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Citizenship and Immigration Analysis
for Children Born Abroad Through Intercountry Surrogacy

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- To enter the United States, you must either be a U.S. citizen or obtain a U.S. visa.

- Will the child become a U.S. citizen at birth? *See* INA §§ 301 and 309, 8 U.S.C. §§ 1401 and 1409.
    - If there is an intended mother and she is the genetic mother of the child and a U.S. citizen, INA § 301 or 309(c) will apply and the child will be a U.S. citizen at birth.
    - If the intended mother is not the genetic mother, or if there is no intended mother, look to the intended father.
    - If the intended father is the genetic father and a U.S. citizen:
        - If the child is marital, INA § 301 will apply and the child will be a U.S. citizen.
        - If the child is non-marital, INA § 309 will apply and the child will be a U.S. citizen, so long as the four elements in section 309 are met.
        - (The U.S. State Department looks at the sources of the sperm and the egg to determine whether the child was conceived in wedlock. Ask: are the sperm and the egg married?)
    - **WARNING**
        - There are residency requirements for the genetic parent through whom the child will acquire U.S. citizenship. In short, five years of residency in the United States is required for unwed fathers and one year is required for unwed mothers. The rules are complicated and should be changing soon based on the U.S. Supreme Court decision in June 2017, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 198 L.Ed.2d 150. That case held that this line drawn by Congress between fathers and mothers violates the Equal Protection Clause of the Fifth Amendment. The Supreme Court did not remedy this constitutional violation, though, and instead left it to Congress to fix, which has not taken up the issue.
    - Lastly, check INA §§ 320 and 322, 8 U.S.C. §§ 1431 and 1433, for any last-ditch derivation of citizenship arguments, versus the acquisition of citizenship possibilities above.
    - If the child does not have an argument for U.S. citizenship as set forth above, the child will need a visa to enter the United States and it should be a permanent visa, *i.e.*, a green card,

i.e., Lawful Permanent Resident status, if the intent is for the child to enter the United States to reside here permanently. Any other type of entry into the United States for the child could be viewed as fraudulent.

- If the child is a U.S. citizen at birth, file for a Consular Report of Birth Abroad ("CRBA") and U.S. passport after birth. The intended parents may need the surrogate's signature, but most U.S. Embassies and Consulates will only require the intended parents' signatures. This filing will be done through the State Department, in particular the U.S. Citizen Services Office in the nearest U.S. Embassy or Consulate (versus through USCIS in a USCIS International Field Office located within a U.S. Embassy or Consulate, a distinction that could become highly relevant in the future, see below). A genetic test may be required, along with several other pieces of original evidence, *e.g.*, original birth certificates, proof of residency in the United States for the period of time required by statute, etc.

- If the child will not become a U.S. citizen at birth, the intended parents must obtain a visa for the child.
    - Below is a list of visas that may apply in intercountry surrogacies:
        - Step-child of U.S. citizen – not subject to quota system
        - Child of LPR – subject to quota system!
        - Adoption (possibly a Hague adoption)
        - Humanitarian parole and then apply for green card from within the United States – unlikely to be granted without some type of emergency or tragedy
    - The intended parents should also make sure the child will become a citizen of the country of birth. Otherwise, the child could become stateless in violation of international human rights law. This can have very real, practical consequences, namely the inability to obtain a passport or comparable travel document from any country and therefore the inability to travel internationally, including to the United States.
    - Beware that filing for one of the visas above may take several months and require the intended parents to stay with the child in the country of birth until the visa application is adjudicated.
        - Beware that wait times for this type of processing may be going from one to three *months* to one to two *years*. This is because of President Trump's plan to close the majority of USCIS Field Offices abroad by 2020.
        - During longer wait times, intended parents may apply for a visitor's visa for the child, for a short trip to the United States, so long as all the facts are disclosed to USCIS and the State Department. Under these facts, it would not be uncommon for a visitor's visa to be denied.
    - Beware of entering the United States with the child under the visa-exempt program for Canada or the visa waiver program for some European countries, as both require temporary intent, *i.e.*, you cannot enter under one of these program if you intend for your child to reside in the United States permanently. Entering under one of these programs with the intend for the child to permanently reside in the United States could be viewed as a fraudulent entry.

- Warning in incoming Canadian cases
    - Many U.S. intended parents who engage in Canadian surrogacies are counseled to simply drive their newborn babies home across the land border of the United States and Canada, without applying for a U.S. passport or visa for the child. This could be an unlawful and fraudulent entry.

- Cases to watch
    - There are three cases pending in the federal courts right now involving birthright citizenship of children born abroad through surrogacy.
        - *Dvash-Banks v. State Department*, 2018 CV 523, U.S. District Court for Central District of California; 2019 CV 55517, appealed to the U.S. Court of Appeals for the Ninth Circuit
        - *Blixt v. State Department*, 2018 CV 124, U.S. District Court for D.C.
        - *Mize-Gregg v. State Department*, 2019 CV 3331, U.S. District Court for the Northern District of Georgia
    - These cases all involve same-sex couples, but the same birthright citizenship issues apply for different-sex couples who engage in intercountry surrogacy.
    - There are two problems identified in these lawsuits:
        - The State Department insists on requiring a genetic connection to transmit citizenship to a child born abroad. Legal or intended parentage is not enough.
        - The State Department classifies children as marital or non-marital by looking at whether the sperm is married to the egg, versus looking at the marital status of the intended parents.

- Treaty to watch
    - The Hague Conference Experts' Group originally convened in 2015 to study intercountry surrogacy. It continues to study the issue of whether a multilateral public international law treaty is needed on the issue of parentage and citizenship for intercountry surrogacy arrangements. AAAA has submitted extensive comments to the Hague Conference and a proposed treaty framework. The most recent meeting of the Experts' Group was early 2019. That report recommends proceeding with a treaty on parentage, choice of law, jurisdiction, and recognition/comity.
    - Follow this group at https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

- Helpful links for incoming cases
    - https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/assisted-reproductive-technology.html
    - https://travel.state.gov/content/passports/en/abroad/events-and-records/birth.html