The Long Road to U.S. Citizenship

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Naturalization is at the heart of what it means to be an American. It is the brass ring of immigration, the process of intentionally becoming a citizen of one's adopted country. Citizenship confers the right to vote, the right to work for the federal government and its contractors, and safety from deportation in an age of heightened enforcement. We are a nation of immigrants, so every immigrant's dream of becoming a United States citizen is the dream of our own ancestors, distant or recent -with exception for, and apologies to, the Native American First Peoples. The process of naturalization has grown more complex and costly in recent years, the application form itself has mushroomed from 10 to 21 pages, and completing the form and preparing for interview can be difficult to navigate, despite what may seem at first like simple requirements.

I. Steps in the naturalization process

Some procedural aspects of naturalization differ from state to state, even though it is a federal benefit. For civilian applicants, the N-400 Application for Naturalization is currently filed by mail or courier to a lockbox address in either Phoenix, Arizona or Lewisville, Texas, per the most current instructions as posted by U.S. Citizenship and Immigration Services on their website, but applicants and counsel alike should routinely check for updates and revisions at www.USCIS.gov. The appropriate filing address usually depends on the state where the applicant resides. Spouses of certain US citizens regularly employed abroad must file at the Phoenix lockbox, and all military applicants must file with the Nebraska Service Center. The N-400 application must be complete, and must be signed by the applicant. It must be accompanied by two passport-style color photographs on a white background, with the applicant's name and alien registration number written on the back, and a photocopy of the front and back of the applicant's I-551 permanent resident card. The Form N-400 must be accompanied by a check or money order for the application filing fee ($595.00 as of this writing), and Biometric processing fee (currently $85.00) - a single payment for both fees is acceptable. Naturalization applicants over age 75 are exempt

from biometric processing. If an applicant seeks a waiver of the filing and biometric fees, Form N-400 should be accompanied by Form I-912, Request for Fee Waiver, with documents to support the fee waiver request, such as an approval letter to the applicant for issuance of a means-tested public benefit. In most cases, no other documents need be submitted until the applicant appears for an interview. However, in cases where there is any arrest history, it would be prudent to submit photocopies of the Certificate(s) of Disposition along with the N-400 application - originals should be saved for the interview. Where an applicant seeks special accommodations or exemption from certain requirements due to a medical disability, Form N-648 signed by a physician and copies of supporting documents affirming the disability should be submitted with the N-400 application. In order for a medical waiver to be approved, the Form N-648 must include a diagnostic code from the current Diagnostic & Statistical Manual and a statement by the physician explaining how the applicant's medical condition renders them incapable of meeting one of the requirements.

After filing, the applicant will get a receipt notice, and thereafter an appointment for biometric processing at a local USCIS Application Support Center, where the applicant must present photo identification and have digital photographs and fingerprints taken. The purpose of biometric processing is twofold: it is both an identity check and a security and criminal background check. USCIS will compare the digital photos to the passport photos submitted in hard copy with the N-400 application. The applicant's fingerprints will be forwarded to the FBI to check both nationally and internationally for criminal background and records pertaining to national security, terrorist and gang-related activity. While there is variation in the time it takes for security checks to clear, most applicants are scheduled for an N-400 interview three to five months after filing. While USCIS does not currently state this requirement on its N-400 interview appointment notices or accompanying document checklists, an applicant whose fingerprints were unreadable at a biometric processing appointment must obtain a Certificate of Good Conduct from the local police department and present it at the interview.

At the naturalization interview, all testimony is given under oath,

the same as in a courtroom. The applicant will be asked to present all original passports including expired ones, permanent resident card, birth and marriage certificates, tax return, and any other documents relevant to the application, including any legal changes of name, citizenship or marital status. In addition to confirming the facts stated in the N-400 application, including proof of identity from birth up to the present, the applicant will be asked questions to confirm his or her ability to speak, read and write in the English language; basic knowledge and understanding of the fundamentals of United States history and civics; and to affirm support for our form of government and allegiance to the US Constitution. Some senior Immigration Services Officers have authority to approve a naturalization application at the time of interview; many others do not, and their cases must be reviewed by a supervisor before an N-400 can be approved.

Once the applicant has passed the tests of English and civics given at interview, and the examining officer or a supervisor deems the case approvable, the last step is a formal naturalization oath ceremony, where the applicant will surrender his or her permanent resident card, swear allegiance to the flag and Constitution of the United States of America, and receive a Certificate of Naturalization. Timing of the oath ceremony for approved naturalization applicants to become U.S. citizens depends on the federal court having jurisdiction over the state of residence. For example, in New Jersey, if an N-400 is approved at the time of interview, and staffing permits, the applicant may be sworn in on the same day, in the same building at the Newark District office of USCIS. By contrast, in New York, the federal courts retain exclusive jurisdiction over naturalization oath ceremonies, so approved N-400 applicants residing in New York face a wait of two weeks to three months after a successful N-400 interview before an oath ceremony may be scheduled. Leadership of the New York District Office of USCIS has made several valiant attempts to change this state of affairs, but their efforts to institute regular administrative oath ceremonies have been consistently rebuffed by the courts, except for high-profile ceremonial events where large groups are naturalized. Exceptions to this rule exist for urgent timing situations, such as military applicants about to be deployed, and special medical situations, such as homebound applicants who are physically incapable of travel, who can be interviewed and

sworn in at home by arrangement in advance with the New York District.

The most important step for any legal service provider assisting naturalization applicants is the initial screening, to determine whether the prospective applicant is indeed eligible to become a naturalized citizen, or whether filing an N-400 may set off a cascade of undesirable consequences, which might result in loss of residence or removal proceedings.

II. Basic Eligibility Requirements

The basic requirements for eligibility to apply for naturalization to become a citizen of the United States are as follows:

An applicant for naturalization must be lawfully admitted as a Permanent Resident[1] must be at least 18 years of age,[2] and must have maintained Lawful Permanent Resident status for at least five years,[3] or for at least three years since marriage to a U.S. citizen with whom the applicant is living in marital union.[4] Procedurally, civilian applicants residing in the United States and applying under either the regular five-year eligibility rules, or the three-year rules for spouses of US citizens, may file Form N-400 up to three months before the date on which they become eligible for naturalization[5].

Within the statutory eligibility period, an applicant for naturalization:

- must have been physically present in the United States for at least half of that period;[6]

[1]INA §318, §316(a)(1); 8 CFR §316.2(a)(2)
[2]INA §334 (b); 8 CFR §316.2(a)(1)
[3] INA §316(a)(1); 8 CFR §316.2(a)(3)
[4] INA §319(a); 8 CFR §319.1(a)(2),(3)
[5] INA §334(a); 8 CFR §310.2
[6] INA §316(a)(1); INA §319(a); 8 CFR §316.2(a)(4); 8 CFR 319.1(a)(4)

- must not have been absent from the United States for a continuous period of a year or more;[7]
- must reside continuously in the United States from the time of application through the grant of citizenship;[8]
- must reside continuously in the state or district in which the application is filed for at least 3 months prior to filing;[9]
- shall be a person of "good moral character" throughout the eligibility period and until the grant of U.S. citizenship,
- must be attached to the principles of the Constitution, and to the good order and happiness of the United States.[10]

There are different eligibility rules for spouses of certain US citizens working abroad for the US government, for an American research institution or US employer engaged in foreign trade, or for a US-based international organization of which the United States is member per treaty or statute.[11] There are also different eligibility rules for applicants who have performed qualifying active duty service in a branch of the US military.[12] These special classes of applicants may not apply three months in advance of their eligibility date, and are not subject to the physical presence and continuous residence requirements. However, all applicants for naturalization must be Lawful Permanent Residents, and must demonstrate good moral character.

