

## A Plan to Address Birth Tourism

By Malcolm Pearl

### Summary

One aspect of the debate over immigration concerns how to curb the number of children born to temporary or illegal alien residents in the United States who then become U.S. citizens, based on the current interpretation of the 14th Amendment to the U.S. Constitution. Trying to pass legislation that changes birthright citizenship rules likely will face several legal and political challenges. A smaller step that can go long way in reducing the problems associated with this practice, and one fraught with fewer potential land mines, is to amend the Immigration and Nationality Act (INA) to detect, deter, and penalize foreigners who come to the United States on tourist or other temporary visas for the purpose of giving birth and returning home. Presently there is no prohibition, nor concerted U.S. government effort to stop, individuals from taking advantage of our liberal citizenship policies in order to make their children instant U.S. citizens.

While exact numbers are impossible to come by, statistics on foreign visitors and anecdotal evidence suggest that easily tens of thousands of women on tourist or business visas (B-1 and B-2 visas in consular parlance) give birth in the United States every year.<sup>1</sup> Consular officers around the globe share similar stories with one another about meeting foreign visa applicants who have given birth to a child or, more likely, children, in the United States and who returned to apply for new visas. The market for birth tourism has gotten so big that some foreign travel agencies offer birth tourism packages with multiple-month hotel stays to mothers-to-be who plan to travel and give birth in the United States.<sup>2</sup> And some of these facilitators have opened what can only be described as “maternity halfway houses” for expecting mothers in the United States.<sup>3</sup>

These newborn children spend only a few weeks in the United States before collecting their U.S. passports and heading back to Seoul, Karachi, Caracas, or wherever. They likely will never learn the Pledge of Allegiance, or about our Founding Fathers, and sometimes they do not even learn English; in other words, they never learn what it is to be an American. Yet these children will retain the full benefits and privileges of U.S. citizenship for life. In my time abroad, it was not uncommon to find adults who were the product of birth tourism saying, “Oh, I’m not an American, I just have the [U.S.] passport.”

Furthermore, under the Child Citizenship Act of 2000, these children, most of whom have only a superficial connection to the United States, can easily pass along their U.S. citizenship to their own future offspring.<sup>4</sup> The Act allows children of American citizens born abroad who do not qualify for citizenship at birth to gain citizenship automatically once they enter the United States on an immigrant visa (which at most embassies can be issued in less than two months after the parent has filed an immigrant petition). Once the child arrives at a U.S. airport, the parents can apply for a passport for the child, and then head back abroad. This cycle can continue in perpetuity, with the end result being multiple generations of American citizens who cumulatively spend only few months in the United States.

In my experience as a consular officer, I encountered on a daily basis visa applicants who had previously given birth in the United States and who I strongly suspected were intending to give birth in the United States again. The most frustrating aspect of this whole process was that my superiors expressly told me that I could do nothing

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to stop it. As it stands now, the State Department's Bureau of Consular Affairs has instructed consular officers that they are not allowed to ask visa applicants if they are pregnant or if they intend to give birth while visiting the United States, and cannot deny visas to applicants who have previously traveled to the United States with the apparent sole intention of giving birth to a child. Under current guidelines, unless it appears that applicants are intending to travel for the purpose of committing a criminal act, the main criteria for visa eligibility are 1) meeting the requirements and purpose for the visa category, and 2) the applicant's likelihood of returning to the country of origin.

## Step 1: No Fly-By Births

The first step Congress can take to address the problem of birth tourism is to amend the INA, which governs most visa rules and eligibility, to make traveling to the United States with the primary intention of giving birth a visa ineligibility and bar to admission. This will empower consular officers (and strengthen the authority of immigration inspectors at the ports of entry) to ask applicants if they are pregnant or intend to give birth in the United States and to refuse a visa or a request for admission on those grounds. Because no traveler has a right to a tourist visa or to admission even if the traveler has a visa, the burden of proof will be on applicants to show that they are not pregnant or intending to give birth in the United States when applying for a visa. Shifting this burden on to the applicant is a significant feature of current U.S. immigration law with respect to temporary visitors, and is critical to the law's effectiveness.

Congress also should allow consular officers to issue limited-duration visas specifically to applicants who are suspected of traveling here to give birth. Currently, consular officers do have the authority to issue limited-duration visas, but are officially discouraged from doing so. While some officers continue to use their broad authority in cases where they suspect applicants are traveling to give birth in order to prevent multiple episodes of birth tourism, it would send a strong message as to the seriousness of the issue if Congress legislatively sanctioned consular officers to limit visa duration to reduce the frequency of birth tourism. Since most applicants are issued tourist visas with a five-year validity, applicants can have multiple children in the United States before a consular officer has a chance to reexamine the case.

## Step 2: No Free Rides

In addition to trying to prevent foreigners from coming to the United States to give birth, Congress should also direct the State Department and the Department of Homeland Security to penalize temporary visitors who have received taxpayer-funded public assistance to cover the associated costs of their birth, or who have had the expenses waived by the hospital. In one of the more galling examples of government loopholes, a foreigner can come to the United States, give birth in a U.S. hospital, which even without complications can routinely cost close to \$9,000,<sup>5</sup> and return to her country of origin without paying her bills and suffer no consequences when applying for future tourist visas. This is possible because of provisions under the Emergency Medical Treatment and Active Labor Act (EMTALA) that require Medicare-participating hospitals (virtually all hospitals) to provide emergency medical services, including active labor, regardless of an individual's citizenship and ability to pay.

