

BOOK A STAY AND WIN U.S. CITIZENSHIP: EXAMINING
BIRTH TOURISM AS A BUSINESS SUBJECT TO FEDERAL
REGULATORY CONTROLS

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TABLE OF CONTENTS

I.	INTRODUCTION	274
II.	BIRTH TOURISM: AN INDUSTRY DEFINED	278
	<i>A. Brief History</i>	278
	<i>B. The Business Model for a Successful Operation</i>	279
	<i>C. Procurement of a Travel Visa</i>	281
	<i>D. Procurement of an Immigrant Visa</i>	282
III.	FEDERAL CRIMINAL CHARGES	283
IV.	TRANSNATIONAL CRIME ORGANIZATIONS	289
V.	CONCLUSION.....	291

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I. INTRODUCTION

Neighbors often expressed concern about the seemingly normal red brick townhouse in Queens, New York.¹ Construction workers were at the residence night and day, altering the design of the building without public notice of requisite construction permits.² The second floor and basement level underwent extensive remodeling to create individualized apartments.³ Beyond building alterations, neighbors noticed heavy foot traffic to and from the building, more illustrative of a business operation than a residential home.⁴ However, what garnered the most attention from the neighborhood was the seemingly endless number of vans pulling up to the residence and dropping off large groups of pregnant women with suitcases in their hands.⁵

Despite such concerns, neighbors did not learn the truth behind these unusual circumstances until police sirens and screams on an early Friday morning alerted them to a grisly stabbing of three infants and two adults within the residence.⁶ The townhome was allegedly operating as a maternity hotel, an establishment solely created to house foreign-born pregnant women who entered into the United States to give birth to their children on American soil.⁷

The salacious news of the stabbings garnered national attention, but news outlets did not focus on the travesty of the crimes, or how a business could allow these women to live and give birth under questionable conditions. Rather, news outlets chose to discuss the crime as a byproduct of United States' immigration policies and the continual legality of birthright citizenship.⁸

¹ Christina Goldbaum, *It Was a Suspected 'Birth Tourism' Site. Then Came Late-Night Screams.*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/nyregion/queens-stabbing-day-care-birth-tourism.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See, e.g., Kuang, Elizalde, & Dillon, *Infant Stabbing in Queens Shines Light on Shadowy Nurseries in So-Called 'Birth Tourism' Market*, N.Y. DAILY POST (Oct. 10, 2018), <https://www.nydailynews.com/news/ny-news-flushing-nursery-stabbing-birth-tourism-20181010-story.html> ("The birthright citizenship is considered a status symbol . . ."); Moore, Pagones, & Eustachewich, *Crazy Lady Goes on Stabbing Spree at Illegal NYC Day Care*, N.Y. POST (Sept. 21, 2018), <https://nypost.com/2018/09/21/infants-among-wounded-in-queens-day-care-stabbing/> ("Using tourist visas, pregnant Chinese mothers arrive in America to give birth—granting the child US citizenship under the 14th Amendment . . ."); Zolan Kanno-Youngs & Melanie Grayce-West, *Three Infants, Two Adults Stabbed at Possible Birthing Center in Queens*, WALL ST. J. (Sept. 21, 2018), <https://www.wsj.com/articles/three-infants-and-man-stabbed-at-queens-day-care-1537532555> ("Under federal law, a child born in the U.S. automatically becomes an American citizen and can later, as an adult, sponsor foreign family members for a green card and eventually citizenship.");

This story is not unique, and birth tourism is hardly a new phenomenon in the United States. Throughout the last decade, news outlets have published various accounts detailing the alleged, illegal business operations of maternity hotels throughout the country.⁹ However, the newfound public interest with birth tourism hardly arose in association with the complex facets of its successful business model. Rather, the interest arose mostly in relation to ongoing political debates regarding immigration concerns.

Maternity hotels are located in highly developed countries, such as the United States, that grant citizenship based on the concept of *jus soli*, or birthright citizenship.¹⁰ *Jus soli* establishes a child's right to citizenship based on the country in which the child is born.¹¹ Thirty of the world's one hundred ninety-four countries offer birthright citizenship, and as such, birth tourism agencies have arisen to capitalize on an expectant mother's interest in obtaining a specific country's citizenship for her child.¹²

Birth tourism is an industry, and a profitable one at that.¹³ Operators of these birth hotels charge up to \$80,000 for packages that can include a plane ticket into the United States, room and board, and medical expenses for the delivery of the expectant mother's child.¹⁴ Despite the profitability of the business, many politicians argue that its operation disrespects the purpose behind

Ryan Gaydos, *Suspected Birth Tourism Site Reportedly at center of New York City Stabbing*, FOXNEWS (Sept. 24, 2018), <https://www.foxnews.com/us/suspected-birth-tourism-site-reportedly-at-center-of-new-york-city-stabbing-spree> (quoting to law enforcement agencies who stated that the crime arose in relation to immigration and citizenship concerns).

⁹ See generally Shayna Rose Arnold, *Home Birth: Inside a Chino Hills "Maternity Hotel"*, L.A. MAG. (Dec. 23, 2013), <https://www.lamag.com/citythinkblog/home-birth-insidea-chino-hills-maternity-hotel/>; Tamar Lewin, *California Apartments Raided in Federal Investigation of Chinese "Birth Tourism"*, N.Y. TIMES (Mar. 3, 2015), <https://www.nytimes.com/2015/03/04/us/california-homes-raided-in-federal-crackdown-on-chinese-birth-tourism.html>; Frank Shyong, *Why Birth Tourism from China Persists Even as U.S. Officials Crack Down*, L.A. TIMES (Dec. 30, 2016), <https://www.latimes.com/lcal/lanow/la-me-lnbirth-tourism-persists-20161220-story.html>; *FBI Raids 'Miami Mama' Business in Hallandale Beach*, NBC MIAMI (June 21, 2017), <https://www.nbcmiami.com/news/local/FBI-Raids-Miami-Mama-Business-in-Hallandale-Beach-429966353.html>; Nicole Tam, *Maternity Tourism in Hawaii*, HAWAII BUS. MAG. (Mar. 4, 2018), <https://www.hawaiibusiness.com/maternity-tourism-in-hawaii/>.

