

TRAINING DAY

The Nuts and Bolts Of 1326 Defense - Derivative Citizenship and Attempted Entry

Introduction

Most people assume that a person can be a United States citizen only if they were born in the United States or if they applied for and were granted US naturalization. In actuality, there are numerous other ways a person may be a citizen. Regardless of where a person was born, they may be United States citizens (USC) because of their parents citizenship or by certain conditions that occurred during their life. Often, an “alien” is really a USC without even realizing it. The Immigration and Nationality Act, contained in Title 8 of the United States Code, provides under Section 1400 scores of ways in which a person may have become a USC. This paper deals with those ways that are commonly known as “derivative citizenship.”

A person who is a derivative citizen is a USC when all of the conditions are met. Often, this is at birth. Therefore a derivative citizen is often a USC their entire life, only they didn't know it or couldn't prove it. Citizenship and Immigration Service (CIS; formerly the “customer service” arm of the INS) may issue a Certificate of Citizenship but this is only official proof of the persons' U.S. citizenship. It is not bestowing citizenship at the time the certificate is issued (unlike naturalization) but is instead only recognizing what has been true all along.

THE LAW OF DERIVATIVE CITIZENSHIP

The Legal Elements Step By Step

Step 1 – Determine When the Client Was Born

Step 2 – Determine Who the Child's Biological Parents Were

Step 3 – Determine if One or Both of the Parents or Grandparents are USC

Step 4 – Determine if the Client was Born In or Out of Wedlock

Step 5 – Determine if Any Special Conditions Apply

The Steps in Detail

Step 1 – Determine When the Client Was Born

Which version of the law you should use will depend on when your client was born. A client born in 1933 will have to meet very different conditions to derive citizenship than one born in 1954.

Step 2 – Determine Who the Child’s Biological Parents Were

Citizenship can normally be passed along by the biological parents of the client. There are provisions that apply to adopted children but they are outside the scope of this paper.

Step 3 – Determine if One or Both of the Parents or Grandparents are USC

Derivative citizenship can be passed down through the generations. So even if both parents of the client are foreign born, if one of their parents is or was a USC, that parent may be a USC without even knowing it. And if the proper conditions are met, that USC status may have been transmitted to your client. For this reason, it is important to inquire about the citizenship not only of the parents, but the grandparents as well.

Step 4 – Determine if the Client was Born In or Out of Wedlock

Just like date of client’s birth matters, so to does a determination as to the marital status of the client’s parents at the time of the client’s birth. For immigration purposes, a child born out of wedlock is illegitimate.

Step 5 – Determine if Any Special Conditions Apply

See conditions below.

DATE OF CLIENT’S BIRTH

The Immigration and Nationality Law that is to be used, along with the resulting conditions, is the law in effect at the time of your client’s birth. Below is a breakdown of the law by the date with the attendant conditions that must be met.

1. Dates and Conditions if Born *IN WEDLOCK*

Prior to May 24, 1934

Either parent must be USC and have been present in the U.S. at any time prior to birth of the client.

Jeannie was born in Mexico on July 2, 1929. Her father, Nelson, was born in Presidio, Texas and lived in the United States until he was 4 years old, at which time his family moved to Mexico, where he lived the rest of his life. Jeannie is a USC.

May 24, 1934 to January 1, 1941

If both parents are USC, then one must have been present in the U.S. at any time prior to birth of the client.

If only one parent is a USC, the parent must have been present in the U.S. at any time prior to birth of the client. However, there is also a unique retention requirement for this time period when only one parent is a USC. The client has to have either had 5 years of continuous physical presence in the U.S. between the ages of 14 and 28 starting before the age of 23 or have two years continuous physical presence in the U.S. between the ages of 14 and 28 starting before the age of 26. An absence of less than 12 months in the aggregate during the 5 year period did not break continuity of residence or physical presence but an absence of 60 days or more in the aggregate breaks the continuity of physical presence for the 2 year period. Honorable service in the U.S. Armed Forces counts as residence or physical presence. Further, if at the time of child's birth, the USC parent was employed by a the U.S. Government or a specified U.S. international organization, the client is exempt from these retention requirements.

Mallory was born in Mexico on December 23, 1936. Her father, Steven, is a USC but her mother Elise is not. Steven resided in the U.S. for a few months after his birth but Mallory will also have to meet the retention requirements. She was in the United States from the age of 18 until 25. However, she was gone a total of 3 months during this time to give birth to a child in Saltillo and therefore will not qualify under the 2 year period. However, she will qualify for the 5 year period and therefore is United States citizen.

January 13, 1941 to December 23, 1952

If both parents are USC one must have resided in the US at any time prior to the birth of the client.

If only one parent is USC, that parent must have resided in the United States for 10 years and at least 5 of those years had to come after the age of 16. This requirement is met by time abroad if the U.S. parent was employed by the U.S. government or a specified U.S. international organization. 8 CFR 316.20. Further, the same retention requirements as above apply.

