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Immigration Benefits for Children Born Out of Wedlock and for Their Natural Fathers: A Survey of the Law

PAUL WICKHAM SCHMIDT*

The United States Supreme Court in Fiallo v. Bell recently upheld section 101(b)(1)(D) of the Immigration and Nationality Act which excludes natural fathers and their illegitimate children from preferred immigration status. After exploring the distinction between legitimate and illegitimate children, the author discusses three ways by which an illegitimate child may attain legitimate status through his natural parents: (1) through the natural mother, (2) through legitimation, and (3) as a stepchild. The article concludes by discussing recent legislative proposals that would give immigration benefits to natural fathers and to their illegitimate children.

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Cases in this article cited as “File No.” are on file in the library of the Board of Immigration Appeals, Washington, D.C.
INTRODUCTION

There is perhaps no relationship that is more fundamental and emotional than that between parent and child. The term "child" has such a well-established meaning for most of us that we think of it as needing no definition.

Nevertheless, the Immigration and Nationality Act of 1952 (Act) defines "child" in a way that is complex and, in some instances, unusual. In addition to a legitimate child, the definition encompasses, under certain specified conditions, a stepchild, a legitimated child, an illegitimate child in relationship to its mother, an adopted child, and an orphan. This definition is the key to determining various relationships that lead to preferred treatment under the immigration laws. The cases interpreting and applying

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1. Immigration and Nationality Act of 1952, § 101(b)(1), 8 U.S.C. § 1101(b)(1) (1976) [the Immigration and Nationality Act is hereinafter cited as I. & N. Act], provides:

   (b)(1) The term 'child' means an unmarried person under twenty-one years of age who is—
   (A) a legitimate child; or
   (B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or
   (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation. [; or]
   (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother; [or]
   (E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter. [; or]
   (F) a child, . . . who is an orphan . . .

A different definition of "child" applies to the nationality provisions contained in Title III of the I. & N. Act. Id. § 101(c)(1), 8 U.S.C. § 1101(c)(1).

2. The Act defines "parent" in terms of its definition of "child." Id. § 101(b)(2), 8 U.S.C. § 1101(b)(2). Children of United States citizens and parents of United States citizens over the age of 21 are defined as "immediate relatives." They are thereby exempt from both the numerical limitations and the labor certification requirements for immigration. Id. § 201(b), 8 U.S.C. § 1151(b). Unmarried sons and daughters of United States citizens have first preference in the allocation of immigrant visas. Id. § 203(a)(1), 8 U.S.C. § 1153(a)(1). Unmarried sons and daughters of lawful permanent resident aliens are given second preference in immigrant visa allocation. Id. § 203(a)(2), 8 U.S.C. § 1153(a)(2). Married sons and daughters of United States citizens have fourth preference in the allocation of immigrant visas. Id. § 203(a)(4), 8 U.S.C. § 1153(a)(4). Brothers and sisters of United States citizens who are over the age of 21 constitute the fifth preference in immigrant visa allocation. Id. § 203(a)(5), 8 U.S.C. § 1153(a)(5). The foregoing classes of preference immigrants are also exempt from the labor certification requirements. The definition of "child" is used in determining whether an alien
the definition of "child" are among the most difficult that the administrative authorities must decide under the Act. This is especially true in situations involving those unfortunate children born out of wedlock.

The Act excludes natural fathers and their illegitimate children from the scheme for preferred immigration status. As a result of the limitations imposed by the statute and by the administrative cases interpreting it, some children who are considered legitimate or legitimated under their own state or foreign law are not so recognized for the purpose of obtaining benefits under the Act. There is a trend in the law in general toward more favorable treatment for children born out of wedlock and for their natural fathers. This trend, however, does not appear to have carried over into the field of immigration law.

**LEGAL OR ILLEGITIMATE?**

The question of whether an alien child is "legitimate," "legitimated," or "illegitimate" is extremely important under the Act. An alien legitimate child of a United States citizen or of a lawful permanent resident alien may qualify for benefits through section 101(b)(1)(A) of the Act without fulfilling any other requirements. In contrast, an alien illegitimate child may attain status only by claiming through his natural mother, or through his natural father if the child is legitimated in accordance with section 101(b)(1)(C), or if the child is a stepchild under section 101(b)(1)(B).

The term "legitimate" is not defined in the Act. For immigration purposes, legitimacy generally is determined according to the

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law of the place of birth. Thus, children of a polygamous marriage may be considered legitimate if they were born in a country where polygamy was legal. Likewise, children of certain concubines who are considered legitimate under the applicable domestic law are considered legitimate for immigration purposes.

One of the earliest cases discussing the concept of legitimacy under the Act is *In re B-S*, which involved a child born out of wedlock in China seeking status through his mother. The law in effect at the time of the child's birth in 1931 was article 1065 of the Civil Code of the Republic of China, which provided that every child is legitimate in relationship to his (or her) mother. The case arose in 1954, prior to the amendment of the Act which made an illegitimate child the “child” of his mother. Therefore, the granting of status depended upon whether the child could be considered a “legitimate child” of the mother under section 101(b)(1)(A) of the Act.

The Immigration and Naturalization Service (INS) argued that under various dictionary definitions and general United States standards the term “legitimate” must be limited to children born in wedlock. The INS also argued that Congress must have intended that “legitimate” be given the meaning understood in the United States and that it should be construed without reference to foreign law. To recognize the relationship created under Chinese law, the INS asserted, would result in preferential treatment of children born in China over children born out of wedlock in the United States and elsewhere.