1. Physical Presence

Regular applicants for naturalization, who have a five-year statutory eligibility period under INA §316(a), must have been physically present in the United States for 30 months prior to applying for naturalization. Applicants living in marital union with a US citizen spouse, who have a three-year statutory eligibility period under INA §319(a), must have been physically present in the United States for 18 months prior to applying. This cumulative

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[7] INA §316(b)
[8] INA §316(a)(2); INA §319(a); 8 CFR §316.2(a)(3); 8 CFR 319.1(a)(3)
[9] INA §316(a)(1); INA §319(a)
[10] INA §316(a)(3)
[11] INA §319(b)
[12] INA §§328 & 329

physical presence requirement for at least half of the statutory eligibility period seems straightforward enough – either a person is physically present within the boundaries of the United States on a given day, or not. However, permanent residents who engage in frequent international travel need to know how to count all the days they have spent in transit.

A travel day of which the person spent *any part* in the United States, even one minute, counts as a day present in the United States for purposes of the cumulative physical presence requirement.[13] Thus, for any trip abroad, both the departure date and the arrival date count as days in the United States. At a naturalization interview, the examining officer will typically review the applicant's current passport and all prior passports, both to verify the total number of days spent in the United States since the grant of permanent residence, and to verify the applicant's immigration history prior to becoming a resident.

Unlike nonimmigrants, permanent residents cannot avail themselves of the US Customs and Border Protection electronic entry/departure records to retrieve the government records of their recent travel history. However, they can still be negatively impacted by trends that have surfaced there - the CBP entry/departure database reflects some errors imported from airline flight manifests, sometimes including flights the person did not actually board, and sometimes failing to include entries or exits because of variations in the name and how the inspecting officer entered the data.

2. Continuous Residence

Often referred to as single requirement, "continuous residence" for naturalization purposes actually has two separate parts, a country component covering the entire eligibility period, and a state component covering the three months prior to filing. The country part of the continuous residence requirement[14] attempts to identify whether the applicant has maintained residence in the form of an actual primary place of abode in the United States, without

[13] M-476 Guide to Naturalization, p.24.
[14] INA §316(a)(2); INA§319(a); 8 CFR §316.2(a)(3); 8 §CFR 319.1(a)(3)

interruption, throughout the statutory eligibility period. Residence is defined by law as "principal, actual dwelling place in fact, without regard to intent."[15] The state part of the continuous residence requirement,[16] looks to whether the applicant has maintained a primary residence in the same state as the home address shown on Form N-400, for at least three months preceding the date of application, and still resides in that state at the time of interview. This determines how soon an applicant can file Form N-400 after moving across state lines, and which USCIS District Office will receive the application file and conduct the interview. A move across state lines after filing Form N-400 changes the office that has jurisdiction, and requires the file to be transferred.

Any stay abroad of six months to one year creates a rebuttable presumption that continuity of residence was broken.[17] Staying abroad past the six-month mark shifts the burden of proof to the applicant to show continuous residence by a preponderance of the evidence, under a totality of the circumstances test including, but not limited to, continuing employment in the United States, maintaining full access to a principal place of abode in the United States, immediate family members remaining in the United States, and the applicant not obtaining new employment abroad.[18] For an absence from the United States of less than six months, there is no presumption of a break in continuity, but if an applicant proffers facts on the N-400 or at interview indicating that he or she has moved to a primary place of abode abroad, and/or taken a new job with a foreign employer, USCIS is not prohibited from inquiring into whether that applicant has broken continuity of residence in the United States, or abandoned residence altogether. As long as there is no finding of abandonment, an applicant who has broken continuity of residence will become eligible to apply for naturalization four years and a day after moving back to resume a primary residence in the United States.[19]

For certain missionaries and other religious workers admitted as

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[15] INA §101(a)(33)
[16] INA §316(a)(1)
[17] INA §316(b), 8 CFR §316.5(c)(1)(i)
[18] 8 CFR §§316.5(c)(1)(i)(A)-(D)
[19] 8 CFR §316.5(c)(1)(ii)

permanent residents, who have spent at least one year of physical presence and continuous residence in the United States, subsequent periods spent abroad performing ministerial, priestly or missionary functions within the same religious denomination will not be deemed to break continuous residence.[20]

The regulations on continuous residence take into account a broad constellation of factors, and acknowledge that many people may have more than one residential address at a time that they may legitimately call home. Students attending school elsewhere than in their home state may use either their school address or home residence address when applying for naturalization.[21] Applicants who have residences in multiple states are deemed to reside principally at the home address used for federal income tax return filings.[22] Multiple-residence situations where the address used for income tax filings was not used by the applicant as an actual dwelling place require close examination, both to determine the facts of where the applicant actually resides, and also to identify whether any material misrepresentations were made in order to obtain immigration or tax benefits, either of which could be the basis for a bar to naturalization.

Students who attend school abroad may not be deemed to have broken continuity of residence on that basis alone, because a student may also have a permanent residence where the parents live, but other regulatory factors will be taken into consideration[23].

Commuter aliens who reside abroad in a contiguous territory but who work inside the United States may not apply for naturalization until they take up an actual principal dwelling place in the United States, and maintain it for the statutory period.[24]

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[20] INA §317
[21] 8 CFR §316.6(b)(2)
[22] 8 CFR §316.5(b)(4)
[23] Li v. Chertoff, 490 F. Supp.2d 130 (D. Massachusetts 2007)
[24] 8 CFR §316.5(b)(3)

An applicant who has failed to file US income tax returns at any time since becoming a permanent resident[25] or who filed a Form 1040-NR or state income tax return claiming non-resident status, raises a rebuttable presumption that he or she has abandoned permanent residence.[26] Any non-resident US or state income tax return may be deemed *prima facie* evidence of the applicant's intent to abandon residence in the United States. While instructions provided by USCIS prior to the N-400 interview only require the applicant to bring a US income tax return for the single most recent past year, older past tax returns may be deemed probative and relevant to establish continuous residence, and may be requested by the examiner, especially where the applicant has a history of lengthy or frequent international travel.

Most physical absences of one year or more terminate permanent residence automatically, by operation of law.[27] However, an absence of over one year will not automatically terminate lawful permanent residence if, prior to departing the United States, the resident filed an I-131 Application for Travel Document and obtained a Re-Entry Permit, demonstrating an intent to return.[28] Possession of a Re-Entry Permit by itself only prevents the Service from making a one-factor determination that the permit holder has abandoned residence, based solely on length of absence from the United States; it does not prohibit a substantive inquiry into all other factors to determine whether the person has in fact maintained continuous residence.[29]

An absence of over one year with a Re-Entry Permit still breaks the continuity of residence, unless the applicant also qualifies for, and applies for, the much narrower benefits under INA §316(b), by filing and obtaining approval of a Form N-470, Application to

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[25] i.e., any applicant who earned enough to owe income taxes: Applicants who have not filed income tax returns for years in which they were Lawful Permanent Residents, but earned less than the standard deduction and had no obligation to file a tax return in such years, are not deemed to have indicated any intent to abandon residence.
[26] 8 CFR §316.5(c)(2)
[27] INA §316(b)
[28] INA §223
[29] 8 CFR §223.3(d)(1)

Preserve Residence for Naturalization Purposes.[30]

The N-470 application to preserve continuous residence covers:

> "a person who has been physically present and residing in the United States after being lawfully admitted for permanent residence for an uninterrupted period of at least one year and who thereafter, is employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Attorney General, or is employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or corporation, or is employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence, no period of absence from the United States shall break the continuity of residence if-
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> (1) prior to the beginning of such period of employment (whether such period begins before or after his departure from the United States), but prior to the expiration of one year of continuous absence from the United States, the person has established to the satisfaction of the Attorney General that his absence from the United States for such period is to be on behalf of such Government, or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged in the development of such foreign trade and commerce or whose residence abroad is necessary to the protection of the property rights in such countries of such firm or corporation, or to be employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence.[31]

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[30] INA §316(b); 8 CFR §316.5(d)
[31] INA §316(b)

The N-470 application is of limited utility, because the statute expressly disqualifies most of the people it purports to benefit. INA §316(b) requires the applicant to have spent 365 uninterrupted days of physical presence and continuous residence in the United States, prior to a transfer abroad for a year or more. Thus, the only applicants who qualify to preserve their continuity of residence for naturalization purposes are those who have not set foot outside the United States for at least a full calendar year after becoming a resident and before they are transferred abroad. This rarely occurs in real life - when any US company, research institution, government agency, or international organization is about to transfer a worker abroad for a posting that will last more than a year, it is overwhelmingly likely that the organization will have required that person to travel abroad frequently in years preceding the transfer, and the worker is likely to have engaged in frequent international travel even in previous jobs.

