WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter **Issue 6 / March 2021**

What You Need to Know for Your Noncitizen Client

If your noncitizen client is facing criminal charges or adverse findings in Family Court...

Please contact the WNY Regional Immigration Assistance Center. We provide legal support to attorneys who provide mandated representation to noncitizens in the 7th and 8th Judicial Districts of New York. *Email contact is most efficient

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We are funded by the New York State Office of Indigent Legal Services to assist mandated representatives in their representation of noncitizens accused of crimes or facing findings in Family Court following the Supreme Court ruling in *Padilla v. Kentucky,* 559 U.S. 356 (2010), which requires criminal defense attorneys to specifically advise noncitizen clients as to the potential immigration consequences of a criminal conviction before taking a plea. Our Center was established so that we can share our knowledge of immigration law with public defenders and 18b counsel to help you determine the immigration consequences of any particular case you may be handling. There is no fee for our service.

Please consider also contacting us if you need assistance interviewing your client to determine immigration status or communicating immigration consequences; or if you would like us to intercede with the DA or the judge to explain immigration consequences. We speak Spanish and French.

NEW CASE

In a claim under *Bivens* and the Federal Tort Claims Act against the U.S., ICE and IRS agents, on behalf of workers who were arrested and detained following a 2018 workplace raid in Tennessee, the E.D. Tennessee issued an order on the Government's motion to dismiss. The court acknowledged that it was hampered by recent SCOTUS precedent on *Bivens*, but, significantly, called on a higher court to "recognize causes of action that more directly address agents' searches and seizures based on skin color." The § 1985 (3) and § 1986 class claims, which allege the agencies conspired with the Tennessee highway patrol to violate the equal protection rights of the workers survived, as did individual claims of excessive force under *Bivens*. Most notably, the court eloquently acknowledged and called out the racism directed at the workers by ICE agents who arrested them only because of the color of their skin.

See press release and decision here: https://www.splcenter.org/presscenter/federal-court-allows-workers-claims-proceed-lawsuit-challenging-major-ice-workplace-raid

LEGAL AID BUREAU of Buffalo, Inc.

Ontario County NEW YORK

WNY Regional Immigration Assistance Center

A partnership between the Ontario County Public Defender's Office and the Legal Aid Bureau of Buffalo, Inc.

HOW DOES MY CLIENT BECOME A U.S. CITIZEN?
The Requirement of "Good Moral Character"

By Sophie Feal, Supervising Attorney, WNYRIAC, Legal Aid Bureau of Buffalo, Inc.

Before discussing the legal requirements of becoming a United States citizen, we should first clarify who is already a citizen. Clearly, as we all know, people born in the U.S. are citizens, as are those born in Puerto Rico, the Panama Canal Zone, the U.S. Virgin Islands, and Guam. U.S. citizens are eligible to carry a U.S. passport, and may never be deported or denied admission to this country, though they may be detained, searched and questioned at the border upon seeking admission. *See*, *Tabaa v. Chertoff*, 509 F3d 89 (2d Cir. 2007); *see also*, https://fas.org/sgp/crs/homesec/R46601.pdf). (In a recent case, three U.S.-born infants were forced to wait in Mexico with their undocumented mothers who were seeking asylum here.* See, https://theintercept.com/2021/01/02/asylum-seekers-children-expulsion-pandemic/).

Some citizens have dual nationality and may hold more than one passport, depending upon the laws of the countries in which they were born or hold citizenship. Certain people born in a U.S. possession, such as American Samoa, may be a U.S. national, but not a citizen, though they may also carry a U.S. passport.

Depending on the tribal affiliation and whether the tribe's historical territory is located in both countries, Native Americans born in Canada have the right to travel freely between the U.S. and Canada, though they may not be U.S. citizens. Native Americans born in Mexico may also have such rights on our southern border. These individuals will not have U.S. passports, but will carry a "Secure Certificate of Indian Status" to permit them to travel between the two countries. However, they enjoy no other rights granted to U.S. citizens.

