jurisdiction over the applicant's state of residence.[28] Persons residing outside the United States must mail their application to the INS Service Center that issued the original Certificate of Citizenship.[29]

◆ *Comment:* The granting of posthumous citizenship and the issuance of a Certificate of Citizenship does not entitle the surviving spouse, parent, son, daughter, or other relative of the decedent to any benefit under any provision of the INA, and does not make the statutory provision regarding naturalization of surviving spouses of U.S. citizens who die during honorable service in active duty status in the Armed Forces of the United States applicable to the surviving spouse.[30]

e. Noncitizen Nationality [§§ 2732-2737]

§ 2732. Definition of "national"

For purposes of the Immigration and Nationality Act, the term "national" means a person owing permanent allegiance to a state[31] and the term "national of the United States" means either a citizen of the United States or a person who, though not a citizen of the United States, owes permanent allegiance to the United States.[32] An abstract, subjective sense of "allegiance" to the United States is not sufficient to satisfy the statutory requirement of permanent allegiance to the United States in order to become a national of the United States,[33] and "allegiance" is generally defined as the obligation of fidelity and obedience which an individual owes to the government under which he or she lives or to his or her sovereign in return for the protection the individual receives.[34] Generally, a person may become a national of the United States under the statute granting that status as a result of owing permanent allegiance to the United States only at birth, and a person who is born in another country must affirmatively renounce all allegiance to the foreign state and apply for naturalization in order to become a national of the United States.[35]

◆ *Comment:* Although other federal statutes and regulations contain definitions of the word "national" that are similar to that found in the Immigration and Nationality Act (INA),[36] nationals may also be defined differently than they are defined for purposes of the Immigration and Nationality Act.[37]

28. 8 CFR § 392.4(e).

29. 8 CFR § 392.4(e).

30. 8 CFR § 392.4(d).

31. 8 USCA § 1101(a)(21).

32. 8 USCA § 1101(a)(22).

33. Oliver v. U. S. Dept. of Justice, Immigration and Naturalization Service, 517 F.2d 426 (2d Cir. 1975).

34. Hamilton v. Regents of the University of Calif., 293 U.S. 245, 55 S. Ct. 197, 79 L. Ed. 343 (1934), reh'g denied, 293 U.S. 633, 55 S. Ct. 345, 79 L. Ed. 717 (1935) and (abrogation on other grounds recognized by, Auburn Alliance For Peace and Justice v. Martin, 684 F. Supp. 1072, 46 Ed. Law Rep. 1153 (M.D. Ala. 1988)); U.S. v. Wong Kim Ark, 169 U.S. 649, 18 S. Ct. 456, 42 L. Ed. 890 (1898); Carlisle v. U.S., 83 U.S. 147, 21 L. Ed. 426 (1872).

35. Oliver v. U. S. Dept. of Justice, Immigration and Naturalization Service, 517 F.2d 426 (2d Cir. 1975).

36. 22 CFR § 50.1(d) (Department of State nationality procedures); 32 CFR § 1602.3(b) (regulation adopted under Military Selective Service Act); 22 USCA §§ 1621(c), 1641(2), 1642(1), 1643a(1) (International Claims Settlement Act).

37. U. S. v. Fernandez-Pertierra, 523 F. Supp. 1135 (S.D. Fla. 1981) (definition found in the Trading With the Enemy Act adopted).

◆ *Observation:* The Selective Service System has established Class 4-C for any registrant who establishes that he is a national of the United States and of a country with which the United States has a treaty or agreement that provides that such person is exempt from liability for military service in the United States.[38]