¹⁰ Justin Lollman, *The Significance of Parental Domicile Under the Citizenship Clause*, 101 VA. L. REV. 455, 455 (2015).

¹¹ *Id.* ("Under the United States' system of *jus soli* citizenship, birth within the territory automatically confers U.S. citizenship.")

¹² Jon Feere, *Birthright Citizenship in the United States: A Global Comparison*, CTR. FOR IMMIGR. STUD. (Aug. 31, 2010), <https://cis.org/Report/Birthright-Citizenship-United-States>.

¹³ Daniel Lasher, *Twenty-Five Surprising Facts About Birth-Tourism*, TRAVEL (Oct. 14, 2018), <https://www.thetravel.com/25-surprising-facts-about-birth-tourism/>.

¹⁴ Cynthia Liao, *U.S. Cracks Down on Birth Tourism Industry*, JACKSON LEWIS IMMIGR. BLOG (Mar. 7, 2018), <https://www.globalimmigrationblog.com/2018/03/u-s-cracks-down->

immigration policies, which take into account a country's economic and political systems, as well as the distinctive character of the country itself.¹⁵ In response, many countries have altered their constitutions to prevent immigrants from using birthright citizenship as the means by which to bypass ordinary citizenship and naturalization requirements, citing that unregulated immigration from birthright citizenship resulted in negative economic, social, and political concerns.¹⁶ In the United States, the current administration appears to promulgate similar views. For example, President Donald Trump has advocated for the abolishment of birthright citizenship, a concept rooted in the very foundation of the country, which arises from the Constitution and an interpretation of the Fourteenth Amendment.¹⁷ However, birth tourism does not have to be understood or analyzed solely through a political or Constitutional lens.

The birth tourism business, in its simplest form, provides highly sought-after services to international clients for set fee arrangements. However, there are birth tourism agencies that engage in illegal activity during the course of regular business, and this activity is prosecutable under United States federal law.¹⁸ The United States government has long viewed birth tourism as an immigration issue, but this might be because the country has never sought to prosecute the operators of these businesses until this year.¹⁹

non-birth-tourism-industry/.

¹⁵ Miriam Jordan, *3 Arrested in Crackdown on Multimillion-Dollar 'Birth Tourism' Businesses*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/us/anchor-baby-birth-tourism.html>.

¹⁶ Kimutai Gilbert, *Countries Who Offer Birthright Citizenship*, WORLD ATLAS, <https://www.worldatlas.com/articles/countries-who-offer-birthright-citizenship.html> (last visited Oct. 18, 2018) (discussing how India has recently abolished its practice of birthright citizenship); see Adam C. Abrahms, *Closing the Immigration Loophole: The 14th Amendment's Jurisdiction Requirement*, 12 GEO. IMMIGR. L.J. 469, 476–77 (1998) (suggesting that the jus soli provision within the 14th Amendment serves as a “loophole” for people to avoid the country's immigration policies).

¹⁷ BEN HARRINGTON, CONG. RESEARCH SERV., LSB10214, THE CITIZENSHIP CLAUSE AND “BIRTHRIGHT CITIZENSHIP”: A BRIEF LEGAL OVERVIEW (2018).

¹⁸ Not all birth tourism agencies engage in illegal activity in furtherance of their business. There are agencies which offer, or purport to offer, services that help foreign-born nationals obtain entry into the United States in compliance with all federal immigration laws. See, e.g., Jennifer Pak, *How Specialist Agencies Help Chinese Mothers Give Birth in the U.S.*, MARKETPLACE (Mar. 7, 2019), <https://www.marketplace.org/2019/03/07/agencies-help-pregnant-mothers-in-china-give-birth-in-the-us/>. The legal operation of birth tourism agencies is beyond the scope of this Note. All discussion regarding birth tourism agencies in this Note pertains only to those agencies which operate their businesses in violation of federal law.

¹⁹ *Federal Prosecutors Unseal Indictments Naming 19 People Linked to Chinese 'Birth Tourism' Schemes That Helped Thousands of Aliens Give Birth in US to Secure Birthright Citizenship for Their Children*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Jan. 31, 2019), <https://www.ice.gov/news/releases/federal-prosecutors-unseal-indictments-naming-19people-linked-chinese-birth-tourism> [hereinafter ICE News Release].

This Note proposes that birth tourism should not be viewed or regulated through immigration reform. Nor should the current administration alter the Constitution based on political pressures and inflammatory rhetoric regarding an influx of births from foreign nationals. Rather, this Note will examine birth tourism on a transnational level, evaluating whether the United States should regulate birth tourism agencies that engage in illegal activities as businesses of organized crime.

Part II of this Note will present the background of birth tourism, outlining the development of the industry and how its operators are able to maintain successful business models. Further, Part II will present a brief history of the United States' adoption of *jus soli*, and why birth tourism agencies capitalize on the country's citizenship requirements under the Fourteenth Amendment.

Part III will propose that the U.S. government, more specifically, the Federal Bureau of Investigation and Immigration and Customs Enforcement, should examine the criminal underpinnings of these agencies' business models. Accordingly, this Part will focus on how these businesses fraudulently use travel and immigrant visas to help their clients enter into the country. Furthermore, Part III will analyze this proposal in respect to the United States' recent decision to bring the "first-ever federal criminal charges [] against operators and customers of birth tourism businesses."²⁰ Particularly, this Part will outline the specific federal indictments charged against these operators in respect to the alleged "wide array of criminal schemes" implemented within their businesses.²¹

Part IV will examine whether the proposed federal regulatory controls stated within these indictments effectively target and limit the prevalence of birth tourism in the United States without harming their foreign-national clients. More specifically, this Part will also discuss whether or not it is practical for the United States government to view birth tourism agencies as transnational organized crime groups, subject to additional federal crime regulation.

