New Policy for Military Families Sparks Debate and Confusion About U.S. Citizenship Laws

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In late August the Trump Administration announced it would no longer treat certain children born abroad to U.S. military personnel as "residing" in the United States, thus precluding them from acquiring U.S. citizenship automatically. The political firestorm that ensued revealed that many Americans misunderstand our citizenship laws, especially as they apply to children born outside the geographic limits of the United States and its territories.

This article examines the principal ways U.S. citizenship is acquired by birth in and outside of the United States. It also explains how children under 18 may attain citizenship after birth abroad, either automatically or by application, and how the government's new policy impacts members of the military and their families. The process of naturalization for U.S. permanent residents over the age of 18, and the ways in which U.S. citizenship may be lost, are outside the scope of this article.

Birth in the United States

The 14th Amendment to the U.S. Constitution and, consequently, Section 301(a) of the Immigration and Nationality Act, (8 U.S.C. 1401(a)), provide that persons born in the United States and subject to its jurisdiction are U.S. citizens at birth. Through various acts of Congress, *United States* today refers to the 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, 8 U.S.C. 1101(a)(38), as well as the Commonwealth of the Northern Mariana Islands. Public Law 94-241 §506(c), March 24, 1976, effective Nov. 3, 1986. It also includes U.S. territorial waters and airspace. See 7 FAM 1114(b), 1115(b).

Virtually all individuals born the United States are subject to its jurisdiction and thus U.S. citizens at birth. There is a small number of foreign diplomatic officials accredited to the United States, the United Nations, and other international organizations, who are immune from U.S. jurisdiction. Where such immunity extends to the families of these foreign diplomatic officials, their children born in the United States generally are also immune from U.S. jurisdiction and are not citizens at birth. U.S. law does, however, accord these children the benefit of choosing to become U.S. permanent residents upon application and proof of continuous residence in the United States since birth, 8 CFR 101.3.

Birth Abroad

The Constitution does not specify how those born abroad may become U.S. citizens. Instead, Article 1, Section 8, Clause 4 of the Constitution delegates to Congress the responsibility to "establish a uniform rule of naturalization." Since 1790 Congress has enacted numerous laws prescribing how U.S. citizenship may be acquired at or after birth abroad. Since these laws have

generally repealed prior versions without retroactivity, evaluating a claim to citizenship requires an examination of the statute in effect at the time the claimant was born.

The current statutes prescribing who acquires U.S. citizenship upon birth abroad generally has been in effect since 1986. It provides that a child born abroad to two U.S. citizen parents is a U.S. citizen at birth so long as at least one of the parents *resided* in the United States before the child's birth. If only one parent is a U.S. citizen, then that parent must have been *physically present* in the United States for at least five years, at least two of which are after the age of 14, prior to the child's birth. The legal distinction between *residence* and *physical presence* is beyond the scope of this article other than to highlight that a difference exists; "residence" in the United States refers to a presence more significant and contextual than a mere *physical* or literal presence.

- *Acquisition of U.S. Citizenship After Birth Abroad Upon Residing in the United States*

  Children born abroad who are not U.S. citizens at birth will automatically acquire U.S. citizenship under 8 U.S.C. 1431, once they begin residing in the United States as U.S. permanent residents, provided they are under the age of 18 and in the legal and physical custody of at least one U.S. citizen parent. In this case, it is irrelevant whether the citizen parent was a U.S. citizen, or had resided or been physically present in the U.S., prior to the child's birth. This commonly occurs when a parent with minor children naturalizes. For example:

  Diego, a Mexican citizen, moves to the U.S. with his spouse and daughter, Maria, who is 11 years old. Diego has an H-1B visa and his family has H-4 visas. Diego's U.S. employer sponsors him for U.S. permanent residency (the "green card"). The application is granted and Diego, his spouse, and Maria become U.S. permanent residents. Five years later, Diego and his spouse apply for naturalization and become U.S. citizens. Once the parents are granted citizenship, Maria, who is now 16 and residing with her parents, automatically becomes a U.S. citizen, since she is under 18. This occurs by operation of law; i.e., Maria need not apply for citizenship. The above scenario holds true even if only one of the parents chooses to naturalize, so long as Maria is living with the parent who has become a citizen.

- *Acquisition of U.S. Citizenship After Birth While Residing Abroad*

  Unlike children residing in the United States, children born and residing abroad with a U.S. citizen parent do not automatically become U.S. citizens unless the child acquires citizenship at birth. Rather, 8 U.S.C. 1433 permits a child's U.S. citizen parent to file an application for citizenship on the child's behalf *if* the citizen parent has been physically present in the United States for at least five years, at least two of which are after the age of 14. Here, physical presence does not need to have occurred prior to the child's birth as it does when establishing citizenship at birth. While the application for citizenship may be made from abroad, the child must be in the United States to take an oath of allegiance before citizenship is granted.

- *Exceptions for Members of the Military and the Recent Change in Policy*

The statute provides two important exceptions for members of the U.S. armed services stationed abroad. First, time the citizen parent is abroad under military orders counts as U.S. physical presence. Second, military children do not need to enter the U.S. to take the oath of allegiance; they may take the oath and be granted citizenship abroad.

In the past, U.S. Citizenship and Immigration Services (USCIS) *policy* conferred a third benefit to military families stationed abroad. It treated military children as if they were *residing* in the United States for purposes of acquiring U.S. citizenship, although no such concession appears in the statute. This permitted eligible military children to obtain U.S. citizenship automatically and obviated the need for a citizen parent to apply on their behalf or show prior periods of U.S. physical presence.

USCIS has ended that policy, applicable to children born abroad on or after Oct. 29, 2019. Members of the U.S. military stationed abroad whose children are not citizens at birth will now need to seek citizenship for their children by application and only after the parent has met the physical presence requirements.

The following example illustrates the impact in this change in policy:

Marta, a citizen of Chile and U.S. permanent resident, is employed by the U.S. Army and stationed in Germany. Marta meets and marries a German national and gives birth to a daughter, Greta. Since Greta is not born in the United States and neither of her parents are U.S. citizens, she is not a U.S. citizen at birth.

Marta subsequently naturalizes and becomes a U.S. citizen. Under prior USCIS policy, which treated military children born abroad as if they were *residing* in the United States, Greta would have automatically become a U.S. citizen, provided she was living with her mother.

Under current policy, however, Greta would not acquire U.S. citizenship automatically while living in Germany. While she would likely acquire it automatically upon the family's return to the United States as U.S. residents, if Marta seeks U.S. citizenship for her daughter while residing in Germany, she will need to make an application on her behalf and may only do so once she—Marta—meets the physical presence requirements; i.e., has been physically present in the U.S., including time abroad on military orders, for at least five years, two of which are after the age of 14. Depending on when Marta came to the United States as a permanent resident, she will need to calculate the point at which she meets the five-year physical presence requirement and, as needed, how much longer she will need to accrue physical presence while serving in the military abroad before she can apply for citizenship on her daughter's behalf.

It is unclear how many members of the military this change in policy will impact but whomever it impacts will face delay in obtaining citizenship, a new application process, and related administrative burden. Whether or not the government's decision to reverse a long-standing policy and/or the opposition to the change is politically motivated, USCIS's new policy position is firmly grounded in statute.

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