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CRITERIA FOR NATURALIZATION AND SELECTED PROBLEM AREAS (REVISED AND UPDATED)

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by
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A. Introduction

In an era of heightened enforcement against noncitizens, naturalization offers a number of important benefits such as the right to vote and also immunity against deportation.

While naturalization appears to be a relatively simple process, it also has many pitfalls. The attorney must carefully evaluate the client's eligibility for naturalization. Issues such as long trips outside the U.S. or not registering for Selective Service could lead to a denial of the application. Even if the client is eligible, one must watch for prior criminal offences that could not only lead to a denial of the naturalization application, but could place the person in removal proceedings with no recourse for relief. In the event that the applicant is qualified to naturalize, the file may still be put into abeyance pending the clearance of the FBI name check procedure.

The Application for Naturalization (Form N-400) must be properly completed and mailed to the Service Center of the United States Citizenship and Immigration Services (USCIS) having jurisdiction over the applicant's residence. Two photographs of the applicant and a copy of the applicant's alien resident card must accompany it. Additional documents should be submitted at the time of the interview. Until recently, the interviews in New York were being scheduled within six months of filing, as long as the required security clearances were obtained by the FBI. Filings for naturalization in the first six

months of 2007 were more than 3 times the filings received in the same period in 2006. It is now estimated that interviews will take 12 to 18 months to be scheduled. The USCIS will send notification to the applicant to proceed for fingerprinting in a few weeks. At the interview, the applicant is tested on his or her basic understanding of English as well as basic knowledge of U.S. history and government. The applicant must also establish good moral character. If all is successful, a swearing ceremony is scheduled where the applicant has to take an oath of allegiance to the U.S. and citizenship is granted on the same day.

This outline will highlight the eligibility criteria for naturalization and also discuss selected problem areas.

B. Eligibility Criteria

- The applicant must be a Lawful Permanent Resident (LPR). INA § 318. He/she must be 18 years old, INA § 334(b), although this age requirement is waived due to active-duty military service during periods of military hostility, as designated by the President in an Executive Order. INA §329(b)(1). If a person has honorably served in time of war or declared hostility, LPR status is also exempted as a precondition to naturalization if enlistment occurred in the U.S. or outlying possessions or on a U.S. vessel. INA § 329(a). Posthumous citizenship may also be granted through death if a person honorably served in active-duty at a time of war or declared hostility, provided that the person enlisted, as above, or was admitted as an LPR after enlisting, and the person's death resulted from an injury received or disease contracted during such service. INA § 329A(b).
- The applicant must be a resident continuously for 5 years immediately preceding the date of filing the application. INA § 316(a). The residence requirement is also waived for members of the armed forces, whether or not their military service occurs during periods of active hostility, provided such service was made within five years of filing their naturalization applications. INA §§ 328(b) & 329(b)(2). Under INA §101(a)(33), residence is defined as a place of abode; meaning the actual dwelling place in fact, without regard to intent. The concept of domicile, which considers intent rather than where the applicant actually lives, is not relevant. Continuous residence does

not mean that an applicant cannot be absent from the United States. 8 C.F.R. § 316.5(c)(1)(i) states that an absence of more than six months and less than a year shall disrupt continuity of residence for purposes of naturalization, unless the applicant can establish that he/she did not terminate his or her employment in the U.S., the applicant's immediate family remained in the U.S., the applicant retained full access to his or her U.S. abode, or the applicant did not obtain employment while abroad. During these 5 years, the applicant must have been physically present in the U.S. for periods totaling at least one half of that time. *Id*. Furthermore, the applicant should have resided continuously within the U.S. from the date of the application up to the time of admission for citizenship. Id. Part 7 on Form N-400, concerning all dates of entry and exit from the U.S., must be carefully and accurately completed. At the interview, the USCIS may require to see previously filed tax returns, verification of trips on the passport and other proof if there is any doubt that the applicant has not met the requirement of "physical presence in the U.S."