§ 2733. Persons to whom status granted at birth

Unless otherwise provided by statute,[39] the following individuals are nationals, but not citizens, of the United States at birth: (1) a person born in an outlying possession of the United States on or after the date of formal acquisition of such possession; (2) a person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions, prior to the birth of such person; (3) a person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his or her attaining the age of 21 years, not to have been born in such outlying possession; and (4) a person born outside the United States and its outlying possessions of parents, one of whom is an alien and the other a national but not a citizen of the United States, becomes a national but not a citizen of the United States at birth where prior to that person's birth the national was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of 10 years.[40] To satisfy the physical presence requirement the national parent must not have been outside the United States or its outlying possessions for a continuous period of more than one year, and at least five years of which were after attaining the age of 14 years.[41] This section of the INA, making nationals persons born outside the United States and its outlying possessions to parents both of whom are nationals, but not citizens, has been held to apply prospectively only and not to apply to persons born prior to its effective date.[42]

The proviso of the provision dealing with citizens "at birth"[43] applies to the national parent under this paragraph in the same manner as it applies to the citizen parent under that section.[44]

◆ *Observation:* At present, the term "outlying possessions of the United States" applies only to American Samoa and Swains Island.[45]

§ 2734. —Children born out of wedlock

The statutory provision granting U.S. national status to persons born outside the United States and its outlying possessions of parents, both of whom are nationals but not citizens,[46] applies as of the date of birth to a person born out of wedlock if: (1) a blood relationship between the child and the father is established by clear and convincing evidence; (2) the father had U.S. nationality

38. 32 CFR § 1630.42(a).

39. 8 USCA § 1401.

40. 8 USCA § 1408.

41. 8 USCA § 1408(4).

42. In the Matter of T_____, 5 I. & N. Dec. 380, I. & N. Interim Dec. No. 477, 1953 WL 7466 (B.I.A. 1953).

43. 8 USCA § 1401(g).

44. 8 USCA § 1408.

45. 8 USCA § 1101(a)(29).

46. 8 USCA § 1408(2).

at the time of the child's birth; (3) the father (unless deceased) has agreed in writing to provide financial support for the child until such child reaches the age of 18 years; and (4) while such child is under the age of 18 years (a) such child is legitimated under the law of the child's residence or domicile, (b) the father acknowledges paternity of the child in writing under oath, or (c) the paternity of the child is established by adjudication of a competent court.[47]

§ 2735. Application for certificate to Secretary of State

A person who claims to be a national, but not a citizen, of the United States may apply to the Secretary of State for a certificate of noncitizen national status.[48] The Secretary of State may provide an individual living within the United States or its outlying possessions with such a certificate upon proof that the applicant is a national, but not a citizen, of the United States.[49] In the case of a person born outside of the United States or its outlying possessions, the oath of allegiance required by the INA of a petitioner for naturalization will be taken and subscribed before an immigration officer within the United States or its outlying possessions.[50]

◆ *Observation:* The Secretary of State must furnish the individual with a certificate of noncitizen national status, but only if the individual is at the time within the United States or its outlying possessions.[51]

§ 2736. Loss of status upon independence of territory of birth

A person born in a territory over which the United States exercises sovereignty, and who acquires the status of a national, but noncitizen, obtains no vested right in such nationality status, and his or her status is changed to that of an alien if the territory becomes an independent and sovereign nation.[52] Therefore, all Philippine citizens who had not acquired U.S. citizenship as of July 4, 1946, when the United States recognized the Philippines as an independent nation, lost their U.S. nationality, regardless of permanent residence in the continental United States on that date.[53]

◆ *Observation:* Prior to January 13, 1941, the effective date of § 205 of the Nationality Act of 1940, an illegitimate child of unestablished paternity became a U.S. noncitizen national at birth in American Samoa or Swains Island after the annexation dates, if, at the time of the child's birth, his or her mother had such status.[54]

§ 2737. Ineligibility for visa

A national of the United States may not be issued a visa or other documentation as an alien for entry into the United States.[55]

3. Action for Declaratory Judgment of U.S. Nationality [§§ 2738-2753]

§ 2738. Availability of declaratory relief

Any person who is within the United States, who claims a right or privilege as

47. 8 USCA § 1409(a).

48. 8 USCA § 1452(b).

49. 8 USCA § 1452(b).

50. 8 USCA § 1452(b).