Finally, Part V will conclude that the United States cannot effectively curtail birth tourism with the end of birthright citizenship or with fearmongering propaganda that paints foreign nationals as enemies of the country. Most importantly, the United States government has brought the first-ever federal criminal charges against birth tourism operators, and the impact of these cases will establish the precedent for how the United States resolves issues related to birth tourism moving forward.

²⁰ *Id.*

²¹ *Id.*

II. BIRTH TOURISM: AN INDUSTRY DEFINED

A. *Brief History*

Birth tourism refers to the “practice of women travelling to a country that provides for birthright citizenship for the express purpose of giving birth in that country so that their child[ren] will be citizens.”²² Among the 30 countries that offer birthright citizenship, the industry tends to center its businesses in the United States because it is a highly developed country with one of the largest economies in the world.²³ Birthright citizenship is a concept dating back to the foundation of the country, a principle codified in the Constitution under the Fourteenth Amendment.²⁴ The Fourteenth Amendment specifically provides that “all persons born or naturalized in the United States [are] subject to the jurisdiction thereof.”²⁵ The phrase has been dissected and examined over the years, with an overall agreeance that the “subject to the jurisdiction thereof” phrase specifically means that the United States government does not owe its allegiance to illegal aliens or temporary visitors.²⁶ As such, the language sparks considerable emotion from United States citizens, including President Trump, who believe that birth tourism agencies will cheapen the value and ideals central to United States citizenship.²⁷

Several countries, such as Australia, have ended birthright citizenship based on the same fears and concerns currently expressed in the United States.²⁸ In ending its practice, the Australian Minister for Immigration and

²² Emily Kendall, *Amending the Constitution to Save a Sinking Ship? The Issues Surrounding the Proposed Amendment of the Citizenship Clause and “Anchor Babies,”* 22 BERKELEY LA RAZA L.J. 349, 372 (2012).

²³ See Will Cabanis, *S.E. Cupp: Only About 30 Other Countries Offer Birthright Citizenship, Making U.S. ‘Anomaly’*, POLITIFACT (Aug. 23, 2015), <https://www.politifact.com/punditfact/statements/2015/aug/23/se-cupp/se-cupp-only-about-30-other-countries-offer-birthr/> (finding that “countries that offer birthright citizenship are located almost exclusively in the Western Hemisphere. No country in Europe or East Asia has a similar citizenship policy.”).

²⁴ Mehera Nori, *Asian/American/Alien: Birth Tourism, the Racialization of Asians, and the Identity of the American Citizen*, 27 HASTINGS WOMEN’S L.J. 87, 94-95 (2016).

²⁵ U.S. CONST. amend. XIV, § 1.

²⁶ Ronald Rizzo, *Born in the USA But Not a Citizen? How the Birth Visa Can Solve Today’s Immigration Challenges*, 27 J. CIV. RTS. & ECON. DEV. 393, 400-01 (2014).

²⁷ Kevin Liptak, *Trump Claims He Can Defy Constitution and End Birthright Citizenship*, CNN (Oct. 31, 2018), <https://www.cnn.com/2018/10/30/politics/donald-trump-ending-birthright-citizenship/index.html>; see William Cummings & David Jackson, *President Trump Says He Plans to End Birthright Citizenship with an Executive Order*, USA TODAY (Oct. 30, 2018), <https://www.usatoday.com/story/news/politics/2018/10/30/trump-birth-right-citizenship-executive-order/1816666002> (describing how the President vowed to issue an executive order to end birthright citizenship, calling the constitutional right “ridiculous” and one that “has to end.”).

²⁸ Rizzo, *supra* note 26, at 398-99.

Ethnic Affairs described automatic birthright citizenship as a “generosity in our law [that] can be exploited by visitors and illegal immigrants who have children born here in order to seek to achieve residence in Australia.”²⁹ Similarly, in 2004, Ireland ended birthright citizenship through the 27th Amendment to the Irish Constitution.³⁰ The Amendment arose amidst years of heated political debate concerning birth tourism and its purported detrimental effects on the nation’s health system and maternity facilities, as well as an unmanageable influx in immigration numbers.³¹ New Zealand and the Dominican Republic ended the practice in 2006 and 2010, respectively, only serving to further the international trend to end universal birthright citizenship.³²

However, the United States, through an established prosecutorial system, has imposed regulatory measures that would at least curtail, if not effectively end, birthright tourism without having to resort to a change in its Constitution. The United States only has to understand the operational structure of the business in order to do so.

B. The Business Model for a Successful Operation

Birth tourism, at its core, is a simple process, operating in a similar manner to someone booking an Airbnb for a relaxing vacation.³³ Owners and operators of maternity hotels solicit business from pregnant women from mostly East Asian countries such as China, Taiwan, and Turkey, who are interested in a one to two month “package” at select accommodations in the United States.³⁴ For example, an expectant mother only has to search for “giving birth in the U.S.” on Weibo, a popular microblogging platform, and she will be directed to over 3 million birth tourism agents, purporting to operate a maternity hotel in the United States.³⁵

Most agencies “tier” their packages and offer basic services such as lodging, airfare, and medical expenses for \$30,000.³⁶ Some Russian birth tourism

²⁹ *Id.* at 398.

³⁰ Kendall, *supra* note 22, at 362-63.

³¹ *Id.* at 362 (describing how the Irish Department of Justice refused to deport nearly 10,500 foreigners because they had children born on Ireland soil, which granted the child Irish citizenship).

³² Feere, *supra* note 12.

³³ Lyndsie Bourgon, *Why Women Are Using Birthing Hotels in Canada*, CHATELAINE (Aug. 9, 2017), <https://www.chatelaine.com/living/birthing-hotels-canada/>.

³⁴ Jon Feere, *Birth Tourists Come from Around the Globe*, CTR. FOR IMMIGR. STUD. (Aug. 2015), <https://cis.org/Feere/Birth-Tourists-Come-Around-Globe>.