Individuals who have broken continuity of residence, including those who have had and used a Re-Entry Permit for an absence of a year or more, and who resume continuous residence in the United States thereafter, do not have to wait the whole statutory period to become eligible to file. They may apply for naturalization four years and one day after moving back to a primary residence in the United States - or two years and one day after moving back to the United States, for spouses of U.S. citizens applying under INA 319(a).[32]

3. Good Moral Character

The concept of Good Moral Character is like a photographic negative, defined by what it is not. While the law[33] requires any applicant for naturalization to be "a person of good moral

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[32] 8 CFR §316.5(c)(1)(ii)

[33]Required period of good moral character: under INA §316(a)(3), five years; under INA §319(a), three years; under INA §319(b), at time of interview but no specified prior period; under INA §328, one year. Under INA §329, no specified period.

character" throughout the statutory eligibility period, and after filing up until the grant of citizenship, there is no affirmative statement of who qualifies as such a person. Instead, there is the vague and elastic remark in the old INS Interpretations that "standards of average citizens of the community in which the applicant resides" will be applied,[34] thus acknowledging that the definition of good moral character is normative but fluid, and changes with public mores over time. While there is no authority on what is good moral character, there is plenty of statutory and other authority specifying what it is *not*, enumerating a host of actions and offenses which will result in a determination that the applicant lacks good moral character.

A. Statutory & Regulatory Bars to Good Moral Character

Due to immigration laws enacted in the 1990s that are far out of step with federal and state criminal laws and made sweeping changes to the Immigration & Nationality Act[35], meting out harsh immigration consequences for many minor offences, it is essential to review a potential naturalization applicant's arrest history with great care and attention to detail. Minor, expunged, and sealed juvenile records for long-past offenses may have draconian consequences including denial of naturalization, removal (deportation) and loss of permanent residence, and possibly new criminal penalties should the person re-enter the United States thereafter.

The statute at INA §101(f), which incorporates a significant number of grounds of inadmissibility from INA §212(a), prohibits a finding of good moral character for any naturalization applicant who, at any time during the statutory eligibility period -

-is or was a habitual drunkard[36]

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[34] INS Interpretations 316.1(e)(1)
[35] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214("AEDPA") & The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub.L. 104-208, 110 Stat. 3009-546, ("IIRAIRA")
[36] INA §101(f)(1)

-came to the US to engage in prostitution or other form of commercialized vice, or engaged in prostitution or procuring of prostitutes within 10 years of applying for a visa, admission to the US, or adjustment of status[37]

-ever knowingly engaged in alien smuggling (assisted, aided or abetted a person to enter the US in violation of law)[38]

-came to the US to practice polygamy, or practiced polygamy after admission[39]

-has been convicted of, admitted committing, or admitted to the essential elements of a crime involving moral turpitude[40] ("CIMT"), with exceptions for a single offense, either where the applicant was under age 18 at the time, and the offense was five or more years prior to the date of application; or where the maximum possible sentence was under one year, and any actual sentence imposed was of six months or less[41]

-has been convicted of, admitted committing, or admitted to the essential elements of any drug or controlled substance offense, with the exception of a single offense for simple possession of 30 grams or less of marijuana[42]

-has been convicted of two or more offenses (regardless of whether they arose from a single scheme of conduct) for which the total sentence imposed was five years or more[43]

-has given the Department of Homeland Security reason to believe that he or she is or was a drug trafficker[44], or, is the spouse, son or daughter of a known drug trafficker who benefited from the

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[37] INA §101(f)(3), incorporating INA 212(a)(2)(D)
[38] INA §101(f)(3), incorporating INA 212(a)(6)(E)
[39] INA §101(f)(3), incorporating INA 212(a)(10)(A)
[40]INA §101(f)(3), incorporating INA 212(a)(2)(A)(i)(I). Like "good moral character", a "crime involving moral turpitude" is not defined by statute.
[41] INA §212(a)(2)(A)(ii)
[42] INA §101(f)(3), incorporating INA §212(a)(2)(A)(i)(II)
[43] INA §101(f)(3), incorporating INA §212(a)(2)(B)
[44] INA §101(f)(3), incorporating INA §212(a)(2)(C)(i)

trafficker's activity within the past five years, and knew or should have known they were receiving the benefit of illicit activity[45]

-derived income principally from illegal gambling[46]

-has been convicted of two or more gambling offenses[47]

-has given false testimony for purposes of obtaining any immigration benefit[48]

-has been in prison for an aggregate of 180 days or more, regardless of when the underlying offenses were committed[49]

-has at any time after November 29, 1990, been convicted of an aggravated felony, as defined at INA 101(a)(43)[50]

-has ever participated in acts of Nazi persecution, genocide, torture or extrajudicial killings[51]

An important feature of these mandatory bars to a finding of good moral character under INA §101(f) is the diverse range of timelines: some apply only to conduct or convictions within the statutory eligibility period, some reach further back in time to a specific enactment date, and some bars apply to conduct regardless of when it occurred.

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[45] INA §101(f)(3), incorporating INA §212(a)(2)(C)(ii)
[46] INA §101(f)(4)
[47] INA §101(f)(5)
[48] INA §101(f)(6)
[49] INA §101(f)(7)
[50] While INA §101(f)(8) on its face seems retroactive to any aggravated felony ever, 8 CFR §316.10(b)(1)(ii) limits its application to convictions on or after November 29, 1990, effective date of the IMMACT 90 expanded definition of 'aggravated felony'. "Date of conviction" for purposes of this section is the date of sentencing or date the judgment was entered. Puello v. BCIS, 511 F.3d 324 (2d Cir. 2007). This permanent bar applies even if relief was granted under INA §212(c). Letter of Acting Asst. Comm'r., Adjudications, Miller, HQ316-C (May 5, 1993) *reprinted in* 70 Int. Rel. 752, 769-70 (June 7, 1993).
[51] INA §101(f)(9)

i. False Testimony, False Statements in Writing, & False Claims to US Citizenship

The statutory bar to a finding of good moral character for false testimony under INA §101(f)(6) is limited to affirmative misstatements, not omissions, made in oral testimony[52] under oath.[53] This may include testimony before an officer at an interview in connection with a written application, such as a USCIS interview for asylum, adjustment of status, or naturalization.[54] In the 9th Circuit, the definition of false testimony is limited to statements made "before a court or tribunal."[55] However, the meaning of this distinction from other circuits has been diluted, since both naturalization and asylum interviews have been found to constitute a "tribunal" for this purpose.[56]

Apart from the false testimony bar, there is a broad statutory bar to naturalization under INA §318 for those who obtained permanent residence unlawfully. This includes anyone later found to have been inadmissible due to fraud or a misrepresentation that was material to a benefit sought, which would include material misrepresentations by omission in written applications or petitions that led to a grant of permanent residence. Misrepresentations covered under this section of the statute must have been made to a government official, typically a consular officer or an officer of the Department of Homeland Security, with respect to an application for a benefit on the alien's own behalf, not in an application or petition for someone else.[57]

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[52] Matter of L-D-E-, 8 I&N Dec. 399 (BIA 1959)
[53] Matter of G-, 6 I&N Dec. 208 (BIA 1954); Kungys v. United States, 485 U.S. 759 (1988)
[54] Matter of Ngan, 10 I&N Dec. 825 (BIA 1964); Matter of G-L-T-, 8 I&N Dec. 403 (BIA 1959)
[55] Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981), reversed on other grounds, 464 U.S. 183 (1984)
[56] Bernal v. INS, 154 F.3d 1020 (9th Cir. 1998); Matter of R-S-J-, 22I&N Dec. 863 (BIA 1999)
[57] Misrepresentations in the alien's own application are covered by INA §212(a)(6)(C)(i), but those on behalf of someone else may trigger the ground of inadmissibility for alien smuggling under INA §212(a)(6)(E). See 9 FAM 40.63, Note 4.4.