Lisa was born in Mexico on October 9, 1945. Her father, Homer is USC but her mother Marge is not. Homer resided in the United States until he was 8 years old when his parents took him back to their village in Mexico. As a young man, he came to work in the fields when he was 17. He worked in the fields until he was 24 and then returned to Mexico, where he met Marge and they had three children. Homer then brought his family to the U.S. when Lisa was 12. Lisa was in the U.S. until she left when she turned 18. She never left the U.S. during this time. As she has two years after fourteen, she is a USC.

December 24, 1952 to November 13, 1986

If both parents are USC one must have resided in the US at any time prior to the birth of the client.

If only one parent is a USC, that parent must have been present in the U.S. for 10 years prior to the child's birth, at least 5 of which were after the age of 14. This requirement is met by time abroad if the parent was employed by the U.S. government or a specified U.S. international organization. 8 CFR 316.20. There are no retention requirements.

Jethro was born on April 1, 1969 in Mexico. His mother, Granny, was born in Los Angeles on October 13, 1938. She lived in the United States from birth until she was 13 years old. She then left to Mexico, never to return. Jethro is not a USC. Even though she lived here for more than 10 years, at least 5 have to be after she was 14.

November 14, 1986 and after

If both parents are USC one must have resided in the US at any time prior to the birth of the client.

If only one parent is a USC, that parent must have physically present in the US at least five years prior to the child's birth, at least 2 of which were after the age of 14. This requirement is met by time abroad if the parent was employed by the U.S. government or a specified U.S. international organization. 8 CFR 316.20. There are no retention requirements.

Arnold was born on August 23, 1988 in Mexico. His older brother Willis was born on July 1, 1983. Their father, Drumond, was born in New York City on

February 23, 1957. He lived in the United States from birth until he was 10. He then went to live in Mexico, returning to work in the US from age 19 to 22. Arnold is a USC as his father was present in the US at least 5 years including 2 years after he was 14. However, Willis is not, as he needs his father to be present at least 5 years after the age of 14 and he was present only 3 years.

2. Dates and Conditions if Born OUT OF WEDLOCK

The rules change if your client was born out of wedlock or illegitimately. In some cases, the conditions become easier to meet. But for the case of a person trying to claim citizenship through a father, the conditions are often onerous. In the case of a USC father, paternity is often at issue, especially if the father does not appear on the birth certificate.

Prior to May 24, 1934

USC Mother

Mother must have been present at any time in the US prior to birth.

USC Father

Father present in US at any time prior to birth AND legitimated child at any time under the laws of the father's domicile.

Jeannie was born in Mexico on July 2, 1929. Her father, Nelson, was born in Presidio, Texas and lived in the United States until he was 4 years old, at which time his family moved to Mexico, where he lived the rest of his life. While living in Mexico, he legitimated Jeannie according to Mexican law. Jeannie is a USC.

May 24, 1934 to January 1, 1941

USC Mother

Mother must have been present at any time in the US prior to birth.

USC Father

Father present in US at any time prior to birth AND legitimated child at any time under the laws of the father's domicile. Further, child must meet retention requirements as above.

Mallory was born in Mexico on December 23, 1936. Her father, Steven, is a USC but her mother Elise is not. Steven resided in the U.S. for a few months

after his birth. He legitimated Mallory at the time she was born in Mexico. Mallory will also have to meet the retention requirements. She was in the United States from the age of 18 until 25. However, she was gone a total of 3 months during this time to give birth to a child in Saltillo and therefore will not qualify under the 2 year period. However, she will qualify for the 5 year period and therefore is United States citizen. Mallory is a USC.

January 13, 1941 to December 23, 1952

USC Mother

Mother must have resided in the US at any time prior to birth.

USC Father

Father resided in the U.S. at least 10 years, at least 5 of which after the age of 16 (military service may count toward this requirement); before child turned 21 years of age child was legitimated by laws of father's domicile or paternity was established by court proceeding, and child meets retention requirements as above.

Lisa was born in Mexico on October 9, 1945. Her father, Homer is USC but her mother Marge is not. Homer resided in the United States until he was 8 years old when his parents took him back to their village in Mexico. As a young man, he came to work in the fields when he was 17. He worked in the fields until he was 24 and then returned to Mexico, where he met Marge and they had three children. Homer then brought his family to the U.S. when Lisa was 12. Lisa was in the U.S. until she left when she turned 18. She never left the U.S. during this time. As she has two years after fourteen, she meets the retention requirements. However, her father must have legitimated her or established paternity through court proceedings prior to her turning 21 either in the U.S. or in Mexico for Lisa to be a USC.

December 24, 1952 to November 13, 1986

USC Mother

Mother must have been physically present in the US for a continuous period of one year prior to child's birth.

USC Father

Father physically present in the US for 10 years, at least 5 of which after he turned 14. Child must have be legitimated prior to the age of 21 by the laws of the father's domicile and be unmarried at the time of legitimation. If born after

November 14, 1968, the legitimation requirements that apply to persons born after November 14, 1986 may be used.

Jethro was born on April 1, 1969 in Mexico. His mother, Granny, was born in Los Angeles on October 13, 1938. She lived in the United States from birth until she was 13 years old. She then left to Mexico, never to return. Jethro is a USC. Here his mother only needs one year of continuous presence because she was unmarried at the time of his birth. Note that if she were married at the time of his birth, Jethro would not be a USC because she would have to meet the 10 years/5 years after 14 requirements. Even though she lived here for more than 10 years, at least 5 have to be after she was 14.