The Board of Immigration Appeals (Board) rejected the INS arguments, stating that in light of the plain language of section 101(b)(1)(A) “there is no need to engage in the nebulous process of ascertaining Congressional intent.” The Board cited the well-

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12. INS District Directors have jurisdiction to grant or deny applications for immediate relative and preference classification (known as visa petitions) under the L & N Act. 8 C.F.R. §§ 103.1(n), 204.1(a) (1978). Appeals from denials of visa petitions (with certain exceptions not relevant here) may be taken to the Board of Immigration Appeals. *Id.* § 3.1(b)(5). The Board is an independent, quasi-judicial body within the Department of Justice consisting of a Chairman and four Board members appointed by the Attorney General. *Id.* § 3.1(a). For further information about the Board and its functions, see Milhollan, *The Work of the Board*, 54 INTERPRETER RELEASES 322 (1977); Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).
13. 6 I. & N. Dec. at 308-08.
established rule that legitimacy or illegitimacy is governed by the law of the place of birth. The Board further found that “[l]egitimacy once created by proper law should everywhere be recognized.”

In approving the petition for status, the Board noted that there is no public policy forbidding recognition of a relationship of legitimacy where identity of the parents is known and that, in fact, the law favors recognizing the status of legitimacy whenever possible. The Board concluded by stating that “there is no reason to assume that Congress in using the word ‘legitimate’ intended to limit it to a dictionary definition when the great body of case law and authoritative writings indicate a widespread acceptance of the liberal interpretation of the term.” The Board’s ruling in *In re B-S* was affirmed by the Attorney General.

Subsequent cases, while somewhat blurring the distinction between “legitimate” and “legitimated,” adhered to the notion that legitimacy created under the law of the place of birth should be recognized. For instance, *In re K.* involved a child who had been born out of wedlock in Poland. A Polish constitutional provision had abolished the status of illegitimacy and made all children born in the country legitimate. The Board held that the child could qualify as a “legitimate or legitimated” child, evidently drawing no meaningful distinction between the terms.

In a later case, the Board held that a child born out of wedlock and acknowledged by the father was “legitimate” under the law of Poland and for immigration purposes. Similar conclusions were reached in cases involving children born out of wedlock in Yugoslavia and in Panama, both of which had abolished the status of illegitimacy.

However, in *In re Kubicka*, another case involving the law of Poland, the Board qualified its earlier holdings. The Board concluded that the term “legitimate” as used in section 101(b)(1)(A)
refers solely to a child "born in wedlock." Relying on *Webster's Dictionary*, the Board adopted as a federal standard the same definition it had rejected in *In re B-S*. Noting the contrary language in *In re K.*, the Board found that it "should more correctly have stated in *Matter of K-* that a child born out of wedlock recognized by the father as his own in accordance with the law of Poland, becomes the father's 'legitimated' child, rather than his 'legitimate' child." 

In *Kubicka* the petition was granted because the Board found that the requirements for legitimation by the father under section 101(b)(1)(C) of the Act had been met. The full significance of the Board's distinction between "legitimate" and "legitimated" did not become apparent until *In re Dela Rosa*. In *Dela Rosa* the Board denied status to a child concededly legitimate under the law of Panama on the ground that she had not been in her father's "legal custody" at the time he had acknowledged her and therefore did not meet the requirements for legitimation under section 101(b)(1)(C) of the Act.

*In re Lo* involved an alien who claimed the benefit of article 15 of the Marriage Law of the People's Republic of China. The petitioner argued that article 15 abolished all legal distinctions between children born in wedlock and children born out of wedlock. However, the Board held that the People's Republic of China continues to distinguish between children born in wedlock and those born out of wedlock and that the paternity of the child involved had never been "legally established" in accordance with article 15. The Board therefore found it unnecessary to decide whether "legally establishing" paternity under article 15 was the same as "legitimating" the child under section 101(b)(1)(C) of the Act.

*In re Lo* was followed in *In re Chin Lau*, an unpublished decision. In *Chin Lau* the petitioner advanced the claim that all chil-

23. *Id.* at 304.
24. *Id.*
26. For a discussion of the legal custody requirement for legitimation, see notes 74-98 and accompanying text *infra.*
28. Article 15 of the Marriage Law of the People's Republic of China provides:

Children born out of wedlock shall enjoy the same rights as children born in lawful wedlock. No person shall be allowed to harm them or discriminate against them. When the paternity of a child born out of wedlock is legally established by the mother of the child or by other witnesses or by other material evidence, the identified father must bear the whole or part of the cost of maintenance and education of the child until the age of eighteen.

*Id.* at 380.
dren born in the People's Republic of China are legitimate by virtue of article 15. The Board rejected this argument, relying upon Lo. Counsel also cited previous Board holdings that children born in countries that had abolished the status of illegitimacy could be granted status as legitimate or legitimated children under the Act. In rejecting this argument, the Board essentially drew a factual distinction between those cases and Chin Lau.

