’ APA claim. *Id.* Defendants answered the Amended Complaint. ECF No. 59. With this Court’s approval, the parties bifurcated the case to first proceed to summary-judgment briefing on Plaintiffs’ Section 1503(a) claim without conducting additional discovery. Letter Order, ECF No. 64. The parties filed a stipulation of facts in connection with their bifurcation agreement. ECF No. 65.

LEGAL STANDARD

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A party moving for summary judgment must demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *E.E.O.C. v. GEO*

Group, Inc., 616 F.3d 265, 270 (3d Cir. 2010). If the moving party makes such a showing, summary judgment is appropriate if the nonmoving party fails to “to present specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also Celotex Corp.*, 477 U.S. at 323.

Under Section 1503(a), the court considers whether to issue judgment declaring that the claimant is a U.S. citizen. “[A]nyone in the United States who claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States has a statutory right to claim the benefits of citizenship in a declaratory judgment action under 8 U.S.C. § 1503(a).” *L. Xia v. Tillerson*, 865 F.3d 643, 652 (D.C. Cir. 2017). Section 1503 entitles a claimant “to a *de novo* proceeding before an Article III court to determine whether he is a United States citizen.” *Edwards v. Bryson*, 578 F. App’x 81, 83 (3d Cir. 2014) (citing *Delmore v. Brownell*, 236 F.2d 598, 599 & n.1 (3d Cir. 1956)); *see also McGill v. Attorney Gen. U.S.*, 623 F. App’x 49 (3d Cir. 2015) (citing *Mathin v. Kerry*, 782 F.3d 804, 805 (7th Cir. 2015) *as amended on denial of reh’g* (July 7, 2015)). The claimant bears the burden of proof to demonstrate that he is a U.S. citizen. *Edwards*, 578 F. App’x at 83; *see also Mathin*, 782 F.3d at 807.

ARGUMENT

This Court should grant summary judgment for Defendants on Plaintiffs’ Section 1503(a) claim because it is appropriate to read 8 U.S.C. § 1401 to require a biological relationship between the U.S. citizen parent and the foreign-born child seeking to acquire U.S. citizenship at birth. Section 1401’s plain language; the historical context in which the statute was enacted; and its relationship to 8 U.S.C. § 1409, which governs the transmission of U.S. citizenship at birth for children born of unmarried parents, all support this interpretation. The deference owed to the

Department’s interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), also militates in favor of accepting the Department’s reading of Section 1401. This result does not unduly interfere with family unity, does not foreclose L. Z.-B.’s acquisition of U.S. citizenship through other means, and does not delegitimize Allison and Stefania’s marriage or family.

I. The State Department appropriately interprets Section 1401 to require a biological relationship between a child and his parents seeking to transmit citizenship.

Section 1401 confers citizenship on individuals “born ... of parents” who meet the statutory requirements. To be “born,” of course, is “[t]o be brought forth as offspring, to come into the world.” *Oxford English Dictionary*, <https://oed.com> (definition I.1 of “born, *adj.*”). And “of,” in this context, “[i]ndicat[es] the thing, place, or person from which or whom something originates, comes, or is acquired or sought.” *Id.* (definition III of “of, *prep.*”); *see also, e.g., American Heritage Dictionary* 1221 (5th ed. 2016) (“[d]erived or coming from”). For a child to be “born of parents,” then, means that he originates or derives from those parents. *Mize v. Pompeo*, 2020 WL 5059253, at *12 (N.D. Ga. Aug. 27, 2020). That is obviously true if the child and parents are biologically related. It is otherwise not true, at least not obviously so. As district courts have observed, the phrase *can* be read to encompass parents’ use of ART to create a child, *see Kiviti v. Pompeo*, 2020 WL 3268221, at *10 (D. Md. June 17, 2020); *Mize*, 2020 WL 5059253, at *13, but that is hardly a necessary reading or the most natural one. *See Mize*, 2020 WL 5059253, at *11–13 (adopting this reading only in light of constitutional avoidance concerns).

Plaintiffs claim that the State Department was incorrect to adjudicate L. Z.-B.’s application under Section 1409—which governs the citizenship of children born out of wedlock—instead of Section 1401, because Allison and Stefania were married to each other at the time of L. Z.-B.’s birth. Am. Compl. ¶¶ 4, 5, 101. But Section 1401’s plural reference to

“parents” supports the inference that the statute requires a biological relationship to both married parents to transmit at-birth U.S. citizenship. The statute does not refer to a child “born of a marriage” in which one parent is a U.S. citizen and the other is not. Rather, it refers to a child “born ... of parents,” bolstering the conclusion that *each* parent must have a biological relationship to the child. The FAM, meanwhile, explains that individuals in legally valid and recognized marriages (including marriages of opposite-sex couples) may still have a child considered “born out of wedlock” for Section 1409 purposes. *See, e.g.*, 8 FAM 304.3-2. Thus, the term “out of wedlock” concerns the marital status of a child’s biological parents, and its application is not a failure to recognize Allison and Stefania’s marriage.⁴

The Department’s interpretation of Section 1401’s text is further supported by its context: the conferral of *jus sanguinis* citizenship. *See, e.g., Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (“Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”). *Jus sanguinis* literally means the “right of blood—the conferral of nationality based on descent, irrespective of the place of birth.” Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 15 (6th ed. 2008). Consistent with that

⁴ The Department’s treatment of children who lack a biological relationship with both of their married parents as “born out of wedlock” under § 1409, moreover, does not stigmatize Allison and Stefania’s marriage. That phrase should be understood in light of the circumstances in which Congress adopted it, first in the Nationality Act of 1940 and then in the Immigration and Nationality Act of 1952. In those years, long before the advent of assisted reproductive technology (“ART”) a child born to married parents would have lacked a biological relationship with both parents only if the child had been conceived through an extramarital relationship. Such a child is naturally described as “born out of wedlock.” The phrase is less natural as applied to children who lack a biological relationship with both parents because they were conceived through ART. But the history makes clear that Congress did not mean it as pejorative to such children or their parents (whether the parents are a same-sex or an opposite-sex couple). Congress intended the phrase simply to describe children whose biological parents were not married to each other at a time when ART did not exist.

historical understanding of the doctrine, the Supreme Court has repeatedly emphasized the importance of the government's interest in "assuring that a biological . . . relationship exists" between a child and a parent through whom the child claims citizenship. *Nguyen*, 533 U.S. at 62; *see also Miller*, 523 U.S. at 436.

That traditional understanding of *jus sanguinis* citizenship provides a strong reason to conclude that in enacting the INA, Congress meant to confer citizenship at birth on children born abroad who have a biological connection to a U.S. citizen by whom citizenship is intended to be transmitted. To be sure, if the text of Section 1401 unambiguously extended citizenship without a biological relationship, then the text would govern. But Section 1401's text favors a biological relationship requirement for the reasons discussed above. And had Congress meant to depart from the traditional understanding of *jus sanguinis* citizenship, one would expect it to have spoken more clearly.

While the Second and Ninth Circuits have concluded that Section 1401 does not contain a biological-relationship requirement, those cases were wrongly decided and, in any event, non-binding. In *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018), the Second Circuit held that the husband of a child's biological mother was the child's "parent" at the time of his birth for purposes of Section 1401(g). *Jaen*, 899 F.3d at 184–88. But, *Jaen* ignored the statute's "born . . . of" language; the Court wrongly believed that the "sole question" was whether the husband was the child's "parent," *id.* at 185. Thus, contrary to Plaintiffs' contention, *Jaen* is not a "directly-on-point" decision rejecting the Department interpretation of Section 1401 at issue in this case.

Moreover, the Second Circuit's decision in *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007), supports the Department's interpretation. The petitioner in that case claimed citizenship under a predecessor to 8 U.S.C. § 1401(c). *Colaianni*, 490 F.3d at 187. One reason the

petitioner's claim failed was that § 1401(c) "pertains only to the acquisition of citizenship 'at birth,'" and the petitioner had been adopted by his U.S. citizen parents only after his birth. 490 F.3d at 187; *see id.* at 186. But the Second Circuit did not base its ruling solely on that ground. The court also rejected the petitioner's argument that by following the word "born" with "the preposition 'of,' rather than 'to,' Congress implied that biological parentage is not necessary for a person to claim citizenship under" Section 1401(c). 490 F.3d at 187. It found that argument "contradicted by the plain language of the statute, which refers to persons 'born . . . of parents both of whom are citizens of the United States'" as well as "pertain[ing] only to the acquisition of citizenship 'at birth.'" *Id.* (emphasis in original). Thus, the Second Circuit's law on this issue is, at best, ambiguous.

In the Ninth Circuit, *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), held that Section 1401 does not include a biological-relationship requirement. *Scales*, 232 F.3d at 1164; *Solis-Espinoza*, 401 F.3d at 1091. The Ninth Circuit also recently issued an unpublished panel decision in a recent case analogous to this one, *E. J. D.-B. v. United States Dep't of State*, 825 F. App'x 479, 480 (9th Cir. 2020), concluding it was bound by *Scales* and *Solis-Espinoza* to affirm the district court's issuance of a declaration of U.S. citizenship pursuant to 8 U.S.C. § 1503(a). In that appeal, however, the Government argued that *Scales* and *Solis-Espinoza* were wrongly decided. *See id.* The time to seek *en banc* rehearing of the case and, by extension, to ask the Ninth Circuit to reconsider *Scales* and *Solis-Espinoza* in light of the Government's strong textual, historical, and structural arguments, has not yet run. In light of the fact that the Third Circuit has yet to address this issue, the way is open for this Court to adopt what Defendants submit is the appropriate view—that Section 1401, properly construed, encompasses a biological relationship requirement.

II. The common-law presumption of parentage does not invalidate the statutory biological-relationship requirement.

Plaintiffs argue that the “common law . . . presuming that every child born in wedlock is the legitimate offspring of the child’s married parents” was codified in the INA and applies here such that L. Z.-B. should be considered “born . . . of” Allison and Stefania under 8 U.S.C. § 1401(g). Am. Compl. ¶ 29. Although the law of the jurisdiction where a child is born may sometimes create a presumption that children born during the marriage of their legal parents are “the issue of that marriage,” 8 FAM § 301.4-1(D)(1)(d), the FAM explains that any such “presumption is not determinative in citizenship cases, . . . because an actual biological relationship to a U.S. citizen parent is required.” *Id.*; *see also id.* § 301.4-1(D)(1)(a) (“It is not enough that the child is presumed to be the issue of the parents’ marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child’s own claim is based, U.S. citizenship is not acquired.”).

Stated differently, the common law presumption is irrelevant to whether a child is “born . . . of” his parents for purposes of Section 1401, even if it may sometimes remain relevant to determining a child’s legal “parents.” That is because the presumption is not a rule of evidence concerning the determination of a child’s actual biological father. It is instead the opposite: “a substantive rule of law” providing that it is “*irrelevant* . . . whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband.” *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (plurality opinion). In effect, the presumption supplies a legal fiction that paternity exists, irrespective of a biological relationship. But in enacting Section 1401, Congress made a specific choice about the relevance of an actual biological relationship. The determination whether a child is “born . . . of” his parents turns on exactly the biological facts that the presumption treats as irrelevant.

Nor does the presumption undercut the Department's view that biology was historically central to *jus sanguinis* citizenship. Insofar as the historical citizenship laws allowed children to acquire citizenship from their mothers' husbands without any consideration of biological paternity, they treated "marriage as a proxy for a blood relationship." Abrams & Piacenti, *Immigration's Family Values*, 100 Va. L. Rev. 629, 658 (2014). That is no basis to conclude, as Plaintiffs suggest, that biological relationships are unimportant to *jus sanguinis* citizenship. To the contrary, it highlights the importance of biological relationships: when they did not exist, it was considered better to presume that they existed than to eliminate the requirement altogether.

III. This Court should defer to the Department's interpretation.

To the extent Section 1401 remains ambiguous notwithstanding the textual and contextual factors favoring the State Department's interpretation, a tiebreaking factor is the deference owed to that interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* and its progeny recognize that agency interpretations lacking the force of law may nonetheless warrant deference "given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citation omitted; quoting *Skidmore*, 323 U.S. at 139, 140). Such interpretations are entitled to deference proportional to their power to persuade. *Hayes v. Harvey*, 903 F.3d 32, 45 (3d Cir. 2018). The proportional deference afforded the agency's interpretation depends upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade" *Skidmore*, 323 U.S. at 140. Other decisions reflect a similar approach. *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 15–16 (2011); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 401–02 (2008) ("The agency's interpretive position . . . provides a

reasonable alternative that is consistent with the statutory framework. No clearer alternatives are within our authority or expertise to adopt; and so deference to the agency is appropriate under *Skidmore*.”).

The State Department’s longstanding interpretation of Section 1401, Section 1409, and related provisions is exactly the sort of interpretation that warrants *Skidmore* deference. To begin, the interpretation reflects the Department’s “specialized experience” and its appreciation of the need for “uniformity,” *Mead*, 533 U.S. at 234. The Department has long been concerned about the phenomenon of individuals fraudulently claiming citizenship on behalf of a child born abroad who is not actually theirs. *See* Excerpts from Dep. of Paul Peek, Defs.’ Ex. F; *see also*, *e.g.*, 8 FAM § 301.4-1(E) (concerning suspected fraud or falsehood in citizenship claims).

