

2.1 Determining Whether Your Client Is a U.S. Citizen

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2.1 Determining Whether Your Client Is a U.S. Citizen

A. Generally

If your client is a U.S. citizen or a U.S. national, he or she is not subject to removal or most other adverse immigration consequences (unless, in the case of a naturalized citizen, citizenship has been revoked because naturalization was obtained through some type of misrepresentation).¹

A “national” is a broader term that not only refers to any person who is a U.S. citizen, but also covers a person born in “outlying possessions of the United States.” *See* INA § 101(a)(22)(A), 8 U.S.C. § 1101(a)(22)(A); INA § 308, 8 U.S.C. § 1408. The outlying possessions of the United States are American Samoa and Swains Island. *See* INA § 101(a)(29), 8 U.S.C. § 1101(a)(29). Because “nationals” who are not U.S. citizens comprise such a small group, and because they are treated no differently than citizens for immigration purposes, this manual uses the term “citizen” to cover both U.S. citizens and noncitizen nationals.

B. Obstacles to Understanding Your Client's Status

Generally, identifying whether your client is not a U.S. citizen is a straightforward task. There are a few caveats, however. Criminal defendant clients do not always trust appointed attorneys, especially at the first meeting. They may fear that informing you of their noncitizen status could actually trigger immigration consequences.

Practice Note: Your client may have no familiarity with the adversarial process that is part of the U.S. criminal justice system—he or she may not understand that appointed counsel is independent of the government. When interviewing a client for the first time, it is helpful to reassure the client about confidentiality and that you have no association with U.S. Immigration and Customs Enforcement (ICE).

1. U.S. citizens can lose the ability, however, to submit a family visa petition for a noncitizen relative. The Adam Walsh Act, passed in 2006, imposes immigration penalties on U.S. citizens and permanent residents who are convicted of specified crimes relating to minors, including sex and kidnapping offenses. Certain convictions would prevent them from filing a visa petition on behalf of a close family member. *See* Section 402 of the Adam Walsh Act; INA § 204(a)(1)(A)(viii), (B)(i), 8 U.S.C. § 1154(a)(1)(A)(viii), (B)(i). For example, if your U.S. citizen client pleads guilty to indecent liberties, he may not be permitted to file a visa petition for a noncitizen relative.

Other times, noncitizen clients may simply be unaware that they are not U.S. citizens, particularly those who came to the U.S. at a young age. They may mistakenly assume that they are citizens because they have lived in the United States for so long. Or, some noncitizens may interpret the question, "Are you a citizen," to be the same as "Are you here legally?" Thus, they may erroneously answer yes simply because they have a green card (for a discussion of people with green cards, see *infra* § 2.2B, Lawful Permanent Resident Status). It therefore may be necessary to clarify an affirmative response with follow-up questions.

Occasionally you will encounter a client who may be a citizen without realizing it, as in the case of someone who automatically derived citizenship from a family member without ever having taken any affirmative step. Therefore, some cases may require investigation beyond simply asking your client whether he or she is a citizen.

Practice Note: It is helpful to begin the citizenship inquiry by asking your client where he or she was born. If the person was not born in the U.S., then ask follow-up questions about citizenship and how, if at all, it was obtained. See *infra* § 2.4, Sample Questions to Identify Client's Immigration Status and Eligibility for Relief.

C. Who Are U.S. Citizens

Generally, your client is a U.S. citizen if he or she is within one of the following categories.

Place of Birth. Any person born in the United States is a U.S. citizen, except for certain children of foreign diplomats. See INA § 301(a), (b), 8 U.S.C. § 1401(a), (b). A person is also a U.S. citizen if he or she was born in Puerto Rico, the U.S. Virgin Islands, Guam, or American Samoa and Swains Island, as well as those born in the Northern Mariana Islands after November 4, 1988 and in many cases before. See INA §§ 301(a), (b), 302, 304–07, 8 U.S.C. §§ 1401(a), (b), 1402, 1404–07 (citizen by birth in the U.S., Puerto Rico, U.S. Virgin Islands, Guam, or Commonwealth of the Northern Mariana Islands); INA § 308, U.S.C. § 1408 (noncitizen national by birth in American Samoa and Swains Island).

Naturalization. A person who is born outside the United States may become a U.S. citizen by petitioning for and being granted citizenship through the "naturalization" process. This process generally involves passing a civics and English test, establishing "good moral character" for a specific period, and participating in a swearing-in ceremony. See INA §§ 310–319, 8 U.S.C. §§ 1410–1430.

"Acquired" Citizenship from U.S. Citizen Parent. A person is a U.S. citizen if he or she was born outside the United States but "acquired" U.S. citizenship at birth by having been born to a U.S. citizen parent or parents. The current law on "acquired" citizenship is contained in INA §§ 301(c), (d), (e), (g), (h), 303, 8 U.S.C. §§ 1401(c), (d), (e), (g), (h), 1403; and INA § 309, 8 U.S.C. § 1409 (child born out of wedlock). Thus, your client

might be a U.S. citizen and not know it. Many people born in other countries unknowingly inherit U.S. citizenship from their parents under these provisions.

“Derivative” Citizenship from Naturalized U.S. Parent. A person is a U.S. citizen if he or she was born outside the United States but “derived” U.S. citizenship as a minor when one or both of his or her parents became a naturalized citizen. The current law on “derivative” citizenship is contained in INA § 320, 8 U.S.C. § 1431. Again, your client might be a U.S. citizen and not know it.

Practice Note: You should ask your client whether any of his or her parents or grandparents were born in the United States or at any point obtained U.S. citizenship, which could give your client “acquired” or “derivative” citizenship even if he or she was not born in the U.S. or U.S. territories. The rules surrounding “acquired” and “derivative” citizenship are complicated, however, and depend on several factors, including an ever-changing set of laws that are not retroactive. Because this is a particularly difficult area of law, if there is any question regarding your client’s citizenship, you should contact an immigration expert for further assistance.

Documentation of U.S. Citizenship. U.S. citizens may have one of the following:

- U.S. Passport
- U.S. Birth Certificate
- U.S. Certificate of Citizenship
- U.S. Certificate of Naturalization

Sample images of some of these documents appear at the end of this chapter.