Chin Lau reached the district court, and the Board's decision was reversed. The district judge agreed with the Board that the People's Republic of China continues to distinguish between children born in wedlock and those born out of wedlock. However, the court disagreed with the Board's conclusion that article 15 requires that paternity be "legally established" for the child to be considered legitimate. The court found that it would be necessary to "legally establish" paternity only in situations where the putative father denied the relationship, which was not true in the case before it. The court went on to find that apparently there are no provisions in Chinese law prescribing the method for legitimation of children born out of wedlock and that therefore the terms "legitimate child" and "illegitimate child" are meaningless in the context of the Chinese legal system. The court concluded, after examining the legislative history of the Act, that it would be sufficient for the Act's purposes if the petitioner could prove the existence of the blood relationship between father and child.

The Government appealed, and the Court of Appeals for the Second Circuit affirmed the district court. In doing so, the Second Circuit went beyond the ruling of the district judge and held that all children born in the People's Republic of China are legitimate at birth. The court noted that legitimacy is a legal concept that is dependent upon the law of the place of birth. The fact of birth in or out of wedlock has no legal significance unless some legal significance is attached to that fact by the law of the place of birth. The court concluded that a child who is legitimate at birth under article 15 qualifies as a legitimate child under section 101(b)(1)(A) of the Act. In the court's opinion, procedures for legitimation would have been superfluous in the context of the Chinese legal system.


Notwithstanding Chin Lau, the Board has continued to hold that the term “legitimate” refers solely to a child born in wedlock. However, in light of the Government’s failure to seek Supreme Court review of Chin Lau, it is likely that the Board will consider itself bound in the Second Circuit by that decision.

If the child is not “legitimate” under the applicable law, it is possible (although more difficult) for that child to achieve immigration status through his natural parents. The following section discusses three methods by which an illegitimate child may attain immigration status through his natural parents. First, status may be attained through the natural mother. Second, a child may be legitimated. Third, a child may become a stepchild.

THREE METHODS BY WHICH AN ILLEGITIMATE CHILD MAY ATTAIN IMMIGRATION STATUS THROUGH HIS NATURAL PARENTS

Attaining Status Through Natural Mother but Not Through Natural Father: Fiallo v. Bell

Immigration law prior to the Immigration and Nationality Act of 1952 gave preferred immigration status to children of United States citizens but made no specific reference to illegitimate or legitimated children. The administrative construction was that an illegitimate child could qualify for nonquota status through his (or her) natural mother.

In developing the Act, Congress expressed a desire to preserve and to reunite family units. The definition of “child” was broadened to include “legitimated child” if the legitimation took place under the law of the child’s or father’s residence or domicile prior to the child’s eighteenth birthday, and the child was in the legal custody of the legitimating parent or parents at the time of legitimation. It was also broadened to include “stepchild” when the

34. If the Government does not seek further review, the Board ordinarily considers itself bound within that jurisdiction by a circuit court's decision. In re Gonzalez, I.D. No. 2594 (1977). The Board has departed from this general rule only in very unusual circumstances. See, e.g., In re Mangabat, 14 I. & N. Dec. 75 (1972).
35. Act of May 26, 1924, ch. 190, § 4(a), 43 Stat. 155 (repealed 1952). See also id. § 28(m), which defined child in a negative manner as not including an adoptive relationship unless the adoption took place before January 1, 1924.
marriage creating the relationship took place before the child's eighteenth birthday.

Ironically, this broadening of the definition resulted in a ruling by the Attorney General that an illegitimate child could no longer be considered the "child" of his natural mother. Congress expressed displeasure with this interpretation, but to no avail. The law was amended in 1957 to specify that an illegitimate child is the "child" of his natural mother and that a stepchild is a "child" regardless of whether he is legitimate or illegitimate.

The reason Congress chose to treat natural fathers and their illegitimate children less favorably is not specified in either the legislative history of the 1952 Act or the 1957 amendments to the definition of "child." Nevertheless, a portion of the legislative history, as well as the overall statutory scheme, suggest that Congress generally was concerned about the possible use of the definition of "child" to evade quota restrictions and numerical limitations on immigration. Congress certainly was aware of the inherent proof problems in paternity cases. In addition, it is likely that Congress accepted the conventional view that illegitimate children do not have close ties to their natural fathers and therefore do not come within the general rationale of reuniting bona fide family units.

The constitutionality of the above-described statutory scheme was challenged by the plaintiffs in Fiallo v. Bell, who alleged that the denial of immigration benefits to natural fathers and their illegitimate children violated the first, fifth, and ninth amendments to the Constitution. The Supreme Court rejected these arguments.


43. Id. § 1 (codified at 8 U.S.C. § 1101(b)(1)(B) (1976)).

44. See S. REP. No. 1515, 81st Cong., 2d Sess. 468 (1950).


46. See id.

47. Id.
Basically, the Court found that immigration cases are subject only to a very limited scope of judicial review and that the distinctions drawn under the Act represent a legislative policy choice with which it should not interfere. In other words, Congress has virtually unlimited power to choose which aliens can enter the country. The Court noted that “legislative distinctions in the immigration area need not be as ‘carefully tuned to alternative considerations,’” ... as those in the domestic area.48

A dissenting opinion, written by Justice Marshall and concurred in by Justices Brennan and White, accused the majority of having devised a standard of review for immigration cases that in fact constituted no review at all.49 The dissent found that the statute was an invidious discrimination against certain United States citizens who wished to bring their illegitimate children or their natural fathers to the United States but were prevented from doing so by the statutory system.50

**Legitimation: Three Requirements**

If a child is neither “legitimate” under the relevant guidelines nor able to claim status through his natural mother, he may still be able to come within the Act’s definition of “child” by claiming through his natural father and fulfilling three requirements for legitimation: (1) sufficient acts of legitimation, (2) the age requirement, and (3) legal custody.

