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David Newman
Director, Office of Legal Affairs
Bureau of Consular Affairs, Visa Office
United States Department of State
Washington, D.C. 20522-0106

Re: Modernizing the Treatment of U.S. Citizenship Acquisition for Children Born Abroad after Conception through Assisted Reproductive Technology

Dear Mr. Newman:

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

AILA thanks the Department of State (State) for its willingness to consider AILA's suggestions regarding the treatment of families formed through assisted reproductive technology (ART). We are happy to know that State recognizes the longtime approach to ART set out in the Foreign Affairs Manual (FAM) has not kept pace with technological, social, and legal developments and that it intends to update those policies as appropriate.[1]

AILA urges State to modernize the FAM to better reflect the ways in which U.S. citizens now form families using ART. As described below, such revisions not only constitute good public policy, but they also reflect a better interpretation of the Immigration and Nationality Act of 1952, as amended (the INA).

While legislation will be required to bring some aspects of ART-related U.S. nationality law into the twenty-first century, the current language of the INA can be read to better recognize the modern reality of families formed through ART. In fact, the Ninth Circuit Court of Appeals has applied well-established canons of statutory construction to do just that. In the process, it expressly rejected the FAM's current implementation of the INA, which focuses solely on genetics.

[1] *See* OIG Inspection Report of Embassy New Delhi, India, at 36 (indicating that "CA is aware that regulations and laws have not ke[pt] pace with technology and [State] is working with legal advisers and other agencies to update policies as appropriate"); Note added on June 29, 2012 to 7 FAM 1441.1(b) (indicating that State is indeed reviewing its FAM policy on ART and citizenship).

The FAM's Current Genetic-Relationship Prerequisite for Acquiring U.S. Citizenship upon Birth Abroad:

In the FAM, State has focused solely on genetic relationships to determine parent-child relationships. It requires genetic parenthood for a U.S. citizen to transmit citizenship to a child abroad, focusing solely on the man who provided the sperm and the woman who provided the egg. This genetics-only approach is reflected in various sections of the FAM and accompanying notes, including 7 FAM 1131, 7 FAM 1441, 7 FAM 1445, 7 FAM 1110 Appendix A and 7 FAM Appendix E. It even extends to the determination of whether a child is "born out of wedlock" under INA §309: According to 7 FAM 1445.5-7, "[i]f the child's *genetic* parents were not married at the time of birth, the child can acquire citizenship only under Section 309 of the INA."

The FAM's sole focus on a genetic relationship does not originate from statutory language in INA §301. Rather, it appears to stem from the general Roman law concept of *jus sanguinus*. *See* 7 FAM 1131.1-1. While the United States may have indirectly inherited the general idea of acquiring citizenship upon birth to citizens abroad from this Roman law theory, that does not mean we should constrain our understanding of current U.S. immigration statutes in deference to that ancient doctrine, particularly when doing so means disregarding the statutory language of relevant acts of Congress.

Background and Relevant Precedent:

Unlike the current FAM, the INA only requires a genetic relationship for citizenship acquisition upon birth *out of wedlock* abroad.

The INA was drafted at a time when all children were assumed to be conceived through sexual intercourse. In enacting the INA, however, Congress did not focus solely on biological parentage and treat all children the same. Instead, it created a special category for children born "out of wedlock" in INA §309, requiring a "blood relationship" to demonstrate paternity in that context. All other children were regulated under INA §301, which is silent regarding any "blood relationship" requirement.

The Ninth Circuit Court of Appeals has recognized that this statutory distinction indicates Congress meant to respect the marriage of a child's parents and to recognize the widespread family-law presumption of parentage for children born in wedlock, regardless of whether they were the genetic progeny of both their married parents. *See Scales v. INS*, 232 F.3d 1159 (2000); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (2005). The court pointed out that the INA clearly indicates blood relationships are an absolute prerequisite for transmission of U.S. citizenship only with regard to the fathers of children born *out of wedlock*. It noted the well-established canon of statutory construction that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Scales*, at 1164-65. (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The court reasoned that the "blood relationship" requirement in INA §309 would have been superfluous if such relationships were required for citizenship transmission in *all* cases involving children born abroad. Finally, applying INA §301 in these cases, the court held that U.S. citizen husbands and wives of non-citizens transmit their U.S. citizenship to legally presumed, non-genetic children.[2]

[2] These cases dealt with the children of old-fashioned extramarital affairs, but their logic applies at least as strongly in cases involving planned pregnancies using ART.

In the process of deciding *Scales* and *Solis-Espinoza,* the Ninth Circuit considered and expressly rejected the FAM's narrow genetics-only approach to citizenship transmission. AILAnow encourage State to follow suit.[3]

Recommendations for FAM Revision:

Neither good public policy nor the text of the INA supports the FAM's current exclusive focus on genetics in determining parent-child relationships for purposes of citizenship transmission upon birth abroad. While we understand the attraction of a bright line genetic standard, simplicity should not trump the fundamentally important principle of family unity and the rights and needs of stateless children and married U.S. citizen parents. Instead, State should revise the FAM to create greater alignment with the language of the INA and its interpretation by the courts, as well as modern technology and the legitimate rights and expectations of families.

AILA suggests the following revisions to the FAM in order to bring it into better conformance with modern technology, family law, and social understanding:

- **The FAM should be revised to eliminate the requirement that *both* spouses in a married couple be *genetically* related to their child before applying INA §301**. The INA does not require this outcome. In fact, the best interpretation of the INA would respect the distinction between Sections 301 and 309 as recognized by the Ninth Circuit Court of Appeals. State and foreign family law do not pose this litmus test, and the FAM should follow the well-established principle that federal statutes respect state and foreign family law status to the extent that no federal statute provides otherwise. *See De Sylva v. Ballentine,* 351 U.S. 570, 580 (1956).