While the likelihood or past history of dependence on public assistance would theoretically disqualify someone for admission as a "public charge," under the current guidance provided to State Department and Homeland Security personnel, "non-cash benefits (other than institutionalization for long-term care) are generally not taken into account for purposes of a public charge determination."<sup>6</sup> This includes short-term emergency care, such as maternity stays, that fall under the EMTALA or other provisions. Congress should act so that all applicants who have had children in the United States in the past must demonstrate to the satisfaction of the consular officer that all medical bills in connection with the birth were paid in full by the applicant or the applicant's insurance — and not by Medicaid or other publicly funded health care programs.<sup>7</sup> Failure to provide this evidence would result in the applicant becoming ineligible for future visas. This provision would be analogous to current regulations that prevent U.S. citizens who owe more than \$2,500 in child support from obtaining a passport.

In addition, Congress should mandate procedures to track those foreign visitors who have children here and try to prevent repeated attempts at birth tourism. The passport application is a natural checkpoint opportunity to track these individuals, because both parents are required to appear in person at a passport agency or accredited facility to apply for a newborn's passport. Adjudicators should be instructed to place a visa lookout in the Consular Lookout and Support System (CLASS) for any parent who is in the United States on a short-term temporary visa and applying for a child's passport. This information will then be available to both consular officers abroad and Customs and Border Protection at the port of entry to be on the lookout for repeat offenders. This system will have the added benefit of finally allowing the government to estimate the number of children born as a result of birth tourism, a figure that currently is widely contested. Congress can go a step further by making preventing birth tourism a priority in the State Department visa fraud prevention programs.

### Step 3: Revise the Child Citizenship Act of 2000

The original intention of the Child Citizenship Act of 2000 was to expedite the naturalization of children born abroad who were adopted by U.S. citizens living here. However well-intentioned, the law as it stands now also allows U.S. citizens living abroad with tenuous ties to America to easily and quickly pass along citizenship benefits to their children. And this practice can continue to occur across generations *ad infinitum*.

To remedy this loophole, Congress should amend the Act to allow automatic citizenship to children who are admitted to the United States as permanent residents only if the U.S. citizen parent has been physically present in the United States for at least five years, at least two of which were after the age of 14 — the same requirements for biological parents to transmit U.S. citizenship to their children at birth. This change still would allow children adopted abroad by U.S. citizens living in the United States to benefit from expedited naturalization. At the same time, it would restore the conditions that existed prior to the Act for those U.S. citizens who have spent little time in this country and give birth abroad: While they would still be permitted to petition for their children to have a green card, the children would need to go through the normal naturalization process to become citizens. This process would typically take three to five years of physical residency in the United States.

### Conclusion

After spending a few months on the visa line, most consular officers, regardless of prior political persuasion or attitudes about immigration in general, become frustrated with a broken immigration system that is continually abused by foreigners. Consular officers want to prevent birth tourism, but are left powerless because of an inadequate congressional mandate to take on this problem. Instead of trying to amend the Constitution, proponents of sensible immigration policy can make a meaningful impact by changing the INA to provide tools to detect, deter, and penalize individuals who travel to the United States for the purpose of obtaining U.S. citizenship for their newborn children. The most important first step in achieving those goals is to empower consular officers to take on this mission.

## End Notes

<sup>1</sup> W.D. Reasoner, “Birthright Citizenship: A National Security Problem in the Making?” Center for Immigration Studies, March 2011, <http://cis.org/birthright-citizenship-for-visitors>.

<sup>2</sup> Devin Dwyer, “A New Baby Boom? Foreign ‘Birth Tourists’ Seek U.S. Citizenship for Children,” ABC News, April 14, 2010.

<sup>3</sup> Ching-Ching Ni, “‘Birthing tourism’ center in San Gabriel shut down,” *Los Angeles Times*, March 25, 2011.

<sup>4</sup> The Child Citizenship Act of 2000 provides that alien children of at least one U.S. citizen automatically acquire U.S. citizenship upon their entrance to the United States pursuant to lawful admission as a legal permanent resident. Because gaining admission as a legal permanent resident for children of U.S. citizens takes only a few weeks of wait time, in theory, a U.S. citizen born during a birth tourism trip can pass along his or her citizen to a child by bringing the child to the United States for one day and then returning back to the country of origin. This cycle can continue *ad infinitum*.

<sup>5</sup> Stella Chang, “The Healthcare Costs of Having a Baby,” Thomson Healthcare, July 2007.

<sup>6</sup> For the Department of Homeland Security’s guidance on public charge, see <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=829b0a5659083210VgnVCM100000082ca60aRCRD&vgnnextchannel=829b0a5659083210VgnVCM100000082ca60aRCRD>.

<sup>7</sup> Richard Wolf, “Rising health care costs put focus on illegal immigrants,” *USA Today*, January 22, 2008.