**Sufficient Acts of Legitimation Under Section 101(b)(1)(C)**

The Board has ruled that in order to be considered “legitimated” for immigration purposes, an illegitimate child must attain a status virtually identical to that of a legitimate child. Thus, various forms of legal acknowledgement by the father that do not confer rights equal to those of a legitimate child do not qualify the child as legitimated under section 101(b)(1)(C).51 This is true even when the act of acknowledgement makes the child equal in all respects save those concerning succession.52 However, the Board has held that complete equality with respect to rights foreign to United States common law is not necessary for effective

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49. *Id.* at 805 (Marshall, J., dissenting).
50. *Id.* at 816.
52. Peignand v. INS, 440 F.2d 757 (1st Cir. 1971); *In re Reyes, I.D. No. 2641* (1978).
If the applicable domestic law permits, a natural father may be able to adopt his illegitimate child formally. In order to be effective for immigration purposes, the adoption must take place while the child is under the age of fourteen. Also, the two-year custody and residency requirements of section 101(b)(1)(E) of the Act must be fulfilled. In one case, however, the Board held that an overage adoption that took place between the ages of fourteen and eighteen was a valid act of legitimation for the purposes of section 101(b)(1)(C).

Age Limitation

Section 101(b)(1)(C) specifies that legitimation must take place under the law of the child's or father's residence or domicile before the child reaches the age of eighteen. The eighteen-year age limitation presumably was designed to preclude the possibility of fraudulent legitimation of adults in order to circumvent immigration restrictions. Because legitimation of an adult would not involve support or maintenance obligations on the part of the "legitimating parent," it could conceivably present an attractive opportunity for fraud. In addition, Congress probably believed that where the natural father had not performed legitimating acts before his child reached the age of eighteen, it was likely that no real family unit existed.

Under most domestic laws, the act of legitimation operates to make the child legitimate from the date of birth. The Board has not given legitimation such a retroactive effect because to do so would negate the congressional intent behind the eighteen-year age requirement.

A number of interesting cases involving the age requirement arose under former section 230 of the California Civil Code. That provision was repealed in 1975 when California adopted the

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53. In re Lee, I.D. No. 2606 (1977) (right to succeed to title "Head of Family" in Korea).
55. See generally In re M., 8 I. & N. Dec. 118 (1959) (aff'd by Atty Gen.).
57. See note 1 supra.
Uniform Parentage Act. However, the Board still applies section 230 to cases in which the alleged legitimating acts took place prior to its repeal. Section 230 provided that:

The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth.

Legitimation under this statute did not require a court decree. California decisions have held that legitimating acts for section 230 purposes may have taken place outside the state. Administrative cases adopted this rationale and held that legitimation had taken place under section 101(b)(1)(C) when the acts had been performed in a foreign country, despite the fact that neither the father nor the child had moved to California until many years thereafter.

In In re Singh, the Board qualified these earlier holdings. Singh involved a claim of legitimation under section 230 in which neither the father nor the child had taken up residence or domicile in California prior to the child’s eighteenth birthday. The Board ruled that under such circumstances the parties could not possibly meet the requirement that legitimation take place under the law of the father’s or the child’s residence or domicile prior to the child’s eighteenth birthday.

Subsequently, the Board imposed further limitations upon the application of section 230. In In re Buenaventura, the Board held that notwithstanding that California makes no distinction whether the legitimating acts took place while the parties, or one of them, were domiciled in California, the language of section 101(b)(1)(C) requires that at the time the legitimating acts under section 230 took place, the father or the child must have been a resident or a domiciliary of California and the child must have

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61. 1975 Cal. Stats. ch. 693, § 11 (codified at CAL. CIV. CODE §§ 7000-7018 (West Supp. 1978)). The Uniform Parentage Act states that: “The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.” CAL. CIV. CODE § 7002 (West Supp. 1978). A man is presumed to be the natural father if he receives the child into his home and openly holds out the child as his own. Id. § 7004(a)(4).
64. In re Estate of Lund, 26 Cal. 2d 472, 159 P.2d 643 (1945); see In re Garcia, 12 I. & N. Dec. 628 (1968); In re Pableo, 12 I. & N. Dec. 503 (1967) (decided by Dist. Dir.).
been under the age of eighteen. Prior decisions to the contrary were overruled. The Board stated that the effect given the statute by California courts for inheritance under California law is not controlling with respect to an immigration question because the latter involves the application of federal standards.

In Buenaventura the Board ruled that the father's action in taking his natural children into his home in the Philippines did not legitimate them for the purposes of section 101(b)(1)(C) because neither the father nor the children were living in California at the time. Therefore, California had no nexus with the parties at the time the alleged legitimating acts occurred. However, after the father moved to California, the children took up residence with their paternal grandmother in the Philippines. The Board found that this latter action constituted reception into the father's family and did result in legitimation for section 101(b)(1)(C) purposes because the father was domiciled in California at the time and the children were still under the age of eighteen.