51. 8 USCA § 1452(b).

52. Resurreccion-Talavera v. Barber, 231 F.2d 524 (9th Cir. 1956).

53. Rabang v. Boyd, 353 U.S. 427, 77 S. Ct. 985, 1 L. Ed. 2d 956 (1957), reh'g denied, 354 U.S. 944, 77 S. Ct. 1421, 1 L. Ed. 2d 1542 (1957).

54. In the Matter of S_____, 3 I. & N. Dec. 589, I. & N. Interim Dec. No. 32, 1949 WL 6503 (B.I.A. 1949).

55. 22 CFR § 40.2(a).

a national of the United States, and who is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that the claimant is not a national of the United States, may institute an action for a judgment against the head of such department or independent agency declaring such claimant to be a national of the United States.[56] A suit pursuant to this provisions of the INA is not for judicial review of an agency decision, but rather requires the District Court to determine de novo the plaintiff's status as a U.S. national.[57] The court must determine whether the expatriating act was performed voluntarily, with the specific intent to relinquish citizenship.[58]

- *Practice guide:* Since adequate relief is available in the form of a judicial declaration of nationality, relief in the nature of mandamus should be denied in the exercise of discretion where plaintiff seeks to nullify his or her prior renunciation of citizenship.[59]

§ 2739. Issue of nationality must not have arisen in exclusion proceeding

A person may not institute an action for a declaratory judgment of U.S. nationality under the INA if the issue of such person's status as a national of the United States arose by reason of, or in connection with, any exclusion proceeding under the INA or any other Act, or is an issue in any such exclusion proceeding.[60] Therefore, an alleged national, who has been excluded as an alien, and subsequently effects an unlawful entry under a claim of citizenship, but who is later apprehended and placed in deportation proceedings is not entitled to maintain an action for a declaratory judgment of U.S. nationality, because the deportation proceeding stems from the previous exclusion in which the nationality issue originally arose.[61] Moreover, one court has held that the denial of a passport and the issuance of a certificate of loss of nationality abroad by the State Department constitutes an exclusion proceeding within the meaning of the statute, and that under those circumstances, an action for a declaration of U.S. nationality is precluded.[62]

§ 2740. Denial of claim must have related to right or privilege as U.S. national

In order to support an action for a declaratory judgment of U.S. nationality, the action complained of must constitute a denial of a right or privilege as a national of the United States.[63] The denial of a certificate of citizenship is a denial of a right which will support an action for a declaratory judgment of American nationality,[64] as is the failure of the Secretary of State to act promptly on a claimed citizen's application for a passport.[65] A denial of a passport ap-

56. 8 USCA § 1503(a).

57. Maldonado-Sanchez v. Shultz, 706 F. Supp. 54 (D.D.C. 1989).

58. Maldonado-Sanchez v. Shultz, 706 F. Supp. 54 (D.D.C. 1989).

59. Cartier v. Secretary of State, 506 F.2d 191 (D.C. Cir. 1974).

60. 8 USCA § 1503(a).

61. Nevarez v. Brownell, 218 F.2d 575 (5th Cir. 1955); Vasquez v. Brownell, 113 F. Supp. 722 (W.D. Tex. 1953).

62. Aiko Matsuo v. Dulles, 133 F. Supp. 711 (S.D. Cal. 1955).

63. 8 USCA § 1503(a).

64. Cepo v. Brownell, 147 F. Supp. 517 (N.D. Cal. 1956).

65. Dulles v. Quan Yoke Fong, 237 F.2d 496 (9th Cir. 1956).

plication is an administrative denial of the claim or right or privilege as a U.S. national.[66]

◆ *Practice guide:* In an action[67] by a person who acquired dual United States and Venezuelan citizenship at birth because he was born in the United States to Venezuelan parents, and who was denied a U.S. passport on the ground that he had been issued a Certificate of Loss of Nationality (CLN) and thus was no longer a U.S. citizen, the five-year statute of limitations began to run when the plaintiff was denied the passport, rather than when the CLN was issued, since, as a national, the plaintiff had the right to request relinquishment of his U.S. citizenship, and having this request granted by way of a CLN cannot be characterized as the denial of a right.[68]