In addition to the aforementioned, children born abroad to U.S. citizens may *acquire* citizenship at birth by operation of law. A child who qualifies for acquisition may obtain proof of their citizenship at the time of their birth from a U.S. Consulate abroad or, later in time, they may apply for a certificate of citizenship or a U.S. passport. As well, children who are under eighteen years of age may *derive* U.S. citizenship by operation of law when a parent naturalizes, as described below. However, the laws on acquisition and derivation of U.S. citizenship through parentage are complex, and may depend on the law in effect at the time of the child's birth. In some cases, a child may only acquire or derive U.S. citizenship when both parents are citizens. There may also be requirements concerning the citizen parent's residence in the U.S., the child's admission to the U.S., the parent's marriage, and divorce and custody issues, if applicable. These "children" may also apply for U.S. passports or certificates of citizenship if they qualify.

Prospective naturalization applicants may want to be as certain as possible that they will be granted citizenship before investing in the costly process. They must assess their ability to speak, read and write English, to pass the required exam, and be certain that any conviction or other "bad" act within the statutory period preceding the application will not lead to a denial of naturalization based upon a lack of "good moral character."

Naturalization is the process by which a foreign born person becomes a U.S. citizen, as set forth in Title III of the Immigration and Nationality Act (INA). Once a person effectively naturalizes, which includes filing an application, attending an interview, and passing a test,

*Contrary to popular belief, and "anchor baby" myth, a US citizen cannot petition for a parent to legally immigrate to the US until the citizen is 21 years old.

as well as taking an oath of allegiance to this country, s/he has the same rights and obligations as any other U.S. citizen, although a naturalized citizen may be denaturalized in civil or criminal proceedings in those rare instances where fraud or concealment has occurred. See e.g., 8 USC §1451; 18 USC §1425; https://www.justice.gov/opa/pr/department-justice-creates-section-dedicated-denaturalization-cases; https://nipnlg.org/PDFs/practitioners/practice_advisories/fed/2020_07Apr_denaturalization-pa.pdf . Additionally, a naturalized citizen will no longer have a "green card," since that card must be surrendered at the citizenship oath ceremony. However, s/he will be given a certificate of naturalization and may then immediately apply for a U.S. passport and register to vote.

An applicant for naturalization must first generally be a lawful permanent resident (LPR) for at least five years before s/he is eligible to apply. There is an exception for those married to U.S. citizens.* They may apply to naturalize after three years as an LPR, but there are specific requirements which must be met in addition to the marriage to a U.S. citizen. Immigration Courts have no jurisdiction over naturalization applications. An application for naturalization is made on an N-400 to Citizenship and Immigration Services (CIS), the benefits branch of the Department of Homeland Security. The application carries a hefty filing fee of $640, plus the $85 cost of biometrics, and the cost of passport sized-photos. Of course, there may also be attorney's fees involved. For this reason alone, I am careful to advise prospective naturalization applicants that they may want to be as certain as possible that they will be in fact granted citizenship before investing in the very costly process. Considerations would include an honest assessment of their ability to speak, read and write English, to pass the required exam, and to be certain that a conviction, or other "bad" act, will not lead to a denial of naturalization, as described below.

In order to naturalize there are rules about physical presence in the U.S., language ability, and knowledge of U.S. history and civics, but the critical requirement for criminal defense and family law attorneys to understand is the requirement that the applicant prove that s/he is of "good moral character" (GMC) in the five (or three) years preceding the application for naturalization. *Any* criminal offense, as well as other "bad" conduct during those years, could derail an LPR's hope to become a U.S. citizen.