- **The FAM should be revised to respect the legal marriage of a child's parents in determining whether or not the child is born "out of wedlock," and apply INA §301 when the child is not.** Where a child's father or mother is married at the time of the child's birth, and the relevant jurisdiction recognizes that spouse as the child's legal parent, State should recognize that relationship as well. Of course, genetics could be relevant to establishing the parental relationship of the child with one spouse. But once that relationship is established, the marriage and the resulting legal presumptions of parentage should kick in. Section 301 should apply, and legal children born in wedlock should be recognized on the same basis as others, even if they are not genetically related to both parents. This too follows federal precedent and scholarly opinion.

- **The FAM should be revised to eliminate the absolute blood relationship requirement for citizenship acquisition under INA §301.** The Ninth Circuit Court of Appeals and legal scholars agree that this is the best reading of INA §301 in conjunction with INA §309. That reading is also consistent with the U.S. Supreme Court's opinions holding that it is rational to discriminate on the basis of parental sex in the citizenship acquisition context. The Supreme Court found that INA §309 was intended "'at least in part, to ensure that a person *born out of wedlock* who claims citizenship by birth actually shares a blood relationship with an American citizen.'" *Miller v. Albright,* 523 U.S. 420, 421 (1998). The Court justified the less favorable

[3] Scholarly articles have also examined the FAM's approach to this issue in the context of ART in great detail, rejecting it in favor of the Ninth Circuit interpretation of the INA. *See* Scott Titshaw, *Sorry Ma'am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47 (2010); Logan Bobo, *Note: Wedlock, Blood Relationship, and Citizenship*, 14 CARDOZO J.L. & GENDER 351 (2008).

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treatment of fathers of children born out of wedlock in order "to ensure that the child and citizen parent have some demonstrated opportunity to develop ... a relationship ... that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." *Nguyen v. I.N.S.,* 533 U.S. 53, 54 (2001). This rationale supports the classification under INA §301 of parents, who are legally bound to each other and legally responsible for children under state or foreign family law, regardless of their genetic relationship to their spouses' children.

- **The FAM should be revised to recognize that "civil unions" and other forms of registered partnership entailing legal parental presumptions and responsibilities substantially similar to marriage are analyzed under INA §301, rather than INA §309.** Section 309 expressly references children born "out of wedlock." This term does not fit children born in the unanticipated context of registered partnerships. Children born to parents in a legally registered partnership that extends the presumption of paternity/maternity and its legal consequences under state or foreign family law have little in common with children "born out of wedlock" and the need to require further evidence establishing "the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." Therefore, children born within a registered partnership fall more sensibly under INA §301. There is no logical need for the parent to demonstrate parent-child ties under INA §309 where those ties exist as a matter of law.

- **The FAM should be revised to clarify that children of same-sex spouses and registered partners should be recognized under INA §301 on the same basis as the children of different-sex spouses or registered partners.** The INA is silent on this point, and the Defense of Marriage Act (DOMA) does not control in this context. Section 3 of DOMA merely defines the terms "marriage" and "spouse" for federal purposes. Both the clear language of DOMA and Congressional intent support a very limited reading of that statute, which does not extend to any implied categorization of children as "born out of wedlock" based of their parents' sex.[4] This reading of DOMA's plain language is also supported by another cardinal principle of statutory interpretation, the rule that ambiguous statutes should be interpreted so as to avoid difficult constitutional questions. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Recent opinions by the U.S. Attorney General and several federal courts certainly evidence a serious issue regarding the constitutionality of Section 3 of DOMA, which would become even more serious if extended to deprive a couple's baby of U.S. citizenship.

AILA is aware that focusing solely on relationships that can be established through DNA testing alleviates concerns about fraud, but this policy is not based on sound statutory interpretation. More importantly, it profoundly harms U.S. citizens and their children and undermines the INA's deep concern with family unity. State has long examined birth certificates, medical records, marriage certificates, and state and foreign family law in order to reach determinations with regard to family status under the INA, and those same tools should be employed in this context as well when a fact is at issue that does not rely solely on a genetic relationship.[5]

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[4] Scott Titshaw, *A Modest Proposal to Deport the Children of Gay Citizens, & etc.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples,* 25 Geo. Immigr. L. J. 407 (2011) (describing in detail the legislative histories of both DOMA and the INA in this regard.)

[5] State's response to AILA's initial question indicated some concern regarding "baby supermarkets and the apparent womb-rental market." To the extent that there is a womb-rental market, it should not be substantially affected by the proposals above: after all, the FAM's current policy provides no protection to gestational surrogates in the most common ART circumstance, where a child is genetically related to a U.S. citizen intended parent. If "baby supermarkets" means the selling of unrelated children to U.S. citizens abroad, there is no reason to think the revisions suggested in this memo would exacerbate any such problem. Children conceived through ART would normally be genetically related to one intended

Conclusion

AILA respectfully requests that State amend the FAM to better comport with family law and real family expectations regarding children conceived through ART. The revisions recommended above not only fulfill those objectives, but they also comport better with relevant federal statutes than do current FAM provisions. The Ninth Circuit Court of Appeals has adopted this approach, expressly rejecting the FAM's genetics-only approach in favor of recognizing family relationships clearly established under state or foreign family law. The proposals regarding legally registered partnerships and same-sex couples are also well supported by reason, canons of statutory construction, and Supreme Court precedent.

Sincerely,

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parent, and that relationship could be established through a DNA test. The other parent's relationship would be demonstrated through the same sort of legally binding evidence of marriage and birth in wedlock (or registered partnership), which is used in other contexts.