Of course, citizenship fraud is not limited to the context of assisted reproduction, and a biological-relationship requirement is not a failsafe means of preventing it. But because biological relationships can easily and objectively be verified through DNA testing, this requirement is a powerful way to address concerns about fraud. Without it, citizenship claims could be supported merely by documents purporting to show marriages and legal relationships between parents and child, and it can be extremely difficult (especially in certain countries) to verify that such documents are genuine and accurate. *See, e.g.*, Joint Statement of USCIS and the Dep’t of State, *U.S. Suspends Processing New Nepal Adoption Cases Based on Abandonment* (Aug. 6, 2010), *available at* <https://www.uscis.gov/archive/us-suspends-processing-new-nepal-adoption-cases-based-on-abandonment#:~:text=In%20order%20to%20protect%20the,and%20related%20visa%20issuance%20for> (last accessed Nov. 18, 2020) (explaining that, in Nepal, “[c]ivil documents, such as ... birth certificates[,] often include data that has been changed or fabricated”); *see also Sabra v. Pompeo*, 453 F. Supp. 3d 291 (D.D.C. 2020) (case where child’s

alleged birth in a private home unattended by medical professionals, and the embassy's inability to directly view and assess the child—the U.S. embassy requested additional evidence to establish the child's claim to U.S. citizenship and identity through her putative parents).

The State Department's assessment of fraud concerns is a strong reason for the Court to defer to the Department's interpretation of the INA. *Cf. Fiallo v. Bell*, 430 U.S. 787, 799 n.8 (1977) (explaining that, in adopting a provision not at issue here, "Congress may well have given substantial weight" to the "difficulty" of parentage determinations "and the potential for fraudulent visa applications that would have resulted from a more generous drawing of the line"). The Department's interpretation reflects its "'specialized experience'" in adjudicating thousands of applications for citizenship documents, as well as its appreciation of the need for standards that can be applied "uniform[ly]" in countries around the world, including those where legal documents may be falsified or inaccurate. *Mead*, 533 U.S. at 234. And the interpretation accounts for the Department's predictive judgment that eliminating a biological-relationship requirement would increase citizenship fraud. *See New Jersey Bd. of Pub. Utilities v. F.E.R.C.*, 744 F.3d 74, 111 (3d Cir. 2014) ("[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to *particularly deferential* review, as long as they are reasonable. . . .") (quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006)) (emphasis in original).

Nor is fraud the only relevant concern. If a child could acquire citizenship through a legal parent regardless of whether he is biologically related to that parent, then the conferral of U.S. citizenship on children born overseas would depend on the legal parentage laws of more than two hundred countries, some of which recognize forms of parentage inconceivable to the Congress that enacted the INA. For example, the law of Ontario, Canada, currently affords

automatic recognition to up to four intended parents designated in a surrogacy agreement, and allows courts to recognize more than four. Children’s Law Reform Act, R.S.O. 1990, c. C.12, §§ 10, 11, *available at* <https://www.ontario.ca/laws/statute/90c12>. These outcomes would surely be far afield from the intent or understanding of Congress at the time these statutes were crafted.

In addition, the State Department’s position is consistent and longstanding. As the FAM explains, a biological relationship with a U.S. citizen parent has been a prerequisite to citizenship for a child born abroad “[s]ince 1790.” 8 FAM § 301.4-1(B). And to facilitate the evenhanded application of the requirement to people claiming citizenship under a wide range of circumstances, the State Department’s application form for a CRBA—as noted above—asks all parents to indicate whether they were married to the child’s other biological parent when the child was born. Defs.’ Ex. A. There is no basis to suggest that the interpretation at issue in this case reflects “*post hoc* rationalizatio[n],” as opposed to the kind of “careful consideration” that warrants *Skidmore* deference, *Kasten*, 563 U.S. at 15–16.

The State Department’s position is also eminently reasonable as a construction of the INA, even assuming alternative constructions could also be regarded as reasonable. As discussed above, Section 1401’s use of the phrase “born of” supports the Department’s interpretation of that provision to entail a biological-relationship requirement. That interpretation is further corroborated by the statutory context, including the historical understanding of *jus sanguinis* citizenship. And it serves important governmental objectives, including the prevention of citizenship fraud. A contrary interpretation, even if plausible, is not so clearly correct as to foreclose the State Department’s view.

IV. Public policy concerns do not override the Department’s statutory interpretation.

Finally, Plaintiffs argue that their interpretation promotes public policy goals regardless of whether it is faithful to the text of the statute. Specifically, Plaintiffs cite the INA’s goal of “family unity.” Am. Compl. ¶ 9. But “the proposition that the statute at hand should be liberally construed to achieve its purposes” is a “losing cause[],” since “[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means.” *Dir., Office of Workers’ Comp. Programs, Dep’t of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135–36 (1995). Indeed, despite its broad policy proclamations, the INA contains a variety of provisions that “hinder reunification of the family in this country.” *Fiallo*, 430 U.S. at 797. Here, in sections 1401(g), Congress clearly did not intend to freely confer citizenship any time it would facilitate family unity and, indeed, maintains additional statutory requirements for transmission of at-birth U.S. citizenship besides the biological-relationship requirement, such as a residency-requirement for U.S. citizen parents. These provisions lay out specific requirements which reflect multiple competing interests, including Congress’ undeniable interest in ensuring a biological connection between a U.S. citizen parent and child born abroad. *See infra* at 25.

Regardless, the Department’s interpretation did not foreclose the Zaccari-Blixt family from maintaining unity and does not foreclose the family from continuing to do so in this country. Indeed, there are multiple avenues through which children may legally reside in the U.S. even though they were born abroad with one U.S. citizen parent to whom they have only a legal relationship, and one non-citizen parent to whom they are biologically related. For example, Stefania may apply to become an LPR as the spouse of a U.S. citizen, *see* 8 U.S.C. § 1151(b)(2)(A)(i), and if successful, she may then qualify to become a U.S. citizen after residing in the U.S. for three years, *see* 8 U.S.C. § 1430(a). Once Stefania naturalizes, L. Z.-B.

can become an LPR and then may automatically acquire citizenship through Stefania by satisfying the relevant requirements of the Child Citizenship Act.⁵ *See* 8 U.S.C. § 1431(a). Thus, the “family unity” policy objective does not justify Plaintiffs’ expansive reading of Section 1401(g).

Plaintiffs also argue that a biological relationship requirement in sections 1401(g) “drives apart families” by classifying the children born to certain married parents “differently depending upon which mother bore the child.” Am. Compl. ¶ 9. But differential treatment based on the longstanding principle that a child born abroad generally must have a biological relationship to a U.S. citizen parent to receive U.S. citizenship accords with immigration-law principles and with provisions elsewhere in the INA: for example, children born abroad and adopted by U.S. citizen legal parents may only acquire U.S. citizenship cannot acquire at-birth citizenship, *see* 8 U.S.C. §§ 1431(b), 1433, even if they were adopted as infants. Regardless, “[i]n this difficult context of conferring citizenship on vast numbers of persons,” no immigration rule can produce results that are uniformly “logical” in each and every case, especially by Plaintiffs’ standards. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70 (2001). Here, the INA sought to create “an easily administered scheme” for conferring citizenship on those born abroad, *id.* at 69, and although “it could be argued that the line[s] should have been drawn” elsewhere, these are “policy questions entrusted exclusively to the political branches,” *Fiallo*, 430 U.S. at 798.

⁵ A child in this circumstance may alternatively apply for lawful permanent resident (“LPR”) status by virtue of her relationship to the U.S. citizen parent, who qualifies—through marriage to the child’s biological parent—as the child’s stepparent for purposes of 8 U.S.C. § 1101(b)(1)(C). Stepchildren qualify as immediate relatives entitled to immigrate without numerical limitation. *See* 8 U.S.C. § 1151(b)(2)(A)(i).

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in favor of Defendants.

Dated: November 18, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Branch Director

/s/ Vinita B. Andrapalliyal
Vinita B. Andrapalliyal
Trial Attorney
United States Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 305-0845
vinita.b.andrapalliyal@usdoj.gov

CERTIFICATE OF SERVICE

I certify that I served the foregoing on all counsel of record through this Court's CM/ECF system.

Dated: November 18, 2020

/s/ Vinita B. Andrapalliyal
Vinita B. Andrapalliyal
Trial Attorney
United States Department of Justice

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

ALLISON DAWN BLIXT and L. Z.-B.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	Civ. No. 1:20-cv-02102-KM-JBC
The UNITED STATES DEPARTMENT OF STATE and MICHAEL POMPEO in his official capacity as Secretary, U.S. Department of State	:	
	:	
Defendants.	:	
	:	

APPENDIX

Defendants attach for this Court’s reference the following excerpts from the Department of State’s Foreign Affairs Manual (“FAM”). The FAM is publicly available at <https://fam.state.gov>.

FAM Excerpt	Name
8 FAM 301.4	Acquisition by Birth Abroad to U.S. Citizen Parent(s) and Evolution of Key Statutes
8 FAM 304.1	Birth in Wedlock, of Wedlock, Void and Voidable Marriages
8 FAM 304.2	DNA Testing and Citizenship
8 FAM 304.3	Acquisition of U.S. Citizenship at Birth – Assisted Reproductive Technology

UNCLASSIFIED (U)

8 FAM 301.4

ACQUISITION BY BIRTH ABROAD TO U.S. CITIZEN PARENT(S) AND EVOLUTION OF KEY STATUTES

*(CT:CITZ-13; 11-07-2018)
(Office of Origin: CA/PPT/S/A)*

8 FAM 301.4-1 (U) BASIS FOR DETERMINATION OF ACQUISITION

8 FAM 301.4-1(A) Authority

8 FAM 301.4-1(A)(1) Federal Statutes

(CT:CITZ-1; 06-27-2018)

- a. Acquisition of U.S. citizenship by birth abroad to a U.S. citizen parent is governed by Federal statutes. Only insofar as Congress has provided in such statutes, does the United States follow the traditionally Roman law principle of "jus sanguinis" under which citizenship is acquired by descent (see [8 FAM 301.1](#)).
- b. Section 104(a) of the Immigration and Nationality Act (8 U.S.C. 1104(a)) gives the Secretary of State the responsibility for the administration and enforcement of all nationality laws relating to "the determination of nationality of a person not in the United States."

8 FAM 301.4-1(A)(2) Applicable Statute

(CT:CITZ-1; 06-27-2018)

The law applicable in the case of a person born abroad who claims citizenship is the law in effect when the person was born, unless a later law applies retroactively to persons who had not already become citizens. Instructions in [8 FAM 301.4](#) will note when a law is retroactive.

8 FAM 301.4-1(A)(3) Delegation of Authority

(CT:CITZ-1; 06-27-2018)

Consular officers may decide cases involving acquisition of citizenship by birth abroad. Designated nationality examiners may also do so in connection with providing passport and related services. If guidance is needed, a case may be submitted to the Department (see [8 FAM 105.1](#)).

8 FAM 301.4-1(B) Prerequisites for Transmitting U.S. Citizenship

(CT:CITZ-1; 06-27-2018)

Since 1790, there have been two prerequisites for transmitting U.S. citizenship at birth to children born abroad:

- (1) At least one biological parent must have been a U.S. citizen when the child was born. The only exception is for a posthumous child; and
- (2) The U.S. citizen parent(s) must have resided or been physically present in the United States for the time required by the law in effect when the child was born.

8 FAM 301.4-1(C) Adoption By a U.S. Citizen Does Not Automatically Result in U.S. Citizenship for the Child

(CT:CITZ-1; 06-27-2018)

- a. Adoption of an alien minor by a U.S. citizen does not, in and of itself, result in U.S. citizenship for the child. Adoption, however, is one way in which a U.S. citizen father may be able to legitimate his biological child born out of wedlock abroad for purposes of transmitting citizenship (see [8 FAM 301.4-3\(D\)\(2\)](#)).
- b. For provisions that govern the naturalization of adopted children, see [8 FAM 301.6](#).

8 FAM 301.4-1(D) A Biological Relationship, or Blood Relationship, Is Required for a U.S. Citizen Parent of a Child Born Abroad to Transmit U.S. Citizenship to the Child

8 FAM 301.4-1(D)(1) Establishing Blood Relationship

(CT:CITZ-1; 06-27-2018)

- a. The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired. The burden of proving a claim to U.S. citizenship, including blood relationship and legal relationship, where applicable, is on the person making such claim.
- b. Applicants must meet different standards of proof of blood relationship depending on the circumstances of their birth:
 - (1) Section 309(a) INA (8 U.S.C. 1409(a)), as amended on November 14, 1986, specifies that the blood relationship of a child born out of wedlock to a U.S. citizen father must be established by clear and convincing evidence. This standard generally means that the evidence must produce a firm belief in the truth of the facts asserted that is beyond a preponderance but does not reach the certainty required for proof beyond a reasonable doubt. There are no specific items of evidence that must be presented. DNA tests are not required, but may be submitted and can help resolve cases in which other available evidence is

insufficient to establish the relationship. For the procedures for establishing legal relationship to or legitimation by a citizen father once blood relationship has been proven, see [8 FAM 301.4-3\(D\)](#). ([8 FAM 304.2](#) provides guidance regarding DNA tests.); and

- (2) The Immigration and Nationality Act (INA) does not specify a standard of proof for persons claiming transmission of U.S. citizenship based upon birth (a) in wedlock to a U.S. citizen parent or (b) out of wedlock to a U.S. citizen mother. The Department's regulations also do not explicitly establish a standard of proof in these two circumstances. Where no other standard of proof is explicitly required by law, the Department applies the general standard of a preponderance of the evidence. This standard means that the evidence of the biological relationship is of greater weight than the evidence to the contrary. In such a case, the evidence is credible and best accords with reason and probability. Meeting the standard does not depend on the quantity of evidence presented.
- c. A man has a biological relationship with his child, or a "blood relationship" as required in the current text of INA section 309(a), when he has a genetic parental relationship to the child. A woman may have a biological relationship with her child through either a genetic parental relationship or a gestational relationship. In other words, a woman may establish a biological relationship with her child either by virtue of being the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby). (See [8 FAM 304.3](#).)
 - d. Children born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual biological relationship to a U.S. citizen parent is required. If doubt arises that the U.S. citizen "parent" is biologically related to the child, the consular officer is expected to investigate carefully. Circumstances that might give rise to such a doubt include, but are not limited to:
 - (1) Conception or birth of a child when either of the alleged biological parents was married to another person during the relevant time period;
 - (2) Naming on the birth certificate, as father and/or mother, person(s) other than the alleged biological parents;
 - (3) Evidence or indications that the child was conceived at a time when the alleged father had no physical access to the mother;
 - (4) If the child was conceived or born when the mother was married to someone other than the man claiming paternity, a statement from the man to whom the mother was married disavowing paternity, a divorce or custody decree mentioning certain of her children but omitting or specifically excluding the child in question, or credible statements from neighbors or friends having knowledge of the circumstances leading up to the birth may be required as evidence bearing on actual natural paternity; and
 - (5) The child was born through surrogacy or other forms of assisted reproductive technology. ([8 FAM 304.3](#) provides guidance about acquisition of U.S. citizenship by birth abroad and assisted reproductive technology.)
 - e. In such cases, it is within the consular officer's discretion to request additional evidence pursuant to 22 CFR 51.45.