³⁵ Rachel Lu, *Look Who’s Walking: Chinese Birth Tourism Goes Stateside*, FOREIGN POL’Y (Apr. 25, 2014), <https://foreignpolicy.com/2014/04/25/look-whos-walking-chinese-birth-tourism-goes-stateside/>.

³⁶ Anna Schecter, *Born in the U.S.A.: Birth Tourists Get Instant U.S. Citizenship for Their Newborns*, NBC NEWS: ROCK CENTER (Mar. 7, 2013), <http://rockcenter.nbcnews.co>

agencies offer luxury packages at Trump Tower apartments, starting at \$75,000, and offer additional services for expectant mothers, such as beach yoga, social get-togethers and around-the-clock medical care.³⁷ Many agencies that do not market luxurious accommodations or vacation-like amenities operate their maternity hotels out of residential apartment complexes, and these operations often violate local zoning codes and create dangerous conditions.³⁸

The packages may differ in regard to their services and amenities, but all birth tourism agencies offer expectant mothers one crucial thing: United States citizenship for their child, along with the potential for the mother's own United States citizenship when the child turns twenty-one and can sponsor her arrival with a green card.³⁹

Prior to the expectant mother's entry into the United States, birth tourism agents assist the mother in completing an application for a travel visa.⁴⁰ Furthermore, these agencies capitalize on the fact that it is not illegal to enter into the United States to deliver a child.⁴¹ However, there are Customs and Border Protection officials at border entry points throughout the United States who routinely question pregnant women once they notice a woman's pregnancy, specifically regarding the amount of cash the mother is carrying at the time and her specific plans for her stay in the United States.⁴² However, this informal questioning is hardly regulated in a consistent manner that could effectively deter birth tourism. Not all pregnant women who are foreign nationals will be stopped for questioning, and those who have purchased a package through a birth tourism agency may have been coached on how to answer questions from federal officers concerning their entry into the country.⁴³

m/news/2011/10/28/8511587-born-in-the-usa-birth-tourists-get-instant-us-citizenship-for-their-newboms.

³⁷ Harriet Pavey, *Wealthy Russians are Flocking to Give Birth at Trump's Luxury US Resorts so Their Kids Can Have Dual-Citizenship*, EVENING STANDARD (Sept. 7, 2017), <https://www.standard.co.uk/lifestyle/london-life/russians-flock-to-give-birth-at-trump-s-properties-in-the-us-so-their-kids-can-have-dualcitizenship-a3628971.html>; see Katie Zavadski, *Russians Flock to Trump Properties to Give Birth to U.S. Citizens*, DAILY BEAST (Sept. 7, 2017), <https://www.thedailybeast.com/russians-flock-to-trump-properties-to-give-birth-to-us-citizens> (finding that some companies market \$100,000 birthing packages that include personal chauffeurs and a suite in the Trump Tower II in Miami with gold-tiled bathtubs).

³⁸ Lu, *supra* note 35.

³⁹ Nori, *supra* note 24, at 90-91.

⁴⁰ Kendall, *supra* note 22, at 372-73.

⁴¹ *Id.* at 373.

⁴² Benjamin Carlson, *Welcome to Maternity Hotel California*, ROLLING STONE (Aug. 19, 2015), <https://www.rollingstone.com/culture/culture-news/welcome-to-maternity-hotel-california-168813/>.

⁴³ *Id.*

The expectant mother delivers her baby on United States soil, establishing the child's citizenship, and the mother and child usually return to their home country within weeks of the birth. From there, the family remains in the mother's home country until the child turns 21 years of age, at which point the child will return to the United States and sponsor the parent on a green card.⁴⁴ Although a long process, birthright citizenship has granted the right for two individuals to potentially work and live in the United States without adhering to established federal laws concerning naturalization and immigration.

C. Procurement of a Travel Visa

As a first step, birth tourism agencies often assist their clients in obtaining travel visas, because without such a visa, a foreign national generally cannot enter into the United States.⁴⁵ A foreign national entering into the United States must either obtain a nonimmigrant visa for a temporary stay, or an immigrant visa for permanent residence.⁴⁶ The nonimmigrant visa is referred to as a visitor visa and is used for business (B-1), tourism or medical treatment (B-2), or a combination of the two (B-1/B-2).⁴⁷ A birth tourism agency will most likely obtain B-2 visitor visas for its clients because the B-2 visa is fairly generous in its coverage of permissible activities: tourism, vacation, visiting friends and relatives, medical treatment, participating in musical or sporting events, and the enrollment in recreational courses of study.⁴⁸ However, this visa does not permit foreign national expectant mothers to enter into the United States to deliver their children. As such, birth tourism agencies advise these women on how to complete online visa applications to avoid detection.⁴⁹ With many of these agencies marketing luxurious vacations at Trump Towers, the "cover story" of an extended vacation appears plausible.⁵⁰ However, it is a federal crime to lie or cover up one's true intentions for entry into the United States on a visa application.⁵¹ Following the visa application, birth tourism

⁴⁴ Liao, *supra* note 14; Kendall, *supra* note 22, at 367.

⁴⁵ *Visitor Visa*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html> (last visited Nov. 2, 2018).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Gabrielle Fonrouge, *Feds Crack Down on Birth Tourism at 'Maternity Hotels'*, N.Y. POST (Jan. 10, 2018), <https://nypost.com/2018/01/10/feds-crack-down-on-birth-tourism-at-maternity-hotels/>.

⁵⁰ Jordan, *supra* note 15.