False claims to US citizenship are a federal criminal offense, subject to fines and a term of up to three years of imprisonment under 18 USC §911, for false claims made "willfully." They also trigger both a specific ground of inadmissibility[58] and a specific ground of removal[59].

False claims to US citizenship are subject to further federal criminal penalties, including up to five years in prison, under the narrower provisions of 18 USC §1015(e), if the claim was made knowingly, with intent to gain a government benefit for oneself or any other person, or to engage unlawfully in employment in the United States. Under Section 344(c) of IIRAIRA, the impact of any false claims to citizenship made on or after September 30, 1996 was vastly expanded. As of that date, both the INA and the criminal statute encompass false claims to US citizenship made to a private party to secure unauthorized employment, for example on an I-9 Employment Eligibility Verification Form to start a job with a private employer[60], as well as any false claims of citizenship made "with intent to gain a government benefit"[61] such as voting in a federal, state or local election, signing a voter-registration form, engaging in fraud to procure government benefits or reduce taxes, or renewing a driver's license or professional license. False claims to US citizenship on an I-9 should be the subject of specific inquiry by counsel for any prospective naturalization applicant who may have had a period of unauthorized employment prior to the grant of residence but after September 1996. While an alien's statements on a Form I-9 go to the question of admissibility, and authorities have sought out and used this information in removal and criminal cases, USCIS, ICE and prosecutors are prohibited by law from using Form I-9 except to enforce specific provisions, and may not ask either an applicant or an employer to furnish I-9 forms in order to review the person's admissibility.[62]

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[58] INA 212(a)(6)(C)(ii). No waiver under §212(i) is available.
[59] INA §237(a)(3)(D)
[60] Ateka v. Ashcroft, 384 F.3d 954, 956-957 (8th Cir. 2004)
[61] Includes a benefit under the INA or any other federal or state law, per Jamieson v. Gonzales, 424 F.3d 765 (8th Cir. 2005).
[62] INA §274A(b)(5), Limitation on use of attestation form.-A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be

If a false claim to US citizenship was made prior to September 30, 1996, then it must have been made to a government official, for the purpose of obtaining a specific immigration benefit under the INA, in order to render the person inadmissible.[63]

Good moral character will be found lacking upon most indications of intentional misleading statements or conduct – and a material omission may be just as significant as an affirmative misstatement. Even if an applicant can affirmatively show good moral character for the entire statutory period, he or she may still have been inadmissible at the time residence was granted, and would still be deportable, although the five-year window for rescission of adjustment of status[64] may have passed. A person whose immigration history reveals fraud, intentional misrepresentation or omission of material facts in obtaining residence should never file an N-400 application. Past misstatements or omissions which do not meet the definition of false testimony under INA §101(f)(6) still bar the applicant under INA §318 as a person who obtained permanent residence unlawfully.

Indicators of fraud or concealment of material fact in the applicant's immigration history, particularly those leading up to the grant of residence or the removal of conditions on residence, need to be explored in detail, regardless of when they occurred.

The naturalization applicant has the burden of proving that residence was obtained lawfully[65], and a finding of fraud or material misrepresentation in the green card process will result in more than denial of naturalization. It can lead to rescission of permanent residence, if discovered within five years of the grant of

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used for purposes other than for enforcement of this Act and sections 1001, 1028, 1546 and 1621 of title 18,United States Code.

[63] *See* INS Memorandum from Acting Assoc. Commissioner Joseph R. Greene, April 6, 1998, on "Section 212(a)(6)(C)(ii) Relating to False Claims to US Citizenship," AILA InfoNet Doc. No. 98040691

[64] INA §246(a)

[65] INA §318

residence[66] and to removal proceedings[67] if discovered by USCIS at any time – even after a grant of citizenship.

ii. Crimes Involving Moral Turpitude

Crimes involving moral turpitude ("CIMT") have three effects: 1) a single CIMT within the statutory period is an automatic bar to naturalization; 2) any two CIMTs since the grant of residence render the applicant removable; and, 3) a single CIMT at any time since the grant of residence renders the applicant inadmissible, thus prohibiting foreign travel. Unlike many other statutory bars, actual conviction of a CIMT is unnecessary if the applicant has admitted committing the elements of the offense.

The general definition of a Crime Involving Moral Turpitude ("CIMT") per the Board of Immigration Appeals is "conduct which is inherently base, vile, or depraved and contrary to the accepted rules of morality and the duties owed between persons or to society in general…Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or *malum in se*, so it is the nature of the act itself and not the statutory prohibition which renders a crime one of moral turpitude."[68]

More recently, it has been determined by the Attorney General to involve "both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness."[69]

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[66] Under INA §246(a), the government has the burden of proof in rescission proceedings, and the standard of proof is by clear, unequivocal and convincing evidence. Matter of Masri, 22 I&N Dec. 1145, 1149 (BIA 1999); Matter of Hernandez-Puente, 20 I&N Dec. 335, 337 (BIA 1991); Matter of Pereira, 19 I&N Dec. 169, 171 (BIA 1984)

[67] Per INA §237(a)(1)(A), for having been inadmissible due to a misrepresentation under 212(a)(6)(C)(i) at the time of admission or adjustment of status.

[68] Matter of Franklin, 20 I&N Dec. 867, 868 (BIA 1994), aff'd 72 F.3d 571 (8th Cir. 1995); Matter of Short, 20 I&N Dec. 136, 139 (BIA 1989); Matter of Flores, 17 I&N Dec. 225, 227 (BIA 1980)

[69] Matter of Silva-Trevino, 24 I&N Dec. 687, 689 n.1 and 706 n.5 (AG 2008)

Broad classes of offenses have emerged as CIMTs, including:

- Crimes of larceny, but not all theft offenses – the distinction being any taking intended to permanently deprive the owner of a property right, as opposed to a taking that may be temporary.[70] If the object of theft is cash or retail goods, then it is a CIMT.[71] Robbery and knowing receipt of stolen property are CIMTs.[72]

- Any intentional act that permanently deprives another party of funds due to them for goods or services, whether that party is a government, a company, or an individual, is a CIMT, down to turnstile-jumping and other fare-beating offenses.

- Any offense with fraud as an essential element is a CIMT.[73] This ranges from mail fraud, tax fraud, benefits fraud, credit card fraud, and trafficking in counterfeit goods, to knowingly passing bad checks.

- While simple assault and battery are not CIMTs because they lack a *mens rea*, crimes of violence entailing vicious motive,[74] use of a deadly weapon,[75] or threats of bodily harm[76] are CIMTs.

- Sexual abuse of a minor[77] and domestic violence involving willful infliction of injury on a family member[78] are

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[70] Matter of V-Z-S-, 22 I&N Dec.1338, n.12 (BIA 2000)
[71] Matter of Grazley, 14 I&N Dec. 330 (BIA 1973); Matter of Jurado, 24 I&N Dec. 29 (BIA 2006)
[72] Matter of Gordon, 20 I&N Dec.52 (BIA 1989)
[73] Jordan v. DeGeorge, 341 U.S. 223 (1951); Matter of Flores, 17 I&N Dec. 225 (BIA 1980)
[74] Matter of Sanudo, 23 I&N Dec. 968, 971 (BIA 2006), et al.
[75] Matter of Medina, 16 I&N Dec.611 (BIA 1976)
[76] Matter of Ajami, 22 I&N Dec. (BIA 1999); Matter of B, 6 I&N Dec. 98 (BIA 1954)
[77] Padilla v. Gonzales, 397 F.3d 1016 (7th Cir. 2005)
[78] Matter of Tran, 21 I&N Dec. 291, 294 (BIA 1996)

CIMTs.

