

Tales from  
the Arena



CHARLES MEDINA, ESQ.

# US citizenship by birth abroad to unwed citizen father and alien mother

A PERSON may acquire US citizenship either at birth or through naturalization. A person born in the US and subject to its jurisdiction acquires US citizenship at birth but, under certain circumstances, a person born outside the US may also acquire US citizenship at birth.

Under INA 309(c), a child born abroad to a US citizen (USC) mother and an alien father out of

wedlock is a USC by birth if the USC mother had been physically present in the U.S. or its outlying possession for a continuous period of one year prior to the child's birth.

Under INA 309(a) and INA 301(g), a child born abroad to a USC father and an alien mother out of wedlock is a USC by birth if: (1) the USC father had been physically present in the US or its outlying possession for a total period of 5 years prior to the child's birth, 2 years of which were after the age of 14; (2) the blood relationship has been

established; (3) the father was a USC at the time of the child's birth; (4) the father, unless he is deceased, agrees to support the child until he reaches 18; and (5), while under 18, the child was legitimated or the father acknowledged paternity or paternity was established by court adjudication. INA 301(g) refers to the physical presence requirement while INA 309(a) refers to the legitimation requirement.

In *Morales-Santana v. Lynch*, No. 11-1252-ag, slip op., (2nd Cir. July 8, 2015), the petitioner raised

the issue of whether it was valid to treat unmarried USC fathers and unmarried USC mothers differently in terms of the physical presence required to transmit US citizenship to their children born abroad.

In *Morales-Santana*, the petitioner was born out of wedlock in 1962 in the Dominican Republic to a USC father and a Dominican mother. The law in effect at the time of petitioner's birth, INA 301(a)(7), required that his father should have been physically present in the US for 10 years prior to child's birth, 5 years of which were after the age of 14. Petitioner's USC father lived in the US territory of Puerto Rico since birth until he permanently moved to the Dominican Republic before he turned 19. Thus, petitioner's father failed to meet the physical presence required under then INA 301(a)(7). However, if the physical presence required for unmarried USC fathers were the same as that for unmarried USC mothers under INA 309(c), then petitioner's father would have easily met this requirement and petitioner would be considered a USC by birth.

Petitioner argued before the Second Circuit Court of Appeals that this gender-based difference in the way unmarried USC fathers and unmarried USC mothers are treated violated his father's right to equal protection. So he requested the Second Circuit

to extend to unmarried fathers the benefits unmarried mothers receive under INA 309(c).

The government asserted that this gender-based difference in treatment was justified to: (1) ensure sufficient connection between USC children and the US; and (2) avoid statelessness for children born in countries that do not confer citizenship based on place of birth. However, the Second Circuit held that this difference in the treatment does not advance the government's asserted interests.

The Second Circuit found no reason why unmarried fathers need more time in the US prior to their child's birth in order to assimilate the values that they would pass on to their children born abroad and ensure a connection between the child and the US. On this same issue, the Ninth Circuit in *US v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008) had a contrary finding.

In *Nguyen v. INS*, 533 U.S. 53 (2001), the Supreme Court found that the legitimation requirement for unmarried USC fathers under INA 309(a), which did not apply to unmarried USC mothers, did not violate the equal protection clause. The Supreme Court explained that the purpose of the legitimation requirement was to provide an unmarried USC father an opportunity to develop a meaningful relationship with his child born abroad. It is assumed

that the ties that provide a connection between the child and the USC father would also connect the child to the US. However, it is not necessary to provide an opportunity for a meaningful relationship to a biological mother since this is already inherent in the fact that she gave birth to the child.

Thus, the Second Circuit concluded in *Morales-Santana* that unmarried mothers and fathers are not similarly situated with respect to the parent-child ties that justified the legitimation requirement at issue in *Nguyen*. However, unmarried mothers and fathers are similarly situated with respect to how long they should be present in the US prior to the child's birth in order to have assimilated citizenship-related values that they could transmit to the child.

Finally, as to the government's purpose of preventing a child from becoming stateless, the Second Circuit found that this could be accomplished by other gender-neutral but more effective alternatives.

\*\*\*

Charles Medina practices immigration law. Visit his website at [medinalawgroup.net](http://medinalawgroup.net) for more details. This article provides general information only and does not provide legal advice on any specific matter or predict the outcome of any legal matter. It does not invite or create an attorney-client relationship.

(Advertising Supplement)