

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

<b>STEP 1</b>	<b>STEP 2</b>	<b>STEP 3</b>	<b>STEP 4</b>
Select period in which child was born	Select applicable parentage and immigration status of parents	Measure citizen parent's residence <b>PRIOR</b> to the child's birth against the requirements for the period in which child was born. (The child acquired U.S. citizenship at birth if, at time of child's birth, citizen parent had already met applicable residence requirements.)	Determine whether child has since lost U.S. citizenship. (Citizenship was lost on the date it became impossible to meet necessary requirements—never before age 26.) Individuals who have failed to meet residence requirements can regain citizenship by taking an oath of allegiance.
<b>PERIOD</b>	<b>PARENTS</b>	<b>RESIDENCE REQUIRED OF USC PARENT</b>	<b>RESIDENCE REQUIRED OF CHILD</b>
Born prior to 5/24/34	Father or mother citizen	Citizen parent had resided in the U.S.	None
Born on/after 5/24/34 and prior to 1/14/41	Both parents citizens	One had resided in the U.S.	None
	One citizen and one alien parent	Citizen had resided in the U.S.	Either: 1) 2 years continuous physical presence <sup>2</sup> between the ages of 14 and 28, <sup>3</sup> or 2) if begun before 12/24/52, 5 years residence in U.S. or its outlying possessions between the ages 13 and 21, or 3) if begun before 10/27/72, 5 years continuous physical presence between the ages 14 and 28. <sup>4</sup> Individuals unaware of potential U.S. citizenship may fulfill the residence requirement through constructive physical presence. <sup>5</sup> No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. Individuals who failed to meet residence requirements can regain citizenship by taking an oath of allegiance. <sup>6</sup>
Born on/after 1/14/41 and prior to 12/24/52 <sup>7</sup>	One citizen and one alien parent	Citizen had resided in U.S. or its outlying possessions 10 years, at least 5 of which were after age 16. If citizen parent served honorably in U.S. Armed Forces between 12/7/41 and 12/31/46, 5 of the required 10 years may have been after age 12. <sup>8</sup> If the citizen parent served honorably in U.S. Armed Services between 1/1/47 and 12/24/52, 5 of the required 10 years of physical presence may have been after age 14. <sup>9</sup>	If begun before 10/27/72, 2 or 5 years continuous physical presence <sup>2</sup> between ages 14 and 28. <sup>10</sup> If begun after 10/27/72, 2 years continuous physical presence between ages 14 and 28. Individuals unaware of potential U.S. citizenship may fulfill the residence requirement through constructive physical presence. <sup>5</sup> No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. (This exemption is not applicable if parent transmitted under the Armed Services exceptions.) Individuals who failed to meet residence requirements can regain citizenship by taking an oath of allegiance. <sup>6</sup>
	Both parents citizens; or one citizen and one national <sup>11</sup>	One had resided in the U.S. or its outlying possessions.	None
Born on/after 12/24/52 and prior to 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possessions.	None <sup>12</sup>
	One citizen, one national parent	Citizen had been physically present in U.S or its outlying possessions for a continuous period of one year. <sup>2</sup>	None <sup>12</sup>
	One citizen and one alien parent	Citizen had been physically present in U.S. or its outlying possessions 10 years, at least 5 of which were after age 14. <sup>13 &amp; 14</sup>	None <sup>12</sup>
Born on/after 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possessions.	None <sup>12</sup>
	One citizen and one national parent	Citizen had been physically present in U.S. or its outlying possessions for continuous period of one year. <sup>2</sup>	None <sup>12</sup>
	One citizen and one alien parent	Citizen had been physically present in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14. <sup>13</sup>	None <sup>12</sup>

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

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<sup>1</sup> See *Marquez-Marquez v. Gonzales*, 455 F.3d 548 (5th Cir. 2006) (holding that petitioner did not obtain citizenship at birth based on adoption by United States citizen since INA § 301(g) did not address citizenship through adoption); see also *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007) (same). But see *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) (explaining that a child acquired U.S. citizenship at birth even though neither of his biological parents were citizens, but at the time of his birth his mother was married to a U.S. citizen); see also *Solis-Espinoza v. Gonzales*, 401 F.3d 1091 (9th Cir. 2005).

<sup>2</sup> For a discussion of continuous physical presence related to these provisions of the law, please see INS Interpretations 301.1(b)(6).

<sup>3</sup> Allows for absences of less than 60 days in aggregate during two-year period. Former INA 301(b), Pub. L. 92-582, 86 Stat. 1289. In 1972, Congress liberalized retention requirements, reducing the period of continuous physical presence from 5 years to 2 years. Act of Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1289. While the statute did not address retroactivity, INS Interpretations 301.1(b)(6)(vii) extended the 1972 2-year requirement to those born between 5/24/1934 and 1/13/1941. Per the interpretations, if someone lost citizenship having failed to satisfy the 5-year requirement but had satisfied the amended language for the 2-year requirement, the individual was regarded as never having lost citizenship, nor having interrupted citizenship status. INS Interpretations 301.1(b)(6)(vii).