The refusal of the Attorney General to grant an alien an extension of his or her stay in the United States on the ground that the alien believes himself or herself to be a national of the United States is not the denial of a right or a privilege to such person as a national of the United States, since the administrative proceeding initiated by such application relates to the rights and privileges of an alien rather than the rights and privileges of a national of the United States.[69]

§ 2741. Denial must have been of claim by person within United States

An action for declaratory judgment of U.S. nationality may be brought only after the denial of a claim of a right or privilege as a national of the United States made by a "person who is within the United States."[70] Generally, therefore, a denial of a claim of citizenship which occurs prior to entry into the United States may not be the basis for an action for a declaratory judgment of citizenship,[71] although one court has permitted a permanent resident of Puerto Rico who was informed while temporarily in Spain that her American passport was void to bring an action upon her return to Puerto Rico, where the return to Puerto Rico was not illegal or surreptitious,[72] and another has permitted a naturalized U.S. citizen who was denied an extension of his passport while abroad to bring an action upon his return to the United States.[73] Moreover, a person who has entered the United States on a temporary visa is not a person "within the United States" for purposes of bringing an action for declaration of U.S. citizenship under INA § 360(a).[74]

◆ *Observation:* Redress of denials of claims of U.S. nationality made by persons who are "not within the United States" is generally provided by the statute dealing with applications for certificates of identity and admis-

66. Whitehead v. Haig, 794 F.2d 115 (3d Cir. 1986).

67. 8 USCA § 1503(a).

68. Maldonado-Sanchez v. Shultz, 706 F. Supp. 54 (D.D.C. 1989).

69. Antonacci v. Brownell, 133 F. Supp. 201 (S.D. Ill. 1955).

70. 8 USCA § 1503(a).

71. Correia v. Dulles, 129 F. Supp. 533 (D.R.I. 1954); Rosasco v. Brownell, 163 F. Supp. 45 (E.D.N.Y. 1958); D'Addino v. Dulles, 136 F. Supp. 417 (E.D.N.Y. 1954); Aiko Matsuo v. Dulles, 133 F. Supp. 711 (S.D. Cal. 1955).

72. Puig Jimenez v. Glover, 255 F.2d 54 (1st Cir. 1958).

73. Strupp v. Dulles, 258 F.2d 622 (2d Cir. 1958).

74. Rosasco v. Brownell, 163 F. Supp. 45 (E.D.N.Y. 1958); Ferretti v. Dulles, 150 F. Supp. 632 (E.D.N.Y. 1957), order aff'd, 246 F.2d 544 (2d Cir. 1957); Basma Abed Harake v. Dulles, 158 F. Supp. 413 (E.D. Mich. 1958).

sion into the United States under such certificates.[75] However, although earlier lower court decisions generally held to the contrary,[76] the Supreme Court has held that a person who has been denied a right of citizenship and who is ineligible to bring an action for declaratory judgment because he or she is outside the United States is not restricted to the procedures prescribed by the certificate of identity provisions[77] but may pursue an adjudication of citizenship under the Declaratory Judgment.[78]

§ 2742. Administrative remedies must be exhausted

A party must exhaust his or her administrative remedies before bringing an action for declaratory judgment of U.S. nationality.[79] Accordingly, a District Court abstained from resolving the issue of a defendant's citizenship by birth to allow the AAU to decide the defendant's appeal of an adverse decision in which the INS District Director denied the defendant's application for a certificate of citizenship.[80] However, if there has been a denial of a right or privilege of citizenship, an action may be brought for a declaration of U.S. nationality even though the plaintiff asserts a different factual or legal claim than that presented to the administrative agency.[81] The issuance of a certificate of the loss of U.S. nationality and its subsequent approval by the Secretary of State constitute a final administrative denial of a right or privilege of U.S. nationality for purposes of the appropriate federal[82] statute.[83] However, the issuance of a certificate of loss of U.S. Nationality upon the act of formal renunciation does not constitute a final administrative denial where the act of expatriation by formal renunciation at a U.S. Embassy occurred entirely without formal or informal administrative determination.[84]