8 FAM 301.4-1(E) Suspected False or Fraudulent Citizenship Claim of Minor Child

8 FAM 301.4-1(E)(1) General Guidance

(CT:CITZ-1; 06-27-2018)

Questions of possible parentage fraud must be handled sensitively. Necessary efforts to enforce the citizenship laws may result in the Department being accused of threatening the family unit and of jeopardizing the welfare of the child. Cases of this kind often have public relations ramifications or give rise to congressional interest. All such cases must be handled in a timely manner with consideration for the family. Posts may provide information on visa eligibility in cases where it has been proven that the child has no claim to U.S. citizenship and the parents wish to take the child to the United States. Posts should suggest that parents consult a lawyer knowledgeable in family law and U.S. immigration law.

8 FAM 301.4-1(E)(2) Paternity Issues

(CT:CITZ-1; 06-27-2018)

- a. Issues of false or fraudulent paternity claims: Paternity fraud is an intentionally-filed claim to citizenship filed on behalf of a child said to have been born to a U.S. citizen father who is not, in fact, the biological father of the child. Paternity fraud is most commonly found in cases where the claimed biological mother is an alien. In some cases, the alleged father believes that he is the biological father in which case the claim is properly considered false rather than fraudulent. In other cases, he knows that he is not the father, and intentional fraud is involved. Circumstances that might indicate false or fraudulent claim to paternity include, but are not limited to:
 - (1) The child was conceived at a time when there is doubt that the alleged father had physical access to the mother;
 - (2) The mother admits, or there is other evidence, that she had physical relationships with other men around the time of conception;
 - (3) The child allegedly was born prematurely, but its weight at birth appears to indicate that it was a full-term baby;
 - (4) The physical characteristics of the child and of the alleged father do not seem compatible; or
 - (5) There are discrepancies in the birth records.
 - (6) The record contains a DNA test that demonstrates that the putative father is not genetically related to the child.
 - (7) The record contains a court order that indicates that another man is the child's father.
- b. How to resolve doubts: To ascertain the true circumstances surrounding the child's conception and birth, the consular officer may wish to:
 - (1) Obtain available records showing periods of time when the alleged father had physical access to the mother;
 - (2) Interview the parents separately to determine any differences in their respective stories as to when and where the child was conceived. Often, in separate

interviews, one party will admit that the U.S. citizen is not the parent;

- (3) Interview neighbors and friends to determine the facts as understood within the local community; and
- (4) Advise DNA testing if the couple continues to pursue the claim even though the facts as developed seem to disprove it. The propriety of requesting DNA testing is discussed in [8 FAM 304.2](#). If post disapproves the application, enter the "N" lookout in the Consular Lookout and Support System (CLASS) using the Passport Lookout Tracking System (PLOTS) as explained in [8 FAM 1204.1](#) and forward the application to Passport Services for scanning and record keeping in accordance with [8 FAM 501.5](#).

8 FAM 301.4-1(E)(3) Maternity Issues

(CT:CITZ-1; 06-27-2018)

- a. Indications of fraudulent maternity claims: Cases in which a U.S. citizen woman intentionally and falsely claims a child as her biological child for citizenship purposes are relatively rare but can occur. The U.S. citizen woman, alone or in collaboration with her spouse, claims that a foreign-born child is her biological child, when instead she has adopted the child or otherwise, obtained physical custody of the child. The false claim that the child is hers is made to avoid full legal adoption and/or visa procedures and to instead fraudulently document the child as a U.S. citizen. Circumstances that might indicate a possibility of maternity fraud include, but are not limited to:
 - (1) The alleged mother arrived in the foreign country a few days before the child's birth;
 - (2) The alleged mother is beyond normal child-bearing years;
 - (3) The child was born in a private home with the alleged mother unattended or with only a midwife present;
 - (4) The alleged mother claims to have had no prenatal care and not to have known the baby's due date;
 - (5) The alleged mother claims that the child was born prematurely in cases where the documentation does not suggest a premature birth (e.g. due to height/weight at birth) or the child's appearance suggests otherwise; and
 - (6) The physical characteristics of the child and of the alleged parents do not seem compatible.
- b. How to resolve doubts: If the post has any doubts about the child's parentage, further inquiry and documentation are required. Posts should take any of the following steps that seem appropriate or necessary:
 - (1) Establish that pregnancy did exist by, for example, requesting copies of prenatal and post-natal records;
 - (2) Request any authorization letter given to the woman by her physician stating that she could fly without endangering her health. Airlines may refuse to assume responsibility for a woman who has reached an advanced stage of pregnancy and may request such a letter before allowing a pregnant woman on board;
 - (3) Investigate the clinic or hospital where the birth allegedly occurred to determine if it is a legitimate medical facility. Request medical records to determine whether

the woman was a patient, and is the biological mother of the child;

- (4) When the consular officer strongly suspects that a newborn child is not the gestational child of the alleged mother, yet the alleged mother claims a gestational (but not genetic) relationship, was adopted, request that the woman undergo a physical examination as soon as possible by a physician whom the post believes to be reliable. Physical evidence of pregnancy and childbirth may be obvious for only a few weeks after the birth;
- (5) Contact the midwife or doctor who attended the birth to confirm statements given by the alleged parents; and
- (6) If doubts remain about the child's blood relationship to the alleged parents, DNA tests might be useful (see [8 FAM 304.2.](#))

8 FAM 301.4-1(F) Nature of Citizenship Acquired by Birth Abroad to U.S. Citizen Parents

8 FAM 301.4-1(F)(1) Status Generally

(CT:CITZ-1; 06-27-2018)

Persons born abroad who acquire U.S. citizenship at birth by statute generally have the same rights and are subject to the same obligations as citizens born in the United States who acquire citizenship pursuant to the 14th Amendment to the Constitution. One exception is that, if born prior to October 10, 1952, persons who acquired U.S. citizenship at birth by birth abroad to a U.S. citizen(s) may be subject to citizenship retention requirements described in 7 FAM 1100 Appendix L.

8 FAM 301.4-1(F)(2) Not Citizens by "Naturalization"

(CT:CITZ-1; 06-27-2018)

Section 201(g) NA and section 301(g) INA (8 U.S.C. 1401(g)) (formerly 301(a)(7) INA) both specify that naturalization is "the conferring of nationality of a state upon a person after birth." Accordingly, U.S. citizens who acquire U.S. citizenship at birth by birth abroad to a U.S. citizen parent(s) are not considered "naturalized" citizens under either act.

8 FAM 301.4-1(G) Citizenship Retention Requirements

(CT:CITZ-1; 06-27-2018)

- a. Persons who acquired U.S. citizenship by birth abroad were not required to take any affirmative action to keep their citizenship until May 24, 1934, when a new law imposed retention requirements on persons born abroad on or after that date to one U.S. citizen parent and one alien parent.
- b. Retention requirements continued in effect until October 10, 1978, when section 301(b) INA was repealed. Because the repeal was prospective in application, it did not benefit persons born on or after May 24, 1934, and before October 10, 1952 (see 7 FAM 1100 Appendix L).
- c. Persons born abroad on or after October 10, 1952, are not subject to any conditions beyond those that apply to all citizens.

- d. Persons whose citizenship ceased as a result of the operation of former section 301(b) were provided a means of regaining citizenship in March 1995 by an amendment to section 324 INA (8 U.S.C. 1435). A more detailed discussion of the retention requirements and remedies for failure to comply with them is provided in 7 FAM 1100 Appendix L.

8 FAM 301.4-1(H) Report on Applicant Who Has Not Acquired U.S. Citizenship

(CT:CITZ-1; 06-27-2018)

When the post determines that a person applying for documentation as a U.S. citizen has no claim to U.S. citizenship at birth, the post should enter an "N" looking in CLASS via PLOTS in accordance with [8 FAM 1204.1](#). A discussion of the various types of lookouts is found in [8 FAM 501.5](#).

8 FAM 301.4-1(I) Birth in Panama; Special Provisions

(CT:CITZ-1; 06-27-2018)

- a. Congress has enacted special legislation governing the conditions under which U.S. citizenship may be acquired by birth in Panama (see also [8 FAM 302.1](#) for legislation relating to the Canal Zone). This legislation does not apply to all children born in Panama, but only to those born to U.S. citizens employed by the U.S. Government or the Panama Railroad Company. Section 303(b) INA (8 U.S.C. 1403(b)) states that: "Any person born in the Republic of Panama on or after February 26, 1904, and whether before or after the effective date of this Act, whose father or mother or both at the time of birth of such person was or is a citizen of the United States employed by the Government of the United States or by the Panama Railroad Company, or its successor in title, is declared to be a citizen of the United States."
- b. This provision is the same as those in section 203(b) NA and section 2 of the Act of August 4, 1937 (50 Stat. 558). Because it applies retroactively, it is not necessary to refer to the prior versions for citizenship adjudication purposes; they are of historical interest only. Under all three sections, a child born in Panama on or after February 26, 1904, to a U.S. citizen employee of the U.S. Government or the Panama Railroad Company is automatically a U.S. citizen at birth even if the citizen parent had never previously resided or been physically present in the United States. The child is not required to take any particular steps in order to retain citizenship.
- c. Legitimation is required for a child born out of wedlock to a male U.S. citizen engaged in qualifying employment. A child born out of wedlock to an American woman employed by the U.S. Government or the Panama Railroad Company acquires U.S. citizenship at birth.
- d. Until August 4, 1937, there was no special law relating to Americans born in Panama. Acquisition of citizenship was governed by Section 1993, Revised Statutes which on May 24, 1934, was amended to include retention requirements. Those retention requirements were superseded by the August 4, 1937 Act, however, because it applied retroactively, as does its modern version, section 303(b) INA.
- e. In cases outside the scope of section 303(b) INA, the general laws that govern the acquisition of U.S. citizenship by birth abroad apply.
- f. Evidence to prove a claim to U.S. citizenship under section 303(b) INA would include:

- (1) The child's Panamanian birth certificate or other proof of the child's birth to a U.S. citizen (the blood relationship must be established);
- (2) The parents' marriage certificate, if applicable; and
- (3) Proof of the citizen parent's employment by the U.S. Government or the Panama Railroad Company at the time of the child's birth.

8 FAM 301.4-2 EVOLUTION OF KEY ACQUISITION STATUTES

8 FAM 301.4-2(A) March 26, 1790

(CT:CITZ-1; 06-27-2018)

- a. The First Congress enacted "An Act to Establish an Uniform Rule of Naturalization" (1 Stat. 103,104) that stated, in part, that: the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens; Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.
- b. This Act was repealed by the Act of January 29, 1795.

8 FAM 301.4-2(B) January 29, 1795

(CT:CITZ-1; 06-27-2018)

- a. This act (1 Stat. 414) repealed the Act of March 26, 1790, but in section 3, adopted essentially the same provision for acquiring U.S. citizenship by birth abroad.
- b. This act was repealed by the Act of April 14, 1802.

8 FAM 301.4-2(C) April 14, 1802

(CT:CITZ-1; 06-27-2018)

- a. Section 4 of this act (2 Stat. 153,155) stated, in part, that: "the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States."
- b. This act's formula of permitting transmission of citizenship by "persons who now are, or have been citizens" raised a question whether persons who subsequently became citizens by birth or naturalization could transmit citizenship to their children born abroad. The right of such persons to transmit was clearly provided in the act of February 10, 1855.

8 FAM 301.4-2(D) February 10, 1855

(CT:CITZ-1; 06-27-2018)

- a. On this date, Congress enacted "An Act to Secure the Right of Citizenship to Children of Citizens of the United States Born Out of the Limits Thereof," (10 Stat.604).

- b. It stated, in part, that: "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: Provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States."
- c. The act of February 10, 1855 did not repeal the act of April 14, 1802.

8 FAM 301.4-2(E) Section 1993, Revised Statutes of 1878

(CT:CITZ-13; 11-07-2018)

- a. The provisions of the act of 1802 and the act of 1855 were codified as Section 1993 of the Revised Statutes of 1878. From 1878 to 1934, Section 1993, Rev. Stat., stated that: All children heretofore or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.
- b. Section 1993 permitted the transmission of citizenship only by U.S. citizen fathers until it was amended prospectively on May 24, 1934, to permit transmission by U.S. citizen mothers. (The similar rights of women were also addressed by the 1994 amendment to section 301 INA (see [8 FAM 301.7-2\(B\)](#)).

8 FAM 301.4-2(F) May 24, 1934

(CT:CITZ-1; 06-27-2018)

- a. Section 1993 (48 Stat. 797) was amended by the act of May 24, 1934, to permit U.S. citizen women to transmit U.S. citizenship to their children born abroad, regardless of the father's citizenship.
- b. The amended section 1993 was in effect from May 24, 1934, at noon eastern standard time until January 12, 1941. The text of the amended law is shown in [7 FAM 1135.6-1](#). It was repealed, and superseded by the Nationality Act of 1940.

8 FAM 301.4-2(G) January 13, 1941

(CT:CITZ-13; 11-07-2018)

- a. The Nationality Act of 1940 (NA) (54 Stat. 1137) went into effect on January 13, 1941. Section 201 NA addressed acquisition of citizenship by birth abroad. The pertinent text of section 201 NA is shown in [8 FAM 301.6-2](#).
- b. The NA was repealed and superseded by the Immigration and Nationality Act of 1952.

