

# CURRENT DEVELOPMENTS

## CURRENT DEVELOPMENTS IN IMMIGRATION LAW: THE DEBATE SURROUNDING “BIRTH TOURISM”

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### I. INTRODUCTION

There is a booming birth tourism industry in the United States. The “birth tourism industry” involves expecting parents traveling to the United States to give birth so that their children will receive U.S. citizenship (“birth tourists”). These parents pay tour operators and healthcare providers for assistance in getting visas, housing, and sometimes medical services.<sup>1</sup> Currently, it is not illegal to come to the United States with the intention of giving citizenship to a child. There are also no definite, specific statistics as to the number of people coming to the country with that intention. However, the U.S. Center for Disease Control (“CDC”) reported 7,955 births by non-residents in the year 2012, the last year this data was available, which may serve as a very rough indication of the number of individuals who come to give birth in the country.<sup>2</sup>

While few children are born to birth tourists, the issue has received significant attention from the media and politicians. This piece will first examine the historical context of the birth tourism industry. Second, it will examine the modern issues surrounding birth-right citizenship and its impact. The third section will look at the specific legal and policy issues surrounding birth tourism, before concluding with possible solutions to the issue.

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1. Benjamin Carlson, *Welcome to Maternity Hotel California*, ROLLING STONE (Aug. 19, 2015), <https://www.rollingstone.com/politics/news/welcome-to-maternity-hotel-california-20150819>.

2. Aaron Zitner, *Birthright Citizenship, by the Numbers*, WALL STREET JOURNAL (Aug. 20, 2015), <https://blogs.wsj.com/briefly/2015/08/20/birthright-citizenship-by-the-numbers-the-numbers/>.

## II. HISTORICAL CONTEXT

One of the essential features of the United States immigration system is birthright citizenship. This right to citizenship is enshrined within the Citizenship Clause of the Fourteenth Amendment, which states that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>3</sup> This clause was originally written to reverse *Scott v. Sandford*, which held that African Americans were not and could not become citizens.<sup>4</sup> For several decades, this was how both the executive branch and the judiciary interpreted the “Citizenship Clause.”<sup>5</sup> However, this interpretation changed with the Supreme Court’s decision in *United States v. Wong Kim Ark*. That case held that persons born in the United States to foreign nationals domiciled and working in the United States, in a non-diplomatic capacity, become citizens.<sup>6</sup> *Wong Kim Ark* created a general rule of birthright citizenship, however its holding left open several avenues through which Congress could limit birth tourism.

Birth tourism is not illegal; there are no laws prohibiting a pregnant woman from visiting the United States with the express intention of giving birth. However, many of the methods used to facilitate the practice such as visa fraud and lying to customs inspectors are crimes. Customs inspectors may also require expecting parents to show proof of their ability to cover hospital bills.<sup>7</sup> Additionally, many providers encouraging these actions violate zoning and tax laws.<sup>8</sup> Many of the providers of “birth tourism” services do not adhere to land use and zoning laws by operating hotels and even medical facilities within residential areas. This has led to conflicts with neighbors who complain of noise and overcrowding.<sup>9</sup>

## III. MODERN ISSUES AND IMPACTS

The origins of modern birth tourism can be linked to several “push and pull factors” in the origin and receiving countries. Pull factors include political stability or economic opportunities in the receiving country, and push

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3. U.S. CONST. amend. XIV, § 1.

4. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

5. See *Slaughter-House Cases*, 83 U.S. 36, 73 (1872); see also U.S. DEP’T OF INTERIOR, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, at 1219-1221 (Sept. 30, 1873).

6. *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898).

7. Jesusemen Oni, *Foreigners Seeking US Citizenship for Children Flout Law, Can Endanger Babies*, VOICE OF AMERICA (Dec. 6, 2016), <https://www.voanews.com/a/foreigners-seeking-american-citizenship-children-flout-law-endanger-babies/3626080.html>.

8. Frank Shyong, *Why birth tourism from China persists even as U.S. officials crack down*, LOS ANGELES TIMES (Dec. 30, 2016), <http://www.latimes.com/local/lanow/la-me-ln-birth-tourism-persists-20161220-story.html>.

