CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

THE ABSURDITY OF THE BIRTHRIGHT CITIZENSHIP ACT OF 2011

Posted on January 15, 2011 by Cyrus Mehta

By Cyrus D. Mehta

When I first glanced at he Birthright Citizenship Act of 2011, H.R. 140, introduced by Representative Stephen King (R-IA) on January 5, 2011, http://www.opencongress.org/bill/112-h140/show, I figured that it was not worth my time to even write about it. I read it once more, and it dawned upon me that I could have some fun commenting on it and highlighting its absurdity. The granting of automatic citizenship to a child born in the US is rooted in the first sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." A list of resources can be found on Bender's Immigration Bulletin at http://bit.ly/f5pX7U. And here is a good policy policy piece from AILA, http://www.aila.org/content/default.aspx?docid=34106 and a great blog with more resources, http://ijjblog.org/blog-mt/dan/2010/11/birthright_citizenship_under_t_1.html.

Nobody is attempting the extremely arduous task to amend the hallowed Fourteenth Amendment, although opponents of birthright citizenship are proposing a reinterpretation of the phrase "subject to the jurisdiction thereof" by denying the children of illegal immigrants and temporary residents from claiming US citizenship. Well over a century ago in United States v. Wong Kim Ark, 169 U.S. 649 (1898), the Supreme Court held in no uncertain terms:

The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or

qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owning direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciles here, is within the allegiance and the protection, and consequently subject to the jurisdiction of the United States.

H.R. 140 seeks to amend section 301 of the Immigration and Nationality Act, which replicates the 14th amendment, by not just depriving the children of illegal immigrants from automatically becoming citizens, but by narrowly limiting birthright citizenship to a person born in the US to parents, one of whom is –

1) a citizen or national of the United States;
2) an alien lawfully admitted for permanent residence in the United States whose residence is in the United States; or
3) an alien performing active service in the armed forces (as defined in section 101 of title 10, United States Code).

This bill, if enacted into law, would even deprive the child of a nonimmigrant parent from automatically becoming a US citizen who is lawfully in the US in H-1B status, and approved for permanent residence but for the fact that she is stuck in the employment-based preference backlogs for many years. What would be the status of such a child? H.R. 140 is silent. Would this poor child be rendered deportable the minute it is born by virtue of being an alien present in the US without being admitted or paroled under INA section 212(a)(6)(A)(i)? Or would the child be given a dependent H-4 status? What if the parents of the child have two different statuses – one on an H-1B visa and the other on a B-1 business visa? Will the child get the more solid H-4 status or the more transient B-2 status as a visitor for pleasure?

It is true that a diplomat, in accordance with *Wong Kim Ark*, is not subject to the jurisdiction of the US as a diplomat enjoys immunity from US law, but a child of such a diplomat born in the US is at least deemed to be a permanent resident. *See Matter of Huang*, Interim Decision #1472 (BIA May 27, 1965). On the other hand, it is not so apparent that conferring some kind of legal status short of citizenship is the intent of H.R. 140, which seeks to keep children in the same

illegal status as their parents if born in the US.

The only historic exceptions to those subject to the jurisdiction of the US are diplomats and enemies during the hostile occupation of a part of US territory. Congress even passed legislation to ensure that children of all Native Americans are US citizens. *See* INA section 301(b). An illegal immigrant is undoubtedly subject to the jurisdiction of the US. If he commits a crime, he will surely be prosecuted. He can sue and be sued in US courts, and Uncle Sam gleefully collects his taxes and his contributions to social security (even if he is unable to claim it later on). You cannot liken an immigrant who has entered the US without inspection with the objective of finding work to a member of a hostile force occupying a part of the US. When a hostile force occupies any part of the US, the laws of the US are no longer applicable in the occupied territory. Even a terrorist who enters the US in a nonimmigrant status, such as on an F-1 student visa with an ulterior motive to commit an act of terrorism, unlike a member of a hostile occupying force, is subject to the jurisdiction of the US as she can be convicted or treated as an enemy noncombatant, and if she gives birth to child here, the child ought to be a US citizen under the Fourteenth Amendment.

Moreover, often times being legal or illegal is part of the same continuum. A thoroughly undocumented person, when placed in removal proceedings, can seek cancellation of removal under stringent criteria and become a permanent resident. Such a person whose visa has long since expired could get wrapped up in a romantic encounter with a US citizen, marry, and dramatically convert from illegal to permanent resident within a few months. At times, Congress bestows such permanent residency through section 245(i) or the LIFE Act, or a person can obtain Temporary Protected Status if a calamity were to befall her country. The following extract from the Supreme Court's decision in *Plyler v. Doe*, 457 US 202 (1982), which held that undocumented children could not be deprived of a public education:

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in the country, or even become a citizen.

Under H.R. 140, one who is so unlucky to have been born a day before his parent adjusted to permanent resident status would be in some kind of

immigration purgatory. The Birthright Citizenship Act of 2011, along with similar proposals from states to issue two types of birth certificates, is not just unconstitutional but is also shockingly absurd!