⁵¹ Matthew Kugler, *Current Developments in Immigration Law: The Debate Surrounding "Birth Tourism,"* 32 GEO. IMMIGR. L.J. 321, 324 (2018) ("The U.S. Immigration and Customs Enforcement . . . raided certain birth tourism hotels due to their assistance in visa fraud because they encourage[d] customers to lie about their reasons for visiting the United States.").

agencies educate applicants on how to respond to in-person interview questions posed by U.S. Border Control officers.⁵²

Although the overall mechanics behind the operation do not appear blatantly illegal, there is a strict stipulation governing the use of a visitor visa: an individual cannot use the visitor visa to try and obtain permanent residence in the United States.⁵³ More specifically, the United States government operates under the presumption that every visitor on a visa is an “intending immigrant.”⁵⁴ Accordingly, the government requires that all applicants state their true intentions or purposes for entering into the United States.⁵⁵ Applicants must confirm that they have a residence outside the United States, as well as binding ties that will ensure the applicant’s departure from the United States.⁵⁶ Any foreign citizen seeking permanent residence must apply and abide by the immigrant visa process.⁵⁷

D. Procurement of an Immigrant Visa

Birth tourism thrives because there is the promise that an expectant mother may not only be able to obtain United States citizenship for her unborn child, but for herself as well. If the child is born in the United States, thus obtaining United States citizenship, the expectant mother may seek permanent legal residence for herself through an immigrant visa when the child reaches 21 years of age.⁵⁸ An immigrant visa allows a United States citizen to petition for a spouse, child, parent, or sibling to enter into the United States and establish permanent residency.⁵⁹ Since a mother is considered an “immediate relative”

⁵² Carlson, *supra* note 42.

⁵³ U.S. DEP’T OF STATE, *supra* note 45.

⁵⁴ *Visitor Visas - Business and Pleasure*, U.S. DEP’T OF STATE, https://travel.state.gov/content/dam/visas/PDF-other/VisaFlyer_B1B2_March_2015.pdf (last visited Nov. 2, 2018) (“The required presumption under U.S. law is that every visitor visa applicant is an intending immigrant until they demonstrate otherwise.”).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Immigrate*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate.html> (last visited Oct. 26, 2019) (“A foreign citizen seeking to immigrate generally must be sponsored by a U.S. citizen or lawful permanent resident immediate relative(s), or prospective U.S. employer, and have an approved petition before applying for an immigrant visa.”).

⁵⁸ *Family-Based Immigrant Visa*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration/family-based-immigrant-visas.html> (last visited Oct. 26, 2019).

⁵⁹ *U.S. Citizen Petition for an Immediate Relative*, U.S. CITIZENSHIP AND IMMIGR. SERV., https://my.uscis.gov/exploremyoptions/us_petition_for_immediate_relative (last visited Jan. 11, 2018).

of the child, the government implements a fast-track plan for citizenship referred to as a “family unity benefit.”⁶⁰ The government designed such a plan so that a mother and her child would never be separated simply because the child retained United States citizenship and the mother did not.⁶¹ Once the child attains twenty-one years of age, the child is able to sponsor the mother, and her United States citizenship can be processed within a few months, subject to the completion and filing of the appropriate forms.⁶²

There are birth tourist clients who have no interest in obtaining an immigrant visa or proceeding any further in the process than obtaining United States citizenship for their child. Expectant Brazilian mothers, for example, often solely consider the well-being of their future child when purchasing a package through a birth tourism agency, citing that the United States provides quality, free education and reputable hospitals to ensure a safe delivery.⁶³ However, these interests pose a concern for the United States government when foreign nationals seek to procure citizenship in violation of federal law and principles codified within the Constitution. Accordingly, the United States employs law enforcement agencies, such as the U.S. Customs and Border Protection and the Federal Bureau of Investigation (FBI) to ensure that foreign nationals entering the country comply with mandated immigration laws.⁶⁴ Birth tourism directly interferes with these law enforcement agencies’ abilities to prevent, detect, and investigate federal crimes related to national security.⁶⁵ However, the United States has not effectively tried to resolve birth tourism through enforcement of its own federal prosecutorial system until this year.

III. FEDERAL CRIMINAL CHARGES

On January 31, 2019, U.S. Immigration and Customs Enforcement (ICE) published a press release detailing the “first-ever federal criminal charges brought against [the] operators and customers of birth tourism businesses.”⁶⁶ ICE is another federal law enforcement agency that operates as a division of the Department of Homeland Security and specifically addresses issues arising from “federal laws governing border control, customs, trade, and immigration.”⁶⁷

⁶⁰ Liao, *supra* note 14.

⁶¹ *Id.*

⁶² *IR5 Visa – US Visa for Parents*, VISAGUIDE.WORLD, <https://visaguide.world/us-visa/immigrant/ir5/> (last visited Nov. 2, 2018).

⁶³ Feere, *supra* note 34.

⁶⁴ Federal Law Enforcement, Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=tp&tid=74>.

⁶⁵ *Id.*

⁶⁶ See ICE News Release, *supra* note 19.

⁶⁷ *U.S. Immigration and Customs Enforcement*, DEP’T HOMELAND SECURITY, <https://stu>

ICE filed indictments against nineteen individuals, mostly Chinese citizens, for their involvement in three birth tourism “schemes” operating out of luxury apartment complexes in Orange County, Los Angeles County, and San Bernardino County, California.⁶⁸ Three of the individuals indicted were the alleged operators of the businesses; however, the remaining sixteen individuals were customers alleged to have violated various federal laws related to visa fraud, tax fraud, and marriage fraud through their purchase of a ‘birth tourism’ package as advertised by these agencies.⁶⁹

In March 2015, when the FBI raided these maternity hotels, many women found at the complexes were not charged with any crime in association with their purchase of a package, but were designated as material witnesses in the case against the business operators.⁷⁰ This is an important issue for the United States to consider when dismantling these agencies, i.e. whether the customers should be the target of these investigations. These women allegedly engaged in criminal activity, but if the United States chose to prosecute these women, the birth tourism industry would still continue to thrive. For example, Star Baby Care, one of the operations named in these indictments, advertised that they “provided services to 8,000 pregnant women.”⁷¹ Dongyuan Li, the operator of You Win USA, advertised that her agency served more than 500 Chinese birth tourism customers.⁷² The business allegedly operated out of twenty apartment complexes in Irvine, California, and clients were charged between \$40,000 and \$80,00 for various services.⁷³ Strategically, it does not make sense to prosecute a handful of women, when they could serve as witnesses in trials against the operators of these businesses. The businesses are the ones with the powerful presence and authority in foreign markets, and these operators are the ones soliciting mass business in violation of federal law. Furthermore, prosecuting expectant mothers would only serve to increase political rhetoric concerning immigration and birthright citizenship.