One federal district court in California has differed with the Board's approach to section 230. The case involved a child who was born out of wedlock in Yugoslavia in 1934. The child lived with his natural father and mother in Yugoslavia from 1934 until 1941. The father then moved to the United States and eventually established a domicile in California in 1953, when the child was nineteen. The father acknowledged his son's birth to the Yugoslav authorities in 1958, thereby establishing legitimacy under the law of Yugoslavia. However, by this time his son was twenty-four years old.

The Board denied a petition submitted by the father to have his son classified as a legitimated child under section 101(b)(1)(C) of the Act. The district court reversed the Board's decision and or-

69. See also In re Varian, I.D. No. 2395 (1975), involving an interesting discussion of a claim under former § 230 of the California Civil Code in a nationality context.
72. In re Kaliski, File No. A19 907 908 (Aug. 5, 1974), motion for reconsideration denied. (July 14, 1975). It is interesting to note that the Board decisions deal only with the issue of legitimation under the Yugoslav law and do not discuss § 230 of the California Civil Code. The brief filed in support of Mr. Kaliski's motion for reconsideration also failed to mention § 230.
dered the visa petition approved. The court held that the legiti-
mating acts under section 230 of the California Civil Code took
take place during the first seven years of the child’s life, between 1934
and 1941, when he resided with his natural parents in Yugoslavia.
The court pointed out that under the California law, the acts pre-
scribed by section 230 need not have been performed within Cali-
ifornia so long as the father later became domiciled in the state.73

The court purportedly found it unnecessary to consider the the-
ory of retroactivity advanced by the petitioner. Instead, it relied
upon a perceived distinction between “legitimating acts” and
“those which activate the legal process” and upon the further per-
ceived distinction between legitimation “under” the law of Cali-
ifornia and legitimation “by” the law of California. The court held
that the child was legitimated under the law of California during
the first seven years of his life, thereby fulfilling the requirement
of section 101(b)(1)(C), and that he was legitimated by the law of
California when the petitioner established domicile there.

Legal Custody

Section 101(b)(1)(C) requires that the legitimated child be “in
the legal custody of the legitimating parent or parents at the time
of such legitimation.”74 The language of this section has re-
main unchanged since its enactment in 1952. The legislative
history offers no specific guidance as to the meaning that Con-
gress intended to attach to the term “legal custody.”75 It is appar-
ent, however, that Congress generally was concerned about the
possibility of fraud.76 It therefore is likely that the “legal custody”
requirement was intended to prevent a claim of legitimation by a
man who had little or no contact with the child and whose motive
was circumvention of immigration restrictions.77

Early Board decisions ignored the legal custody requirement.
In no published decision prior to 1970 was a petition in behalf of a
legitimated child denied solely for failure to fulfill the legal cus-

73. See In re Estate of Lund, 26 Cal. 2d 472, 159 P.2d 643 (1945).
74. See note 1 supra.
75. See 22 C.F.R. § 41.209 (1949). A similar definition was used in the National-
ity Act of 1940, ch. 876, § 102(h), 54 Stat. 1137 (repealed 1952). However, the legisla-
tive history of that Act is also silent as to the meaning and purpose of the legal
custody requirement. See H.R. Res. No. 2396, 76th Cong., 3d Sess. (1940). This
provision does not appear to have been derived from earlier immigration laws.
The term “legal custody” is also used in connection with adoptions under I & N.
76. See authorities cited notes 44-46 and accompanying text supra.
77. See In re Dela Rosa, 14 L & N. Dec. 728, 730 (1974) (dissenting opinion); In
In the majority of reported cases, status was denied because the requirements for legitimation under the applicable domestic law had not been met. In several cases, status was denied for failure to meet the age requirements. In one case, the Board assumed consent on the part of the natural mother to legitimation by the natural father and found that such consent constituted agreement to transfer custody to the natural father. In another case, the Attorney General assumed that legal custody had been satisfied where the child lived in the same household with his natural parents. In the remainder of the reported cases, status was granted without discussion of how the legal custody requirement had been met. Several of these cases merit amplification.

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In *In re K.*, the child was born out of wedlock in Poland. The natural father left Poland permanently when the child was three months old. He acknowledged the child in 1948 by sending a document to the Polish authorities while he was in England and the child was still in Poland. The Board granted the petition without any mention of legal custody.

In *In re G.*, the child was born out of wedlock in Hungary. A short time later, the natural father in Hungary acknowledged the child as his own, thereby effecting legitimation under Hungarian law. The Board found that the requirements of section 101(b)(1)(C) had been met and granted the petition. No question was raised over legal custody at the time of legitimation.

In *In re Chojnowski*, the child was born out of wedlock in Poland. The Board held that acknowledgement by the natural father

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78. Only a small number of the Board's decisions are designated as precedents and published in accordance with 8 C.F.R. § 3.1(g) (1978). However, a search of those unpublished decisions indexed by the Board and maintained in the Board's library also revealed no pre-1970 decision turning solely on the legal custody issue.


81. *In re W., 7 I. & N. Dec. 376 (1956).*


in Poland established the child’s status as a legitimate child under Polish law. The Board did not mention legal custody.

In *In re Jancar*, the natural father in Yugoslavia acknowledged the child when the child was five months old. The natural father then left Yugoslavia, never to return. One of the grounds that the District Director relied upon to deny the petition was that the child had not come within the legal custody of the father until the child entered the United States at the age of twenty. The Board held that the child became legitimated under Yugoslavian law by the father’s act of acknowledgement and that she qualified as either a legitimate or a legitimated child. The Board did not raise the legal custody requirement although the District Director had mentioned it in his denial.