8 FAM 301.4-2(H) December 24, 1952

(CT:CITZ-1; 06-27-2018)

- a. The Immigration and Nationality Act (INA) of 1952, the current law, has been in effect since December 24, 1952.
- b. For original and amended provisions of this act, see [8 FAM 301.4-3\(B\)\(1\)](#) and [8 FAM 301.4-3\(B\)\(2\)](#).

8 FAM 301.4-2(I) 1986, 1988, 1994, and 1997 Amendments of INA

(CT:CITZ-1; 06-27-2018)

- a. The citizenship provisions of the INA have been amended by the following significant Public Laws:
- (1) The Immigration and Nationality Act Amendments of 1986 (Public Law 99-653), effective November 14, 1986;
 - (2) The Immigration Technical Corrections Act of 1988 (Public Law 100-525), effective October 24, 1988;
 - (3) The Immigration and Nationality Technical Corrections Act of 1994 (Public Law 103-416), effective October 25, 1994; and
 - (4) Public Law 105-38 of August 8, 1997, which amended Section 102 of Public Law 103-416.
- b. The relevant parts of these statutes:
- (1) Reduced the amount of U.S. physical presence required to transmit citizenship to children born abroad;
 - (2) Changed the procedures by which children born abroad out of wedlock to a U.S. citizen father can acquire citizenship;
 - (3) Enabled children born abroad prior to May 24, 1934, to acquire U.S. citizenship through U.S. citizen mothers;
 - (4) Provided a means for persons whose citizenship ceased through failure to comply with the retention requirements to have their citizenship restored; and
 - (5) Specified the effective dates of various amended provisions.

8 FAM 301.4-3 THROUGH 301.4-9 UNASSIGNED UNCLASSIFIED (U)

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8 FAM 304 EVIDENCE OF RELATIONSHIP TO U.S. CITIZEN/NON-CITIZEN U.S. NATIONAL PARENT(S)

8 FAM 304.1

BIRTH IN WEDLOCK, OF WEDLOCK, VOID AND VOIDABLE MARRIAGES

*(CT:CITZ-1; 06-27-2018)
(Office of Origin: CA/PPT/S/A)*

8 FAM 304.1-1 REBUTTABLE PRESUMPTION OF PATERNITY

(CT:CITZ-1; 06-27-2018)

- a. All presumptions of paternity are rebuttable in appropriate circumstances. (Uniform Parentage Act (1973), Prefatory Note, 9B U.L.A. 379 (2001).)
- b. Many states have enacted paternity statutes establishing a rebuttable presumption of paternity where genetic test results report a paternity equal to or greater than a designated percentage. (See [8 FAM 304.2](#) for guidance about DNA testing.)
- c. When the mother is living with her husband at the time of the child's conception, and the husband is not impotent or sterile, there is a conclusive presumption under the laws of some states that the husband is the father of the child. However, DNA tests along with other credible evidence can possibly result in a finding of non-paternity.
- d. If there are indications that call into question the filiations, despite the existence of a marriage, the consular officer must consult the fraud prevention manager and CA/FPP (see [8 FAM 301.4](#) and [8 FAM 304.2](#)). If doubt arises that the citizen putative "parent" is related by blood to the child, the consular officer is expected to investigate carefully. Circumstances that might give rise to such a doubt include:
 - (1) Conception or birth of a child when either of the alleged biological parents was married to another;
 - (2) Naming on the birth certificate, as father and/or mother, person(s) other than the alleged biological parents; and
 - (3) Evidence or indications that the child was conceived at a time when the alleged father had no physical access to the mother.

- e. If the child was conceived or born when the mother was married to someone other than the man claiming paternity, a statement from the man to whom the mother was married disavowing paternity, a divorce or custody decree mentioning certain of her children but omitting or specifically excluding the child in question, or credible statements from neighbors or friends having knowledge of the circumstances leading up to the birth may be required as evidence bearing on actual natural paternity. If Consular Affairs (CA) is not satisfied by a preponderance of the evidence that filiation exists, the putative parent(s) may submit DNA evidence following procedures in [8 FAM 304.2](#) and the CA Internet page on DNA and parentage testing. See [8 FAM 303.1-4](#) for further guidance on adjudication.

NOTE:
 CA/FPP’s CAWeb Intranet Relationship Fraud feature.
 CA/FPP’s Intranet Fraud Digest includes other information about relationship fraud. For example: Relationship Fraud in Yemen; Marriage Fraud Dangerous and Pervasive.

8 FAM 304.1-2 “IN WEDLOCK” AND “OF WEDLOCK”

(CT:CITZ-1; 06-27-2018)

- a. The term “birth in wedlock” has been consistently interpreted to mean birth during the marriage of the biological parents to each other.
- b. This includes a child conceived before the marriage but born during the marriage.
- c. To say a child was born "in wedlock" means that the child’s biological parents were married to each other at the time of the birth of the child.
- d. In the case of a marriage terminated by dissolution, death, or annulment, the term “of wedlock” still includes a biological child conceived during the marriage and born within 300 days after termination of the marriage.
- e. If a married woman and someone other than her spouse have a biological child together, that child is considered to have been born out of wedlock. The same is true for a child born to a married man and a person other than his spouse.

8 FAM 304.1-3 VOID AND VOIDABLE MARRIAGES

(CT:CITZ-1; 06-27-2018)

- a. A marriage that does not conform to the laws of the country or state in which it was performed generally is voidable and may be declared void by an appropriate authority, usually a court in the jurisdiction where the marriage occurred.
- b. Prior to such a declaration, the marriage usually is considered valid for all purposes. Even after a marriage is voided, the children's status usually is not affected. In the United States, for example, every state considers children of a void marriage to be legitimate.
- c. Some marriages are considered void ab initio (from the beginning), as opposed to voidable. [8 FAM 303.1-4](#) provides further guidance about adjudication. Questions about this subject must be referred to AskPPTAdjudication@state.gov.

- d. Except where Federal statute provides to the contrary, the U.S. Supreme Court held that marriages (not polygamous or incestuous, or otherwise declared void by statute) if valid by the law of the state where entered into, will be recognized as valid in every other jurisdiction (Meister v. Moore, 96 U.S. 76 (1878); Travers v. Reinhardt, 205 U.S. 423, 440 (1907).
- e. U.S. embassies and consulates abroad must have available a copy of the consular district's local laws on marriage and legitimation:
 - (1) If for any reason a marriage does not appear to have been valid, legitimation is a determining factor in the citizenship claim and a U.S. domicile cannot be identified, the consular officer will consult local law in an attempt to determine if children born of a void marriage are considered legitimate (see the Foreign Legitimation Law Chart on the CAWeb);
 - (2) If the child is not considered legitimate, the consular officer must determine that the marriage was declared void by an appropriate authority before denying the child's claim;
 - (3) A post considering a case involving legitimation in a third country must seek information on the laws of that country from the embassy of that country or from the U.S. embassy or consulate in that country; and
 - (4) If any of the above inquiry are inconclusive or questionable, posts and passport agency/center management must consult AskPPTAdjudication@state.gov. [8 FAM 303.1-4](#) provides further guidance about adjudication.
- f. A law that declares legitimate a child born during a void marriage presumes that the marriage ceremony took place before the child's birth unless the law specifically mentions children born before the marriage. Cases that involve void marriages occurring after a child's birth must be referred to AskPPTAdjudication@state.gov.

8 FAM 304.1-4 ADJUDICATION

(CT:CITZ-1; 06-27-2018)

- a. In most acquisition of U.S. citizenship by birth abroad cases, adjudication of whether a citizenship claim comes within the scope of the Nationality Immigration Act (INA) 301 (8 U.S.C. 1401) or rather INA 309 (8 U.S.C. 1409) will be clear. The parents will present a marriage certificate certified by the civil registry authority responsible for maintaining marriage certificates as proof of marriage, and adjudication will proceed in a straightforward way.
- b. On rare occasions, you may be confronted with an acquisition of citizenship adjudication in which a child is born during the course of a marriage but one or both the spouses advise that the biological father is another person not married to the biological mother. The following documents must be submitted:
 - (1) The child's birth certificate certified by the civil registry authority responsible for maintaining birth certificates;
 - (2) Form DS-5507 notarized Affidavit of Parentage, Physical Presence and Support executed by the mother and the person she claims is the father;
 - (3) An notarized affidavit executed by the husband denying paternity;

- (4) Evidence of access by the putative father at probable time of conception including, for example, entry/exit stamps in passports, airline/hotel receipts, travel orders, etc.;
 - (5) Evidence of lack of access by the husband at probable time of conception. For example, evidence that the husband was not in the country such as overseas military assignment, imprisonment, etc.; and
 - (6) In addition, the family may submit DNA tests in accordance with procedures set forth in [8 FAM 304.2](#).
- c. For posthumous children, see [8 FAM 304.4](#).
- d. If there is indication of fraud, consular officers must consult post's Fraud Prevention Manager and CA/FPP. Passport agencies and centers must consult their fraud program managers.
- e. If a spouse contacts a post denying paternity after a passport or Consular Report of Birth of a U.S. citizen abroad has been issued, obtain a sworn statement from the individual and contact AskPPTAdjudication@state.gov) for guidance.
- f. If the foreign birth certificate lists the husband, post must include in analysis of the case whether it is possible to obtain an amended birth certificate. This is not feasible in all cultures. For example, in some cultures a woman could be killed for such an admission.
- g. Questions about void and voidable marriages, polygamy, and common law marriage are extremely rare but usually complex. They may be brought to the attention of AskPPTAdjudication@state.gov.

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8 FAM 304.3

ACQUISITION OF U.S. CITIZENSHIP AT BIRTH - ASSISTED REPRODUCTIVE TECHNOLOGY

(CT:CITZ-1; 06-27-2018)
(Office of Origin: CA/PPT/S/A)

8 FAM 304.3-1 (U) BIRTH ABROAD TO A U.S. CITIZEN GESTATIONAL MOTHER WHO IS ALSO THE LEGAL MOTHER AT THE TIME SHE GIVES BIRTH (BIRTH MOTHER, BUT NOT GENETIC MOTHER)

(CT:CITZ-1; 06-27-2018)

- a. A child born abroad to a U.S. citizen gestational mother who is also the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under the Immigration and nationality Act (INA) 301(c).
- b. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c).
- c. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the non-U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen mother and alien father, with a citizenship claim adjudicated under INA 301(g).
- d. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, and who is not married to the genetic mother or father of the child at the time of the child's birth, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c).

8 FAM 304.3-2 BIRTH ABROAD TO A SURROGATE OF A CHILD WHO IS THE GENETIC ISSUE OF A U.S. CITIZEN MOTHER AND/OR U.S. CITIZEN FATHER

(CT:CITZ-1; 06-27-2018)

- a. For purposes of this section, the term "surrogate" refers to a woman who gives birth to a child, who is not the legal parent of the child at the time of the child's birth in the location of the birth. In such a case, the surrogate's citizenship is irrelevant to the child's citizenship analysis.
- b. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and her U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizen parents, with a citizenship claim adjudicated under INA 301(c).
- c. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and anonymous sperm donor, is considered for citizenship purposes to be a person born out of wedlock to a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c). This is the case regardless of whether the woman is married and regardless of whether her spouse is the legal parent of the child at the time of birth.
- d. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and her non-U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen mother and alien spouse, with a citizenship claim adjudicated under INA 301(g).
- e. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and his non-U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen father and alien spouse, with a citizenship claim adjudicated under INA 301(g).
- f. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). This is the case regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth.
- g. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and the surrogate (mother) who is not married to the U.S. citizen father is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). Note that in such a case, despite the genetic and gestational connection, the surrogate mother is not the legal parent of the child at the time of birth, usually pursuant to a surrogacy agreement.

8 FAM 304.3-3 ANONYMOUS SPERM/EGG DONORS CANNOT TRANSMIT U.S. CITIZENSHIP TO A CHILD

(CT:CITZ-1; 06-27-2018)

U.S. citizenship cannot be transmitted by an anonymous sperm or egg donor, even if a clinic, sperm bank, or intended parent(s) purport to certify that the sperm or egg was donated by a U.S. citizen. The applicant (or his or her parent, applying on behalf of a minor applicant) bears the burden of demonstrating the donor transmitting parent's U.S. citizenship and fulfillment of each other statutory requirement, and the evidence in support must be verified by the consular officer. This will require cooperation from the donor(s) to establish the possible claim to U.S. citizenship.

8 FAM 304.3-4 ESTABLISHING A BIOLOGICAL RELATIONSHIP IN AN ART CASE

(CT:CITZ-1; 06-27-2018)

- a. In most cases involving assisted reproductive technology there is no shortage of documentation, and consular officers are free, as in any case, to ask for appropriate supporting documentation that fits the circumstances of the case.
- b. Examples of appropriate supporting documentation would be: certified hospital records or physicians' records where the procedure occurred and a sworn statement from the physician who performed the procedure; medical records documenting pre-natal care of the surrogate or the gestational mother; medical records documenting underlying medical conditions that caused parent to seek assisted reproductive technology (i.e., infertility or injury); insurance documents or other types of receipts documenting the payments made for the various different procedures. DNA testing may be recommended depending on the other medical evidence and circumstances of the case. (See [8 FAM 304.2](#).)
- c. In cases involving surrogacy, in addition to the medical records discussed above, the intended parents are likely to have signed contracts or other legal instruments with any of the following: fertility clinic, physician, laboratories, the surrogate mother, and/or egg / sperm donor. These legal documents should detail the various parties' intentions with respect to future parental rights and also about fees and payments to the various parties.
- d. If consular officers are not satisfied with other evidence presented, they may ask to interview the surrogate and/or her spouse or other family members.
- e. In cases involving a gestational and legal mother, in addition to the medical and financial records discussed above, an officer could ask for photographs taken during the pregnancy or following the birth or other physical mementos (such as hospital bracelets). If the records are insufficient or the consular officer suspects fraud, the officer may ask for a physical exam of the woman by a panel physician.
- f. Questions relating to family/genetic/blood relationships can be considered intrusive and contacts with families in these circumstances may become somewhat emotional. Interviews should always be conducted with consideration for privacy and the sensitivity of the issues. Of course, when there are fraud indicators, posts must ensure that discrepancies are reviewed and resolved.