November 14, 1986 and after

USC Mother

Mother must have been physically present in the US for a continuous period of one year prior to child's birth.

USC Father

Father physically present in the US 5 years, at least 2 of which are after he turned 14 years of age; before child turns 18 was legitimated under laws of child's domicile, OR father acknowledged paternity in writing under oath, or paternity established by court adjudication AND father has agreed in writing to provide financial support until child reaches age 18 and child must be unmarried prior to acquisition of citizenship.

Arnold was born on August 23, 1988 in Mexico. His older brother Willis was born on July 1, 1983. Their father, Drumond, was born in New York City on February 23, 1957. He lived in the United States from birth until he was 10. He then went to live in Mexico, returning to work in the US from age 19 to 22. Arnold is a USC if his father legitimated him prior to Arnold turning 18 as his father was present in the US at least 5 years including 2 years after he was 14. However, Willis is not, as he needs his father to be present at least 5 years after the age of 14 and he was present only 3 years.

Basic Elements to Prove

Remember it is always key to prove the following:

1. Paternity – The client must prove they are the natural born child of the USC from whom they are claiming citizenship through.

2. Citizenship of the Parent – The client must prove the parent is in fact a United States Citizen.

3. Child Citizenship Act of 2000

This Act provides for additional means by which a client may have acquired U.S. citizenship. This is an additional means to acquire citizenship aside from the means noted above. The big requirement is the person must have been under 18 years of age at the time of its effective date, which is February 27, 2001. If so, then the following requirements must be met:

- 1) The child has at least one USC parent, either by birth or naturalization;
- 2) Live in the legal and physical custody of the USC parent; and
- 3) Be admitted as a lawful permanent resident.

US citizenship is acquired when all of the conditions are met.

Theo was born on November 15, 1985. Both of his parents were born in Mexico. In 1986, Theo and his parents immigrated to the United States as legal permanent residents. In 1992, his mother became a naturalized citizen. He was living with her on February 27, 2001 as an LPR. On that day, he became a United States Citizen.

The important date is February 27, 2001, with the critical birth date being on or after March 1, 1983. The Act applies only to persons born *after* this date. It may also apply to adopted children if they were adopted prior to reaching the age of 16 and have resided with the adopted parent for at least two years. §1431, § 1101(B). Unlike the other provisions of the law regarding derivative citizenship, there are no physical presence or residency requirements for the parent.

THE NUTS AND BOLTS: PROVING THE DERIVATIVE CLAIM

Even if a person qualifies under the law, the person must still prove the claim with the necessary claim. Even a strong claim may fail due to a lack of documentary proof.

One important consideration is deciding whether you want to apply for a certificate of citizenship with CIS or whether you prefer to wait until trial to prove your case before a jury. This is a strategic decision that is dependent on the facts of your case. You may prefer to apply directly to the CIS to avoid the need of going to trial or to obtain the added benefit to your client of actually providing him with a legal means to stay in the US. However, you may prefer to go to trial if you have a case that may not meet the CIS requirements to issue a certificate and thus will be denied, or if you prefer to withhold some of the evidence at trial (note, reciprocal rules of discovery will require

you to turn most if not all, documentary evidence in your possession if you intend to use it in court. With that,

What you will need:

N-600 Application: If you are applying to CIS for a Certificate of Citizenship, it all starts with the official CIS application for the certificate, known as the N-600. This form can be found under the “Forms and Fees” section of the CIS website and is in fill-in PDF format. The form should be filled out completely as possible. There will also be a filing fee that will need to be submitted with the application. Although photos are normally required, if your client is in jail, the application can be submitted without the photos.

Be sure to include a detailed cover letter explaining how your client meets the requirements for derivative citizenship.

Take note, Friday mornings are reserved for attorneys and their staff at the CIS offices at Hawkins and Montana. The offices are closed to the public and allows for much speedier filing of the N-600 by an attorney or staff person. Otherwise, the wait just for filing the application can last several hours.

Birth Certificates: This is the basic document in any derivative case. You first need your client’s birth certificate. The birth certificate is necessary to show paternity. If a USC parent’s name is missing from the certificate, it will require an explanation, by way of affidavit from a witness or possibly a DNA test. If you cannot establish paternity, the person will not be able to claim derivative citizenship.

You also need the birth certificate of at least the USC parent to establish that person’s citizenship. Also, the birth certificates of siblings can be useful to demonstrate paternity (provided they are all from the same parent) and to support affidavits.

Marriage Certificates: Needed to prove your client was born in wedlock.

Social Security Records: SSI records can be very useful to prove the person’s parent accrued the physical presence or residency in the United States required. The social security service maintains work records dating back to the 1930’s for all persons who worked and whose wages were reported. For CIS purposes, these are the strongest proof possible of a persons’ presence in the U.S. The reason is the records show not just wages, but also where the person was employed and in what city. So if the records show the person worked in Chicago over a 20 year period, that will be strong evidence of the person’s presence in the United States.