- Most offenses relating to possession of controlled substances (or firearms) do not require scienter and thus are not CIMTs, but drug trafficking offenses are CIMTs.[79]

These examples and precedents illustrate some general trends, but *in every case* it is essential to read and analyze the statute in question. If the statute defining the offense may cover some conduct that does not require any intent or knowledge, then the offense may not be a Crime Involving Moral Turpitude.

In the beginning, there was almost a century of jurisprudence that looked solely to the statutory language, to determine whether or not the offense proscribed was a Crime Involving Moral Turpitude by assessing whether the minimum criminal conduct necessary to sustain a conviction under the statute would qualify as a Crime Involving Moral Turpitude. This was known as the "categorical approach."

In November 2008, then-Attorney General Michael Mukasey upended the analytical framework used by the Board of Immigration Appeals, Immigration Judges, and the Department of Homeland Security, and set forth a new three-step approach in the precedent decision *Matter of Silva-Trevino*[80]. The first of these three steps was a statutory analysis, also called a "categorical approach" but altered substantially from the "minimum conduct" test to a test as to whether there was a "realistic probability, not a theoretical possibility" that the statute could apply to conduct not involving moral turpitude. If the statute could realistically be applied to both turpitudinous and non-turpitudinous conduct (known as a "divisible" statute), then step two of *Silva-Trevino* required a "modified categorical approach," permitting examination of the record of conviction [deemed to include the indictment, judgment of conviction, jury instructions, signed guilty plea or plea transcript] in order to determine the exact nature of the offense committed. If the record of conviction was still inconclusive as to whether the offense entailed moral turpitude

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[79] Matter of Khourn, 101 I&N Dec. 1041 (BIA 1997)
[80] 24 I&N Dec. 687 (AG 2008)

because it was not an element of the crime, then step three permitted looking beyond the record of conviction and considering any other evidence necessary to determine whether the offense was a CIMT. The *Silva-Trevino* decision held that "a finding of moral turpitude under the Act requires that a perpetrator have committed the reprehensible act with some form of scienter."[81] This is minimally helpful in that it excludes strict liability offenses.

Its greatest departures from past analysis were substitution of a "realistic probability test" for the "minimum conduct" test, and allowing examination of evidence not contained in the record. This essentially allowed both immigration courts and federal courts to go on fishing expeditions for evidence of actual conduct outside the record of conviction.

For nearly six years, the BIA followed *Silva-Trevino*, but some federal courts declined to do so, or followed it only in part and retained the old form of the categorical approach. To date, *Silva-Trevino* has been rejected in the 3rd, 4th, 5th, 9th & 11th circuits, not in that order[82] but including the Silva-Trevino case itself, while the 7th and 8th Circuits have explicitly allowed judges to look beyond the record of conviction to determine whether an offense was a CIMT.[83]

The Supreme Court's 2013 decisions in *Moncrieffe v. Holder*[84] and *Descamps v. United States*[85] have since modified the stance of the Board of Immigration Appeals. The resulting test for what a person was "convicted of" returns focus to the elements of the offense in the state statute under which the person was convicted, rather than the facts of the underlying conduct. As of July 2014, in *Matter of Chairez-Castrejon*[86], the BIA has since clarified proper

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[81] *Id.*, at 706
[82] Jean-Louis v. U.S. Att'y Gen., 582 F.3d 462 (3rd Cir. 2009); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303 (11th Cir. 2011); Prudencio v. Holder, 669 F.3d 472 (4th Cir. 2012); Olivas-Motta v. Holder, 716 F.3d 1199 (9th Cir. 2013); Silva-Trevino v. Holder, 742 F.3d 197 (5th Cir. 2014)
[83] Ali v. Mukasey, 521 F.3d 737 (7th Cir. 2008), Bobadilla v. Holder, 679 F.3d 1052 (8th Cir. 2012)
[84] 569 US__(2013)
[85] 133 S. Ct. 2276 (2013)
[86] 26 I&N Dec.349 (BIA 2014)

use of the categorical and modified categorical approach to determine the nature of a conviction, including analysis of both CIMTs and aggravated felonies. In *Matter of Chairez-Castrejon*[87], the BIA applied *Moncrieffe* to focus on the minimum conduct covered under the state statute of conviction, without applying the 'realistic probability' test, and applied *Descamps* to permit examination of the record of conviction only when a statute is clearly "divisible" into separately enumerated crimes, at least one of which is a categorical match to the federal statute, in order to determine which one of them was the basis for the conviction.

Steps for analyzing a conviction to determine if it was (and still is) a CIMT: 1. Identify the federal statute that defines the generic offense at issue; 2. Compare the state statute of conviction to see if all the conduct proscribed by the state offense falls within the federal definition – if not, then the client may not have committed a CIMT; 3. Check the state statute to see if it is divisible, i.e. if it covers multiple alternative offenses – if yes, proceed with modified categorical approach; 4. If modified categorical approach applies, determine which documents in the record of conviction a court may consider to determine which sub-offense was committed, and whether that is a CIMT.

For more on how to analyze Crimes Involving Moral Turpitude, see the most current editions of Immigration Consequences of Criminal Activity, by Mary E. Kramer; as well as Tooby's Crimes of Moral Turpitude, and Tooby's Categorical Analysis Tool Kit by Norton Tooby. For a more granular review of evolving case law on use of the categorical approach in immigration cases, see the excellent July 31, 2014 Practice Advisory on *Matter of Chairez-Castrejon*, by the National Immigration Project of the National Lawyers Guild and Immigrant Defense Project.

iii. Aggravated Felonies

A single aggravated felony conviction bars naturalization automatically if occurring after November 29, 1990, may bar naturalization even if occurring prior to that date, and may trigger

[87] Ibid.

removal proceedings, regardless of when it occurred.

There is nothing intuitive or obvious about the definition of "aggravated felony" in the Immigration & Nationality Act: it includes some offenses that are mere misdemeanors under state law, as well as offenses committed in foreign countries where a term of imprisonment was served within the preceding 15 years. Every record of conviction must be carefully reviewed to see whether it falls within the purview of this section, and it is essential to examine current federal case law in the circuit where the conviction occurred.

The statutory definition of "aggravated felony" at INA §101(a)(43) includes:

-murder, rape or sexual abuse of a minor

-illicit trafficking in controlled substances

-illicit trafficking in firearms or destructive devices, and related federal offenses

-any money laundering of funds exceeding $10,000; any tax evasion or fraud crime where the loss exceeds $10,000

-any crime of violence where the term of imprisonment imposed is at least one year [the INA does not define "crime of violence"]

-any theft, burglary or receipt of stolen property where the term of imprisonment imposed is at least one year [the INA looks to the sentence actually imposed]

-racketeering and gambling offenses where a term of imprisonment of at least one year *may* be imposed [the INA looks to permissible range of sentences that could be imposed under state statute of conviction]

-kidnapping

-child pornography

-prostitution enterprises, peonage and slavery offenses

-federal offenses for gathering or transmitting defense or national security information, including sabotage and treason

-alien smuggling and harboring

-re-entry after deportation for an aggravated felony

-failure to appear for service of sentence, where the underlying offense is punishable by a term of imprisonment of at least five years

-forgery, counterfeiting or alteration of a US passport for which the term imposed is at least one year (except 1st offenses for a spouse, parent or child)

-commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered VIN numbers where the term of imprisonment imposed is at least one year

-obstruction of justice, perjury, subornment of perjury, or bribery of a witness where the term of imprisonment imposed is at least one year

-bail jumping, where the term of imprisonment that may be imposed on the underlying felony charge is two years or more

-attempt or conspiracy to commit any of the above

As noted in the previous section, case-by-case analysis of the state statute of conviction is essential to determine whether the conviction was and still is an aggravated felony, with reference to the most current edition of a guide such as Aggravated Felonies, by Norton Tooby and JJ Rollin, and Tooby's Categorical Analysis Tool Kit by Norton Tooby, plus AILA and Immigrant Defense Project practice advisories.