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8 FAM 304.2

DNA TESTING AND CITIZENSHIP

(CT:CITZ-26; 09-11-2019)
(Office of Origin: CA/PPT/S/A)

8 FAM 304.2-1 INTRODUCTION

(CT:CITZ-26; 09-11-2019)

- a. This subchapter provides guidance to passport agencies and centers and U.S. embassies and consulates abroad about citizenship adjudication and the use of DNA testing to establish the requisite relationship between the U.S. citizen putative or alleged parent and a child claiming derivative U.S. citizenship. *For procedural information about DNA testing, see [7 FAH-1 H-944](#). For information regarding the requirement of a biological relationship, see [8 FAM 301.4-1](#).*
- b. The requirement that *there be a biological relationship between* the U.S. citizen parent and the child is in *accordance with* section 1993 RS, section 201(g) of the Nationality Act of 1940, and section 301(g) INA (“a person born ... of parents”). *Assessing* whether a claimant *has provided sufficient evidence* to establish a derivative claim to U.S. citizenship can usually be accomplished *through* review of documentary evidence provided by the claimant. *If doubt arises that the U.S. citizen “parent” is biologically related to the child, you are expected to investigate carefully ([8 FAM 301.4-1\(D\)\(1\)](#)).*
- c. Genetic testing is most commonly used to verify a parent/child relationship in conjunction with a citizenship case or an immigrant visa application, when other forms of credible evidence are insufficient. However, *because of* the expense, complexity, and logistical delays inherent in parentage testing, genetic testing should be used only if other credible proof does not establish to *your* satisfaction that the relationship exists.
- d. When genetic testing appears warranted – *see [8 FAM 301.4-1\(D\)\(1\)](#) for illustrative circumstances* – *you*, with concurrence of the supervisor, may advise the applicant that genetic testing may establish the validity of the relationship. Such testing is entirely voluntary, and all costs of testing and related expenses must be borne by the applicant and *typically be* paid to the laboratory in advance. The applicant must be cautioned that submitting to testing does not guarantee the subsequent issuance of a U.S. passport, and that the results of DNA testing may rather preclude issuance. Standard language for communicating with applicants about DNA testing is available in the Passport Services’ Information Request Letter (IRL). General guidance about the Bureau Consular Affairs (CA) requirements for DNA parentage testing is available on the CA Internet page.
- e. Who should be tested: If at all possible, the child, mother, and father should all be tested. In the event of the death of one or both parents, the American Association of Blood Banks (AABB) accredited testing facility will provide specific guidance regarding the utility of testing of other relatives.

NOTE: Why test *both parents*? DNA relationship/parentage testing favors testing the child and both the mother and father to ensure that the child is

actually the child of the two alleged parents—that is, to rule out cousins, unrelated children, etc. CA follows this practice even if the citizenship claim is through the U.S. citizen *parent*. Including *both* biological *parents* in any DNA paternity test strengthens test results. Whenever possible, *both biological parents* should submit DNA samples as a participant. Testing *both parents'* DNA increases the likelihood of a conclusive result for any DNA test, including DNA tests for paternity, siblings, grandparents, etc.

8 FAM 304.2-2 BURDEN OF PROOF FOR ESTABLISHING U.S. CITIZENSHIP AND DNA TESTING

(CT:CITZ-26; 09-11-2019)

- a. Applicants for U.S. passports and Consular Reports of the Birth Abroad of a Citizen of the United States have the burden of proving by a preponderance of the evidence, also known as balance of probabilities, their identity (22 CFR 51.23) and that they are citizens of the United States (22 CFR 51.40). The standard is met if the proposition is more likely to be true than not true. Effectively, the standard is satisfied if there is greater than a 50 percent chance that the proposition is true. Nothing contained in 22 CFR 51.42 through 51.46 shall prohibit the consular officer or the passport specialist from requiring an applicant to submit additional evidence deemed necessary to meet this standard to establish U.S. citizenship or nationality. (See 22 CFR 51.45).
- b. 8 U.S.C. 1409 (a)(1) (INA 309(a)(1)) provides that for a person born abroad out of wedlock to a U.S. citizen father, a blood relationship between the person and the father *must be* established by clear and convincing evidence. This is an intermediate level of burden of persuasion sometimes employed in U.S. civil procedure. In order to prove *a contention* by "clear and convincing evidence," the party with the burden of proof must convince the trier (*or finder*) of fact that it is substantially more likely than not that the thing is in fact true. This is a lesser *standard* than "proof beyond a reasonable doubt" which requires that the trier of fact be close to certain of the truth of the matter asserted, but a stricter requirement than proof by "preponderance of the evidence," which merely requires that the matter asserted seems more likely true than not.
- c. DNA paternity/maternity testing reliability has advanced to the industry-accepted standard of 99.5 percent. When the mother and father of the child are tested, consular officers may only *rely on* test results reporting a 99.5 percent or greater degree of certainty with respect to paternity/maternity in citizenship cases. However, a test that supports paternity/maternity to a degree less than 99.5 percent generally can be followed by retests to determine if the 99.5 percent accuracy can be achieved.

NOTE: It is also possible to reach 99.5 *percent* certainty or better on sibling tests, although it is not possible to do it consistently enough for the testing to be conclusive.

- d. In cases where an alleged mother or father are deceased, missing, or unavailable to participate in genetic testing, both of the paternal or maternal grandparents can be tested in order to determine the likelihood of grandparentage. In a case where both grandparents are not available to contribute samples, a Family Reconstruction Test must take place. Reconstruction can include any known biological family members of the possible father or

possible mother, including their siblings. This type of DNA testing is referred to as avuncular DNA analysis. Unlike a DNA paternity test which will always provide a conclusive result, avuncular DNA tests are different. *It is possible and quite probable that two genuinely related people will not achieve a 99.5 percent result.* It is not possible to achieve a 99.5 percent result *using* avuncular DNA analysis. However, CA will accept as probative DNA test results involving siblings, grandparents, aunts and uncles, etc., for U.S. citizenship, if the testing facility confirms that such test is able to produce meaningful results. *For example:*

- (1) The test lab performs a Y chromosome test, which provides a 99.5 percent certainty or better match for an uncle/nephew or grandfather/grandson, even though the DNA test as a whole provides less than 99.5 percent certainty; or*
- (2) The test lab performs tests of multiple purported relatives, which provides a combined 99.5 percent certainty or better match as noted by the lab, even though the individual DNA tests provide less than 99.5 percent certainty.*

NOTE: This differs from the [9 FAM 601.11](#) policy guidance due to the differing burden of proof and evidentiary standard in citizenship cases.

UNCLASSIFIED (U)

regards the citizenship of a surrogate who gestates a child as “irrelevant to the child’s citizenship analysis.” 8 FAM § 304.3-2(a).

4. For the purpose of determining citizenship, the Department applies 1409 when the child’s biological parents were not married at the time of the child’s birth or conception, regardless of the parents’ legal marital status, sex, or sexual orientation. 8 FAM 304.1-2.
5. Although the law of the jurisdiction where a child is born may sometimes create a presumption that children born during the marriage of their legal parents are “the issue of that marriage,” 8 FAM § 301.4-1(D)(1)(d), the FAM explains that any such “presumption is not determinative in citizenship cases, . . . because an actual biological relationship to a U.S. citizen parent is required.” *Id.*; *see also id.* § 301.4-1(D)(1)(a) (“It is not enough that the child is presumed to be the issue of the parents’ marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child’s own claim is based, U.S. citizenship is not acquired.”).
6. The FAM requires agents “to investigate carefully” whenever a “doubt arises that [a] U.S. citizen” through whom a child claims citizenship—including a legal parent of the child—“is biologically related to the child.” 8 FAM § 301.4-1(D)(1)(d). Such doubts may arise, for example, “when either of the alleged biological parents was married to another person during the relevant time period” or when “the child was conceived at a time when the alleged father had no physical access to the mother.” *Id.* They also arise whenever a “child was born through surrogacy or other forms of assisted reproductive technology.” *Id.*

7. “A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and anonymous sperm donor,” can acquire citizenship only under Section 1409(c)—not under Section 1401—“regardless of whether the woman is married and regardless of whether her spouse is the legal parent of the child at the time of birth.” 8 FAM § 304.3-2(c). Likewise, “[a] child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor,” can acquire citizenship only if the father satisfies the requirements of Section 1409(a) and Section 1401(g), “regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth.” 8 FAM § 304.3-2(f).
8. A same-sex couple’s use of surrogacy or other forms of assisted reproductive technology (ART) may more readily be apparent to agents than an opposite-sex couple’s use of ART. Yet, In order for the rules to be applied evenhandedly and not just to those for whom a passport adjudicator or consular officer can readily ascertain that ART was used, the Department’s CRBA application form requires parents to indicate whether they were married to the child’s other biological parent when the child was born. CRBA Application, Defs.’ Ex. A at 4.
9. Plaintiff Allison Blixt is a U.S. citizen. *See* Passport of Allison Blixt, Defs.’ Ex. B.
10. She is married to Stefania Zaccari, an Italian citizen, *See* Certificate of Marriage, Compl., Ex. B, ECF No. 56-2; Passport of Stefania Zaccari, Defs.’ Ex. C.

11. Stefania conceived L. Z.-B. using assisted reproductive technology and a sperm donor and carried him to term. *See* CRBA Adjudication Notes, Ex. D at 1; *see also* Stipulation of Facts ¶ 14, ECF No. 65.
12. L. Z.-B. was born in January 2015 in Lambeth, England, Compl., L. Z.-B. Birth Certificate, Ex. C, ECF No. 56-3, during Allison’s marriage to Stefania, *see* Compl., Ex. B.
13. Allison is listed on L. Z.-B.’s birth certificate as “parent.” L. Z.-B. Birth Certificate. Allison was not L. Z.-B.’s egg donor, nor did she carry and give birth to L. Z.-B. CRBA Adjudication Notes at 1; *see also* Stipulation of Facts ¶ 15.
14. Allison and Stefania applied for a Consular Report of Birth Aboard (“CRBA”) and a U.S. passport for L. Z.-B. in London, England. *See* Ex D.
15. Their applications on behalf of L. Z.-B. were denied. *Id.*; *see also* Compl., Ex. D, ECF No. 56-1.
16. The Department of State’s denial letter stated that L. Z.-B.’s application for a CRBA was denied under Section 309(c) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1409(c), because “[i]t has been determined that there is not a biological relationship . . . between the U.S. citizen mother and child.” *See* Compl., Ex. D.
17. Specifically, Plaintiffs were informed that in addition to a legal relationship, either a genetic parental or gestational relationship needed to exist between Allison and L. Z.-B. for the applications to be approved. *Id.*
18. Plaintiffs submitted a letter to the Embassy requesting reconsideration of the denial. Ex. E.

19. In November 2017, the Embassy affirmed its decision. Embassy Letter, Compl. Ex. E.
20. The Embassy noted that “L. Z.-B. may be able to pursue other paths to citizenship” and referred Plaintiffs, inter alia, to the procedures under 8 U.S.C. § 1503. *Id.*
21. Without a biological-requirement that can be objectively verified through DNA testing, citizenship claims could be supported merely by documents purporting to show marriages and legal relationships between parents and child, and it can be extremely difficult (especially in certain countries) to verify that such documents are genuine and accurate. *See, e.g.*, Joint Statement of USCIS and the Dep’t of State, *U.S. Suspends Processing New Nepal Adoption Cases Based on Abandonment* (Aug. 6, 2010), available at <https://www.uscis.gov/archive/us-suspends-processing-new-nepal-adoption-cases-based-on-abandonment#:~:text=In%20order%20to%20protect%20the,and%20related%20visa%20issuance%20for> (last accessed Nov. 18, 2020) (explaining that, in Nepal, “[c]ivil documents, such as ... birth certificates[,] often include data that has been changed or fabricated”)
22. The Department has long been concerned about the phenomenon of individuals fraudulently claiming citizenship on behalf of a child born abroad who is not actually theirs. *See* Excerpts from Dep. of Paul Peek, Defs.’ Ex. F.

Dated: November 18, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Branch Director

/s/ Vinita B. Andrapalliyal
Vinita B. Andrapalliyal
Trial Attorney
United States Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 305-0845
vinita.b.andrapalliyal@usdoj.gov

EXHIBIT A

U.S. Department of State

INSTRUCTIONS

APPLICATION FOR CONSULAR REPORT OF BIRTH ABROAD OF A CITIZEN OF THE UNITED STATES OF AMERICA

A Consular Report of Birth Abroad may be issued for any U.S. citizen child under the age of 18 who was born abroad and who acquired U.S. citizenship at birth. Only the child's parent(s), legal guardian, person acting in loco parentis or the child may apply on the child's behalf. The application generally must be signed before a U.S. consular officer, a consular agent, or, in the case of children born in U.S. military hospitals, a designated military official. A Consular Report of Birth Abroad is proof of U.S. citizenship; however, **it is not a travel document** and does not take the place of a passport for travel purposes.

IMPORTANT: You **MUST** provide the required evidence listed below before we can process the application. Please follow the instructions below.

STEP 1: Read the instructions before completing and submitting this application. The instructions contain important information about completing the application and list what documents can be submitted as evidence to support the application.

STEP 2: Complete the application.

STEP 3: Make an appointment with the U.S. embassy or consulate online or contact the U.S. consular agency or designated U.S. military official.

STEP 4: Assemble the required documentary evidence. Take the application and supporting documents with you to your appointment at the U.S. embassy, consulate, consular agency, or with a military acceptance agent. NOTE: Do not sign the application until you are before a designated U.S. consular official or military acceptance agent.