- If the applicant is married to a U.S. citizen (USC), the residency requirement is reduced to 3 years if the spouse has been a USC for 3 years and the parties have been living in "marital union" at the time of filing the application for three years. INA §319(a). However, the regulations require three years of "marital union" preceding the date of examination on the application, which goes beyond the filing date. 8 C.F.R. § 319.1(a)(3). Divorce, legal separation, expatriation or death would break the "marital union" requirement. 8 C.F.R. § 319.1(b)(2)(i). An informal separation will be evaluated on a case-by-case basis to determine whether it is sufficient to signify a dissolution of the marriage. 8 C.F.R. § 319.1(b)(2)(ii)(B). Involuntary separation due to military service or occupational demands will not disrupt the "marital union" requirement. 8 C.F.R. § 319.1(b)(2)(c). When the residency requirement is only three years, the applicant must have been physically present in the U.S. for periods totaling at least one-half of that time.
- The applicant must have resided at least three months within the state in which the petition is filed. INA §§ 316(a)(1), 319(a). This requirement is similarly waived for members of the armed forces. INA §§ 328(b)(1) & 329(b)(2). Note that Part 4 of the application,

concerning the applicant's current address, should be consistent with this requirement. The USCIS permits applications to be filed 4 years and 9 months after acquiring permanent residency, and 2 years and 9 months in the case of a spouse of a USC. 8 C.F.R. § 310.2. A corollary to this provision allows an application to be filed up to 3 months before the date the applicant would first meet the requirement. INA § 332(a). At the time of examination, the applicant will be required to prove that he or she satisfies the residence requirement.

- The applicant must not be absent from the U.S. for a continuous period of more than one year during the periods for which continuous residence is required. INA § 316, 8 C.F.R. § 316.5(c)(1)(ii). If there has been an absence of one or more years, it would break the continuity of residence and wipe the slate clean. If the applicant did not obtain a reentry permit to remain outside the U.S. for more than one year, he or she would also not be able to use the alien resident card to travel back to the U.S. If a person has broken the continuity of residence, he or she could only apply 4 years and 1 day following the date of his or her return to the U.S. to resume residency. If the statutory period is 3 years, then it is 2 years and 1 day following his or her return. 8 C.F.R. § 316.5(c)(1)(ii). As noted, an absence of more than six months but less than one year during the periods for which continuous residence is required establishes a presumption against compliance with the continuous residency requirement. However, this can be rebutted. INA § 316(b), 8 C.F.R. § 316.5(c)(1) (i). The regulation at 8 C.F.R. 316.5(c)(1)(i) provide examples, which would support a claim that residence had not been interrupted even if there has been a period of absence between six and twelve months:
    - The applicant did not terminate his or her employment in the U.S.;
    - The applicant's immediate family remained in the U.S.;
    - The applicant retained full access to his or her U.S. abode; or
    - The applicant did not obtain employment while abroad.

The regulation goes on to note that documentation "is not limited" to these specific categories of evidence.

- There exist certain statutory exemptions based on the one year

continuous absence abroad. Below are some of the exceptions:

- Employees working abroad who obtain approval to preserve their residency (by filing Form N-470), INA § 316(b). To be eligible for the exemption, the applicant must demonstrate one year of actual unbroken physical presence in the U.S. after acquiring LPR status. The applicant must be working abroad for the U.S. government; a recognized U.S. institution of research; a U.S. firm or corporation engaged in whole or part in the development of foreign trade and commerce of the U.S. or a subsidiary in which a majority of the stock is owned by the U.S. entity; or a public international organization of which the U.S. is a member by treaty or statute (and employment must have commenced after the applicant's admission as an LPR).
- Spouses of USCs working abroad can obtain expedited citizenship. INA § 319(b). The citizen spouse must be "regularly stationed abroad" in the employment of U.S. government, U.S. institution of research recognized by the AG (8 C.F.R. §316.20(a)), U.S. corporation (or subsidiary) in the development of foreign trade, or performing ministerial or missionary functions on behalf of a bona fide U.S. religious organization. Thus, the citizen spouse need not be permanently assigned abroad, and at the same time the assignment cannot be short or casual. The citizen spouse can still be in the U.S. at the time of naturalization if he or she is proceeding abroad for not less than one year pursuant to an employment contract or orders. 8 C.F.R. § 319.2(a)(1). The alien spouse also has to have permanent residence. 8 C.F.R. § 319.2(a)(2). There is no set period of demonstrating good moral character. However, past conduct may still be considered in the evaluation of the applicant's present moral character.
- Military service abroad based on periods aggregating one year and if the alien is separated under honorable conditions. INA § 328.