The analytical steps are the same as for CIMTs: 1. Identify the federal statute that defines the generic offense at issue; 2. Compare the state statute of conviction to see if all the conduct proscribed

by the state offense falls within the federal definition – if not, then the client may not have committed an aggravated felony; 3. Check the state statute to see if it is divisible, i.e. if it covers multiple alternative offenses – if yes, proceed with modified categorical approach; 4. If modified categorical approach applies, determine which documents in the record of conviction a court may consider to determine which sub-offense was committed, and whether that is an aggravated felony.

Case law in the area of controlled substances is vast and changes rapidly, particularly with respect to which offenses get characterized as drug trafficking. A major split among circuits was resolved in December 2006, when the Supreme Court decided *Lopez v. Gonzales*,[88] finding that a state offense for controlled substance possession only constitutes a "felony punishable under the Controlled Substances Act" if the proscribed conduct is also punishable as a felony under federal law. The *Lopez* decision had both favorable and unfavorable impacts: a single state conviction for first-time simple possession of a controlled substance is not deemed an aggravated felony trafficking offense. However, for a person with multiple drug possession convictions, under *Lopez* a second controlled substance conviction, even for simple possession, was treated as an aggravated felony, even if both were misdemeanors under state law. Mercifully, in 2010, this was scaled back by the Supreme Court's decision in *Carachuri-Rosendo v. Holder*[89], which requires the second state conviction to contain a recidivist provision that corresponds to the federal "recidivist possession" felony, in order for it to be deemed an aggravated felony. A person with two controlled substance convictions remains deportable even if neither one is an aggravated felony, but may be eligible for cancellation of removal and termination of proceedings to pursue naturalization.

Aside from its role in resurrecting the categorical approach in immigration cases generally, one of the most heartening effects of the Supreme Court's 2013 decision in *Moncrieffe v. Holder* was its impact within the realm of controlled substance cases. The Court

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[88] 127 S. Ct. 625 (2006)
[89] 560 U.S.___, 130 S.Ct. 2577 (2010)

found that Mr. Moncrieffe's conviction under an indivisible Georgia state statute which did not require prosecutors to prove the amount, and did not distinguish between sharing a small amount of marijuana for no remuneration and possession with intent to distribute for sale, was overbroad and encompassed conduct that did not necessarily meet the federal definition of drug trafficking, hence he was not convicted of an aggravated felony.

Among crimes to have joined the long list of aggravated felonies are offenses for violating an order of protection. Because these types of statutes address the threat of future harm, any conviction for violating a "no contact" order, even via telephone or e-mail, may render the applicant ineligible to naturalize and deportable.

In sum, the specific criminal statute(s) under which a person was convicted must be examined case-by-case and reviewed in light of the most current analysis and case law for that type of offense. While there is a wide selection of hard copy reference works on how crimes are treated for immigration purposes, one of the best tools to start from is Mr. Tooby's series of online checklists, freely available at http://nortontooby.com/resources/free/checklists – including the "Aggravated Felony Alphabetical Quick Checklist," "Checklist of Federal Drug Offenses," and "Checklist of Federal Aggravated Felony Firearms Offenses," among others.

iv. Driving Under the Influence

Convictions for DUI require close examination, including discussion of the underlying fact pattern and of what has transpired since in the way of rehabilitation, because they are *not* always an automatic bar, but under certain circumstances they may trigger two different automatic bars to naturalization.

The first question is whether the DUI conviction involved any factors that may turn it into a Crime Involving Moral Turpitude. The Board of Immigration Appeals' decision *In Re Torres-Varela*[90] found that even an aggravated DUI conviction following on the heels of two prior DUI convictions was not a crime

[90] 23 I&N Dec. 78 (BIA May 9, 2001)

involving moral turpitude, because the Arizona state statute defining the offense in question did not involve any *mens rea*, or culpable mental state, as an element of the offense. Under *Torres-Varela*, any state DUI/DWI laws that do not have a *mens rea* element – which is most of them- are not crimes involving moral turpitude. However, that case distinguishes simple DUI from more complex situations which would involve a culpable mental state, such as a DUI while driving with a suspended license, driving with children in the vehicle, or driving a commercial vehicle with passengers.[91]

In 2004, the Supreme Court decided unanimously that a DUI conviction is not a "crime of violence", and therefore is not an aggravated felony under INA §101(a)(43).[92]

If an applicant has multiple simple DUI convictions, none of which involve any complicating factors or sentences of a year or more, those convictions taken together raise the question of whether the applicant is barred as a habitual drunkard under INA §101(f)(1). There is no specific number of DUI arrests that trigger this statutory provision, so it is applied as a discretionary bar, but naturalization examiners are urged to look closely at divorce decrees and periods of unexplained unemployment for evidence of alcoholism.[93]

v. Effect of Expungement, Pardon or Sealed Record

Criminal records that have been expunged, pardon has been granted, and sealed juvenile records are among those least likely to be disclosed to counsel. Applicants must be advised that all such offenses remain available to immigration authorities, and some may be a bar to naturalization as well as grounds for removal.

An offense for which the applicant received a full, unconditional pardon before the statutory eligibility period will not be a bar to good moral character, provided the applicant can demonstrate that

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[91] Matter of Lopez-Meza, 22 I&N Dec. 1188 (BIA 1999)
[92] Leocal v. Ashcroft, 541 U.S. 1 (2004)
[93] Adjudicator's Field Manual, Chapter 74.2 (g)(12)(B)

rehabilitation and reform occurred prior to beginning of the statutory period.[94] If the pardon occurs during the statutory eligibility period, the applicant is not barred if he or she can demonstrate extenuating or exonerating circumstances.[95]

Expungement of drug offenses will be disregarded for purposes of determining good moral character.[96] If the applicant committed or admits to committing two or more crimes involving moral turpitude during the statutory period, the applicant is precluded from establishing good moral character even if one of those offenses has been expunged.[97]

Other than the bars to good moral character at INA §101(f), there are additional statutory bars to naturalization, for:

-deserters from the military during wartime, and those who departed the United States in order to avoid the draft[98]

-subversives[99]

-members of the Communist Party, unless membership was involuntary or otherwise excusable (e.g., required to find work)[100]

-persons in pending removal proceedings, or under an outstanding final order of removal or deportation[101]

-persons who applied for and received relief from Selective Service based on alienage[102]

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[94] 8 CFR 316.10(c)(2)(i)
[95] 8 CFR 316.10(c)(2)(ii)
[96] 8 CFR 316.10(c)(3)(i)
[97] 8 CFR 316.10(c)(3)(ii)
[98] INA §314
[99] INA §§313, 316(f)
[100] INA §313
[101] INA §318
[102] INA §315(a)

Further automatic bars to naturalization are set forth listed in the regulations, for any applicant who:

-has ever been convicted of murder[103]

-willfully failed to support dependents[104]

-had an extramarital affair which tended to destroy an existing marriage[105], or was grossly incestuous, commercialized, or flaunted openly causing a public scandal[106]

-committed unlawful acts not listed above that adversely reflect on the applicant's moral character[107]

-While a period of parole or probation does not absolutely preclude a finding of good moral character, naturalization cannot be granted at a time when there are still active restraints on the applicant's liberty, so any period of parole or probation must be completed at the time of interview.[108]

B. Discretionary Bars to Good Moral Character

In addition to all the automatic bars in the statute and regulations, a naturalization examiner has broad discretion to find that an applicant lacks good moral character on the basis of other transgressions, such as:

-Willful failure to register for Selective Service

-criminal conduct that did not result in a conviction:

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[103] 8 CFR §316.10(b)(1)(i).
[104] 8 CFR §316.10(b)(3)(i). Refers to court-ordered spousal or child support. It has a *mens rea* element, so USCIS examiners must consider reasons for failure to pay; involuntary loss of employment or other source of income may be deemed a mitigating circumstance.
[105] 8 CFR §316.10(b)(3)(ii)
[106] INS Interpretations 316.1(f)(6)
[107] 8 CFR §316.10(b)(3)(iii)
[108] 8 CFR §316.10(c)(1)

