Supreme Court Birthright-Citizenship Decision Not Retroactive, State Department Clarifies

By Michael H. Neifach and Amy L. Peck

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The U.S. Supreme Court ruling that a federal citizenship statute setting different residency requirements for U.S. citizen fathers and mothers violates the Equal Protection Clause will apply only to individuals born on or after June 12, 2017, according to the updated Foreign Affairs Manual (FAM). It therefore would appear that an individual born prior to that date (and after 1952) to an unwed U.S.-citizen mother may argue that citizenship was acquired under the unlawful, "discriminatory" exception.

The FAM is the State Department's authoritative source for policies and procedures that govern the operations of the State Department, the Foreign Service, and, when applicable, other federal agencies.

Immigration and Nationality Act

In *Sessions v. Morales-Santana,* 582 U.S. ____, 137 S. Ct. 1678 (June 12, 2017), the Court ruled that Immigration and Nationality Act (INA) Section 309(c) violates the Equal Protection Clause of the Constitution. (For more on the decision, see our article, Supreme Court: Gender-Based Distinctions in Immigration Law Violate Equal Protection.) INA Section 309(c) stated that children of unwed U.S.-citizen mothers born outside of the U.S. would be U.S. citizens at birth if the mother had lived in the U.S. for at least one year — a standard more favorable than that applied to any other children born outside of the U.S. to one U.S.-citizen parent.

In the case before it, the Court held the plaintiff, who was born outside of the U.S. to an unwed U.S.-citizen father, could not benefit from INA Section 309(c).

Applies Retroactively?

Thousands of individuals born outside of the United States to unwed U.S.-citizen fathers might have been granted U.S. citizenship if the Court had decided differently. But, after the ruling, questions remained about whether the decision would be applied retroactively to children born to unwed U.S.-citizen mothers. It was up to Congress to act, the Court said. To date, INA Section 309(c) has not been deleted.

Clarifying the issue, the FAM, at 7 FAM 1133.4-5(c)(3), takes the position that the Court ruling will not apply retroactively. It provides:

> An individual born abroad out of wedlock on or after June 12, 2017 to a U.S. citizen mother and alien father acquires U.S. citizenship at birth if the U.S. citizen mother has been physically present in the United States for five years, two of which are after the age of 14, prior to the child's birth. The transmission is through the mother under INA 309(c), provided that she meets—as directed by the Supreme Court's ruling in *Sessions v. Morales-Santana* ...—the 5/2[-year] physical presence requirement set out in INA 301(g)....

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