Accordingly, ICE needs to focus its charges solely against the operators and employees of these businesses. Although each business differed in its services, costs and operation, all three operators “touted the benefits of giving

dyinthestates.dhs.gov/us-immigration-and-customs-enforcement.

⁶⁸ See ICE News Release, *supra* note 19.

⁶⁹ *Id.*

⁷⁰ Andrew Blankstein, Anna Schecter & Tracy Connor, *Feds Raid California 'Maternity Hotels' for Birth Tourists*, NBC (Mar. 3, 2015), <https://www.nbcnews.com/news/us-news/feds-raid-l-maternity-hotel-birth-tourists-n315996>.

⁷¹ ICE News Release, *supra* note 19.

⁷² *Id.*

⁷³ Matt Coker, *Feds Allege Multi-Million-Dollar Chinese Birth Tourism Thrived in Irvine*, OCWEEKLY (Feb. 1, 2019), <https://ocweekly.com/feds-allege-widespread-chinese-birth-tourism-operations-thrived-in-irvine/>.

birth in the U.S., rather than in China.”⁷⁴ Furthermore, as part of their businesses, the operators allegedly helped foreign nationals craft intricate lies on visitor visa applications regarding the extent and purposes of their trips into the U.S.⁷⁵ The question at the crux of these indictments is how the United States will charge and prosecute the operators. Currently, all three operators are indicted with “conspiracy to commit immigration fraud, international money laundering and identity theft.”⁷⁶ Most notably, these indictments center on the crimes as related to “widespread” immigration fraud.⁷⁷

Immigration fraud is a reoccurring element throughout each step of a birth tourism’s business model. ICE is the main unit of the federal government which investigates immigration fraud, largely investigating document fraud and benefits fraud.⁷⁸ Document fraud is referred to as identity fraud and largely involves, “manufacturing, counterfeiting, alteration, sale, and/or use of identity documents and other fraudulent documents to circumvent immigration laws or for other criminal activity.”⁷⁹ Accordingly, there are several avenues the government could pursue related to immigration fraud and fraudulent visas.

Birth tourism agencies solicit business through the promise of a travel visa, but the means by which these agencies help clients obtain such visas can constitute a crime under federal law.⁸⁰ Birth tourism agencies assist applicants, or at least facilitate the means by which expectant mothers can manipulate the purpose of a B-2 travel visa to enter into the United States. Each expectant mother must complete a written application to obtain the B-2 visa, and as such, each applicant must attest to the true purpose of her plans for travel and stay in the United States.⁸¹ Specifically, the applicant must “swear to the veracity of the information contained in the application.”⁸² Women who are purchasing birth tourism packages are not staying for any listed purpose set out in a B-2 travel visa. Instead, through the purchase of this package, their true purpose is to deliver a child in the United States and secure citizenship there. These applicants and organizations are covering up the true purpose in traveling to the U.S., *a material fact*, in the application process for a B-2 Visa.⁸³

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ U.S. IMMIGR. & CUSTOMS. ENF’T., IDENTITY AND BENEFIT FRAUD (2018), <https://www.ice.gov/identity-benefit-fraud>.

⁷⁹ *Id.*

⁸⁰ Kugler, *supra* note 51, at 322.

⁸¹ U.S. DEP’T OF STATE, *supra* note 45.

⁸² Mathew Eltringham, *A Practical Approach to Prosecuting Passport and Visa Fraud Cases*, 65 U.S. ATT’YS BULL. 53, 59 (2017).

⁸³ *Id.* at 57.

Visa fraud is when an individual “utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States.”⁸⁴ Visa fraud also applies to individuals that “knowingly make[] under oath, or as permitted under penalty of perjury . . . knowingly subscribe[d] as true, any false statement with respect to a material fact in any application, affidavit or other document required by the immigration laws or regulation . . .” or “knowingly present[] any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law”⁸⁵

However, visa fraud is not solely confined to the initial application for a travel visa. Specifically, visa fraud can occur “during a field encounter with law enforcement, during the online application process, at a United States Embassy, or at a Consulate.”⁸⁶ Many tourism agencies directly inform clients as to the specific language to repeat to immigration officials to avoid detection.⁸⁷ Agencies also mark specific U.S. entry points that are more susceptible to strict screening processes because pregnant women can be denied entry into the United States for being unable to demonstrate an ability to pay for medical costs associated with a pregnancy.⁸⁸ For example, following an increase in federal agents raiding maternity hotels in Los Angeles and Orange County, one birth tourism agency told its client to avoid traveling directly into Los Angeles International Airport from overseas.⁸⁹ Furthermore, agencies will direct women to wear loose-fitting clothing and to plan their trip into the United States during an early stage of their pregnancy, so that the size of their stomachs does not raise suspicion from federal agents.⁹⁰ Birth tourism agencies flagrantly disregard federal laws governing the procurement of a travel visa, subjecting them to federal prosecution.

Birth tourism agencies can also violate 18 U.S.C.A. § 1001. This federal statute implicates an individual who “knowingly and willfully (1) falsifies,

⁸⁴ *Id.* at 56.

⁸⁵ *Id.* at 57.

⁸⁶ *Id.* at 59.

⁸⁷ Carlson, *supra* note 42.

⁸⁸ Kugler, *supra* note 51, at 324.

⁸⁹ Abby Phillip, *Inside the Shadowy World of Birth Tourism at ‘Maternity Hotels’*, WASH. POST (Mar. 5, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/03/05/the-shadowy-world-of-birth-tourism-at-californias-luxury-maternity-hotels/?utm_term=.2cca4894fca3/.