STEP 5: Once the citizenship claim has been approved, the Consular Report of Birth Abroad will be printed in the United States and sent to the address you designate in the United States or the address you designate abroad in countries where the mailing of U.S. citizenship documents is permitted unless you indicate that you will pick it up at the U.S. embassy, consulate or consular agency.

ABOUT YOUR DOCUMENTS

- You must submit **ORIGINAL** documents or **copies certified by the custodian of the record**. Generally, we will return your documents after we have seen them.
- **We cannot accept photocopies or notarized copies of documents.**

DOCUMENTS WE NEED TO SEE

When applying for a Consular Report of Birth Abroad for a child who has never been documented as a U.S. citizen, the documentary evidence listed below should be presented. In certain instances, additional evidence may be required. Unless otherwise provided, all documentation submitted must be originals or certified copies of the originals bearing the seal of the issuing vital records office, court, or other authority.

1. Child's birth certificate.
2. Evidence of the parent(s)' U.S. citizenship and identity. This may consist of a U.S. passport, U.S. passport card, Consular Report of Birth Abroad, Naturalization Certificate, Certificate of Citizenship or timely filed U.S. birth certificate. For other forms of acceptable U.S. citizenship evidence, contact the U.S. consul. A passport or government issued Photo ID must be presented as proof of identity.
3. Evidence of the U.S. citizen parent(s)' physical presence or residence in the United States prior to the birth of the child. Such evidence may include, but is not limited to affidavits, school, employment, tax, bank, and medical records, utility bills, rent receipts, or other official public documents. Evidence of time spent abroad working for the U.S. government, U.S. Armed Forces or qualifying international organization, or as a dependent child of a person working abroad for such entities prior to the birth of the child is also acceptable in some cases.
4. Parents' marriage certificate, if applicable.
5. Evidence of the termination of any previous marriages of the parents (divorce decree, annulment decree, or death certificate).
6. If a person other than a parent or the child is applying for the Consular Report of Birth Abroad, the person must present a certified copy of legal guardianship or notarized affidavit from the parent(s) authorizing the person to make the application.

HOW TO COMPLETE THIS APPLICATION

Most of the items on the form are self-explanatory with the exception of the items discussed below. The numbers match the numbered items on the form.

1. Name of Child in Full: Enter the name of the child as it is recorded on the local birth certificate. If a different name is shown on the birth certificate, an explanatory affidavit from the parent or legal guardian must be presented regarding the correct name. When a child's name has been legally changed by adoption or certain other legal action amending the child's name from birth, the new name may be recorded on the application if supported by documentary evidence.
2. Sex: Check (X) box to indicate whether male or female.
3. Date of Birth: Write the month before the date and year. (Example: 10/2/2009).
(month)(day)(year)
4. Place of Birth: Enter the name of the city and country.

Mother/Father/Parent. NOTE: If the U.S. citizen parent transmitting citizenship to the child is not present, he or she may complete State Department Form DS 5507 Affidavit of Parentage Physical Presence and Support and submit separately. The parent completing this application should provide as much information on the parent completing the Form DS 5507 as he or she has.)

INFORMATION ABOUT MOTHER/FATHER/PARENT

- 5 and 11. Full Name: Enter Mother/Father/Parent's name as it appears on the passport and/or government issued identity document.
- 6 and 12. All Previous Legal Names: Enter all legal names ever used by father, including name at birth.
- 7 and 13. Sex: Check (X) box to indicate whether male or female.
- 8 and 14. Date of Birth: Write the month before the day and year. (Example: 10/2/2009).
(month)(day)(year)
- 9 and 15. Place of Birth: Enter the name of the city, state/province (if applicable) and country.
- 10 and 16. Current Physical Address (Do not list a P.O. Box) (You may list an A.P.O. Address): Enter the address in the foreign country where the application is completed.
17. Enter Mailing Address
- 18 and 19. Citizenship: Please place an "X" in the "yes" box or the "no" box to indicate whether you were a U.S Citizen or Non-Citizen National when the child was born.
20. Enter yes or no if you and U.S. citizen parent of child were/was married to the child's other biological parent when the child was born.
21. List Date and Place of marriage and check current status of that marriage, adding date of death or divorce if applicable.
- 22 and 23. Marriage(s): Please list any other marriages as follows: Date of marriage; end date, if any; and manner ended, if applicable. If you have never been married, enter "none."
- 24 and 25. Time spent in the United States: List all dates you have been present in the United States.
- 26 and 27. Time spent abroad in U.S. Armed Forces, in other U.S. Government employment, with qualifying international organization, or as a dependent child of a person so employed: Official documentation of relevant periods of service from the appropriate governmental department or international organization must be presented. For names of qualifying organizations, consult the U.S. embassy or consulate.
28. Do not sign until you are appearing before the person administering the oath/affirmation.
29. Do not sign until you are appearing before the person administering the oath/affirmation.
30. The U.S. embassy or consulate official approving the issuance of the Consular Report of Birth Abroad will enter the serial number of the Consular Report of Birth Abroad and the date and place of issuance before signing this section.



U.S. Department of State

OMB NO. 1405-0011
EXPIRES: 08/31/2019
Estimated Burden: 20 minutes

**APPLICATION FOR CONSULAR REPORT OF BIRTH ABROAD
OF A CITIZEN OF THE UNITED STATES OF AMERICA**

Registration Number

A. THIS SECTION TO BE COMPLETED BY THE CHILD'S PARENT(S) OR GUARDIAN(S) OR THE CHILD (USE SECTION D CONTINUATION SHEET)

INFORMATION ABOUT THE CHILD

1. Name of Child in Full

 (Last/Surname) (First) (Middle)

2. Sex M F

3. Date of Birth ____ / ____ / ____
 (month) (day) (year)

4. Place of Birth _____
 (City) (Country)

NOTE: (If the U.S. citizen parent transmitting citizenship to the child is not present, he or she may complete State Department Form DS 5507 Affidavit of Parentage Physical Presence and Support and submit it separately. The parent completing this application should provide as much information on the parent completing the Form DS 5507 as he or she has.)

INFORMATION ON MOTHER/FATHER/PARENT

INFORMATION ON MOTHER/FATHER/PARENT

5. Full Name

 (Last/Surname) (First) (Middle)

6. All Previous Legal Names Used

 (Last/Surname) (First) (Middle)

_____ (Last/Surname) (First) (Middle)

7. Sex M F

8. Date of Birth ____ / ____ / ____
 (month) (day) (year)

9. Place of Birth

 (City) (State/Province) (Country)

10. Current Physical Address (Do not list P.O. Box)
 (A.P.O. Address Permitted)

_____ (Address Line 1)

_____ (City, State/Province, Country, Postal Code)

_____ (Phone Number(s))

_____ (Email Address)

Use this address if Consular Report of Birth will be mailed? Yes No

11. Full Name

 (Last/Surname) (First) (Middle)

12. All Previous Legal Names Used

 (Last/Surname) (First) (Middle)

_____ (Last/Surname) (First) (Middle)

13. Sex M F

14. Date of Birth ____ / ____ / ____
 (month) (day) (year)

15. Place of Birth

 (City) (State/Province) (Country)

16. Current Physical Address (Do not list P.O. Box)
 (A.P.O. Address Permitted)

_____ (Address Line 1)

_____ (City, State/Province, Country, Postal Code)

_____ (Phone Number(s))

_____ (Email Address)

Use this address if Consular Report of Birth will be mailed? Yes No

17. Mailing Address (if different from Current Physical Address) (Do not list a P.O. Box.)
 (You may list an A.P.O. address)

_____ (Address Line 1)

_____ (City, State/Province, Country and Postal Code)

(Continued)

INFORMATION ON MOTHER/FATHER/PARENT

26. Precise Periods Abroad in U.S. Armed Forces, in other U.S. Government Employment, with Qualifying International Organization, or as a dependent child of a person so employed (Specify) (if additional space is needed please use the Section D Continuation Sheet)

Branch/Agency/Org.	Date	Date
	(month-day-year)	(month-day-year)
	From	To

(Continued)

INFORMATION ON MOTHER/FATHER/PARENT

27. Precise Periods Abroad in U.S. Armed Forces, in other U.S. Government Employment, with Qualifying International Organization, or as a dependent child of a person so employed (Specify) (if additional space is needed please use the Section D Continuation Sheet)

Branch/Agency/Org.	Date	Date
	(month-day-year)	(month-day-year)
	From	To

B. THIS SECTION TO BE COMPLETED BEFORE/BY CONSULAR OFFICER, NOTARY PUBLIC, OR OTHER PERSON QUALIFIED TO ADMINISTER OATH

NOTE: If a U.S. citizen parent transmitting citizenship to the child born out of wedlock is not present, he or she may complete State Department Form DS 5507 Affidavit of Parentage Physical Presence and Support and submit separately. Only the U.S. citizen father of a child born abroad out of wedlock must complete the acknowledgement of paternity and agreement to provide financial support.

28. I _____ do solemnly swear (or affirm)(check all that apply)
 (Name)

I am a U.S. citizen or non-citizen national. I am the father of _____,
 (Name of Child)

who was born on _____ in _____. My child was born out of wedlock, and I am the
 (Date of Birth) (Place of Birth)

the father through whom he/she is claiming U.S. citizenship. I agree to provide financial support for this child until he/she reaches the age of eighteen

 (Signature of Affiant)

SUBSCRIBED AND SWORN TO (AFFIRMED) before me this _____ day of _____, _____

 (Signature and Title of Administering Officer)

(SEAL)

(Continued)

THIS SECTION TO BE COMPLETED BEFORE/BY CONSULAR OFFICER, NOTARY PUBLIC, OR OTHER PERSON QUALIFIED TO ADMINISTER OATHS

29. Affirmation: I SOLEMNLY SWEAR (OR AFFIRM) THAT THE STATEMENTS MADE ON THIS APPLICATION ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Name of Person(s) Providing Information	Relationship to the Child <i>(Parent, Legal Guardian, Other (Specify))</i>	Signature of Person(s) Providing Information
-----------------------------------------	-------------------------------------------------------------------------------	----------------------------------------------

_____	_____	_____
_____	_____	_____

Type Name and Title of Official	Signature of Official	City	Date
_____	_____	_____	____ / ____ / ____ <i>(month) (day) (year)</i>

Subscribed to: *(SEAL)*

30. Approval of Consular Report of Birth

_____	_____	
<i>(Printed Name of Consular Officer)</i>	<i>(Signature of Consular Officer)</i>	
_____	____ / ____ / ____ <i>(month) (day) (year)</i> <i>(Date of Approval)</i>	_____
<i>(Approving Post)</i>		<i>(Registration Number)</i>

D.

CONTINUATION SHEET (USE THIS SPACE FOR ADDITIONAL INFORMATION)

PRIVACY ACT STATEMENT

AUTHORITY: The information solicited on this form is requested pursuant to provisions in Titles 8 and 22 of the United States Code (U.S.C.), whether or not codified, including specifically 22 U.S.C. 2705 and predecessor statutes, and by regulations issued pursuant to E.O. 11295 (August 5, 1966), including Part 50, Title 22 Code of Federal Regulations (CFR).

PURPOSE: The primary purpose for soliciting the information is to establish citizenship, identity, and entitlement to issuance of a Consular Report of Birth and to properly administer and enforce the laws pertaining thereto. The information may also be used in connection with issuing other evidence of citizenship, and in furtherance of the Secretary's responsibility for the protection of U.S. nationals abroad.

ROUTINE USES: The information solicited on this form may be made available as a routine use to other government agencies, to assist the U.S. Department of State in adjudicating passport applications and requests for related services, and for law enforcement and administrative purposes. It may also be disclosed pursuant to court order. The information may be made available to foreign government agencies to fulfill passport control and immigration duties. The information may also be provided to foreign government agencies, international organizations and, in limited cases, private persons and organizations to investigate, prosecute, or otherwise address possible violations of law or to further the Secretary's responsibility for the protection of U.S. nationals abroad. The information may be made available to private U.S. citizen 'wardens' designated by the U.S. embassies and consulates. More information on the Routine Uses for the form can be found in the System of Records Notice, Public Notice 6209 for May 2, 2008. The title of this notice is Overseas Citizens Services Records.

DISCLOSURE: Providing the information requested on this form is voluntary. Failure to provide the information requested on this form may result in the denial of a Consular Report of Birth, related document or service to the individual seeking such report, document or service.

PAPERWORK REDUCTION ACT (PRA) STATEMENT

Public reporting burden for this collection of information is estimated to average 20 minutes per response, including time required for searching existing data sources, gathering the necessary documentation, providing the information and/or documents required, and reviewing the final collection. You do not have to supply this information unless this collection displays a currently valid OMB control number. If you have comments on the accuracy of this burden estimate and/or recommendations for reducing it, please send them to: CA/OCS/L, SA-29, 4th Floor, U.S. Department of State, Washington, DC 20037-3202.