9. *Id.*

factors include economic uncertainty or political risk in the country of origin.<sup>10</sup> Many parents choose to give birth in the United States because of the ease of birthright citizenship. However, other pull factors include high quality paternity care, a strong economy with a robust job market, relative political stability, and a leading public education system.<sup>11</sup> As to push factors, many parents want to give their children the option of a life in the United States because of their fears surrounding the stability of their own countries, the potentially limited opportunities for social advancement, disparities in the educational systems, and economic concerns.<sup>12</sup>

Many of the early cases of birth tourism in the United States were necessitated by policies in other nations, such as China's "one child policy" which forced many parents to give birth abroad to avoid harsh penalties.<sup>13</sup> Indeed, even though China has lessened its regulations on the number of children families can have, parents still need a "reproduction permit," which single mothers are unable to obtain.<sup>14</sup> Without this official sanction, their children will be denied access to many essential public services and they will often face severe stigmatization.<sup>15</sup> An even greater portion of birth tourists are upper middle-class and wealthy families who are primarily interested in giving their children, and potentially themselves, access to the advantages of U.S. citizenship.<sup>16</sup>

Additionally, perceptions of life in the United States are magnified by pop culture in other countries, such as the Chinese film "Finding Mr. Right" which romanticized the experiences of a woman who comes to give birth in the United States.<sup>17</sup> Furthermore, many are enticed by the alluring pictures painted by the companies engaged in the practice.<sup>18</sup> The "AmeriMama" program run by a New Jersey hospital marketed birthing services costing between \$8,500 and \$27,500 to Russian mothers on the premises of their children receiving U.S. citizenship.<sup>19</sup> While some of these "birth tourism" operators run safe programs, others aggressively cut corners resulting in higher death

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10. BBC, *Why do people migrate?* BBC (2015), <https://www.bbc.com/bitesize/guides/zkg82hv/revision/5>. Push factors refer to "the reasons why people leave an area" whereas "pull factors" reference "the reasons why people move to a particular area."

11. Oni, *supra* note 7.

12. Shyong, *supra* note 8.

13. Dave Bier, *Chinese Mothers Give Birth in the US to Thwart China's One-Child Policy*, NISKANEN CENTER (Mar. 5, 2015), <https://niskanencenter.org/blog/chinese-mothers-give-birth-in-the-u-s-to-thwart-chinas-one-child-policy/>.

14. Cherie Chan, *China's unmarried women struggle to overcome barriers to having babies*, DEUTSCHE WELLE (Nov. 23, 2016), <http://www.dw.com/en/chinas-unmarried-women-struggle-to-overcome-barriers-to-having-babies/a-36488553>.

15. Shyong, *supra* note 8.

16. See Lilo H. Stainton, *Marketing U.S. Citizenship and Childbirth Services at Meadowlands Hospital*, NJ SPOTLIGHT (Aug. 10, 2016), <http://www.njspotlight.com/stories/16/08/09/marketing-u-s-citizenship-along-with-childbirth-services-at-meadowlands-hospital/>.

17. Shyong, *supra* note 8.

18. *Id.*

19. Stainton, *supra* note 16.

rates and complications for children of “birth tourists.”<sup>20</sup>

Because of the risk to safety, as well as the perceived gaming of the immigration system, both the federal government and local authorities have taken steps to crack down on birth tourism.<sup>21</sup> Consular officers can deny tourist visas on visa fraud grounds when they suspect the practice.<sup>22</sup> There is also increased enforcement at points of entry where Customs and Border Protection (“CBP”) officers can deny entry to pregnant women if they are unable to demonstrate their ability to pay the medical costs associated with their pregnancy.<sup>23</sup> The U.S. Immigration and Customs Enforcement (“ICE”) also recently raided certain birth tourism hotels due to their assistance in visa fraud because they encourage customers to lie about their reasons for visiting the United States.<sup>24</sup> At the local level, some localities, including Los Angeles, have acted to shut down “birthing hotels” located within areas zoned for residential use.<sup>25</sup>