⁹⁰ *Id.* (Though the act of telling women to wear loose fitting clothing to hide their pregnancy may not in and of itself be an example of visa fraud under the statute, it is worth noting that this action, taken as a whole, purports to show that the agencies are explicitly directing their clients to behave in such a manner as to hide their true intentions for their entry into the U.S.).

conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.”⁹¹

This statute could apply to the various illegal activities crucial to the operation of a birth tourism agency.⁹² However, the central focus of the statute is that a person cannot lie to a federal official about a “material fact,” and a material fact is defined as one that “has the natural tendency to influence or [is] capable of influencing, the decisions of the decision-making body to which it is addressed.”⁹³ Furthermore, the Supreme Court has held that the question of materiality specific to false statements in a visa application “must be measured in terms of [the false statement’s] effect on the applicant’s admissibility into this country.”⁹⁴

As noted before, a foreign national must complete a written application to receive a visa, and she must attest to the truth of her stated purpose for entering into the U.S.⁹⁵ When these birth tourism agencies complete an application on the foreign national’s behalf, and either directly lie about the client’s reasons for entering into the country, or provide a script for her to use on the application, this is a deception against the United States government regarding a material fact. Once again, the extent of this crime extends well beyond the written application stage of the process. As noted before, these agencies instruct their clients to routinely lie because these foreign nationals are repeatedly questioned about their purposes for entry into the United States throughout the visa application process.⁹⁶ More specifically, the lies promulgated by these companies constitute material facts under the statute because a Customs and Border Protection officer is influenced by the dishonest behavior and language enough to grant entry into the U.S.⁹⁷ More specifically, lying to a customs inspector is a crime.⁹⁸

⁹¹ 18 U.S.C.A. § 1001 (West 2006).

⁹² *Id.*

⁹³ *United States v. Gaudin*, 515 U.S. 506, 510, 519 (1995) (finding that the materiality of specific statements and facts is a question for the jury, and in a criminal case, the finding must be beyond a reasonable doubt); *see generally* U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 911, <https://www.justice.gov/jm/criminal-resource-manual-911-materiality#targetText=Specifically%2C%20the%20Court%20stated%20that,to%20which%20it%20was%20addressed.%22>.

⁹⁴ *Federenko v. United States*, 449 U.S. 490, 509 (“At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa.”)

⁹⁵ *Eltringham*, *supra* note 82, at 59.

⁹⁶ *Id.*

⁹⁷ Phillip, *supra* note 89 (describing how a birth tourism agency coached women to engage in dishonest behavior with U.S. Customs and Border Protection officials “to wear loose clothes and to avoid traveling to the United States while looking visibly pregnant”).

⁹⁸ Kugler, *supra* note 51, at 322.

ICE is not limited in its ability to prosecute these agencies for their illegal activities outside visa fraud. For example, the federal government could prosecute these agencies under 18 U.S.C. § 371, with a charge of conspiracy to defraud the United States government.⁹⁹ According to the statute, the elements of the crime are as follows: “if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy”¹⁰⁰ These agencies, arguably, must operate, at the very minimum, on a two-person basis: the business agent and the person soliciting the business. The statute is also exceptionally broad and has been interpreted to refer to any behavior that “primarily cheat[s] the Government out of property or money,” or “that interfere[s] with or obstruct[s] one of [the United States’] lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.”¹⁰¹

The operation of birth tourism agencies requires multiple players: the people who assist expectant mothers in completing visa application, purchase and manage the maternity hotels in the United States, schedule hospital appointments, and organize airfare expenses to and from the United States. Since many of these agencies receive substantial business, it is highly unlikely that operations could continue, let alone thrive, without the assistance of many employees.¹⁰² For example, one agency allegedly managed twenty maternity hotels to house their clients.¹⁰³

Additionally, the United States has broad authority to prosecute these agencies under a charge of conspiracy against the government, pursuant to 18 U.S.C.A. § 371.¹⁰⁴ The statute serves to “protect governmental functions from frustration and distortion through deceptive practices.”¹⁰⁵ The government must prove that there were two or more individuals purporting to commit a

⁹⁹ 18 U.S.C. § 371 (West 1994).

¹⁰⁰ *Id.*

¹⁰¹ *United States v. Hammerschmidt*, 881 F.3d 633, 636 (8th Cir. 2018) (the Court relied on a 4-prong test to prove a claim of fraudulent behavior: i) the two [parties] entered into an agreement ii) to obstruct a lawful function of government agency iii) by deceitful means and iv) committed at least one overt act in furtherance of the conspiracy. The terms within those 4-pronged are not necessarily defined, but remain relatively broad, and are subject to determination on a case-by-case basis.).

¹⁰² Wang Lin, *Why Wealthy Chinese Women Are Flocking to LA to Give Birth*, JING DAILY (July 8, 2017), <https://jingdaily.com/los-angeles-chinese-birth-tourism/>.

¹⁰³ Melina Delkic, *Feds Raid ‘Maternity Hotels’ Where Tourists Paid up to \$80k to Give Birth in U.S.*, NEWSWEEK (Jan. 10, 2018), <https://www.newsweek.com/feds-raid-maternity-hotels-birth-tourists-777643>.

¹⁰⁴ 18 U.S.C.A. § 371

¹⁰⁵ U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 923, <https://www.justice.gov/jm/criminal-resource-manual-923-18-usc-371-conspiracy-defraud-us>.

legal or illegal act that served to defraud the United States government.¹⁰⁶ When birth tourism agencies assist foreign nationals obtain travel visas under false pretenses, they are interfering with the U.S. Citizenship and Immigration Service's practice to "oversee lawful immigration to the United States."