A list of conduct that statutorily constitutes a lack of "good moral character" is found at 8 USC §1101(f); INA §101(f). This conduct includes convictions for most removable criminal offenses, as well as for having been confined, as a result of any conviction, to an aggregate period of 180 days in a penal institution. In addition, there is conduct that does not require a conviction, such as being a "habitual drunkard," deriving income principally from gambling, or giving false testimony for the purposes of gaining an immigration benefit; and a person who is on probation or parole may not be naturalized. The law is also clear that one who has been convicted of an aggravated felony can *never* establish GMC.

It is important to note that the naturalization regulations further expand upon what constitutes a lack of good moral character. The rules add that a person engaged in prostitution or commercialized vice lacks GMC, as does one involved in "alien" smuggling, or one who has practiced or is practicing polygamy. The regulations also state that unless the applicant establishes extenuating circumstances, s/he will be deemed to lack GMC for willful failure or refusal to support dependents; or having an affair which tended to destroy an existing marriage.

Finally, 8 CFR §316.10 states that "the fact that a person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." It advises that an

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*There are also special rules for the naturalization of members of the military which are not covered in this article.

adjudicator may evaluate GMC in accordance with statutory provisions and "the standards of the average citizen in the community of residence."

Perhaps more troubling than being denied citizenship is that if an LPR with a conviction for a removable offense on their record files for naturalization, s/he may be placed in removal proceedings if the conviction is discovered by immigration authorities subsequent to the required FBI background check. Therefore, it is imperative that criminal defense attorneys carefully advise LPR clients who are convicted of crimes to seek consultations with immigration lawyers before filing for any future immigration benefit such as citizenship, renewing a "green card," or for that matter, having any contact with any branch of the Department of Homeland Security.

It is equally important to know that a noncitizen falsely claiming to be a U.S. citizen is a ground of removal. 8 USC §1227(a)(3)(D), INA § 237(a)(3)(D). No *mens rea* is required to violate this provision of law, and no relief from this removal ground is available. *Matter of Zhang*, 27 I&N Dec. 569 (BIA 2019).

There is only an exception for children of two U.S. citizens who become LPRs before age 16. The same holds true for a noncitizen who registers to vote or votes in a U.S. election when s/he is not a citizen. 8 USC §1227(a)(6); INA §237(a)(6); *Matter of Fitzpatrick,* 26 I&N Dec. 559 (BIA 2015). These acts are also grounds of inadmissibility at 8 USC §1182(a)(6)(C)(ii); INA §212(a)(6)(C)(ii). Of course, there may also be federal criminal penalties for violations of these laws. A conviction for falsely claiming to be a U.S. citizen would then be a crime of moral turpitude constituting a lack of GMC, and could serve as an additional ground of removal.

Naturalization is not the only immigration benefit where GMC is assessed. A person who is undocumented may seek lawful status in the U.S. if s/he can show ten years of continuous presence in the U.S., and GMC for those ten years, among other requirements. As well, those who have been victims of domestic violence and seek special permanent residency status under the Violence Against Women Act (VAWA) must prove they are of good moral character to obtain this status. Those who receive "T" visas for survivors of human trafficking must also show GMC to ultimately receive permanent residence. Consequently, it may be vital to assess criminal and family cases for its GMC implications, and not solely to determine whether a criminal plea would render a noncitizen deportable.

FYI

* The Biden Administration released its long-awaited guidance on the January 20th Immigration and Customs Enforcement priorities. The guidance is available here. Priority 1 cases for ICE enforcement are those involving national security. Priority 2 involve noncitizens apprehended at the borders. Priority 3 cases for enforcement includes noncitizens convicted of aggravated felonies or those convicted of an offense involving gang activity. The memo also sets forth the factors that will be considered to determine whether one is a public safety concern subject to arrest and detention.

* The New Way Forward Act seeks to disentangle immigration and criminal legal systems, and roll back the injustices of the 1996 immigration law. *See more here:* http://immigrantjusticenetwork.org/newwayforward/

* Read about the Bronx Defenders' attempts to stop the deportation of a noncitizen who received a pardon from Gov. Cuomo for his criminal conviction: https://www.bronxdefenders.org/ousman-darboe/