In *In re Kubicka*, the Board held that under the law of Poland a child born in that country of a bigamous marriage was legitimated by the act of the father in making a report of the child’s birth to the civil registry office. No mention was made of the child being in the legal custody of the father at the time of legitimation. In a number of cases involving children legitimated under section 230 of the California Civil Code, the Board also did not indicate how the legal custody requirement had been satisfied.

The first published Board decision denying an application for status because of failure to meet the legal custody requirement was *In re Harris*. That case involved an attempted judicial legitimation in Liberia while the natural father was in the United States. The Board denied the petition on several grounds, including that the legitimation decree named as the child’s father the grandfather, Mr. Harris, Sr., rather than the natural father, Mr. Harris, Jr. With respect to the legal custody requirement, the Board stated:

> We may ask what Congress meant by ‘legal custody.’ There are, of course, several kinds and degrees of custody. ‘Legal custody’ implies either a natural right or a court decree. It is a settled principle of law that the mother of an illegitimate child has the primary right to its custody, and we cannot presume that she has lost custody. A mother may be de-

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86. 11 I & N. Dec. 365 (1965).
87. 14 I & N. Dec. 303 (1972). See text accompanying note 22 supra for additional discussion of this case.
89. LD. No. 2308 (1970). Although *In re Harris* was decided in 1970, it was not designated for publication under 8 C.F.R. § 3.1(g) until 1974, after the decision in *In re Dela Rosa*, 14 I & N. Dec. 728 (1974), which relied upon *Harris*.
prived of the custody of her child but not without cause.90

Applying the foregoing principles, the Board found that the child had been in the actual custody of the mother at the time of legitimation and that the court decree had not awarded legal custody to the father. The Board concluded that the legal custody requirement had not been met and dismissed the appeal from the denial of the petition.

The chairman of the Board, Maurice Roberts, filed a dissenting opinion in which Board Member Louisa Wilson joined. The dissent took the position that the term “legal custody” is broader and more inclusive than terms such as “actual custody,” “physical custody,” or “custody.” Under this view, “legal custody” includes constructive as well as actual relationships. The dissent found that the natural father had done all that he could to fulfill his legal obligations toward his child, that the mother had expressly consented to the legitimation, and that there was no reason to suspect the kind of fraud which had motivated Congress to impose the “legal custody” requirement in the first place.91

The “legal custody” issue arose again in In re Dela Rosa,92 which involved a child born out of wedlock in Panama, a country that has abolished all distinctions based on legitimacy. The father declared paternity before an official of the civil registry when his daughter was six months old, thereby establishing her legitimacy under Panamanian law.93 He supported the child from birth. When the child was nine, the father immigrated to the United States. A visa was issued for the child at that time, but she did not go with her father because her mother did not wish her to leave Panama. Later, the mother agreed that the child should join her father in the United States.

Following the reasoning set forth in Harris, the Board found that “legal custody” required either a natural right or a court decree and that the father had neither. Therefore, it denied the petition in behalf of his daughter.

Chairman Roberts, joined by Board Member Wilson, again dissented. In addition to reiterating and expanding upon the arguments in the Harris dissent, Chairman Roberts found that the

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90. I.D. No. 2308, at 4.
91. Id. at 11-12 (dissenting opinion).
majority had established a rule that in the absence of a court decree, the natural father could never have legal custody of his legitimated child as long as the natural mother was alive and had not clearly abandoned the child. He pointed out that the father had taken all necessary steps to establish his daughter's legitimacy under the law of Panama years prior to his immigration to this country and that he had obviously taken an interest in her upbringing. Noting the remedial nature of section 101(b)(1)(C), Chairman Roberts declared that he did not believe that the majority's result was in accordance with the congressional intent. He concluded his dissent by pointing out that the Board's decision was inconsistent with the results reached in numerous other cases, citing *inter alia* *In re K.* and *In re Jancar.*

Legal custody subsequently was an issue in *In re Buenaventura.* In this case the natural mother left her children with their paternal grandmother in the Philippines to be raised by the grandmother and supported by their natural father, who was in California. The Board held that legal custody was in the natural father notwithstanding his absence. The Board cited an Attorney General opinion recognizing that the right of a putative father to the custody of his illegitimate child is superior to that of everyone but the mother.

*Buenaventura* indicates that the Board will not necessarily equate actual custody with physical custody. However, the impact of this decision appears to be limited to situations in which the natural mother has clearly relinquished her right to custody. It evidently does not extend to a situation in which a natural father has legitimated his child without obtaining an express or implied release of legal custody from the natural mother.

Under the Board's rulings it may be difficult for a natural father to legitimate his child for immigration purposes unless he obtains a simultaneous court order awarding him legal custody. In jurisdictions that have completely abolished the status of illegitimacy, "legitimating acts" ordinarily would not involve such a court decree. Therefore, children born out of wedlock in such jurisdictions may have a more difficult time qualifying for immigration benefits through their natural fathers than children born out of wedlock in countries with less liberal laws.