IV. TRANSNATIONAL CRIME ORGANIZATIONS

Although federal prosecutors have the ability to charge the operators of birth tourism agencies under a series of statutes related to immigration fraud, as noted above, they are not restricted to these charges alone. More specifically, federal prosecutors could bring charges related to the structure and hierarchical design of the birth tourism agencies because they operate like a transnational crime organization. The United States Department of Justice defines transnational organized crime as the "self-perpetuating associations of individuals who operate inter-transnationally for the purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption."¹⁰⁷ As previously noted, birth tourism agencies that engage in immigration fraud or illegal activities often charge clients upwards of \$80,000 for their services, and the operators can easily become very wealthy through the practice.¹⁰⁸ For example, the operator of You Win USA, charged in the aforementioned indictment, faced the seizure of her "\$2.1 million residence in Irvine [Calif.], six vehicles including four Mercedes Benz vehicles, [and] more than \$1 million from bank accounts . . ."¹⁰⁹ Although, transnational organized crime has largely been used to describe the illegal activities of the mafia, drug cartels, and groups associated with human and weapons trafficking, there is no single structure or criminal activity which defines these groups.¹¹⁰ More specifically, the organizations do not always engage in violent or drug-related crimes. Since 2011, the government has defined agencies affiliated with intellectual property theft and cyber-crime as transnational organized crime groups because they engage in wide-spread illegal activities for business and profit.¹¹¹ Transnational organized crime can pertain to a wide range of illegal activities,

¹⁰⁶ *Id.* at 493.

¹⁰⁷ *International Organized Crime*, DEP'T OF JUSTICE, <https://www.justice.gov/criminal-ocgs/international-organized-crime> [hereinafter *Organized Crime*].

¹⁰⁸ Liao, *supra* note 14.

¹⁰⁹ See ICE News Release, *supra* note 19.

¹¹⁰ See *Organized Crime*, *supra* note 107.

¹¹¹ See WHITE HOUSE, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME 7 (2011), https://obamawhitehouse.archives.gov/sites/default/files/StrategytoCombatTransnational_Organized_Crime_July_2011.pdf.

but the government cannot bring charges under any one federal statute regarding this criminal structure.¹¹² Instead, organized crime is often used interchangeably with “criminal enterprise,” a structure explicitly defined in federal criminal statutes with specific elements.¹¹³ Pursuant to the Continual Criminal Enterprise Statute, an individual engages in a criminal enterprise when he engages in a “continuing series of violations” of Chapter 13 of Title 21 of the United States Code, he undertakes violations in “concert with five or more other persons” in which he occupies a position of organizer or management, and obtains substantial income.¹¹⁴ Although this statute pertains to criminal enterprises that function like businesses, federal prosecutors “target only[] drug traffickers who are responsible for long-term and elaborate conspiracies.”¹¹⁵ However, there is an additional federal statute defining criminal enterprise which pertains to a wider range of criminal activities, beyond those related to drugs and drug trafficking. The FBI defines a criminal enterprise as “a group of individuals with an identified hierarchy, or comparable structure, engaged in a significant criminal activity.”¹¹⁶ Under this definition, ICE could prosecute more than just the operators of the birth tourist agencies, but any individual employed in its operations. For these individuals, “simply being a member in such a group is enough to warrant prosecution, without further evidence that a specific individual committed any other crime.”¹¹⁷ To be liable for criminal sanction under the Racketeer Influenced and Corrupt Organizations Act, such an organization must commit one of the thirty-five federal crimes listed under the statute, crimes which include direct reference to visa fraud:

any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain.¹¹⁸

¹¹² U.S. Dep’t of Just., *Transnational Organized Crime*, FBI.GOV, <https://www.fbi.gov/investigate/organized-crime> (last visited Sept. 1, 2019).

¹¹³ 21 U.S.C.A. § 848 (c) (West 2006).

¹¹⁴ *Id.*

¹¹⁵ Kenneth Carlson & Peter Finn, *Prosecuting Criminal Enterprises*, BUREAU OF JUST. SPECIAL REPORT 1, <https://www.bjs.gov/content/pub/p df/pce.pdf> (last visited Aug. 31, 2009)

¹¹⁶ *Transnational Organized Crime*, FBI, <https://www.fbi.gov/investigate/organized-crime> (last visited Oct. 3, 2019).

¹¹⁷ Marissa Florio, *Can A Corporation Be a Criminal Enterprise?*, HARV. INT’L L.J. ONLINE (Nov. 5, 2015), <http://www.harvardilj.org/2015/11/can-a-corporation-be-a-criminal-enterprise/>.

¹¹⁸ 18 U.S.C.A. § 1961 (West 2016).

Birth tourism agencies profit off the abuse of birthright citizenship and U.S. immigration policies. However, these agencies do not exist as legitimate corporations or businesses and thus are not subject to the international and domestic laws governing such established entities. Rather, this business structure serves solely to pursue the continuation of illegal activity for profit, and it should be prosecuted as such, with each individual facing the liability for the perpetuation of these federal crimes.

V. CONCLUSION

The organization of the birth tourism industry profits solely from illegal activity, subjecting it to prosecution under federal law. However, the United States fails to consider the legal avenues available for limiting birth tourism due to the highly inflammatory rhetoric surrounding immigration reform and politics. The President calls for an end to birthright citizenship, threatening the use of an executive order to restructure the Fourteenth Amendment.¹¹⁹ The Government has authorized 5,200 troops to guard the U.S.–Mexican border, with further discussion suggesting that number be increased to 10,000, based on fears of immigrants entering into the country.¹²⁰ The recent indictments against the operators of these birth tourism agencies could allow the country to reframe the issue of birth tourism. More specifically, these first charges illustrate that there are plausible, workable criminal sanctions against agencies that facilitate illegal transactions. Accordingly, the United States should view birth tourism within this framework to effectively understand and end its influence.

¹¹⁹ Cummings & Jackson, *supra* note 26; Julie Hirchfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html>.

¹²⁰ Nancy A. Youssef, *Trump to Deploy 5,200 Troops to Southern Border*, WALL ST. J. (Oct. 30, 2018), <https://www.wsj.com/articles/military-to-deploy-5-000-troops-to-southern-border-u-s-officials-say-1540820650>.