SSI records are not always the answer. A person may have never worked in the United States. Or the person worked but their wages were never reported. In that case, SSI records won’t exist. Other common problems can include gaps in work history or dips in the amount a person was earning. This raises red flags with CIS as they often

assume the person was just working seasonally in the U.S. and was returning to the foreign country for extended periods of time.

The exception to the strength of CIS records is when they show a person worked along the border. At times, CIS takes the position that the records fail to show the person actually lived in the United States, because the person could have been working in the United States while living in Mexico. There are two ways to address this. One is to show through other documents or affidavits that the person resided in the United States. The other is more elaborate. Even if a person did live in Mexico, the person may have still have spent enough time in the United States to qualify for physical presence purposes. Here, you must literally add up the hours worked and attempt to reach the figure you need. A sample request for SSI records is in the Appendix, pages 1-7.

Military Records – Another compelling form of evidence are military records of the USC parent. Any time the parent served in the military, including serving overseas, will count toward the presence requirement.

Even if the USC parent was not active service, military records regarding registering for the draft can still be useful to determine a parent was residing in a particular location.

School Records – Another very helpful form of documentary evidence. School records will often contain the address of the person and will frequently firmly establish a person's presence in the United States on a year to year basis.

CIS will expect school records if you are including school-age years as part of your claim of USC presence. If you are unable to obtain records (never went to school, records destroyed, etc.), explain their absence in your affidavits.

Affidavits – The catchall document in a derivative application. Affidavits should always be provided of all of the key witnesses. They should be detailed and as precise as possible and focus on the elements necessary as well as address any holes in the other evidence. Especially effective are affidavits from witnesses without a stake in the case, such as a neighbor who recalls the USC parent living at a particular address.

Employment Records – In addition to SSI records, work records, including pay stubs, commendation letters, etc. may have been kept and are excellent documentary evidence. Large companies, such as the railroad, or governmental entities also may keep employment records that date back decades.

Mortgage/Rental Records – These are rarely kept but if they are, they are strong proof of a person residing at a particular location.

Pictures – Often overlooked, pictures may have great evidentiary value. A wedding picture can be used to show that a person was born in wedlock, for example.

Correspondence – Envelopes showing postmarks and US addresses or letters written to a person in the US can serve as evidence of physical presence or residence.

Church records – Often persons registered important events, such as births and weddings, with the church but failed to do so with local governments. A church record can be very valuable in the absence of governmental records.

Court and Criminal Records – What better proof of a persons’ presence in the US than that they were serving time in prison? Other court records may establish other required elements.

County Property Tax and Deed Archives – Helps prove residency and physical presence.

Freedom of Information Act Request (FOIA) – Notoriously slow, the FOIA may nevertheless be crucial. Documents that are otherwise unavailable may be present in the immigration file of another person. For example, say a USC husband applied for residency for his wife years ago. Since then the couple have passed away and all of their documents have been lost. A FOIA request of the wife’s A-File can contain such documents as birth certificates, proof of residency, employment, etc. A sample FOIA is in the Appendix, pages 8-12.

The N-600 Packet

Once you have everything, put it together with the filing fee and cover letter and submit it to the CIS. It can be submitted through the mail but is preferable in person. Always get a receipt or send it certified return receipt as the CIS is notorious for losing documents. Make a copy of everything and never send originals, as they are notorious for losing those. Keep your originals and have them ready for request to be inspected by the CIS.

The packet will be assigned to an adjudication officer within CIS familiar with derivative citizenship law. That officer will review the packet.

Interview with CIS

Often CIS will request to conduct an interview of the key witnesses to the application. The interviews are conducted by the adjudication officer of CIS working on the N-600 application. These interviews are conducted at the CIS office on Hawkins and Montana.

If CIS determines an interview is needed for adjudication then notice will be sent to the attorney and N-600 applicant. The interview notice will most often request to speak to a particular witness, most often the USC parent. The interview is supposed to be non-adversarial but care should always be taken. The witness will be placed under oath by the officer prior to the interview. The client’s attorney can be present. Most often,

the officer will looking to fill in gaps of information or resolve questions that may have arisen. Generally they will start by requesting an overview of the person's life. They will compare the person's answers to any affidavits provided.

Obviously, witness preparation is important. This is especially true as many of the witnesses may be elderly and are being asked to recall facts that are decades old. Many may also be intimidated by the process. An attorney is allowed to accompany the person and is strongly encouraged to do so. The attorney can clear up any misunderstandings that may arise as well as ensure the civility of the interview. CIS officers may at times take the cynical position that an attempted fraud is taking place and counsel is critical.

The applicant will rarely, if ever, be asked to the interview, as they themselves are not privy to the facts.

Adjudication of the Application

The N-600 application is reviewed by a CIS adjudication officer who can do one of three things: recommend approval, recommend denial or request further information. If the officer recommends either approval or denial, a supervisor reviews the officer's recommendation and is the person with the decision making authority to approve or deny. In most cases, the supervisor will follow the recommendation of the officer.