<sup>4</sup> Allows for absences of less than one year in aggregate during the five-year period. Former INA 301(b), Pub. L. 85-316, 71 Stat. 639.

<sup>5</sup> In some cases, applicants will be able to fulfill their retention requirements even though they were not physically present in the U.S. When the applicant is credited with the required physical presence even though he or she was not here, it is called “constructive physical presence.” The most recognized situation is when the applicant does not know that he has a claim to U.S. citizenship until it is too late to fulfill the requirements. Naturalization law allows for applicants to “constructively” meet the retention requirement when they did not know earlier they had a claim to U.S. citizenship. This essentially waives the retention requirement. INS Interpretations 301.1(b)(6)(iii); see also 7 FAM 1120 App. K (detailed overview of unawareness). In order to meet this exception, the applicant must:

- Be provided with a reasonable opportunity to enter the United States after becoming aware of the claim of U.S. citizenship. *Matter of Yanez-Carrillo*, 10 I&N Dec. 366 (BIA 1963), and
- Enter the United States promptly. See *Matter of Farley*, 11 I&N Dec. 51, 53 (BIA 1965)

If the applicant satisfies these conditions, he or she is deemed present in the United States from a date immediately prior to his or her twenty-third birthday (if under the 5-year requirement) or twenty-sixth birthday (if under the 2-year requirement) until their date of admission. See *Matter of Farley*, 11 I & N Dec. 51 (BIA 1965). Someone after the age of 28, having learned of the potential claim of U.S. citizenship and promptly entering the United States, faces no additional residence requirement to retain citizenship. *Matter of Navarrete*, 12 I.&N. Dec. 138, 141 (BIA 1967).

The State Department also provides that constructive physical presence may apply in cases where an applicant presents a defense of either impossibility of performance or official misinformation. See 7 FAM 1130 App. K; 7 FAM 1140 App. K.

<sup>6</sup> Under the 1994 Immigration and Nationality Technical Corrections Act, those who failed to meet the physical presence retention requirement may regain their citizenship by taking an oath of allegiance to the United States. See INA § 324(d)(1). This procedure does not apply citizenship retroactively for any period in which the person was not a citizen. *Id.* The person regains citizenship as of the date that the oath is taken. Since the oath does not restore citizenship, persons will be unable to transmit citizenship to their children born during the period between loss and resumption of U.S. citizenship. 61 FR 29651 (June 12, 1996).

<sup>7</sup> Note that people born on or after 10/10/52 have no retention requirements. INS Interpretations § 301.1(b)(6)(xii). Retention requirements were repealed by Act of 10/10/78, Pub. L. 95-432, 92 Stat 1046).

<sup>8</sup> See INS Interpretations 301.1(b)(3)(ii) for a discussion of the residence requirements for parents who served in the Armed Forces between 12/7/41 and 12/31/46.

<sup>9</sup> INS Interpretations 301.1(b) and the Act of March 16, 1956, Public Law 84-430, 70 Stat. 50. Periods of honorable military service abroad may satisfy requirement for physical presence in the United States. INS Interpretations § 301.1(b)(4)(ii); 7 FAM 1133.3-3(d).

<sup>10</sup> Under the 1972 Amendment, persons who entered before October 27, 1972 were allowed to comply with the original five-year requirement for a period extending beyond October 27, 1972 as long as the five-year period began on or before October 26, 1972. See INS Interpretations 301.1(b)(6)(x). Individuals may prefer the longer requirement due to the more lenient absence standard: the two-year requirement allows for absences of less than 60 days in aggregate; the five-year requirement allows for absences less than one year in aggregate.

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<sup>11</sup> For a definition of “National,” please see INA §§ 308 and 101(a)(29) and Chapter 7-5 of the ILRC’s manual, *Naturalization and U.S. Citizenship: The Essential Legal Guide*.

<sup>12</sup> People born on or after 10/10/52 have no retention requirements. INS Interpretations § 301.1(b)(6)(xii). Retention requirements were repealed by Act of 10/10/78 (Pub. L. 95-432, 92 Stat 1046).

<sup>13</sup> Please see INA § 301(g) for exceptions to the physical presence requirements for people who served honorably in the U.S. military, were employed with the U.S. Government or with an intergovernmental international organization; or who were the dependent unmarried sons or daughters and member of the household of a parent in such military service or employment.

<sup>14</sup> Several recent cases have challenged the less favorable residence requirement for a married U.S. citizen parent (10 years, with 5 years after the age of 14) compared to the residence requirement for an unmarried U.S. citizen parent (1 year of previous continuous residence). The Ninth Circuit recently rejected the argument that the differing requirements violate the equal protection clause in *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008). The Supreme Court split 4-4 with Justice Kagan recused, leaving the 9th Circuit ruling in effect. *Flores-Villar*, 130 S. Ct. 2312 (2011).