I. Married Male Couple

Was child born during the marriage?2

Yes

Was child born at a time when you or your spouse was a US citizen?

No

No birthright citizenship (at least one parent must be a US citizen at time of birth)

Yes

Were both parents US citizens at time of birth?

No

Out-of-Wedlock Biological Requirement: Is one parent a genetic parent? (INA §309(a))

Yes

Does genetic parent satisfy applicable US residency requirement? (For children born to two US citizen parents any period of residence in the US prior to child’s birth is sufficient (INA § 301(c)) . However, State Department is erroneously requiring same-sex married parents to satisfy more onerous residency requirement applicable to couples where one parent is a non-citizen (i.e. 5 years in the US (at least 2 after age 14) prior to child’s birth (INA § 301(g))

No

No birthright citizenship (because no blood relationship to a US citizen parent)

Birthright citizenship

No birthright citizenship

Out of Wedlock Biological Requirement: Is US citizen parent the genetic parent? (INA §309(a))

Yes

Does genetic parent satisfy applicable US residency requirement? (Residency requirement for children born to one US citizen parent and one non-citizen parent is 5 years in the US (at least 2 after age 14) prior to birth (INA § 301(g))

No

No birthright citizenship (because no blood relationship to a US citizen parent)

Yes

Birthright citizenship

No birthright citizenship

Was one parent a US citizen and one parent a non-citizen?

1 This chart is intended to generally illustrate the effect of the State Department’s erroneous policy declaring children born abroad to same-sex married parents “born out-of-wedlock” on birthright citizenship claims. It does not constitute legal advice, nor is it meant to cover every possible scenario that may arise. Moreover it only analyzes claims by children born to two US citizen parents or where one parent is a US citizen and the other a non-citizen. For specific advice, you should consult an experienced immigration attorney.

2 While the chart is intended to provide guidance regarding claims of children born to married same-sex parents (who are erroneously declared out of wedlock), if a child was born at a time when their parents were not married (and hence appropriately considered out-of-wedlock) the same analysis would apply.
II. Married Female Couple

Was child born during the marriage? [Yes/No]

**Out of Wedlock Biological Requirement**: Is one parent the genetic or gestational (and legal) parent? (INA § 309(c))

- Yes
  - Does genetic/gestational parent satisfy applicable US residency requirement? (Out of Wedlock Residency Requirement: If child born between 12/23/1952 and 06/12/2017 – one year of continuous residence prior to birth; after 06/12/17 – 5 years of residence (at least 2 after age 14) prior to birth (INA § 309(c); Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017)). NB: This is more onerous than the residency requirement for children born in-wedlock to two US citizen parents (parent need only show they resided in the US at any time prior to the birth of the child) (INA § 301(c))
  - Yes
    - Birthright citizenship
  - No
    - No birthright citizenship

- No
  - Was one parent a US citizen and one parent a non-citizen? [Yes/No]
    - Yes
      - Out of Wedlock Biological Requirement: Is US citizen parent the genetic or gestational (and legal) parent? (INA § 309(c))
        - Yes
          - Does genetic/gestational parent satisfy applicable US residency requirement? (Out of Wedlock Residency Requirement: For child born between 12/23/1952 and 06/12/2017 – one year of continuous residence prior to birth; after 06/12/17 – 5 years of residence (at least 2 after age 14) prior to birth) (INA § 309(c); Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017)).
        - Yes
          - Birthright citizenship
        - No
          - No birthright citizenship
    - No
      - No birthright citizenship