If the officer requests additional information then such request will be sent in writing to the attorney. This will be in the form of a letter that will list the additional evidence that must be submitted to support the application. A deadline for the submission of the evidence will also be noted. These requests must be answered promptly. CIS often denies applications on the basis the applicant failed to provide the additional information. For this reason, even if the evidence that is requested cannot be obtained, a written response stating the reasons for why the evidence is unavailable should be sent to CIS. This at least prevents CIS from claiming the applicant is not attempting to cooperate in the process.

Applications can take months, even years, to process. If the client is in criminal proceedings, it is a good idea to request the AUSA contact the CIS offices and request the application be expedited.

Denial of the N-600 Application

Upon denial of the N-600 application, a person has two avenues for possible relief. NOTE: THE DENIAL OF THE N-600 DOES NOT PREVENT THE PERSON FROM RAISING HIS CITIZENSHIP AS A "DEFENSE" AT TRIAL!

One of the avenues is an administrative appeal to the Administrative Appeals Unit of the CIS. The AAU will review the case and issue a decision. The person must prepare

a review sheet and file the appeal fee or request a waiver. A copy of the forms is provided in the Appendix, pages 18-21. AAU appeals are rarely successful and can also take years to run their course. The appeal takes place in Washington, D.C. Even though they are rarely successful, it may nonetheless be necessary to preserve your clients' rights.

The other avenue is to file a petition for declaratory relief with the United States District Court. Under the provisions of the Immigration and Nationality Act, Section 360(a) of the Immigration and Nationality Act, 8 U.S.C. §1503, the District Court can order CIS to grant citizenship to your client, if the client meets all the requirements. This is a separate civil action. A model pleading is included in the Appendix at page 24.

Derivative Citizenship in Trial

Derivative citizenship is a “defense” available at a 8 USC 1325 or 1326 trial. Specifically, the citizenship defense goes to rebut the government’s proof on the element of alienage. Although the Fifth Circuit pattern instruction for Section 1326 does not define “alien,” the pattern charge for transporting and harboring aliens under 8 USC Section 1324 defines an “alien” in the negative as “any person who is *not* a national or citizen of the United States.” Fifth Circuit jury instruction Section 2.03, 2.04, 1997 ed.; *see United States v. Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998).

In most 1326 trials, the government will have some kind of proof regarding the client’s alienage. This will usually take the form of either admissions by the client at the time of his arrest, statements made previously by a client to an immigration officer, statements on an immigration petition or even the birth certificate of the client. At this point, it is necessary to raise the issues of derivative citizenship to rebut the government’s proof. If the government cannot prove beyond a reasonable doubt the person is an alien, then the person cannot be convicted.

Things to be aware of:

Removal orders as proof of alienage: A removal order is not proof of alienage. *United States v. Meza-Soria*, 935 F.2d 166 (9th Cir. 1991); *United States v. Ortiz-Lopez*, 24 F.3d 53, 55-56 (9th Cir. 1994). A removal order is admissible only to show an alien was removed from the United States, not that he is an alien. Immigration authorities have deported USC’s in the past. A limiting instruction may be needed to prevent confusion by the jury.

Denial by CIS of an application: The denial of an application is not proof of alienage nor is it proof of the person is not a derivative citizen. First, remember the burden is different in each situation and the burden of proof is also different. For purposes of the N-600 application, the burden of proof will rest on your client and he must prove his USC by a preponderance of the evidence. But at trial, the burden is on the government to prove alienage and they must do so beyond a reasonable doubt. So that

leaves a gap in the burdens of proof, where a person may be unable to prove their citizenship but there is still enough evidence to raise a reasonable doubt. It can lead to the situation of a person not being convicted of illegal re-entry due to questions about alienage but still not being able to show his USC and being deported.

Further, you should attempt to limine out any conclusions reached by an immigration officer. First, the conclusions reached are only an opinion of the prosecuting agency, and not an “expert” opinion. You can object under Federal Rules of Evidence 401, 402, 701 and 702. Second, these conclusions are actually questions of fact that are to be resolved by a jury. An immigration officer should not be permitted to tell the jury how to decide the ultimate question in the case.

Effect of a not guilty: A not guilty finding does not confer US citizenship on a person. In fact, there is nothing to prevent the immigration authorities from detaining and attempting to deport your client who has just been found not guilty. A client will have two options at this point. One option is to raise the citizenship issue with immigration authorities immediately. This may prevent the person from being deported and immigration authorities may be able to process citizenship for the person. The drawback is the person may be detained while the authorities try figure it out and the person may be deported in the end anyway. The other option is to allow the reinstatement order to be executed and apply for citizenship from the foreign country.

Common Issues That Arise in Derivative Cases

Double Derivatives

At times, a client’s parent is not obviously a U.S. citizen. The parent was also born overseas. However, the client’s grandparents are U.S. citizens. In this case, it may be possible the client is himself a U.S. citizen. However, for that to be true, the parent of the client must first be established to be a U.S. citizen.

In this circumstance, start with the parent. Determine the appropriate law by finding the parent’s date of birth and then see if the person meets all of the conditions. If they do, they can apply for their U.S. citizenship certificate. The next step is to see if the client meets the requirements.

Tabitha was born in Mexico in 1956. Her mother, Samantha, was also born in Mexico in 1934. However, Samantha’s mother, Endora was born in Hatch, New Mexico in 1902. For

As with a client, a parent may likewise be unaware they are U.S. citizens by virtue of derivative citizenship.