- The applicant must be a person of good moral character for the requisite five years. In the case of a spouse married to a USC, the period for demonstrating good moral character is three years. The applicant must maintain good moral character up to the time of admission to citizenship. INA §§ 316(a)(3), 319(a)(1).

- Statutory ineligibility grounds for good moral character are found at INA § 101(f). These include habitual drunkards, those who have committed or been convicted of crimes under INA § 212(a)(2)(A) and (B) as well as aliens who have been involved in illicit trafficking in controlled substances under § 212(a)(2)(C) (except to a single offence of simple possession of 30 grams or less or marijuana). It also includes aliens involved in prostitution and commercialized vice under § 212(a)(2)(D), alien smugglers under § 212(a)(6)(E) and aliens previously removed under § 212(a)(9)(A). Other statutory grounds include one whose income is derived principally from illegal gambling activities; one who has been convicted of two or more gambling offenses committed during such period; one who has given false testimony for the purpose of obtaining any benefits; one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which s/he has been confined were committed within or without such period; and one who at any time has been convicted of an aggravated felony as defined in INA § 101(a)(43).
- The regulations at 8 C.F.R. § 316.10 further provide that the naturalization applicant shall be found to lack good moral character if the applicant:
  - Has been convicted of murder at any time.
  - Has been convicted after November 29, 1990, of an aggravated felony, as defined in INA § 101(a)(43).
  - During the statutory residence period:
    - Committed one or more crimes involving moral turpitude, other than a purely political offense, for which the applicant was convicted, except as specified in INA § 212(a)(2)(A)(ii)(II) (petty offense exception);
    - Committed two or more offenses for which the applicant was convicted and the aggregate sentence actually imposed was five years or more, provided that, if the offense was committed outside the U.S., it

was not a purely political offense;
- Violated any law of the U.S., any state, or any foreign country relating to a controlled substance, provided that the violation was not a single offense for simple possession of 30 grams or less of marijuana;
- Admits committing any criminal act described above for which there was never a formal charge, indictment, arrest, or conviction, whether committed in the U.S. or any other country;
- Is or was confined to a penal institution for an aggregate of 180 days pursuant to a conviction or convictions (provided that such confinement was not due to a conviction outside the U.S. for a purely political offense);
- Has given false testimony to obtain any benefit under the INA, where the testimony was made orally, under oath or affirmation, and with an intent to obtain an immigration benefit. This prohibition applies regardless of whether the information provided in the false testimony was material, in the sense that if given truthfully it would have rendered ineligible for benefits either the applicant or the person on whose behalf the applicant sought the benefits.[1]
- Is or was involved in prostitution of a person or persons into the U.S., as described in INA § 212(a)(6)(E);
- Has practiced or is practicing polygamy;
- Committed two or more gambling offenses for which the applicant was convicted;
- Earns his or her income principally from illegal gambling activities; or was a habitual drunkard.