§ 2743. Actual controversy must exist

Actions for declarations of U.S. citizenship[85] are subject to the requirements for the maintenance of declaratory judgment actions generally that an actual controversy exist, and the mere possibility, or even a probability, that a person may in the future be adversely affected by official acts does not amount to a denial of a right or privilege as a national of the United States for purposes of the INA.[86] Consequently, a person who was once denied entry to the United States, but subsequently gained admission and resided in the United States continuously and without the denial of any right or privilege of citizenship may not bring an action for a declaratory judgment.[87] A person does not claim a right or privilege as a national merely by requesting an opinion concerning his

75. 8 USCA §§ 1503(b), (c).

76. Rosasco v. Brownell, 163 F. Supp. 45 (E.D.N.Y. 1958); Aiko Matsuo v. Dulles, 133 F. Supp. 711 (S.D. Cal. 1955); D'Argento v. Dulles, 113 F. Supp. 933 (D.D.C. 1953).

77. 8 USCA §§ 1503(b), (c).

78. Rusk v. Cort, 369 U.S. 367, 82 S. Ct. 787, 7 L. Ed. 2d 809 (1962).

79. Louis Chen Sun v. Brownell, 127 F. Supp. 684 (E.D.N.Y. 1955).

80. U.S. v. Breyer, 841 F. Supp. 679 (E.D. Pa. 1993), aff'd, 41 F.3d 884 (3d Cir. 1994), reh'g and reh'g in banc denied, (Dec. 13, 1994).

81. Chew Wing Luk v. Dulles, 268 F.2d 824 (9th Cir. 1959).

82. 8 USCA § 1503.

83. Linzalone v. Dulles, 120 F. Supp. 107 (S.D.N.Y. 1954).

84. Whitehead v. Haig, 794 F.2d 115 (3d Cir. 1986).

85. 8 USCA § 1503(a).

86. Garcia v. Brownell, 236 F.2d 356 (9th Cir. 1956).

87. Garcia v. Brownell, 236 F.2d 356 (9th Cir. 1956).

or her status as a U.S. national from the Attorney General, and an opinion that such person is not a U.S. national does not constitute the denial of such a claim for purposes of bringing an action for declaratory judgment of U.S. nationality.[88] Although an earlier decision held that a person was not entitled to bring a declaratory judgment action merely because he or she had expatriated himself or herself,[89] a more recent decision in another Circuit has denied mandamus relief to a party seeking to nullify a prior renunciation of citizenship and to compel return of the certificate of naturalization on the grounds that an adequate remedy existed by declaratory judgment.[90]

§ 2744. When and where action must be filed

An action for a declaration of U.S. nationality must be instituted within five years after the final administrative denial of the right or privilege denied upon the ground that the claimant is not a national of the United States, and must be filed in the District Court of the United States for the district in which the plaintiff resides or claims a residence.[91] Such court has jurisdiction over the governmental officials involved.[92]

A declaratory judgment action is not time barred where the final administrative denial of the claim or right or privilege as a U.S. national was within five years of the passport denial.[93]

- *Practice guide:* In a declaratory judgment action by a person who acquired dual United States and Venezuelan citizenship at birth because he was born in the United States to Venezuelan parents, and who was denied a U.S. passport on the ground that he had been issued a Certificate of Loss of Nationality (CLN) and thus was no longer a U.S. citizen, the five-year statute of limitations began to run when the plaintiff was denied the passport, rather than when the CLN was issued, since as a national, the plaintiff had the right to request relinquishment of his U.S. citizenship, and having this request granted by way of a CLN cannot be characterized as the denial of a right.[94]