94. See also *In re K-W-S,* 9 I & N. Dec. 396 (1961) (decided by Att'y Gen.), in which the Attorney General emphasized the remedial nature of § 101(b)(1)(C) and the congressional intent to preserve and maintain the family unit.
95. 8 I & N. Dec. 73 (1958). See text accompanying notes 17 & 83 supra.
STEPCHILDREN

There is another way in which certain illegitimate children may qualify for benefits under the definition of "child" contained in the Act. This way is through the "stepchild" definition contained in section 101(b)(1)(B). Under certain circumstances, an illegitimate child can qualify as a "stepchild" if his natural father marries a United States citizen or lawful permanent resident alien.

As mentioned earlier, Congress in 1957 amended section 101(b)(1) of the Act to overcome certain rulings by the Attorney General that refused to recognize the relationship between an illegitimate child and his mother. The amended law defines a "child" as including a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen at the time the marriage creating the status of stepchild occurred.

The administrative authorities initially took the view that the amended statute did not permit a female citizen to petition for her husband's illegitimate child as her stepchild. This interpretation was based on their reading of the legislative history of the amendments to section 101(b)(1) as indicating a congressional intent to grant immigration benefits only to those illegitimate children seeking status through their natural mothers.

However, a judge in the Southern District of New York disagreed with that interpretation. In Nation v. Esperdy, the court found that a citizen wife could have her husband's alien illegitimate child classified as her "stepchild" under section 101(b)(1)(B). The court cited the lack of a statutory limitation on the qualification of an illegitimate child as a stepchild and the inconclusiveness of the legislative history of the 1957 amendments. The court noted that the wife, her husband, and the child made up a close family unit.

The Board thereafter adopted the Nation decision, stating that Nation would be applied where the facts spelled out a close family unit such as was present in that case. However, another
judge in the Southern District of New York disagreed with the Board’s revised interpretation. In *Andrade v. Esperdy*,\(^{106}\) the court held that the plain language of the statute required approval of a stepchild petition submitted by a citizen wife for her husband’s alien illegitimate child regardless of whether there had been a close family unit.

The Board declined to adopt the *Andrade* decision and continued to apply the “close family unit” rule everywhere but in the Southern District of New York.\(^{107}\) In that district the Board followed the *Andrade* rule and did not require the showing of a close family unit.\(^{108}\) The Board’s reasoning in declining to adopt the *Andrade* rule was that: (1) Congress did not intend the result reached in *Andrade*, (2) the Board was not obliged to follow a lower federal court ruling in other jurisdictions, (3) the Government’s failure to appeal *Andrade* did not necessarily indicate acquiescence, and (4) such action would preserve the issue for judicial review in other jurisdictions.\(^{109}\) However, no other jurisdiction considered the issue. In connection with pending cases, the INS has now taken the position that it is willing to apply the *Andrade* decision on a nationwide basis.

The Board never defined “close family unit.”\(^{110}\) Nevertheless, it is clear that a period of residence by the stepmother with the child was required.\(^{111}\) In an unpublished decision, the Board rejected the notion that a stepmother’s demonstrated interest in the child, short of actually living with it, could satisfy the “close family unit” test.\(^{112}\)

Other Board rulings deal with the question of adulterine stepchildren. The Board originally ruled that a child born of an adulterous relationship could not qualify as a stepchild under the *Nation* rule.\(^{113}\) The rationale was that the adulterine child had been born *subsequent* to the marriage creating the alleged “steprelationship.”


\(^{110}\) The “close family unit” test is not applied to other steprelationships.


In In re Stultz,114 however, the Board reversed itself and held that an adulterine child should be treated the same as any other illegitimate child for the purpose of determining whether a stepchild relationship exists. In granting the petition submitted by a United States citizen in behalf of the daughter born of her husband's adulterous relationship, the Board noted that the petitioner had cared for the child since her abandonment by her natural mother, thus satisfying the "close family unit" test.

The INS requested that Stultz be certified to the Attorney General for review.115 The Attorney General affirmed the Board's decision. In doing so, he cited the Andrade decision several times with approval but without indicating awareness of the Board's rejection of its reasoning.116

RECENT LEGISLATIVE PROPOSALS

In the last two Congresses, bills have been introduced by Congresswoman Elizabeth Holtzman (D-N.Y.) to amend section 101(b)(1) of the Act to allow an illegitimate child to be classified as the "child" of either of its natural parents. The first of these bills, H.R. 10993,117 was introduced in the 94th Congress.

Hearings on this bill were held before the Subcommittee on Immigration, Citizenship, and International Law of the House Judiciary Committee on July 28, 1976.118 At that time, the Department of Justice witness expressed sympathy for the objectives of the bill along with an awareness of judicial decisions extending the rights of illegitimate children and their natural fathers in areas other than immigration.119 Nevertheless, the Department of Justice raised concerns that enactment of the bill would increase

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116. The Board did not initially interpret Stultz as having any impact on its decision not to adopt Andrade. See In re Bourne, LD. No. 2618 (1977). As this article goes to press, the Board has not yet had an opportunity to rule on the INS position that Andrade should be applied on a nationwide basis.
117. H.R. 10993, 94th Cong., 1st Sess., 121 CONG. REC. 38743 (1975). In introducing the bill, Congresswoman Holtzman characterized § 101(b)(1) of the Act as "blatant sex discrimination" that was unconstitutional. 121 CONG. REC. 38743 (1975).
119. Id. at 149, 158 (statement of Hon. Leonard L.F. Chapman, Jr.). See cases cited note 3 supra.
opportunities for immigration fraud and place greater administrative burdens on the INS and on the Department of State in attempting to detect fraud.\textsuperscript{120} The Justice Department recommended that the bill contain some safeguards to reduce the possibility of immigration fraud and suggested that such a safeguard might consist of a requirement of two years' residence with the illegitimate child.\textsuperscript{121} In view of the concern over possible sex discrimination, the Department recommended that this residence requirement be applicable to both fathers and mothers of illegitimates.\textsuperscript{122}