EXHIBIT B

EXHIBIT C

EXHIBIT D



The United States Department of State - Bureau of Consular Affairs

ACS Activity Log

Report by LEHNEID on May , 22ND 2019 14:02 ET

Sensitive But Unclassified (SBU) - Information Protected under The Privacy Act of 1974 (5 USC 552a as amended)

Activity Log

Log Type:	Case Note	Source:	User	Assigned To:	Processing, Automated	Date Completed:	23-MAY-2017
Name:	CCD CRBA Service Note						
Description:	CHILD BORN TO US CITIZEN PARENT & ITALIAN CITIZEN MOTHER - OUT OF WEDLOCK. UNDER SECTION 309(a) INA. US CITIZEN PARENT SUBMITTED: SECONDARY SCHOOL TRANSCRIPT YR 9 - 12 & COLLEGE TRANSCRIPT FALL 1996 - SPRING 2000 (8 SEMESTERS) DOES NOT SHOW 1 CONTINUOUS YEAR.						
Log Type:	Status Update	Source:	System	Assigned To:	Processing, Automated	Date Completed:	23-MAY-2017
Name:	New Case Created						
Description:	New Case Created Case ID: LND20171432466697Z						
Log Type:	Status Update	Source:	System	Assigned To:	Processing, Automated	Date Completed:	23-MAY-2017
Name:	New Service Created						
Description:	New Citizenship Service Created Service ID: LND20171432466696Z						
Log Type:	Status Update	Source:	System	Assigned To:	Processing, Automated	Date Completed:	23-MAY-2017
Name:	New Sub-service Created						
Description:	New CRBA Sub-service Created Subsrv ID: LND20171432466698Z						
Log Type:	Status Update	Source:	System	Assigned To:	Processing, Automated	Date Completed:	23-MAY-2017
Name:	Service status update						
Description:	CRBA service status updated Service ID: LND20171432466696ZSub-service ID: LND20171432466698Z Status updated to: APPLICATION ACCEPTED By User: MAJORD Status Date: 23-MAY-17						
Log Type:	Case Note	Source:	User	Assigned To:	Morgan, John	Date Completed:	24-MAY-2017
Name:	DENIAL - Non-acquisition						
Description:	Child born in wedlock to same-sex couple: Italian citizen biological and gestational mother and American citizen parent. AmCit acknowledges that she was neither the egg provider nor did she carry and give birth to the child. The couple tried to document this child as an American citizen shortly after birth in 2015 and were refused for the same reason, with an 'N' hit appropriately entered. Couple freely admits that they understand the law, they are requesting another formal adjudication today because they intend to file a lawsuit against the USG and want paperwork for this purpose.						
Log Type:	Status Update	Source:	System	Assigned To:	Williams, Ross ACS Fsn	Date Completed:	12-JUN-2017
Name:	Subject Core Biographical Data Updated						
Description:	Modified by user: WILLIAMSRX Critical Field Change: Subject Suffix New Value: Value Removed Old Value: No Previous Value Critical Field Change: Subject State of Birth New Value: Value Removed Old Value: No Previous Value						

Log Type: Name **Source:** System **Assigned To:** Birch, Andrew **Date Completed:**
Check Results

Name: SSA Check not transmitted

Description: SSA Check was not transmitted due to an invalid social security number.

Log Type: Name **Source:** System **Assigned To:** Birch, Andrew **Date Completed:**
Check Results

Name: SSA Check not transmitted

Description: SSA Check was not transmitted due to an invalid social security number.

Log Type: Name **Source:** System **Assigned To:** Birch, Andrew **Date Completed:**
Check Results

Name: SSA Check not transmitted

Description: SSA Check was not transmitted due to an invalid social security number.

Log Type: Name **Source:** System **Assigned To:** Birch, Andrew **Date Completed:**
Check Results

Name: SSA Check not transmitted

Description: SSA Check was not transmitted due to an invalid social security number.

Log Type: Name **Source:** System **Assigned To:** Birch, Andrew **Date Completed:** 19-JUN-2017
Check Results

Name: Name check executed 06/19/17 08:23 AM (UTC+01:00)

Description: Name Check batch 7 executed 6/19/2017 8:23:36 AM (UTC+01:00) by BIRCH, ANDREW: Results for Subject 'Z██████-E██████, L██████', received 6/19/2017 8:23 AM (UTC+01:00): CLASS-E: 1 hit(s) (Complete) CLASP: 0 hit(s) (Complete) IPDB: 3 hit(s) (Complete) MIV: 0 hit(s) (Complete) SSA: 0 hit(s) (Complete) Results for MotherAlias 'BLIXT, ALLISON', received 6/19/2017 8:23 AM (UTC+01:00): CLASS-E: 1 hit(s) (Complete) CLASP: 0 hit(s) (Complete) IPDB: 0 hit(s) (Complete) MIV: 4 hit(s) (Complete) SSA: 1 hit(s) (Error) Results for Mother 'Zaccari, Stefania', received 6/19/2017 8:23 AM (UTC+01:00): CLASS-E: 0 hit(s) (Complete) CLASP: 0 hit(s) (Complete) IPDB: 0 hit(s) (Complete) MIV: 0 hit(s) (Complete) SSA: 0 hit(s) (Complete) Results for Mother 'BLIXT, ALLISON', received 6/19/2017 8:24 AM (UTC+01:00): CLASS-E: 0 hit(s) (Complete) CLASP: 0 hit(s) (Complete) IPDB: 0 hit(s) (Complete) MIV: 4 hit(s) (Complete) SSA: 1 hit(s) (Error) Results for Alias 'Z██████-E██████, L██████', received 6/19/2017 8:23 AM (UTC+01:00): CLASS-E: 1 hit(s) (Complete) CLASP: 0 hit(s) (Complete) IPDB: 3 hit(s) (Complete) MIV: 0 hit(s) (Complete) SSA: 0 hit(s) (Complete) Results for Alias 'Zaccari-Blixt, L██████', received 6/19/2017 8:24 AM (UTC+01:00): CLASS-E: 1 hit(s) (Complete) CLASP: 0 hit(s) (Complete) IPDB: 3 hit(s) (Complete) MIV: 0 hit(s) (Complete) SSA: 0 hit(s) (Complete) Total CLASS-E Hits: 4 Total CLASP Hits: 0 Total IPDB Hits: 9 Total MIV Hits: 8 Total SSA Hits: 2

Log Type: Case **Source:** System **Assigned To:** Processing, Automated **Date Completed:** 20-JUN-2017
Note

Name: ECAS Status

Description: ECAS Status returned: [Non-Fraud Referred To ECAS]

Log Type: Case **Source:** System **Assigned To:** Processing, Automated **Date Completed:** 20-JUN-2017
Note

Name: ECAS Status

Description: ECAS Status changed from: [Non-Fraud Referred To ECAS] to [Non-Fraud CLASS Lookout Associated]

Log Type: Status **Source:** System **Assigned To:** Morgan, John **Date Completed:** 20-JUN-2017
Update

Name: Proof of Citizenship

Description: Citizenship Adjudicated for Case ID: LND20171432466697Z Subject ID: LND200905459398910

Citizenship: US CITIZEN Date Adjudicated: 20-JUN-17 Adjudicated by: MORGANJS (LND)

Log Type: Status Update **Source:** System **Assigned To:** Morgan, John **Date Completed:** 20-JUN-2017

Name: Proof of Citizenship

Description: Citizenship Adjudicated for Case ID: LND20171432466697Z Subject ID: LND201507039206625
Citizenship: NON-CITIZEN Date Adjudicated: 20-JUN-17 Adjudicated by: MORGANJS (LND)

Log Type: Case Note **Source:** System **Assigned To:** Processing, Automated **Date Completed:** 20-JUN-2017

Name: ECAS Status

Description: ECAS Status changed from: [Non-Fraud CLASS Lookout Associated] to [Completed]

Log Type: Status Update **Source:** System **Assigned To:** Morgan, John **Date Completed:** 20-JUN-2017

Name: Service status update

Description: CRBA service status updated Service ID: LND20171432466696Z Sub-service ID: LND20171432466698Z
Status updated to: DENIED By User: MORGANJS Status Date: 20-JUN-17

Log Type: Status Update **Source:** System **Assigned To:** Morgan, John **Date Completed:** 20-JUN-2017

Name: Service status update

Description: Service status updated Service ID: LND20171432466696Z Status updated to: Closed By User:
MORGANJS Status Date: 20-JUN-17

Log Type: Status Update **Source:** System **Assigned To:** Morgan, John **Date Completed:** 20-JUN-2017

Name: Case status update

Description: Service status updated Case ID: LND20171432466697Z Status updated to: Closed By User: MORGANJS
Status Date: 20-JUN-17

Log Type: Status Update **Source:** System **Assigned To:** Morgan, John **Date Completed:** 20-JUN-2017

Name: Proof of Citizenship

Description: Citizenship Adjudicated for Case ID: LND20171432466697Z Subject ID: LND201507039206282
Citizenship: NON-CITIZEN Date Adjudicated: 20-JUN-17 Adjudicated by: MORGANJS (LND)

EXHIBIT E

SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000
FACSIMILE: 1-212-558-3588
WWW.SULLCROM.COM

125 Broad Street
New York, New York 10004-2498

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September 5, 2017

Via E-Mail and Royal Mail

Embassy of the United States of America,
Passport & Citizenship Unit,
24 Grosvenor Square,
London, United Kingdom,
W1K 6AH.

Dear Ladies and Gentlemen:

We represent L [REDACTED] A [REDACTED] Z [REDACTED] B [REDACTED] (“L [REDACTED]”) and his parents, Allison Blixt (“Allison”) and Stefania Zaccari (“Stefania”), in securing L [REDACTED]’ right to United States citizenship at birth. L [REDACTED] was born in London to Allison, a citizen of the United States (“U.S.”), and her wife, Stefania, a citizen of Italy. Allison was born, raised, and spent most of her adult life in the U.S. Nevertheless, by letter dated May 24, 2017 (the “Letter”), the U.S. Embassy in London informed L [REDACTED]’ parents that it would not grant his application for a Consular Report of Birth Abroad. L [REDACTED]’ parents respectfully request reconsideration of that decision pursuant to 7 FAM 1445.9, and submit the following additional information in support of L [REDACTED]’ right to United States citizenship at birth.

BACKGROUND

Allison Dawn Blixt was born in 1978 in Park Ridge, Illinois. Six years later, she moved with her family to Clemmons, North Carolina. Allison lived in Clemmons until graduating from high school, following which she attended Vassar College in Poughkeepsie, New York. After graduation, Allison spent one and a half years coaching college field hockey at Hartwick college in Oneonta, New York before returning to North Carolina to attend law school. In 2005, Allison received her J.D. from the University of North Carolina, and moved to New York City, where she began working as an associate at the law firm of Jones Day.

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Passport & Citizenship Unit

In 2006, Allison met Stefania Zaccari¹ in New York when Stefania was on vacation from Rome. Stefania returned to Italy at the conclusion of her vacation, but Allison and Stefania's relationship continued. At the end of 2007, Stefania visited Allison in New York for three months. During that time, the couple decided to live together permanently, but Stefania was not then eligible for a long-term immigration status in the U.S. As an EU citizen, however, Stefania could live and work freely in the U.K., and she moved there in February of 2008. Allison's employer had an office in London, so she moved there to be with Stefania that March.

In 2009, Allison and Stefania entered into a civil partnership.² In 2014, Stefania became pregnant with Lucas through assisted reproductive technology. During Stefania's pregnancy, the U.K. enacted legislation permitting same-sex marriages, and authorizing the conversion of pre-existing civil partnerships into formal marriages, effective from the date of the civil partnership.³ Allison and Stefania invoked the conversion option, and on January 3, 2015, received notice that their civil partnership was—and effectively had been since 2009—recognized as a marriage like any other under U.K. law.

On ██████████ 2015, Stefania gave birth to L██████. Stefania and Allison—and only Stefania and Allison—are identified as L██████' parents on his birth certificate. No other individual has, or has ever claimed, any parental rights with respect to I██████⁴

¹ Stefania was born in 1974 in Ferrentino, Italy.

² The *Civil Partnership Act* of 2004, which became effective in the U.K. on December 5, 2005, provided same-sex couples with various legal rights also provided to married couples. *See, e.g., Civil Partnership Act, 2004, c. 3* (property and financial arrangements), *c. 4* (parental rights).

³ The *Marriage (Same Sex Couples) Act, 2013, c. 30, sec. 9* (authorizing and describing procedures for couples to convert civil partnerships into marriages), available at: <http://www.legislation.gov.uk/ukpga/2013/30/section/9/enacted>; *see also id.* (Commencement No. 4) Order 2014 (bringing certain provisions, including section 9, into effect as of December 10, 2014).

⁴ In 2008, The United Kingdom passed the *Human Fertilisation and Embryology Act* (the “HFEA”), which provides, in relevant part, that if a woman has a child who was conceived through assisted reproductive technology, and was in a “marriage with another woman,” the other party to the marriage “is to be treated as the parent of the child.” *HFEA, 2008, c. 22, § 42* (2008). In contrast, the *HFEA* provides that a sperm donor may be considered a legal parent of the child only if he gives written notice that he “consents to being treated as the father of any child.” *Id. § 37*. The donor here gave no notice that he intended to be treated as a parent, and in fact remains anonymous until L██████ turns 18. If at that point Lucas wishes to contact the father, he may do so.

Embassy of the United States of America
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After L [REDACTED] was born, his parents applied at the U.S. Embassy in London for a Consular Report of Birth Abroad, based on Allison's U.S. citizenship, her residence in the U.S. for almost thirty years before L [REDACTED]' birth, her lawful marriage to Stefania when L [REDACTED] was born, and her confirmation on L [REDACTED] birth certificate as his lawful parent. Nonetheless, an Embassy official inquired into the details of how L [REDACTED] was conceived and borne and then indicated that the Embassy would not grant a Consular Report of Birth Abroad because Allison had neither carried L [REDACTED] to term nor provided the egg used to conceive him.