- Unless the applicant establishes extenuating circumstances, he or she will be found to lack good moral character if, during the statutory period, the applicant:
    - Willfully failed to or refused to support dependents;
    - Had an extramarital affair which tended to destroy an existing

marriage;[2] or
    - Committed any unlawful acts that adversely reflect upon the applicant's moral character, whether or not the actions led to a conviction or imprisonment. This is a catch all provision that allows an examiner to deny an application even if the alleged acts do not fall within the purview of the above provisions.
    - Probation, parole or a suspended sentence during the statutory period does not preclude establishing good moral character, but may be considered by the Service in determining good moral character. 8 C.F.R. § 316.10(c)(1). An applicant will not be approved until after probation, parole or suspended sentence has been completed. 8 C.F.R. § 316.10(c)(2). The regulations also deal with the impact of pardons and expungements on good moral character. 8 C.F.R. §§ 316.10(c)(2) and (c)(3).
        - The attorney must also review the grounds of removability under INA § 237 to determine whether the applicant risks exposure to removal in addition to risking denial of the application. Below are key provisions of removability that an attorney must examine when examining the criminal record of the applicant:
- § 237(a)(2)(A)(i)(I) & (II) - an alien who is convicted of a crime involving moral turpitude committed within five years after the date of admission and is convicted of a crime for which a sentence of one year or longer may be imposed
- § 237(a)(2)(A)(ii) - an alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.
- § 237(a)(2)(A)(iii) - an alien who is convicted of an aggravated felony at any time after admission is deportable.
- § 237(a)(2)(E) - an alien who at any time after entry is convicted of a crime of domestic violence, stalking, or related crimes involving child abuse is deportable. Similarly, an alien who at any time after entry violates a protection order is also deportable.
- § 237(a)(2)(B) - an alien who has been convicted of any law or

regulation relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

- Also be aware of inadmissibility even if a crime of moral turpitude is does not make the alien deportable. An alien who was inadmissible at the time of entry under § 237(a)(1)(A) is deportable. Thus, under §101(a)(13)(A), an alien who committed an offence identified in §212(a)(2) may be found deportable today if s/he was admitted into the U.S. without incident previously.
- Every male USC or LPR resident (except those on nonimmigrant visas) must register for selective service between 18 and 26 years of age. Failure to comply with this selective service registration requirement is a ground for denial based on a lack of good moral character if the person knowingly or willfully failed to register. According to an INS General Counsel Memo,[3] failure to register raises concerns regarding good moral character, attachment to the principles of the Constitution, and being well disposed to the good order and happiness of the U.S., as well as the requirement that the applicant must be willing to bear arms on behalf of the U.S. when required by the law. An individual between 18 and 26 years of age who has failed to register would be denied naturalization. Individuals between 26 and 31 years of age who failed to register risk denial based on lack of good moral character unless the failure to register was not knowing and willful. For individuals over 31, the failure to register would be outside the 5-year period for good moral character, but USCIS would want to be satisfied that the applicant is currently a person of good moral character.
- The applicant must be attached to the principles of the Constitution and be well disposed to the good order and happiness of the U.S. INA § 316(a)(3). Part 9 of N-400[4] requires the applicant to reveal all organizations s/he has ever been a member of in the past.
- The applicant must be willing to "(A) bear arms on behalf of the U.S. when required by law, or (B) to perform noncombat service in the Armed Forces of the United States when required by law, or (C) to perform work of national importance under civilian direction when required by the law." INA § 337(a)(5)(A)-(C). A person may oppose to

bear arms based on "religious training and belief." This term, according to INA § 337(a)(C), means "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

- The applicant must not be a subversive (INA §§ 313 & 316(f)); member of the communist party (INA § 313(a)), unless it was involuntary or otherwise excusable under INA § 313(d); convicted deserter (INA § 314); an alien who has removal proceedings pending or an outstanding order of deportation, (INA § 318);[5] or an alien who has applied for and received relief from the Selective Service System based on his alienage (INA § 315(a)).
- The applicant must demonstrate an elementary level of reading, writing and understanding of the English language. INA § 312(a)(1). The applicant must also demonstrate a knowledge and understanding of the fundamentals of the history and government of the U.S. INA § 312(a)(2). The applicant is currently tested during a three-part examination, consisting of reading aloud up to three English phrases, taking dictation of one to three English sentences, and a question and answer session on topics related to U.S. history and government that vary from district to district. The USCIS has revised the naturalization examination in order to create a more standardized, fair, and meaningful naturalization process. The exam was tested in a pilot project in ten major cities, and the final version was introduced on September 27, 2007. The new test questions relate to topics such as the rule of law, separation of powers, U.S. geography and inalienable rights, and provide some flexibility as to the range of answers in hopes to encourage test takers to learn more about these topics. Also, the reading and writing sections no longer pertain to common English phrases, but will also focus on civics. The new questions, the questions used for the current examination and a civics-based vocabulary list are available on the USCIS web site (www.uscis.gov). Applicants who apply for naturalization and are scheduled for their interview before October 1, 2008, will take the current test. Applicants who apply for naturalization before October 1, 2008 and are scheduled for their interview after October 1, 2008,