The requirement for all male U.S. citizens and immigrants between the ages of 18 and 25 to register for Selective Service was initiated by the Selective Training and Service Act of 1940. Registration was suspended in 1975, but re-established in 1980 under the Military Selective Service Act to protect against under-enrollment in the event of a military crisis. Men are required to register within 30 days of their 18th birthday.[109] This includes men without valid status, asylees and refugees, as well as Lawful Permanent Residents, but there is no obligation to register for individuals in valid nonimmigrant visa status. The Selective Service System will accept late registrations up until age 26, but not thereafter. For a while in the 1990s, overzealous examining officers were denying N-400 applications by young men who were unaware of their obligation to register for Selective Service, so then-INS issued a policy memorandum[110] explaining that this is not a permanent bar, and how failure to register will be treated for naturalization applicants in different age groups:

a) A man still under 26 who has not registered for Selective Service and refuses to do so cannot demonstrate that he is eligible for naturalization, but must be afforded a reasonable opportunity to do so once he is made aware of the duty to register, even if he is made aware of the requirement at the naturalization interview.

b) A man between 26 and 31 years of age must provide evidence that his failure to register for Selective Service was not knowing and willful. To that end, USCIS will customarily accept a sworn statement or affidavit from the applicant stating that he was unaware of the requirement and only learned of it after his 26th birthday, but the applicant must also obtain a Status Information Letter from the Selective Service System and present it at the interview.

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[109] 50 USC §1903

[110] Memorandum of William Yates, "Effect of Failure to Register for Selective Service on Naturalization Eligibility," (June 18, 1999), AILA InfoNet Doc. No. 99010740, citing attached opinion of INS General Counsel Paul Virtue (April 27, 1998)

c) For an applicant over age 31 who failed to register, the conduct falls outside the five-year eligibility period, and thus should not serve as a basis for denial of naturalization, absent other evidence that he is not well disposed to the good order and happiness of the United States.

Since proof of Selective Service registration is normally required for males completing applications to college and for student loans, all men who attended college in the United States, even briefly, tend to have registered even if they do not remember having done so. For any man born after January 1, 1960, who cannot remember if he registered or not, checking a registration can be done online at SSS.gov, by entering the applicant's name, date of birth and social security number.

A naturalization examiner would surely make note of an applicant's unpaid parking tickets,[111] speeding tickets[112] or civil money judgments.[113] However, to date such failings have been struck down as the sole basis for denial of naturalization based on lack of good moral character; rather, they may be considered as a part of the whole picture.

Note that all the bars based on good moral character (statutory, regulatory, and discretionary) differ from one to the next with regard to the time periods they cover. Some are expressly limited to conduct occurring within the five- or three-year statutory eligibility period; some have limited retroactivity to effective dates of changes in the law; others bar a finding of good moral character regardless of when the conduct occurred. The Service has noted, "Congress undoubtedly intended to make provision for the reformation and eventual naturalization of persons who were guilty of past misconduct."[114] Nonetheless, some offenses do not admit the possibility of reform, such as murder. Some have specific trigger dates, such as aggravated felony convictions after November 1990, or voting or private-sector false claims to

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[111] Yin-Shing Woo v. U.S., 288 F.3d 434, 435 (2d Cir. 1961)
[112] Etape v. Napolitano, 664 F.Supp. 2d 498, 518 (D. Md. 2009)
[113] Puciaty v. DOJ, 125 F. Supp. 2d 1035, 1040-41 (D. Hawaii 2000)
[114] INS Interpretations 316.1(f)(1)

citizenship after September 1996. Other acts committed outside the statutory period may prompt a legitimate fact-specific inquiry into "whether an actual reformation had taken place… Terms of the current section specifically sanction consideration of the petitioner's conduct and acts without the statutory period in order to determine whether the burden of establishing good moral character has been sustained."[115]

Ultimately, the examination of good moral character is based on the applicant's life as a whole, evaluating both favorable and adverse factors, events within and outside the statutory period, to determine whether the person's character has reformed since any earlier misconduct.[116]

4. English Language, U.S. History and Civics Examination Requirements & Exceptions

At the time of the naturalization interview, the applicant must demonstrate competency in written and spoken English; must be attached to the principles of the Constitution and well disposed to the good order and happiness of the United States[117]; and must demonstrate knowledge of the fundamentals of US history and government[118]. The applicant must swear allegiance to the flag and Constitution of the United States[119], and must be willing to bear arms on behalf of the United States, perform noncombatant service, or work of national importance, if required by law.[120]

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[115] INS Interpretations 316.1(f)(2)
[116] *See, e.g.* Torres-Guzman v. INS, 804 F.2d 531, 534 (9th Cir. 1986). "Where…the petitioners have not committed acts bringing them within §101(f)'s enumerated categories, the Board must consider all of petitioner's evidence on factors relevant to the determination of good moral character." Matter of B-, 1 I&N 611, 612 (BIA 1943). "We do not think it should be construed to mean moral excellence, or that it is destroyed by a single lapse. Rather do we think it is a concept of a person's natural worth derived from the sum total of all his actions in the community."
[117] INA §316(a)(3)
[118] INA §312
[119] 8 CFR §316.11
[120] INA §337(a)(5)(A)-(C)

Those with strong moral objections to combat service may just swear that they are willing to serve the US Armed Forces in a non-combatant capacity and to do work of national importance, if required to serve.

Applicants may be interviewed and answer civics test questions in their native language if they are old enough, and have been lawful permanent residents for long enough. INA §312 and implementing regulations exempt applicants over age fifty who have held permanent resident status for 20 years or more, and those over age 55, who have been permanent residents for 15 years or more.[121] Applicants over age 65 are not automatically exempted from testing in English, and must meet one of the preceding English-language exemptions, but are eligible to request and take a reduced civics test with fewer questions. Applicants over age 75 are exempt from biometric processing, and thus are not required to pay the biometrics fee.

Procedurally, the English, history and civics questions, and inquiry into the applicant's attachment to principles of the Constitution and willingness to perform military service, do not get addressed until the interview. However, those claiming an exemption from the English language requirement must claim it on Form N-400, to give USCIS advance notice of the need to make an interpreter available when scheduling, so that the naturalization interview and test can be conducted in the requested language – much like a medical disability requiring special accommodation, which must also be mentioned on the form at part 3 (questions H & I).

[121] INA 312; 8 CFR §312.1(b)

III. Naturalization Based on Marriage to a US Citizen – INA §319(a)

Applicants seeking to apply for naturalization after three years based on marriage to a US citizen[122] must be living together in marital union with that same spouse throughout the three-year eligibility period prior to filing, and up through the date of the interview.[123] "Marital union" means actually residing together under the same roof with the US citizen spouse.[124] Marital union is terminated by divorce, legal separation, death or expatriation[125]; and may or may not be terminated by an informal voluntary separation, determined on a case-by-case basis.[126] There are two exceptions to the "marital union" requirement. One is for involuntary separations imposed by military service or mandatory work assignments by a private employer: involuntary separations are not deemed to sever the marital union.[127] The other exception is for an applicant who was originally the beneficiary of an immigrant visa petition by the US citizen, who became a victim of abuse and obtained lawful permanent residence under the Violence Against Women Act.[128] A naturalization applicant who obtained residence under VAWA need not be living with or still married to the abuser, and should include a copy of the I-360 petition approval notice with the N-400 application.

Applicants married to a US citizen filing under INA §319(a) must meet all the same basic eligibility requirements as regular applicants under INA §316(a), except that relevant time periods for establishing physical presence, continuous residence, and good moral character are reduced proportionally. They must have 18 months of physical presence in the United States, three years of continuous residence in the United States, and three years of good moral character. They must still have at least 3 months continuous residence in the state where they reside at the time of filing.