There have also been several suggestions put forward by members of Congress including the Stop Birth Tourism Act of 2015 (“H.R.2484”) by Representative Rohrabacher of California.<sup>26</sup> H.R. 2484 sought to amend the Immigration and Nationality Act by making certain pregnant nonimmigrant aliens ineligible for visas or admittance into the United States, but failed to pass in committee.<sup>27</sup> The Act would have enabled consular officers to require certification from a healthcare provider that the alien is not pregnant and it would have made undocumented immigrants who were found to be pregnant, and likely to give birth, inadmissible.<sup>28</sup> This bill sought to address birth tourism by making it more difficult for potential parents to obtain visas or enter the United States, rather than to alter birthright citizenship for their children. President Trump has proposed more radical measures to discourage unauthorized immigration that would also limit birth tourism by changing the interpretation of the 14<sup>th</sup> Amendment to exclude birthright citizenship for individuals born to two non-citizens.<sup>29</sup>

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20. Oni, *supra* note 7.

21. Zach Coleman, ‘Birth tourism’ in Saipan causing headaches for USA, USA TODAY (Sept. 9, 2013), <https://www.usatoday.com/story/news/world/2013/09/09/chinese-tourist-births-cnmi/2784797/>.

22. Melina Delkic, *Feds Raid ‘Maternity Hotels’ Where Tourists Paid Up to \$80k to Give Birth in U.S.*, NEWSWEEK (Jan. 10, 2018), <http://www.newsweek.com/feds-raid-maternity-hotels-birth-tourists-777643>.

23. *Can I visit the U.S. while pregnant and what are the risks involved?*, U.S. CUSTOMS AND BORDER PROTECTION, [https://help.cbp.gov/app/answers/detail/a\\_id/882/~/~can-i-visit-the-u.s.-while-pregnant-and-what-are-the-risks-involved%3F](https://help.cbp.gov/app/answers/detail/a_id/882/~/~can-i-visit-the-u.s.-while-pregnant-and-what-are-the-risks-involved%3F) (last visited April 7, 2018).

24. Delkic, *supra* note 22.

25. Shyong, *supra* note 8.

26. Stop Birth Tourism Act of 2015, H.R. 2484, 114<sup>th</sup> Cong. (2015).

27. *Id.*

28. *Id.*

29. Robert Farley, *Trump Challenges Birthright Citizenship* - FACTCHECK (Nov. 13 2015), <https://www.factcheck.org/2015/11/trump-challenges-birthright-citizenship/>.

## IV. SOLUTIONS

One of the issues facing policy makers is the question of whether birth tourism constitutes a problem worth fixing. While many media reports cite to the statistic of 40,000 annual births from non-resident parents,<sup>30</sup> that estimate stands in stark contrast to the 7,955 of total births to non-residents reported by the CDC, a number which suggests a minimal impact on social services.<sup>31</sup> However, problems do emerge when significant flows occur to a specific location, such as in Saipan where hospital resources were strained due to a high volume of birth tourists.<sup>32</sup> But birth tourism can also serve as an engine for local economies, with parents spending money at local stores on general products, medical services, or legal help.<sup>33</sup>

Given the generally limited scope and impacts of birth tourism in the United States, and congressional gridlock, it is unlikely any comprehensive policies such as the Stop Birth Tourism Act of 2015 will be adopted to regulate the practice. However, due to the safety implications for expectant mothers and their children as well as the costs to certain localities, some form of regulation, such as the crackdown on unlicensed maternity care providers in Los Angeles or stricter regulations around their location and the types of services they provide, are likely to emerge in various local governments.<sup>34</sup>

The Supreme Court's ruling in *Wong Kim Ark* left open the option for Congress to limit the ability of children born to two non-resident aliens to receive birthright citizenship because of its focus on the parents being "domiciled" and working in the United States.<sup>35</sup> However, a departure from 120 years of precedent is both unlikely, given legislative deadlock, and unnecessary, as the practice's harmful impacts could be addressed through stricter enforcement of existing laws and regulations.<sup>36</sup>

At the local level, many city and county governments have begun to crack-down on centers which violate zoning ordinances. However, this practice could be expanded beyond targeting "nuisance" operators to targeting less reputable facilities that may endanger the health and wellbeing of the mother and child, on health code grounds. This crackdown may be done in conjunction with ICE by targeting operators assisting in visa fraud and tax evasion in violation of federal immigration laws.<sup>37</sup>

Finally, U.S. embassies operating in countries with significant numbers of birth tourists such as Brazil, China, Mexico, Nigeria, Russia, South Korea, and Turkey should inform visa applicants of the consequences of visa fraud

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30. *Id.*

31. Zitner, *supra* note 2.

32. Coleman, *supra* note 22.

33. Shyong, *supra* note 8.

34. *Id.*

35. *Wong Kim Ark*, 169 U.S. at 705.