On [REDACTED] 2017, Allison and Stefania had another son, M [REDACTED] ("M [REDACTED]"), who, like L [REDACTED], was born in London, but unlike L [REDACTED] was conceived and carried by Allison instead of Stefania. Following M [REDACTED]'s birth, Allison and Stefania returned to the Embassy to submit applications for Consular Reports of Birth Abroad on behalf of L [REDACTED] and M [REDACTED]. Again, Stefania and Allison were asked to explain how their children were conceived and borne. On May 24, 2017, Stefania and Allison received formal notice via mail that M [REDACTED]'s application had been granted, but L [REDACTED] application had again been denied. According to the Embassy's Letter, L [REDACTED] application was denied on the ground that Section 309(c) of the Immigration and Nationality Act ("INA") requires proof of a genetic parental or gestational relationship to Allison despite I [REDACTED] birth certificate. The Embassy did not explain why that provision was relevant or why such proof was required in light of the fact that L [REDACTED] was born to a U.S. citizen who was lawfully married to L [REDACTED] other parent at the time of his birth.⁵

Even absent that error, reconsideration and reversal of the Letter's determination are necessary because refusing to recognize I [REDACTED] U.S. citizenship on the Letter's stated basis violates the Constitution's guarantees of due process and equal protection. There is no justification for denying L [REDACTED] application for a Consular Report of Birth Abroad given that (1) Allison and Stefania are the only individuals named and officially recognized as L [REDACTED] parents on his birth certificate, (2) Allison and Stefania

⁵ After the Supreme Court decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the State Department confirmed that it would recognize same-sex marriages for immigration purposes. See Statement from Homeland Security Janet Napolitano on July 1, 2013, available at <https://www.uscis.gov/family/same-sex-marriages> ("As a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes. Just as USCIS applies all relevant laws to determine the validity of an opposite-sex marriage, we will apply all relevant laws to determine the validity of a same-sex marriage."). The Supreme Court subsequently has made clear that "[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

Embassy of the United States of America
Passport & Citizenship Unit

are legally married and act in all respects as I [REDACTED] parents, and (3) Allison was born and raised in the U.S. If all of the circumstances were identical except for Allison's gender and sexual orientation, L [REDACTED] application would have been accepted and his citizenship by birth acknowledged without question. L [REDACTED] would have benefited from the longstanding presumption of his legitimacy, and thus of Allison's parentage, entitling L [REDACTED] to U.S. citizenship at birth.⁶

ARGUMENT

1. Because the Embassy Applied the Incorrect Law to L [REDACTED] Situation, the Embassy's Refusal to Grant His Application for a Consular Report of Birth Abroad Should Be Reconsidered and Reversed.

Section 309(c) of the INA applies to persons born "outside the United States and out of wedlock." 8 U.S.C. § 1409(c). For children born out of wedlock, citizenship will be recognized only if the applicant's mother meets specific criteria. *Id.* In its Letter, the Embassy took the position that L [REDACTED] application failed to meet "requirements relevant to [his] circumstances" provided in Section 309(c).

The Embassy erred in basing its determination on INA Section 309(c) because that provision does not apply to children, such as L [REDACTED], born to a married couple. Because his parents have been considered legally married since 2009—four years before L [REDACTED]' birth—L [REDACTED] is not a child born "out of wedlock." Therefore, the Embassy applied the incorrect law to L [REDACTED] application, and must reconsider the application under the law that actually applies—INA Section 301(g). For the reasons explained below, that section establishes L [REDACTED] right to U.S. citizenship at birth. *See* 8 U.S.C. § 1401(g).

⁶ *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (recognizing the longstanding presumption that a child born to an opposite-sex married couple is the legitimate issue of that marriage); *Wendy G-M v. Erin G-M*, 985 N.Y.S.2d 845, 596 (N.Y. Sup. Ct. 2014) (holding both female spouses who bear a child conceived by assisted reproductive technologies are the child's parents because "[i]he pervasive and powerful common law presumptions that link both spouses in a marriage to a child born of the marriage . . . apply to this couple," and thus "that the non-biological spouse is a parent of th[e] child under the common law of New York as much as the [child's] birth-mother"); *see also supra* note 4 (discussing U.K. recognition of both mothers as parents); U.S. Department of State, *Foreign Affairs Manual and Handbook*, 7 FAM 1131.4-1(d) ("Children in wedlock are presumed to be the issue of that marriage.").

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2. The Embassy’s Refusal to Grant I█████ Application Cannot Be Reconciled with the Plain Language of the Applicable Statutory Provision.

Congress has defined “citizens of the United States at birth” to include:

a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years[.]

8 U.S.C.A. § 1401(g). This language is clear and unequivocal and unquestionably applies to any child of Allison, who was born in Park Ridge, Illinois in 1978, and lived in the United States continuously until moving to London in 2008. The Embassy’s rejection of L█████ application notwithstanding Allison’s citizenship, her residence history and marital status, and her recognition on I█████ birth certificate as L█████ “parent,” conflicts with the express language of the statute and is unfounded.

3. Intervening Supreme Court Precedent Requires Reconsideration of L█████’ Application in Light of *Morales-Santana* and *Pavan*.

In two decisions issued after the date of the Letter, the Supreme Court has affirmed and clarified the constitutional protections of American citizens from discrimination based on sex and sexual orientation. This intervening precedent—decided after the denial of I█████ application—mandates reconsideration and reversal of the Letter’s determination.⁷

In *Sessions v. Morales-Santana*, the Court overturned a federal law that treated men and women differently for the purposes of recognizing U.S. citizenship of children born abroad. 582 U.S. ____ (2017) (slip op., at 2). The Court held unequivocally that “the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination.” *Id.* The Court subjected the INA to heightened review under the equal protection guarantee of the Fifth Amendment because the challenged section determined citizenship in part “on the basis

⁷ The Embassy’s May 24, 2017 letter denying I█████ application predates the Supreme Court’s decisions in both *Sessions v. Morales-Santana*, 582 U.S. ____ (2017), decided June 12, 2017, and *Pavan v. Nathaniel Smith*, 582 U.S. ____ (2017), decided June 26, 2017. Those decisions are discussed below.

Embassy of the United States of America
 Passport & Citizenship Unit

of the sex of the qualifying parent.” *Id.* at 8. Such laws, the Court insisted, “must substantially serve an important governmental interest *today*.” *Id.* at 9 (emphasis in original). Prescribing one rule for mothers and another for fathers, without an “exceedingly persuasive justification,” violates the constitutional mandate requiring the Government “to respect the equal dignity and stature of its male and female citizens.” *Id.* at 22-23 (internal quotations omitted). There is little doubt that had Allison been male, the Embassy would not have denied L [REDACTED]’ application merely because Stefania had given birth to L [REDACTED]. Allison would have received a “presumption of parentage” as the spouse of L [REDACTED]’ genetic and gestational mother, and L [REDACTED] citizenship would have been recognized on that basis. 7 FAM 1131.4. *Morales-Santana*’s requirement that the government “administer the laws in a manner free from gender-based discrimination” precludes this unconstitutional discrimination against L [REDACTED] and Allison. 582 U.S. ____ (2017) (slip op., at 2). The Embassy’s refusal to recognize L [REDACTED] status on this discriminatory basis undermines the “equal dignity and stature” to which citizens of different genders and sexual orientations are entitled. *Id.* at 23.

Morales-Santana makes clear that it is unconstitutional for the Embassy to have reached a different result solely because Allison is female. The same rules for birth citizenship must apply to L [REDACTED] regardless of whether Allison is a man or a woman.

The Embassy also cannot justify its refusal to recognize L [REDACTED] citizenship by pointing to the fact that his parents are in a same-sex—rather than an opposite-sex—marriage, and therefore could not personally have provided the sperm used to conceive L [REDACTED]. Section 1401(g) of the INA confers citizenship on children, who, like L [REDACTED], were born abroad to parents who were married at the time of the child’s birth without imposing further requirements on, or burdens of proof regarding, the nature of the relationship between the child and his U.S. citizen birth parent. Proof or acknowledgement of parentage is required only when children of U.S. citizens are born abroad *and* “out of wedlock.” Compare 8 U.S.C. § 1401(g) with *id.* § 1409. Citizenship under Section 1401(g) must be equally available to the children of same-sex and opposite-sex marriages. By treating Allison and Stefania as unwed mothers, the Embassy violates the Constitution’s requirement of equal protection. In *Pavan v. Nathaniel Smith*, the Supreme Court held that married couples must receive the same “constellation of benefits . . . linked to marriage,” regardless of whether the spouses are of the same or opposite sexes. *Pavan v. Nathaniel Smith*, 582 U.S. ____ (2017) (slip op., at 1.) Accordingly, the Court struck down an Arkansas law that precluded two women in a same-sex marriage from being listed on their children’s birth certificates. The Court rejected the view that the statute’s focus on the biological relationship of a child to his or her parents, rather than the parents’ marital relationship to each other, validated the statute’s differing treatment of same-sex parents. In so doing, the Court noted that its decision in

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“*Obergefell* proscribes such disparate treatment.” *Id.* at 3. In *Obergefell*, the Court also warned that this kind of discrimination “harm[s] and humiliate[s] the children of same-sex couples.” *Obergefell*, slip op., at 3.

Here, if Allison and Stefania were in an opposite-sex marriage the Embassy would have recognized L [REDACTED] U.S. citizenship. Because Allison is a *woman* married to a woman, the Embassy has discriminated against her and her son in violation of the Constitution. This disparate treatment illegally denies same-sex parents core rights embedded in the “constellation of benefits” enjoyed by spouses in opposite-sex marriages: the right to have children born and raised by married parents treated as the legitimate children of their parents, **and not** as children born “out of wedlock.”

These recent Supreme Court decisions, decided after the May 2017 denial of Lucas’ application for a Consular Report of Birth Abroad, mandate reversal of the Embassy’s initial determination. The Embassy cannot refuse to recognize L [REDACTED] citizenship based on either the gender or sexual orientation of his mother, let alone both. “The right to . . . American citizenship is a precious one,” *Fedorenko v. United States*, 449 U.S. 490, 505 (1981), an “unequivocal legal bond” between this nation and its people, *Ambach v. Norwick*, 441 U.S. 68, 75 (1979).

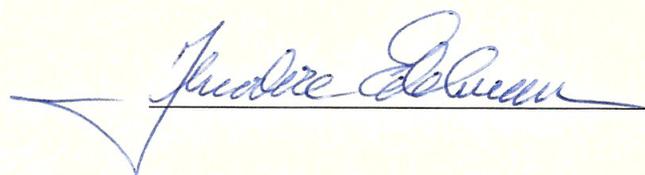
Embassy of the United States of America
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CONCLUSION

For the foregoing reasons, we respectfully request reconsideration and reversal of the decision to deny the application for a Consular Report of Birth Abroad of I [REDACTED] A [REDACTED] Z [REDACTED]-B [REDACTED].

Dated: New York, NY
September 5, 2017

Sincerely,



Theodore Edelman
Jessica Klein
Scott E. Blair
Alexandra H. Moss
Lauren G. Citrome
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
United States of America
(212) 558-4000

Aaron C. Morris
IMMIGRATION EQUALITY
40 Exchange Place
Suite 1300
New York, New York 10005
United States of America
(212) 714-2904

cc. The Honorable Robert Wood Johnson
Ambassador Extraordinary and Plenipotentiary

EXHIBIT F

CONFIDENTIAL - PROTECTIVE ORDER
PAUL PEEK - 12/20/2018

1 CONFIDENTIAL - PROTECTIVE ORDER
 UNITED STATES DISTRICT COURT
 2 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 3
 4 ANDREW MASON DVASH-
 5 BANKS and E.J.D.-B,
 6 Plaintiffs,
 7 v. Case No.
 8 2:18-cv-00523-JFW-JCx
 9 THE UNITED STATES
 10 DEPARTMENT OF STATE,
 11 and THE HONORABLE
 12 MICHAEL R. POMPEO,
 13 Secretary of State,
 14 Defendants.
 15 _____
 16
 17
 18 Video Deposition of Paul Peek
 19 Washington, D.C.
 20 Thursday, December 20, 2018
 21 9:15 a.m.
 22
 23 Job No.: NY-203388
 24 Pages: 1 - 351
 25 Reported by: Donna L. Linton, RMR-CLR

Epiq Court Reporting Solutions - New York
1-800-325-3376 www.deposition.com

CONFIDENTIAL - PROTECTIVE ORDER
PAUL PEEK - 12/20/2018 Page 2

1 Video deposition of Paul Peek, the 30(b)(6)
 2 witness herein, held at:
 3
 4
 5
 6
 7 Sullivan & Cromwell
 8 1700 New York Avenue, Northwest
 9 South Conference Room, Suite 800
 10 Washington, D.C. 20006
 11 (202) 956-7500
 12
 13
 14
 15
 16
 17 Pursuant to Amended Notice of Rule 30(b)(6)
 18 Deposition of Defendant United States Department of
 19 State and Federal Rules of Civil Procedure, before
 20 Donna L. Linton, Registered Merit Reporter,
 21 Certified LiveNote Reporter, and Notary Public in
 22 and for the District of Columbia.
 23
 24
 25

Epiq Court Reporting Solutions - New York
1-800-325-3376 www.deposition.com

1 MS. ANDRAPALLIYAL: Objection. Asked and
2 answered.
3 A Could you repeat the question?
4 BY MR. EDELMAN:
5 Q Yes. Now, I'm not asking you what's the
6 basis. I'm asking you what's the rationale for the
7 requirement that the State Department reads into
8 section 301 that there must be a biological
9 relationship between a U.S. citizen parent and a
10 child?
11 A Within the scope of INA 301 and 309, it
12 is the language of the statutes.
13 Q But what is the -- is there a fundamental
14 purpose for which the State Department believes this
15 is a requirement?
16 A I'm not sure I understand your question.
17 Q Well, is it, for example, a concern about
18 fraud?
19 A Concern about fraud in what context?
20 Q Fraud in either the process or pursuit of
21 U.S. citizenship for children.
22 A Yes, the department is concerned about
23 fraud in the application for documentation of U.S.
24 citizenship.
25 Q Isn't that the principal reason why the

1 MR. EDELMAN: Okay. I'll just do it
2 again.
3 BY MR. EDELMAN:
4 Q So do concerns about preventing fraud
5 have any relevance to the way that the State
6 Department interprets section 301 of the INA to
7 require a biological relationship between the U.S.
8 citizen parent and a child?
9 A The primary concern is to be compliant
10 with the law. The secondary concern is to make sure
11 that fraud is not taking place in how people are
12 applying under the law.
13 Q And when the State Department changed the
14 policy with respect to gestational mothers, was
15 there any discussion about the impact on the effort
16 to prevent fraud of that change?
17 MS. ANDRAPALLIYAL: Objection. Exceeds
18 the scope.
19 A Let me look at the cable that went out
20 announcing the policy.
21 Could you ask the question again? I'm
22 sorry.
23 BY MR. EDELMAN:
24 Q I'll ask it this way based upon your
25 answers to my prior questions.