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The Undiscovered U.S. Immigration Solution Lurking Beneath the Surface: Derivative Citizenship

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Douglas J. Halpert

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A multitude of factors can drive a Canadian citizen to want to relocate to the United States either temporarily or permanently. Some Canadian citizens wish to attend college, graduate or trade school in the United States. Others receive a temporary or permanent job offer from a U.S. company, or wish to indulge their entrepreneurial spirit by establishing or expanding their own business south of the border. Still others may be enticed to travel to the U.S. in search of romance, fame or fortune.

For managers and executives with multi-national companies, and other well-connected or superbly qualified individuals, there may be a quick and solid U.S. immigration solution available. For others, who are not connected to a sponsoring U.S. employer or close relative, or who are of limited means, the road to securing a temporary or permanent U.S. visa may be very difficult. In some instances, there simply may be no viable basis for applying for a U.S. visa. Regardless of whether a Canadian citizen has an ability to pursue a U.S. work visa to temporarily work or study in the U.S. or to permanently reside there, a claim to U.S. citizenship would endow the Canadian citizen with the greatest degree of freedom to enjoy life in the U.S. without restrictions.

Many Canadian citizens incorrectly assume that the only ways to attain U.S. citizenship are if one is born in the U.S. or if one first becomes a U.S. permanent resident (a "green card" holder) and then applies for naturalization. Few Canadians are aware that having a parent who was born in the U.S. may have transmitted a claim to derivative U.S. citizenship to them at the time of their birth. In fact, the transmitting U.S. citizen parent may not even need to be alive to confer a claim upon the Canadian-born child. Many cases I have handled over the decades have been asserted based upon the U.S. citizenship of my Canadian client's deceased parent.

The issue of which foreign-born children of U.S. citizens should have a claim to the U.S. citizenship has been debated by the U.S. Congress, which makes U.S. laws, for many generations. As a result, the law relating to the transmission of derivative citizenship has frequently changed. Since the 1930s, there have been five major overhauls of the laws that govern who can advance a claim to U.S. derivative citizenship. Consequently, when considering a derivative citizenship claim, the first step is to determine the claimant's birth date so as to identify the law governing the claim. [It is advisable not to use the U.S. Consulate's online questionnaire for this purpose since you may unwittingly undermine the credibility of your claim before sorting out the facts on your own or with the aid of a lawyer.] Then the lawyer examines the law to match the facts against the legal requirements. Key components of the derivative citizenship laws include but are not limited to:

- whether the foreign born applicant asserting a claim has one U.S. citizen parent or two;

- whether the U.S. citizen parent was physically present in or resided in the U.S. prior to the child's birth and, if so, for how long;
- what age the U.S. citizen parent was when residing in the U.S. prior to the child's birth;
- whether the foreign national child was born out-of-wedlock, and which parent (mother or father) is or was a U.S. citizen.

Aside from the law that applies to a particular date of birth, the rules are riddled with exceptions resulting from U.S. government interpretations and case law.

Examining some common examples where the Canadian-born child has one U.S. citizen parent and one Canadian citizen parent illustrates how the law applies. If a child was born outside the U.S. to one U.S. citizen parent between December 24, 1952 and November 13, 1986, the child can make a claim to derivative U.S. citizenship if he or she can prove that the U.S. citizen parent was physically present in the U.S. for at least 10 years prior to the child's birth, at least five of which years were after the U.S. citizen parent turned 14 years of age. For Canadian-born children born after November 14, 1986 to one U.S. citizen parent and one non-citizen parent, the law changed to require that the U.S. citizen parent must have been physically present in the U.S. for five years prior to the child's birth, at least two of which were after the parent turned 14.

The law used to be more liberal prior to the above-referenced periods of time. For example, for Canadian-born individuals whose birth dates are before May 24, 1934, the only requirement is that the U.S. citizen parent must have been present in the U.S. at any time prior to the child's birth. During the period between May 24, 1934 and January 13, 1941, the law added a retention requirement that required the Canadian-born claimant to have accumulated certain periods of physical presence in the U.S. between the ages of 14 and 28. However, due to later changes, noncitizens who failed to comply with these retention requirements and lost their citizenship may have it restored under certain circumstances. Some of the most rewarding cases I have handled involved helping Canadian citizens to secure U.S. citizenship that they had lost.

Even when one matches the law with the facts and believes that one may qualify, the battle to successfully attain a U.S. passport is far from over. In fact, in many cases I have handled, assertion of the claim is the biggest challenge. This is because the claimant must complete forms and submit extensive documentation including but not limited to birth certificates, marriage certificates and, of course, proof of the physical presence of the U.S. citizen parent for the prescribed periods of time prior to the Canadian child's birth. Especially in cases for older applicants, immigration, property ownership, school, church, medical and other records may not be immediately available. However, some of the most interesting and exciting cases have involved a search for records in county real property offices, schools, and in census reports. Some of these searches resulted in my clients reconnecting with relatives that they had lost touch with to see what records they had maintained, which resulted in not only some wonderful old documents that helped the citizenship claim to succeed, but also in the restoration of a valuable family friendship.

After the legal analysis and the document hunt, the Canadian citizen making a claim to derivative (and dual) U.S. citizenship typically books an appointment to apply for a U.S. passport (if the applicant is over 18) or to file a Consular Report of Birth Abroad (if the applicant is under 18 and outside the U.S.), and brings the host of required birth, marriage, and other certificates, as well as the documentary proof of the satisfaction of any U.S. residence. The U.S. consular officer reviews the evidence and typically makes an on-the-spot decision. The applicant should understand that he or she has the burden of proof, and challenging fact patterns can exist where, for example, the U.S. citizen parent can prove physical presence at a particular point in time, and at a later juncture, but not have any evidence of a continued U.S. presence in the period in between those dates. Ultimately, the U.S. consular officer will determine whether the evidence meets the threshold and the collection and presentation of the documentation in an effective fashion can make the difference in such cases.

From coast to coast, there are many Canadian citizens who have claims to dual U.S. citizenship through a

U.S. citizen parent or parent, whether alive or deceased, that they are entirely unaware of. Some may be the grandchildren of Canadians who went down to the U.S. to work on the railways, had a child while in the U.S., and then brought their children back north to Canada, as was common in the late 1800s and early 1900s. Others are the children of those who came to the U.S. on temporary work assignments or to attend school. Some, even when made aware, may not choose to act because of their notions about life on the south side of the border, for reasons of Canadian pride, or for tax reasons. To others, it may be an invaluable and emotionally charged birthright that they wish to claim as part of their bond with their U.S. citizen parent, or to capitalize on a career opportunity. There is no more majestic immigration solution than when after months of gathering evidence and having an interview to submit one's application, one steps outside a U.S. Consulate holding a small American flag that flaps in the breeze to signify approval as a newly minted U.S. citizen.