36. *Id.*

37. Shyong, *supra* note 8.

and the risks of working with unregulated operators.<sup>38-39</sup> These actions could be advanced by a collaboration between local and federal authorities, focusing on the more crooked organizations that operate in this industry. Narrowing the focus onto these facilities may also be more feasible than a major policy change, and may be a more efficient use of government resources since these facilities do not provide adequate care for their patients.<sup>40</sup> While this approach may be more limited than others critics such as The Center for Immigration Studies point to the costs U.S. hospitals and educational institutions suffer due to birth tourism.<sup>41</sup> A more targeted approach would likely address the limited damages of the practice, while not constituting an unnecessarily expansive and legally complicated response such as restricting birthright citizenship.

## V. CONCLUSION

The scope and impacts of birth tourism are greatly exaggerated by politicians and organizations seeking to limit the practice.<sup>42</sup> However, it can have a disproportionate impact on certain communities when concentrated in a certain area.<sup>43</sup> There are steps which the federal and local governments can take to limit the negative impacts of birth tourism without drastically changing federal laws. Birth tourism is based on birthright citizenship as enshrined in the 14<sup>th</sup> Amendment's citizenship clause, which grants citizenship to those born in the United States.<sup>44</sup> It would be a dangerous precedent for the executive or the legislature to attempt to undermine 120 years of precedent granting birthright citizenship to address a few thousand individuals a year who gain citizenship this way.<sup>45</sup> There are less drastic solutions, such as requiring pregnant nonimmigrant visa holders to provide proof of their ability to pay for medical services, or that they come on a medical, as opposed to general, B-2 visa.<sup>46</sup> Additionally, localities could act to shut down birth tourism companies that do not provide adequate care

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38. Gary Chodorow, *Welcome to Maternity Hotel*, ROLLING STONE (Aug. 19, 2015), <https://www.rollingstone.com/politics/news/welcome-to-maternity-hotel-california-20150819>.

39. Oni, *supra* note 7.

40. Coleman, *supra* note 21.

41. Jon Feere, *Birth Tourism Baby Calls United States a "Foreign Country,"* Center for Immigration Studies (Sep. 28, 2012), <https://cis.org/Feere/Birth-Tourism-Baby-Calls-United-States-Foreign-Country>.

42. *Id.*

43. Mark Rodriguez: *It's not new, but 'birth tourism' is a growing*, CNMI INDUSTRY (Dec. 4, 2017), <http://www.pacificislandtimes.com/single-post/2017/12/05/It's-not-new-but-'birth-tourism'-is-a-growing-CNMI-industry>.

44. Wong Kim Ark, 169 U.S. at 705.

45. Zitner *supra* note 2.

46. Alex Hunt, *INBOUND MEDICAL TOURISM AND VISA REFORM: HOW INCREASING ACCESSIBILITY FOR FOREIGN PATIENTS CAN DECREASE AMERICAN HEALTHCARE COSTS*, 35 HOUSTON J. INT'L L. 103 (2013). Patients seeking a B-2 visa on medical grounds must show additional documents from a treating local physician and an American physician explaining why they urgently need the treatment in the U.S. as well as documents demonstrating their ability to pay for the costs of those treatments. This alone would make it extremely difficult for most "birth tourists" to obtain a visa to come to the U.S. because there are maternity services in their home countries.

for their patients or violate zoning laws. Therefore, the federal government and local authorities can, and should, seek to control the negative consequences of birth tourism by enforcing existing laws and regulations more strictly, rather than embracing sweeping changes to constitutional interpretation.