Both a parent’s and child’s N-600 application can be filed simultaneously. You do not have to wait for one to be adjudicated and then the other.

Another Child Born During a Period of Presence in the United States

A common issue that arises is a sibling born in the foreign country while at the same time the parent is attempting to claim presence in the United States.

Gilligan is born in 1957 in Mexico. He must have his father, Thurston, establish at least 10 years presence prior to his birth. However, his older brother Skipper was born in Mexico in 1949 and his older sister Mary Anne was born in Mexico in 1955.

This is a problem because the CIS will want to know how these children were being created while the parent was supposedly living in the United States. If children are being born overseas, especially over a prolonged period of time, it raises the idea the parent was really living in the foreign country. This must be addressed, most often through the use of an affidavit by the parent. Some common reasons, include:

- 1) If the parent lived along the border, it was not uncommon for a U.S. citizen parent to live and work in the United States during the week and visit the foreign spouse on the weekends in the neighboring border city. Beware, with this, as you may be cutting away at your presence requirement by admitting the person was living several days at a time overseas for an extended period. These days will literally cut away at the presence time.
- 2) If the U.S. citizen parent is a male, he may have been returning sporadically for visits with his family. It was during this time procreation took place.
- 3) If the U.S. citizen parent is a female, she may have preferred to have the birth take place in Mexico, for any variety of reasons. When she is closer to her due date, she returns to Mexico to give birth there.

Whatever the case, an explanation needs to be afforded. Otherwise, CIS will suspect fraud and may deny the application.

The USC Parent is Dead

The death of the USC parent will not prevent a person from obtaining their citizenship. On the contrary, it is common for a USC parent to be deceased. This only means further investigation to find other witnesses who can attest to the person's presence. It also permits your client to sign any release forms (such as with SSI) as next of kin.

If the USC parent is dead, CIS will require a death certificate. Otherwise, CIS will expect the USC parent to be available to interview regarding the application. Failure to provide a death certificate will lead CIS to suspect fraud.

Citizenship by military service of the client

There are various provisions that permit an alien to become a naturalized USC based on their military service, even if they have been deported or were not legal permanent residents at the time of their service. Section 1439 (dealing with three years or more of service) and 1440 (dealing with service during an armed conflict) exempt an honorably discharged alien veteran from residence and physical presence requirements that may otherwise apply. However, the person must still meet good moral character requirements. It may be possible to meet this requirement even with prior convictions if the convictions are old. Generally speaking, good moral character must be shown during the previous 5 years prior to the application, with any older convictions being left to the discretion of the CIS officer.

Beware the Mexican Birth Certificate

Mexican birth certificates are different from the birth certificate you may be used to in the US. For one, when you request a Mexican birth certificate from say, the *Servicio Civil*, you will often not get a copy of the original, but instead a sworn to computer form that lists the relevant information on it. In many cases this will be sufficient. However, there may be information on the original that is missing from the original. So if this information is missing, make a request from the officials to actually photocopy the original along with the computer printout.

Further, it is not uncommon for information to be added the birth certificate that has a legal impact. For example, the fact the child was legitimated may be noted on the back or in the margin. Literally, the birth certificate may be amended over time. See the Appendix, page 13 and 14 for examples.

Common Law Marriages

CIS defers to the state law to make a determination if a person's parents were married. Therefore in states where common law marriages are recognized, for immigration purposes, a person may have been born in wedlock even though there was no formal marriage.

STATES THAT RECOGNIZE COMMON LAW MARRIAGE:

Only a few states recognize common law marriages:

- Alabama
- Colorado
- Georgia (if created before 1/1/97)
- Idaho (if created before 1/1/96)
- Iowa
- Kansas
- Montana

New Hampshire (for inheritance purposes only)
Ohio (if created before 10/10/91)
Oklahoma (possibly only if created before 11/1/98. Oklahoma's laws and court decisions may be in conflict about whether common law marriages formed in that state after 11/1/98 will be recognized.)
Pennsylvania (if created before 1/1/05)
Rhode Island
South Carolina
Texas
Utah
Washington, D.C.

DNA Testing

More and more, CIS is requesting DNA testing to prove paternity, even if the father appears on the birth certificate or has legitimated the child. There are various companies that do DNA testing across the United States. The company we have used in the past is:

DNA Diagnostic Center
DNA Technology Park
205 Corporate Court
Fairfield, Ohio 45014

Telephone: 1-800-330-7648
Fax: (513) 881-7808
www.DNACENTER.com

The cost of the test is about \$500. The Center will contract a local nurse to obtain the needed DNA samples from the father and child. Once that is done, the results are usually ready five working days after receipt by the Center. A list of AABB Accredited Parentage Testing Facilities is included in the Appendix on pages 22 and 23.

1326 ILLEGAL RE-ENTRY ATTEMPTED CASES

In an attempted re-entry case, inspectors usually encounter and arrest the defendant at the port-of-entry, not in-country. Whether defendant was on the bridge, in the indoor waiting area, at an information window inside, or in a primary inspection line, pedestrian or vehicular, or elsewhere, is important. Jurors may infer intent or plan to immediately "enter." Plus from a legal viewpoint, moving in the line to primary inspection is probably a "substantial step" toward commission of the offense, unless the defendant has a good, innocent explanation.

