

HYPOTHETICAL

Scenario 1:

Potential Client (PC) comes in to see you about her step-son, Mike, age 13 who was born in Canada on August 31, 1997. PC is a USC who married her Canadian husband in 2000 when her stepson was 3 years old. Her husband became a naturalized USC on February 15, 2010 through sponsorship by his US employer. PC's husband and his ex-wife share joint custody of Mike who regularly travels back and forth across the US-Canada border for visitation.

Mike lives most of the time with his father and step-mother because he attends elementary school in the US. He has never been issued a green card. He enters on a B-2 and then travels back and forth across the border unimpeded by CBP.

PC wants to take steps to obtain US citizenship for her stepson. What questions should you ask PC in order to properly evaluate this fact pattern?

A: You have not received any information about Mike's mother. You must inquire whether or not she is a USC citizen or whether or not the paternal or maternal grandparents or great-grandparents were USC's.

Scenario 2: Let's suppose that PC tells you that Mike's mother is a dual national USC and Canadian citizen. What do you need to ask next?

A: You need to ask how old was Mike's mother when she departed the US. You are trying to figure out whether she meets the transmission requirements to transmit US citizenship to Mike at birth or not.

Scenario 3: Let's assume that Mike's mother was 9 years old when she left the US and she has never left Canada and resumed her residency in the US. Is she able to transmit US citizenship to Mike at birth?

A: No. Mike was born on August 31, 1997. The governing statute in effect for a person born abroad who claims US Citizenship through a US parent is the **law in effect on the date of the claimant's birth**, unless a subsequent law specifically by its language in the statute applies retroactively to persons who had not already become citizens by the provisions of the prior law.

When pertinent law requires specific conditions on the part of the citizen parent(s), the conditions must be met prior to the child's birth unless otherwise stated in the statute. Residence or physical presence transmissions can be met while the transmitting parent is not a citizen.

The law in effect at the time of Mike's birth is INA §301(g) which states:

"a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person,

was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person:

(A) honorably serving with the Armed Forces of the United States, or
(B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical- presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date;"

So, under the statute the citizen parent must be physically present in the US or possession 5 years prior to the child's birth, two of which are after the age of 14. Based on this provision of INA §301(g), Mike's mom would not meet the transmission requirements.

Scenario 4: However, the statute goes on to say that honorable U.S. military service, employment with US government or intergovernmental international organization, or as dependent unmarried son or daughter and member of household of a parent in such service or employment, may be included.

This raises the question that you must ask what did Mike's grandparents do for a living in Canada? Was he employed in such a capacity that would meet the above criteria in which case, Mike's mom as a dependent would meet the transmission requirements. You must also ask, were Mike's grandparents US Citizens.

A: Mike's grandparents were not employed in any capacity that would meet the statute's requirements to allow a dependent to satisfy the physical presence requirements. But, they were US citizens who moved to Canada at ages 35, and 37.

Scenario 5: Now that you have gathered all these facts, what is your course of action to assist PC in obtaining US citizenship for Mike?

A: You have two possible courses of action:

Option 1: You could have Mike's mother in Canada file an N-600K for him. She does not meet the physical presence requirement of 5 years before Mike's birth, 2 after the age of 14. However, her parents do meet the physical presence requirements and she can "borrow" the time from them pursuant to INA §322(2)(B) which states, "(2) The United States citizen parent— (B) has(or, at the time of his or her death, had) a citizen parent who has been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years."

Provided the US citizen parent can meet the other requirements of INA §322 which include:

- Child is under age of 18

- The child is residing outside of the United States in the **legal and physical custody** (need to submit copy of joint custody decree) of the applicant (in this case the USC mother)
- The child is temporarily present in the United States pursuant to a **lawful admission**, and is maintaining such lawful status. (Lawful admission such as a B-2)

Option 2: Mike's father who is recently naturalized can file an I-130/I-485 for Mike as the child of a USC. This will make Mike an LPR.

Thereafter, Mike's father files an N-600 for Mike under INA §320 which states,

“(a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

(1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

(2) The child is under the age of eighteen years.

(3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a **lawful admission for permanent residence**. {emphasis added}

In Option 2, Mike must become an LPR in order meet the requirements of INA §320.