

Transmission of American Citizenship

Eileen Martin*



THE STORY WAS ONE OF ROMANCE, intrigue, betrayal, escape and U.S. citizenship. After the expectant American citizen mother followed her groom back to his native Cuba, she discovered he was already married and had a family. She gave birth in Cuba to a baby girl during a time of political upheaval. Mother and baby narrowly escaped back to the United States, with the assistance of political intervention.

Fast forward almost 40 years later. The 30-something daughter wants an American passport, but has no evidence of her American citizenship. When she asks her mother, the daughter learns that the only father she had ever known was not her biological father. It was only then that she heard the whole tale, one that was repeated to me when, as a USINS officer in the early 1990s, I issued a Certificate of Citizenship to the daughter on the basis of the transmission to her of American citizenship.

Most of the stories of foreign-born applicants who apply for evidence of U.S. citizenship are not as dramatic. For instance my own daughter is a U.S. citizen through transmission, with a Consular Report of Birth Abroad issued by the Consulate in Toronto to prove it. Still, even the legally straightforward cases can be rich in human interest.

The statutory basis for U.S. Citizenship transmission is found within the *Immigration and Nationality Act*. There is little relevant case law, because the changes through important cases are subsequently codified. The regulations at 8 CFR are useful, but no resource supersedes the citizenship charts, available at Appendix 71-2 of the USCIS *Adjudicator's Field Manual*. These government-prepared and disseminated charts come with the caveat that they are intended to be "a helpful generalized reference guide, and not to make determinations". Despite the warning, they are very reliable and give helpful references to old and new statutes, and to the *Foreign Affairs Manual* used by U.S. Consular Offices around the world.

The law of transmission of American citizenship has changed frequently over the years, to the extent that now a confirmed non-citizen, with a letter from a U.S. consulate denying a passport application, can become a citizen overnight. However, applications with facts presented loosely may result in a negative response. It becomes crucial to assess a client's circumstances independent of prior consular assessments to ensure correct results. Clients have told tales of uninformed attorneys attempting to talk them into green card application filings, when a U.S. passport was within their grasp.

U.S. citizenship can be transmitted at birth or later in life, through function of law or by application. The charts include variables such as date of birth, number of U.S. citizen parents, and status of parents' marriage, among others. These charts have changed with the times as the law has shifted, reflecting a variety of factors that limit or permit transmission of citizenship. For instance, until 1993, only U.S. citizen fathers married to foreign nationals could transmit to foreign-born offspring born prior to May 24, 1934. When that gender discrimination was corrected, untold numbers of new citizens were created all at once. Additionally, there was a time when some children who obtained U.S. citizenship through transmission were required to fulfill residency requirements to maintain it. Those who lost U.S. citizenship through failure to fulfill these requirements are now permitted to regain it through application and oath of allegiance.

A U.S. citizen parent may lack sufficient periods of U.S. residence to transmit citizenship to children. However, since 2001, that parent can employ the periods of U.S. residence of their own U.S. citizen parent to successfully file applications on the children's behalf. Although these children are not considered to be U.S. citizens from birth,

they gain U.S. citizenship upon approval of the application. Importantly, this advantage is not available to children of a U.S. citizen parent when that child has attained the age of 18.

Another form of transmission occurs when a parent naturalizes. For a Lawful Permanent Resident child under the age of 18, this can result in newly acquired U.S. citizenship. My favorite case involving transmission after naturalization involved an inadmissible Canadian musician. He and his family had obtained green cards long ago. He, his mother and siblings subsequently moved back to Canada, but he visited his dad in the United States several days a week. Whether the USCIS office agreed that the undivorced father's U.S. residence prior to naturalization was imputed to his musician son, or whether it concluded that the son spent sufficient time in the U.S. to have continued to be a resident through the date of his father's naturalization ceremony, is a mystery. It made no difference to him as the musician, now a U.S. citizen, joined the rest of his band in Los Angeles later that week with a smile on his face, not really caring what legal conclusion may have been reached.

A poorly prepared application can draw attention to someone who is not a U.S. citizen, and who has been residing in the U.S. unaware of his unlawful status for many years. Fortunately for one young applicant back in the pre-9/11 years of the USINS, he found the government willing and able to roll his inappropriately filed Application for Certificate of Citizenship into a green card application, which was approved in days. It was not U.S. citizenship, but it fulfilled his requirements. He and his military recruiter both were relieved with that quick result.

My tax attorney colleagues work very hard to establish that their clients are not U.S. citizens. Of course, immigration attorneys cannot imagine such disdain for the "Big Jackpot." The requirement of U.S. citizens to file U.S. federal tax returns annually and the U.S. estate tax that can significantly reduce a sizeable estate are two reasons for not wanting U.S. citizenship. U.S. citizens who desire the right to a U.S. passport despite tax consequences may want to transmit citizenship to children or grandchildren, or the ability to petition for relatives for green cards. They may be facilitating career desires or business opportunities. It is advisable for those considering applying for U.S. citizenship or evidence of it to consult a tax advisor in advance. Filing for evidence of a child's citizenship can put the U.S. citizen parent and child on the Internal Revenue Service's radar screen.

Not everyone wants to be a U.S. citizen, although most immigration attorneys' clients seem interested. Assessing and applying for U.S. citizenship or for proof that it is already in place based on transmission must occur with attention to the ever-changing law, the facts and the individual's family situation. As practitioners, our satisfaction comes from assessing the complex law of U.S. citizenship transmission and applying a client's facts so as to reach the proper result, whether in favor of a U.S. passport or not.

** Eileen Martin is a partner with [Hodgson Russ's Immigration Law Group](#).*