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[122] INA §319(a)
[123] 8 CFR §319.1(a)(3)
[124] 8 CFR 319.1(b)(1)
[125] 8 CFR 319.1(b)(2)(i)
[126] 8 CFR 319.1(b)(2)(ii)(B)
[127] 8 CFR 319.1(b)(2)(ii)(C)
[128] INA 319(a)

Recently-married applicants who file for naturalization as soon as they are eligible may not yet have had the conditions on their residence removed. Such applicants are eligible to naturalize[129] even if removal of condition has not been granted.[130] However, at least one court has read these provisions narrowly, finding that the law only permits *filing* for naturalization before conditions on residence are lifted, but that naturalization cannot be *granted* until removal of conditions has been granted.[131] USCIS examiners have authority to adjudicate a pending I-751 petition for removal of conditions on residence concurrently with an N-400 at the time of naturalization interview, but whether they will do so is at the discretion of individual District Offices, based on local staffing, training and scheduling resources.[132] In districts such as New York where this practice is supported, it presents the practical problem of ensuring that both files arrive at the local office and are united in time for the naturalization interview, when the I-751 file must come from a different location than the N-400 file.

In addition to all passports and original identity documents, at an N-400 interview for naturalization under INA §319(a), the applicant will have to produce evidence of living in marital union for the entire three-year period, including joint income tax returns, leases or mortgage statements for the shared residence, joint bank statements, utility bills, insurance policies, etc., covering the three-year period, (as well as birth certificates of any children) to establish that both spouses have indeed been living together at the same address for that period. The US citizen spouse is not permitted to attend the naturalization interview with the applicant.

IV. Spouses of US Citizens Stationed Abroad – INA §319(b)

[129] Under INA §319(a) or §319(b)
[130] INA §§216(e), 216A(e); 8 CFR §216.1
[131] Abghari v. Gonzales, 569 F.Supp.2d 1336 (C.D. Cal.2009)
[132] Minutes of 02/05/2004 AILA/VSC Liaison Teleconference, AILA InfoNet Doc. No. 04021366

Any person admitted to permanent residence whose spouse is a US citizen regularly stationed abroad in employment with certain US-based entities, who declares a good faith intention to take up residence in the United States immediately upon termination of such employment abroad of the citizen spouse, may be naturalized upon compliance with all the requirements of the naturalization laws, except that no period of prior residence or period of physical presence in the United States shall be required.[133] The person must be present in the United States at the time of interview,[134] and present at time of naturalization, but must have an intent to reside abroad with the citizen spouse, and to take up residence in the United States upon termination of the US citizen's spouse's employment abroad.[135]

Qualifying entities with which the US citizen spouse may be employed include: the United States government; an American research institution recognized by the Attorney General; an American firm or corporation engaged in development of foreign trade or commerce, or its subsidiary; a public international organization in which the United States participates by treaty or statute, such as NATO or the United Nations;[136] or a religious denomination having a bona fide organization in the United States.[137]

While the applicant and US citizen spouse stationed abroad must be living in marital union, under INA §319(b) there is no specified minimum period during which they must have been living together in marital union. Likewise, the applicant must demonstrate good moral character, but not for any specified period.

V. Military Naturalization

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[133] INA §319(b)(1)(A)-(C), (b)(3)
[134] INA §319(b)(2); 8 CFR §319.2
[135] 8 CFR 319.2(a)(3) & (4)
[136] Qualifying American research institutions and international organizations of which the US is a member are listed at 8 CFR §316.20
[137] INA §319(b)(1)(B)

There are separate rules governing eligibility to naturalize for those who have performed a qualifying period of active duty service in a branch of the United State military, including the Army, Navy, Marine Corps, Air Force, Coast Guard, certain Reserve components of the National Guard, and Selected Reserve of the Ready Reserve, or those who have performed active-duty military service during a designated period of hostilities. Military and veteran applicants for naturalization are exempt from filing fees, and exempt from the continuous residence and physical presence requirements. The rules are summarized in USCIS Publication M-599, Naturalization for Military Personnel.

Procedurally, military naturalization applications are all filed at the Nebraska Service Center, with the Military Support Unit. They are not filed with a lockbox because no fee receipts are involved, as military applicants are exempt from application filing fees and the fee for biometric processing. However, along with Form N-400 they are required to submit additional forms that are not required of civilians, including a G-325B Biographic Information Form, and Form N-426, Request for Certification of Military or Naval Service, which must be certified by the appropriate officer in the applicant's chain of command. Every military installation is supposed to have a designated point of contact to provide assistance to active service members applying for naturalization.

Substantively, there are two kinds of military naturalization. The first is a streamlined and accelerated naturalization process under INA §328 available to lawful permanent residents who are currently serving in active-duty status in a branch of the US military, or honorably discharged from active service within the past six months, who have served in active duty status for an aggregate of at least one year or more.[138] These applicants must demonstrate good moral character and honorable service, attachment to the principles of the Constitution, and favorable disposition to the good order and happiness of the United States throughout the period(s) of active duty service in question - i.e., for a minimum of one year - and must not have been dishonorably discharged at any time, including from any periods of service not

[138] INA §328(a)

relied upon for eligibility.[139] Like civilian applicants, they must demonstrate knowledge of the English language and fundamentals of US government and history, and must take an oath of allegiance to the flag and the Constitution.[140]

Service members whose honorable discharge was more than 6 months ago must apply as civilians under INA §316(a). However, for purposes of the physical presence and continuous residence requirements, any periods of active duty military service within the five years preceding the date of filing shall be considered as residence and physical presence within the United States.[141]

There is a separate provision under INA §329 for naturalization of veterans who have served honorably in the US military in a period of designated hostilities, including past conflicts such as World War I, World War II, the Korean and Vietnam wars, and including ongoing hostilities in Iraq and Afghanistan, for even one day.

Both the provision for currently active military applicants and the provision for veterans of hostilities require an aggregate period of honorable active-duty military service of at least five years, which may be completed after naturalization, but if the applicant is discharged other than honorably, or fails to complete the five-year service obligation, then naturalization may be revoked.[142]

Procedurally, USCIS has recognized that veteran applicants may not be able to obtain a certified form N-426, because their records are transferred to the military personnel records center of each branch upon separation. DD Form 214, issued to each veteran at the time of discharge by the Department of Defense is now accepted by USCIS for certification of honorable service, in lieu of Form N-426.[143]

Veteran applicants must demonstrate good moral character and

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[139] INA §328(b)(3), §328(e)
[140] INA §328(b)
[141] INA §328(d)
[142] INA §328(f), INA §329(c)
[143] Memorandum of Donald Neufeld, "Acceptance of DD Form 214…"(April 29, 2009), AILA InfoNet Doc. No. 09050464

honorable service: although INA §329 does not require good moral character on its face, nor does it incorporate the requirements of INA §316(a), circuit courts have held that *Chevron* deference applies to the regulations at 8 CFR §329.2(d) & (e), which require good moral character.[144] Unique to veteran applicants for naturalization under INA §329, they are not required to be lawfully admitted to permanent residence; but if not, they must have been physically present in the United States or its outlying possessions (the Canal Zone, American Samoa, Swains Island) at the time of enlistment,[145] or must have been natives of the Philippines who served in WWII.[146]

Applicants under this section are eligible for naturalization regardless of age, deportability under INA §318, or qualifying as an "alien enemy" under INA §331 by virtue of being a national, citizen, subject or denizen of a country with which the United States is at war.

Conclusion

This article is intended to offer a useful guide to the basic requirements for naturalization, and a variety of common issues that arise in evaluating and pursuing an N-400 application. However, no article on naturalization can be truly comprehensive, because the law defining so many of its elements is constantly evolving.

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[144] Lopez v. Henley, 416 F.3d 455, 457 (5th Cir. 2008); Nolan v. Holmes, 334 F.3d 189 (2d. Cir. 2003)
[145] INA §329(a)
[146] 8 CFR §329.5