If your client is not in a line awaiting primary inspection there are many innocent reasons and intentions that may explain both your client's presence **and** his actions. For example, a person may approach the port-of-entry to ask for information as to how to re-apply for their legal permanent residency after having been removed. Or, they may be asking information about their legal status. Hence, his conduct arguably may not sufficiently corroborate a criminal intent as a matter of law. Further, he arguably has done nothing beyond "mere preparation," even if he had a criminal intent. It is important to stress throughout the trial the theme that an attempt must be an actual attempt to enter, not just preparation as to a possible course of action.

The jury needs to be given information as to how things can occur at a port-of-entry. They need to be made aware there is a difference between the information windows and the primary inspection areas. They need to be aware that different immigration officers hold different responsibilities. Visual aids can be instructive to the jury. Some visual defense exhibits include: (1) a diagram of the port-of-entry, (2) a more detailed diagram of the immigration waiting area, information booths, and offices, in relation to primary lanes, and (3) photos of the area, including the "Information" window and chairs in the waiting area.

JURY INSTRUCTIONS.

There are at least four likely areas of jury instruction issues:

(1) "OFFICIAL RESTRAINT" AT THE POE, "ENTRY" & "FOUND IN."
Defendant has not "entered" the U.S. or been "found in" the U.S. within the meaning of 1326, because he is within the "official restraint" of the POE.

Submit a jury instruction defining "enter" and "found in" so a confused juror does not vote guilty just because the defendant is on the U.S. side of the bridge. See *United States v. Angeles-Mascote*, 206 F.3d 529 (5th Cri. 2000). Submit a strong one, where the judge tells jurors in no uncertain terms that the defendant did not "enter" and was not "found" in the U.S., and that they may not convict, even for "attempt," on that basis. Be ready with an alternative instruction that at least defines the terms so a rational juror should understand it cannot convict on this basis.

(2) An alien, even a deported one, may lawfully go to a port-of-entry to seek immigration related information, inquire about how to request an immigration benefit, or even begin the application process. See *e.g.*, *United States v. Cardenas-Alvarez*, 987 F.2d 1129 (5th Cir. 1993) (fact issue whether defendant requested information or to be admitted). He just cannot "apply for admission" without the A.G.'s prior consent.

(3) DIFFERENCE BETWEEN APPLYING FOR ADMISSION AND OTHER IMMIGRATION BUSINESS. Submit a jury instruction explaining the difference between an "application for admission" and an application for a visa or other immigration document. 8 USC 1101(a)(4), (13). The two are distinct legal concepts. The deported alien may apply for a status or benefit at the POE. He cannot "apply for admission" without the A.G.'s prior consent to do so. Jurors may interpret ambiguous actions and questions by lay, uneducated aliens as constituting an application "for admission" when it is not. *United States v. Cardenas-Alvarez*, 987 F.2d 1129, 1133 (5th Cir. 1993)(citations omitted).

(4) BUSINESS OTHER THAN APPLYING FOR ADMISSION IS LAWFUL. Submit a jury instruction explaining that even deported aliens may lawfully come to a port-of-entry to transact business with CIS or ICE. Specifically, you may be able to add reference to the lawful, but bureaucratic process called an Application to the Attorney General for Permission to Reapply for Admission. (Form I-212, 8 CFR 212.2). This further illustrates to jurors that the law permits aliens, even deported aliens, to come to a port-of-entry to transact business with CIS or ICE, to request information, to apply for a benefit such as consent to reapply. Of course, few people come up to the information window at the POE and state, "I would like to file a form I-212 for the Attorney General's consent to reapply for admission into the U.S. Do you have a blank I-212 for me to fill out?" The only restriction, of course, is that the alien may not "apply for admission" without first getting the A.G.'s consent to do so.

(5) THE ATTEMPT INSTRUCTION. The Fifth Circuit pattern attempt charge is woefully incomplete, and misleading, when compared to the leading "attempt" opinion it cites and purports to follow, *United States v. Mandujano*, 499 F.2d 370, 378 (5th Cir. 1974) *cert. denied* 95 S.Ct. 792 (1975). It is incomplete in part because "[f]ormulating an unchanging definition of the term "substantial step" is difficult." 2 Fed.Jury Pracice & Instructions 3, 5th ed. "A "substantial step" . . . varies from case to case according to the facts." *Id.* Further, it does not explain that the "substantial step" must clearly show an "unambiguous intent."

"Substantial step" is defined so briefly and superficially that it omits points that are critical defense arguments. The jury is still left wondering what "substantial step" means. This problem should not prevent the defense from submitting a "theory of defense" attempt instruction that gives the jury more complete and balanced definition of "substantial step."