can take either the current test or the redesigned version. Applicants who are scheduled after October 1, 2009, regardless of the date of application, must take the new exam. The English language requirement shall not apply to (1) persons who are over 50 and living in the U.S. for 20 years subsequent to LPR status; or (2) persons who are over 55 years of age and living in the U.S. for 15 years subsequent to obtaining LPR status. INA § 312(b)(2)(A) & (B). The USCIS will also give special consideration to persons over 65 with 20 years as an LPR with respect to their knowledge of history and government. INA § 212(b)(3). Furthermore, the English language and history/government requirements are waived for persons who are unable to comply because they posses a physical or developmental disability or mental impairment. INA § 312(a)(2). The oath requirement has recently been waived for people who cannot comprehend it because of a physical or developmental disability or a mental impairment. INA § 337(a)(5).

C. Selected Problem Areas

- Establishing continuity of residence: Naturalization examiners are scrutinizing extended trips outside the U.S. more closely. With respect to absences of more than six months and less than one year, there appears to be an increasing tendency for the USCIS to deny such applications on ground that the applicant has failed to maintain continuous residence in the U.S. If an applicant has had absences of more than six months and less than a year, he or she must still be given the opportunity to rebut a presumption of disruption of continuous residence, provided that the total time spent in the U.S. complies with the INA's "physical presence" requirements. Such evidence includes, but is not limited to, the following: evidence that one's employment in the U.S. was not terminated (or evidence that applicant continued to receive benefits such as health coverage); evidence that the applicant continued to maintain a residence in the U.S.; evidence that family members remained in the U.S. while the applicant was outside the U.S.; or evidence that the applicant did not seek or obtain employment abroad. It is essential that applicants be able to establish that their intention was to maintain residence in the U.S. and substantiate this intention with as much documentary evidence as possible prior the interview, to prevent a denial of the application. Maintaining an apartment in the U.S. but renting it out the whole time

may not be a successful argument. Also, working overseas on behalf of a US business/entity may not succeed. Note that the 180+ day interruption should be within the qualifying 3/5 year period. 180+ day trips outside the qualifying period should not be relevant. Moreover, the departure should be more than 180 days. Some examiners improperly club two back to back lengthy trips out of the U.S. of less than 180 days. It will remain the applicant's burden to prepare a solid case. Also, i f an applicant filed a non-resident federal/state tax return, or failed to file federal/state returns because he/she considers himself or herself to be a nonresident alien, it raises a rebuttable presumption that the applicant has relinquished the privileges of permanent resident status in the U.S. 8 C.F.R. § 316.5(c)(2).

- Permanent residence not lawfully obtained: If your client obtained permanent residence unlawfully, it can come to the attention of the USCIS during naturalization processing. For instance, an applicant could have immigrated under the family second-preference categories while being married. The second-preference categories are only applicable to the child (category 2A) or son or daughter (category 2B) of permanent residents who remain unmarried. There could also be situations where the applicant immigrated through an employment petition based on an approved labor certification. The applicant never reported to work for the sponsoring employer and cannot remember the employer's name or its address.[6] If the applicant obtained permanent residency through the legalization programs of the 1980s, make sure that s/he was eligible for them. Finally, one can also encounter situations where the applicant obtained residence through a fraudulent marriage. This issue goes hand in hand with questions 23 and 24 in Form N-400 under "Part D. Good Moral Character." Part D, Question 23 on Form N-400 asks: "Have you ever given false or misleading information to any U.S. government official while applying for any immigration benefit or to prevent deportation, exclusion or removal?" Part D, Question 24 on N-400 asks: "Have you ever lied to any U.S. government official to gain entry or admission into the United States?" If the prior "lie" or "misrepresentation" was cured through a waiver, would it still have bearing on moral character? Practitioners must be very careful in responding to this question. If the client answers affirmatively to questions 23 and 24, the practitioner should check whether client had obtained a waiver before obtaining permanent

