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US IMMIGRATION & NATIONALITY LAW

# JAEN V. SESSIONS: THE SECOND CIRCUIT REMINDS US THAT GOVERNMENT MANUALS AREN'T ALWAYS RIGHT

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For many years, the policy guidance of the Department of State (DOS) and U.S. Citizenship and Immigration Services (USCIS) has required that a child show a biological relationship with a U.S. citizen parent in order to acquire U.S. citizenship from that parent. Initially, this meant a genetic relationship; recently, an exception was made for gestational mothers who were recognized as the legal mothers of the children to whom they gave birth even if they had used a donor egg to do so, but the government continued to insist that some biological relationship was required in order for a child to acquire citizenship at birth from a parent recognized as such by applicable local law. The Court of Appeals for the Second Circuit, in its decision issued last week in *Jaen v. Sessions*, has now become the second Court of Appeals to point out that this policy has no basis in the Immigration and Nationality Act. Rather, under the law, a U.S. citizen who is a parent of a child as a result of marriage can also pass along U.S. citizenship to that child.

Levy Alberto Jaen was born in Panama in 1972 to a non-U.S.-citizen mother, Leticia Rogers Boreland, who was then married to a naturalized U.S. citizen named Jorge Boreland. According to Levy Jaen's Panamanian birth certificate, however, his father was another man named Liberato Jaen. Levy Jaen was initially raised by his grandparents in Panama, but then came to the United States on a nonimmigrant visa at age 15, in 1988, and lived here with the Boreland family.

After Levy Jaen was convicted of controlled substance violations in 2008 and 2014, Immigration and Customs Enforcement (ICE) sought to remove him from the United States. He moved to terminate the proceedings in 2016 on the basis

that he was a U.S. citizen, but the Immigration Judge (IJ) in his case denied the motion and the Board of Immigration Appeals (BIA) affirmed. He remained detained as a purported non-citizen until April 13, 2018, when the Second Circuit granted his petition, ordered his release, and indicated that an opinion would follow.

In its opinion, the Second Circuit held that Jaen had acquired U.S. citizenship at birth from Jorge Boreland, his U.S. citizen parent, under former INA § 301(a)(7), 8 U.S.C. § 1401(a)(7). That provision is similar to current INA § 301(g), except that it required a different period of physical presence in the United States prior to the birth by the U.S. citizen parent (then ten years, at least five of which had to be after the age of fourteen, as opposed to the current requirement of five years, at least two of which have to be after the age of fourteen). Like current INA § 301(g), former 301(a)(7) referred to one "born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States".

The government had sought to interpret this language as referring only to biological "parents". As the Second Circuit pointed out, however, the historic common-law definition of the term "parent" included a common-law presumption of legitimacy that held a married man to be the father of a child to whom his wife gave birth. As it was put in Blackstone's Commentaries, "Pater est quem nuptiae demonstrant"—the nuptials show who is the father. *Jaen*, slip op. at 13 & n. 5. This common-law definition of parent, the Second Circuit held, would be sufficient to render Jorge Boreland the parent of Levy Jaen for citizenship purposes even if it were not also the case, as it was, that he would have been recognized as Levy Jaen's father under New York law.

The government urged the Court of Appeals to follow the guidance in the DOS Foreign Affairs Manual (FAM) and USCIS Policy Manual, which required biological parenthood to qualify as a "parent". But as the Second Circuit noted in a footnote, those internal guidance manuals are not entitled to *Chevron* deference. *Jaen*, slip op. at 11-12 n.4. Nor did the Second Circuit evidently find them persuasive.

As the Second Circuit observed, it was not the first Court of Appeals to hold that the father by marriage of a child need not have a biological link to that child in order to transmit U.S. citizenship to that child. The Ninth Circuit had held to the same effect in *Scales v. INS*, 232 F.3d 1159, 1161 (9th Cir. 2000). Indeed, the

Ninth Circuit in *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), extended this holding to cover a man whose U.S. citizen mother was not his biological mother but had been married to his biological father at the time of his birth. (It remains to be seen whether the Second Circuit's holding in *Jaen* will be extended in the same way, as the Second Circuit did not have occasion to address this fact pattern.)

Although the Second Circuit's decision did not "break . . . new ground" in finding Jaen to be a citizen through his U.S. citizen parent Jorge Boreland, *Jaen*, slip op. at 19, the government had nonetheless detained Jaen for nearly two years while the proceedings were ongoing. Judge Pooler filed a separate concurring opinion in which she noted that she was troubled by this, as well as by the government's decision to seek summary affirmance of the IJ's erroneous decision that Jaen was not a U.S. citizen. It appears that the government may have been blind to the possibility that its internal manuals were legally incorrect.

In a world where USCIS and DOS decisions often cite to the USCIS Policy Manual, the USCIS Adjudicator's Field Manual (now gradually being replaced by the Policy Manual), or the DOS Foreign Affairs Manual, it can be easy to forget that those guidance manuals are not the law. While it can be appropriate to hold the agencies to the terms of their published manuals when those terms are advantageous, it is not appropriate to assume that an adverse statement of the law in an agency manual is necessarily accurate. When USCIS or DOS get the law wrong in their manuals, federal courts can and will step in to correct them. But this will only happen if attorneys, and their clients, ask the federal courts to do so.