§ 2745. Allegations required in complaint

A party bringing an action for a declaration of U.S. nationality must allege facts showing that he or she has been denied a right or privilege of a national of the United States on the ground that he or she was not such a national,[95] and the party must allege that the petition was filed within five years after the administrative denial of a specific right or privilege as a national.[96]

§ 2746. Against whom action must be brought; service of process

An action for a declaratory judgment of U.S. nationality must be brought

88. Antonacci v. Brownell, 133 F. Supp. 201 (S.D. Ill. 1955).

89. Ferretti v. Dulles, 246 F.2d 544 (2d Cir. 1957).

90. Cartier v. Secretary of State, 506 F.2d 191 (D.C. Cir. 1974).

91. 8 USCA § 1503(a).

92. 8 USCA § 1503(a).

93. Whitehead v. Haig, 794 F.2d 115 (3d Cir. 1986).

94. Maldonado-Sanchez v. Shultz, 706 F. Supp. 54 (D.D.C. 1989).

95. Fletes-Mora v. Brownell, 231 F.2d 579 (9th Cir. 1955); Dulles v. Lee Gnan Lung, 212 F.2d 73 (9th Cir. 1954); Clark v. Inouye, 175 F.2d 740 (9th Cir. 1949).

96. Fletes-Mora v. Brownell, 231 F.2d 579 (9th Cir. 1955).

against the head of the department or agency which has denied the claimed right or privilege.[97] Therefore, in an action complaining of a denial by the INS, the Attorney General, as head of the Department of Justice, is a necessary and proper party defendant,[98] but the Commissioner of the Immigration and Naturalization Service is not a proper and necessary party to such an action.[99] The Attorney General must be served with process in the District of Columbia.[1]

§ 2747. No right to trial by jury

The plaintiff in an action for a declaration of U.S. nationality is not entitled to a trial by jury as a matter of right.[2]

§ 2748. Burden of proof

A person seeking a declaration that he or she is a national of the United States bears the burden of proving that he or she meets the requirements of the statute,[3] by a fair preponderance of the evidence.[4]

The Circuits are not in agreement regarding the burden imposed on the government if the plaintiff makes a prima facie case to support his or her claim of nationality. The courts of some Circuits have held that the introduction of prima facie evidence creates a rebuttable presumption of nationality which may be overcome by substantial evidence.[5] Another Circuit has held that where the plaintiff makes a prima facie case supporting the nationality claim, the government must introduce clear, unequivocal, and convincing evidence of the sort which would sustain a judgment of denaturalization.[6]

§ 2749. Evidence

In an action for a declaratory judgment of U.S. nationality, the plaintiff may establish a prima facie case of U.S. citizenship by proving that he or she has been admitted to the United States as a citizen and has been issued a certificate of citizenship.[7] Birth certificates or court orders in lieu of birth certificates are also generally prima facie evidence of the facts stated therein.[8]

A court may not raise its standards for acceptable testimony to the point where a special quantum of proof is required of persons claiming U.S. nationality, and may not reject the uncontradicted testimony of the plaintiff arbitrarily and without good reasons.[9] However, the court may reject the uncontradicted

97. 8 USCA § 1503(a).

98. Gan Seow Tung v. Carusi, 83 F. Supp. 480 (S.D. Cal. 1947).

99. Skaros v. Brownell, 162 F. Supp. 63 (W.D.N.Y. 1957).

1. Fletes-Mora v. Brownell, 231 F.2d 579 (9th Cir. 1955).

2. Chin Fook v. McGrath, 92 F. Supp. 614 (N.D. Cal. 1950).

3. Haaland v. Attorney General of U.S., 42 F. Supp. 13 (D. Md. 1941); Reyes v. Neelly, 264 F.2d 673 (5th Cir. 1959); Lew Mun Way v. Acheson, 110 F. Supp. 64 (S.D. Cal. 1953).