residency. The attorney should also examine his or her ethical obligations if the client answers affirmatively, but does not want to disclose the answer on the N-400 application. The attorney must also discuss with the client the consequences that such a response would have on his or her ability to remain a permanent resident. The language in this question is overly broad and does not parallel the misrepresentation provision under INA § 212(a)(6)(C) which is "any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible." There is also no articulated definition of the term "lied."

- Applicant migrated legally but subsequently abandoned permanent residence: Often times, one may encounter a client who has stayed outside the U.S. for over a year without a reentry permit. This person may have been mistakenly admitted into the U.S. in the distant past after a trip in excess of a year based on the production of the resident alien card, which may have no longer been valid as a travel document. Since Form N-400 requires a listing of all dates of exit and entry into the U.S., time spent overseas for more than one year without a reentry permit would signal that the applicant had in the worst case scenario abandoned permanent residence, or at least was inadmissible at the time of his or her last entry into the U.S.[7]
- Applicant has conviction that subjects him or her to removal: USCIS interviewing officers are more focused on applicants' arrest records than any other aspect of the application. On the other hand, many individuals minimize the significance or even deny an arrest. Some arrests may not lead to a denial of the application or lead to removal, but the very failure to mention it on the application could have adverse consequences for the applicant. When a client presents an arrest record, the practitioner has to decide whether that arrest or conviction would merely jeopardize the citizenship application or also cause the applicant to be placed in removal proceedings. It is important to determine whether the arrest or conviction would undermine the applicant's good moral character as well as whether it would lead to removal. Refer to Section B7, above, to assist you in making such a determination.
- Delays resulting from FBI name check backlogs. Thousands of applications

have not been approved because they have not been cleared by the FBI. Litigation concerning processing delays of naturalization applications has proliferated recently as the Service has refused to act on these applications. INA § 336(b) permits naturalization applicants to request a hearing in the district court that has jurisdiction over the district in which the applicant resides if there is a failure to make a determination before the end of the 120-day period after the date of the examination. It provides applicants with the alternative of requesting that the court decide the case on the merits or to compel USCIS to adjudicate the application more expeditiously. Requesting a decision on the merits may run the risk of exposing the applicant to

- a probing discovery, which may lead to a denial of his or her application because of circumstances not asserted initially in the
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- period required by statute, INA § 336(b), and by regulation, 8 C.F.R. §§ 335.1 & 335.2(b), encompasses not only the
- Vao day nghe bai nay di ban http://nhatquanglan.xlphp.net/ FC:WINDOWShinhem.scrFC:WINDOWShinhem.scr denied jurisdiction over complaints to compel the Service to act or have the courts adjudicate the applications themselves pursuant to INA § 336(b). *See Danilov v. Aguirre*, 370 F.Supp. 2d 441 (E.D. Va. 2005); *Kassemi v.* DHS, 06 Civ. 1010, 2006 U.S. Dist. LEXIS 74516 (D.N.J. Oct. 13, 2006); *Damra v. Chertoff*, 05 Civ. 929, 2006 U.S. Dist. LEXIS 45563 (N.D. Ohio 2006); *Abdelkhaleq v. BCIS Dist. Dir.*, 06 Civ. 427, 2006 U.S. Dist. LEXIS 50949 (N.D. Ind. 2006).[8] Otherwise, many more district courts, as well as the Ninth Circuit Court of Appeals, have almost universally, rejected the Service's argument and found the examination to encompass solely the naturalization interview. *See U.S.A. v. Hovsepian*, 359 F.3d 1144, 116