During the hearing, Congresswoman Holtzman questioned the need for the residency requirement.\textsuperscript{123} She and Subcommittee Chairman Joshua Eilberg (D-Pa.) pointed out that the INS already makes determinations of paternity in the cases of illegitimate stepchildren and therefore must have developed some evidentiary standards to guard against fraud.\textsuperscript{124} The Subcommittee asked the Departments of Justice and State to submit draft regulations that would govern the proof of paternity if H.R. 10993 were enacted.\textsuperscript{125} No further action was taken on the bill during the 94th Congress.

Congresswoman Holtzman introduced an identical bill, H.R. 409,\textsuperscript{126} at the beginning of the 95th Congress. The Department of Justice report on that bill expressed no opposition to the concept of equal treatment for illegitimate children claiming status through their natural fathers.\textsuperscript{127} Although not renewing the suggestion for a two-year residency requirement, the report stated that the bill should give to the Attorney General and to the Secretary of State specific authority to promulgate regulations setting forth standards for proving paternity.

While H.R. 409 was pending, the Supreme Court decided \textit{Fiallo v. Bell},\textsuperscript{128} upholding the constitutionality of section 101(b)(1)(C).

\begin{itemize}
\item \textsuperscript{121} Id. at 149, 158-59.
\item \textsuperscript{122} Id. at 149, 159.
\item \textsuperscript{123} Id. at 154-55.
\item \textsuperscript{124} Id. at 139-41, 153-55.
\item \textsuperscript{125} Id. at 149-50. These draft regulations are set forth in \textit{id.} at 150-53.
\item \textsuperscript{127} Letter from Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs, to Peter W. Rodino, Chairman, House Judiciary Committee (June 9, 1977).
\item \textsuperscript{128} 430 U.S. 787 (1977). \textit{See} text accompanying notes 47-50 supra for a discussion of \textit{Fiallo}.
\end{itemize}
Among other contentions, the plaintiffs had argued to the Court that section 101(b)(1)(C) was based on outmoded sexual stereotypes and on unrealistic notions regarding the difficulty of establishing paternity. The Court responded that such arguments "should be addressed to the Congress rather than the Courts."\textsuperscript{129} The Court also took note of the pending bill that would have eliminated the challenged distinction.\textsuperscript{130}

**CONCLUSION**

Congress has virtually unlimited power to determine the statutory system for the admission of aliens into the United States, including the admission of alien relatives of United States citizens and lawful permanent resident aliens. The present system originated in 1952, and with respect to the rights of children born out of wedlock has not been changed materially since 1957. The Supreme Court has held that denying natural fathers and their illegitimate children the benefits which are granted to natural mothers and to their illegitimate children is not a violation of any constitutional guarantee.

It is unlikely that Congress contemplated some of the difficult issues that have arisen under the statute, especially in relation to those jurisdictions which have abolished the status of illegitimacy. Reconciling such domestic laws with a statute phrased in terms of "legitimate" or "legitimated" has been a difficult task.

The Board has opted for an interpretation that utilizes the generally understood concept of a "legitimate" child as one born in wedlock. However, the Court of Appeals for the Second Circuit has disagreed with respect to children born in the People's Republic of China, ruling that all such children are legitimate at birth.

There are a number of ways by which an illegitimate child may attain immigration status through his natural parents. The first way is to claim status through the natural mother. The Act recognizes this relationship. A second way is through legitimation by the natural father while under the age of eighteen. This method

\textsuperscript{129}. 430 U.S. at 799 n.9.
\textsuperscript{130}. Id. Congresswoman Holtzman expressed disappointment in the Court's decision and called upon her colleagues to pass the pending bill in order to overcome that decision. 123 CONG. REC. H11,901 (daily ed. May 10, 1977) (remarks of Rep. Holtzman).
requires showing a proper nexus with the jurisdiction under whose law legitimation is claimed. One district court has declined to accept the Board's requirement that such a nexus must have existed at the time the legitimating acts took place, thereby allowing a petitioner to assert legitimation by later moving to the jurisdiction. The legitimating father must also establish that he had "legal custody" through either a court decree or a relinquishment of rights by the natural mother.

A third option for attaining status is through the stepchild provision if the natural father marries a citizen or a lawful permanent resident. Board decisions required a "close family unit"—involving residence together by the stepmother, the father, and the illegitimate child. In the Southern District of New York, however, stepchild status was recognized administratively without a showing of a close family unit. The INS has now indicated that it is unwilling to have the Board adopt the latter rule on a nationwide basis.

Finally, the House of Representatives had identical bills before it during each of the last two sessions which would have amended the Act to grant immigration benefits to natural fathers and to their illegitimate children. While voicing some concerns regarding increased opportunities for fraud, the executive branch has not opposed the concept of equal treatment underlying these bills. Although hearings were held in the 94th Congress, the measure has never reached the floor of the House.