4. Lee Hon Lung v. Dulles, 261 F.2d 719 (9th Cir. 1958); Chow Sing v. Brownell, 235 F.2d 602 (9th Cir. 1956); Ly Shew v. Dulles, 219 F.2d 413 (9th Cir. 1954).

5. Reyes v. Neelly, 264 F.2d 673 (5th Cir. 1959); Mah Toi v. Brownell, 219 F.2d 642 (9th Cir. 1955).

6. Delmore v. Brownell, 236 F.2d 598 (3d Cir. 1956).

7. Reyes v. Neelly, 264 F.2d 673 (5th Cir. 1959); Lew Moon Cheung v. Rogers, 272 F.2d 354 (9th Cir. 1959).

8. Mah Toi v. Brownell, 219 F.2d 642 (9th Cir. 1955).

9. Yip Mie Jork v. Dulles, 237 F.2d 383 (9th Cir. 1956).

evidence of the plaintiff when the evidence contains serious discrepancies,[10] or when the evidence is tainted by self-interest, evasiveness, confusion, inconsistencies, or improbability.[11] In an action for a declaration of U.S. nationality, the court may not consider its experiences in other cases involving similarly situated plaintiffs in making its decision, but each case must be decided upon its own merits.[12]

§ 2750. —Testimony given before INS

An action for a declaration of U.S. nationality is an independent suit rather than a review of an administrative determination,[13] and the court may not consider testimony merely because it was taken in a proceeding before the INS.[14] However, the INS file of a witness may be admitted for the purpose of impeaching the testimony of that witness.[15]

§ 2751. —Results of blood tests

In an action for a declaration of U.S. nationality, the court may require the plaintiff to submit to a blood test, and the plaintiff's refusal to do so will give rise to an inference adverse to the plaintiff.[16] Although under the Federal Rules of Civil Procedure, Rule 35, the court's authority to order blood tests is limited to parties to the litigation and persons in their custody or legal control, where nonparties have apparently consented to court-ordered blood tests and have not challenged them in any way, the results are not suppressible by a party having no legitimate privacy interest that was invaded by the tests.[17] The government may use the results of blood tests to rebut a prima facie case of nationality established by the plaintiff.[18]

§ 2752. Applicant's parents cannot be compelled to submit to blood tests

Where a person seeks to establish that he or she is an American citizen by reason of having been born to an American citizen parent, the parent cannot be required to submit to a blood test under the Federal Rules of Civil Procedure, Rule 35, since he or she is not a party to the action.[19] In such a case, the child's parents are not within the child's custody or control,[20] and where the alleged father is the guardian ad litem of the petitioning child, this legal relationship does not change the fact that the child is the only person seeking relief.[21] Although it is proper under the Federal Rules of Civil Procedure, Rule 35, to

10. Lau Ah Yew v. Dulles, 257 F.2d 744 (9th Cir. 1958).

11. Yee Tung Gay v. Rusk, 290 F.2d 630 (9th Cir. 1961).

12. Mar Gong v. Brownell, 209 F.2d 448 (9th Cir. 1954).

13. Lee Mon Hong v. McGranery, 110 F. Supp. 682 (N.D. Cal. 1953).

14. Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952).

15. Louie Hoy Gay v. Dulles, 248 F.2d 421 (9th Cir. 1957).

16. Et Min Ng v. Brownell, 258 F.2d 304 (9th Cir. 1958).

17. Scharf v. U. S. Atty. Gen., 597 F.2d 1240 (9th Cir. 1979).

18. Lew Moon Cheung v. Rogers, 272 F.2d 354 (9th Cir. 1959).

19. Chin Nee Deu v. Dulles, 18 F.R.D. 350 (S.D.N.Y. 1955); Yee Szet Foo v. Dulles, 18 F.R.D. 237 (S.D.N.Y. 1955); Scharf v. U. S. Atty. Gen., 597 F.2d 1240 (9th Cir. 1979); Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955).

20. Scharf v. U. S. Atty. Gen., 597 F.2d 1240 (9th Cir. 1979).

21. Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955).