A fairly good attempt instrucion may be taken verbatim from one approved by *Mandujano's* analysis. It is balanced, accurate, and incorporates points that explain the limits of "attempt." It reads:

In determining whether or not such an act was done, it is necessary to distinguish between *mere preparation* on the one hand and the *actual commencement of the doing of the criminal deed* on the other. *Mere preparation*, which may consist of planning the offense or of devising, obtaining, or arranging a means for its commission, *is not sufficient to constitute an attempt*, but the acts of a person who intends to commit a crime will constitute an attempt where they, themselves, clearly indicate a certain *unambiguous intent* to willfully commit that specific crime and in themselves are an *immediate step* in the *present execution* of the criminal design, the progress of which would be completed unless interrupted by some circumstances *not intended* in the original design.

499 F.2d 378 (emphasis added); also cited in O'Malley, Grenig & Lee, 2 Fed. Jury Practice & Instructions 24, 5th ed., s 21.04 "A Substantial Step"-- Defined. (It is worth having this paragraph enlarged as a visual aid at closing).

The italicized words express defense theories and Rule 29 insufficiency. (1) Even if defendant had intended to enter at the first opportunity, the acts, at most, constitute mere preparation, since achieving the opportunity at primary depended first upon getting documents or permission at the offices inside. In the words of the instruction, defendant at the POE was at most "arranging a means" at the offices. (2) The conduct has to strongly corroborate an unambiguous intent. Defendant's intent was ambiguous, in other words, conditional. If his intent was to enter, his conduct clearly shows it was conditioned on receiving the government's permission (translate into legalese with "the A.G.'s consent to reapply"). Defendant's acts were not immediate steps leading to the present execution of the crime. On the contrary, defendant fully intended that if the government did not give him permission (again, translate "A.G.'s consent to reapply"), he was not going to enter.

Without this paragraph from *Mandujano*, and based on just the short pattern attempt instruction, the government could argue that any deported alien who crosses the bridge in order to do anything to further a request to reenter has committed a substantial step and has committed the offense of attempted reentry, since he does not yet have the A.G.'s consent to reapply.

Closing Argument

For closing argument this brings to mind a chicken and egg argument. How can the alien request permission (legalese = "the A.G.'s consent to reapply") to be excepted from 1326's prohibition on attempted reentry, without first going to the POE, where the law says he may go, and being accused of violating 1326 by attempted reentry?

Another excerpt for an instruction:

"The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law."

United States v. Oveido, 525 F.2d 881, 885 (5th Cir. 1976).

Entrapment Instruction

ENTRAPMENT INSTRUCTION. An entrapment instruction may be supported by the evidence. Defendant goes to "Information" window to ask in simple, lay terms, how or whether he can get permission or documents to enter. Inspector, having sworn to be a faithful public servant, gives defendant forms or asks questions to set him up for a charge of attempted entry, instead of handing him a form I-212 and doing the honest thing.

LIMINE MOTIONS.

(1) "FACTS PLEASE, NOT OPINIONS OR CHARACTERIZATIONS."

This may be the subtitle of a limine motion. In their testimony agents and inspectors try to describe the defendant's conduct with opinions and loaded characterizations instead of facts. A common example of a sentence of testimony loaded with pure opinion & no facts:

"Mr. Defendant came to my booth and applied for admission into the U.S." The same event described factually: "Mr. Defendant walked up to my window and said, "I have lost my *mica*. Do you know how I can get another one?"

In written Q&As signed by the defendant inspectors insert these loaded legal terms like "application for admission" on unwary aliens. Whether a person "applied for admission" is a conclusion. You can argue that it is in fact an expert legal opinion. "Application for admission" is a specific legal term of art defined at 8 U.S.C. § 1101(a)(4). Opinion testimony should only be admissible under FRE 701 and 702 with prior notice and when the court finds it helps, not confuses, the jury, and when there is a factual foundation for its admission.

The jury is entitled to hear the facts, not just the opinions, and make credibility choices. The legal significance of the facts comes from expert witnesses, with prior notice, or from the court.

(2) "FACTS PLEASE, NOT MIND READING OPINIONS."

Agents and inspectors may try to describe the defendant's state of mind, intent, purpose, plan, etc. "Mr. Defendant wanted to enter the U.S." This is also an opinion. Agents' testimony should be to describe the evidentiary facts, not editorialize or argue inferences from them. The jury's job is to infer. Further, the inspectors' state of mind or opinion of the defendant's state of mind is usually not relevant. Again, lay opinion testimony is admissible, if at all, only under FRE 701- 702, if the court finds it helps the jury and factual testimony is inadequate.

(3) MOTION TO ELECT & STRIKE.

The Fifth Circuit has held that the offenses of entry, found in, and attempted entry are three different offenses. *United States v. Martinez-Espinoza*, 299 F.3d 414 (2002). So it seems an indictment containing all three is duplicitous. BEFORE the trial make the following motions:

(a) to compel the government to elect its theory of guilty (found in, entered, or attempted to enter),

(b) to strike from the indictment theories the government drops, and,

(c) strike any theory the evidence presented to the grand jury does not support as a matter of law. (Yes, thanks to word processing forms and the its reliance on the U.S. Attorney for clerical support, the grand jury indicts defendants under "found in" and "entered" theories without the slightest notion of what it has done.)

No later than at the close of the evidence assert the Rule 29 motion for acquittal.

Thanks to William Maynard, Supervisor AFPD for the El Paso office, for providing additional materials for this paper.