Updated USCIS Guidelines for Vetting LPR Status During the Naturalization Examination

Feb. 18, 2021

I. Introduction

This practice advisory provides background and analysis on recent updates to the U.S. Citizenship and Immigration Services (USCIS) Policy Manual regarding lawful permanent resident (LPR) status and naturalization. On Nov. 18, 2020, USCIS updated its policy guidance to "clarify circumstances under which an applicant may be found ineligible for naturalization if the applicant was not lawfully admitted to the United States for permanent residence in accordance with all applicable provisions under the Immigration and Nationality Act (INA)."[1] The updated guidance invites scrutiny into many aspects of the applicant's immigration history, and states that "[i]f the LPR status was not lawfully obtained for any reason, regardless of whether there was any fraud or misrepresentation by the applicant, the applicant is ineligible for naturalization even if the applicant was admitted as an LPR and possesses a Permanent Resident Card (PRC) (Form I-551)."[2]

This practice advisory summarizes the Nov. 18, 2020 policy guidance, provides practice pointers for advocates preparing to file naturalization applications, and suggests strategies and possible solutions for clients whose naturalization applications have been denied based on an allegation that a grant of permanent residence was not lawful.

II. Summary of Guidance

Based on the Immigration and Nationality Act (INA), a prerequisite for naturalization is that the applicant has been "lawfully admitted to the United States for permanent residence."[3] USCIS has long taken the position that the "lawfully admitted" language of the statute refers to substantive

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[1] *See* Policy Alert, Prerequisite of Lawful Admission for Permanent Residence under All Applicable Provisions for Purposes of Naturalization, PD-2020-23, Nov. 18, 2020, available at uscis.gov/sites/default/files/document/policy-manual-updates/20201118-LPRAdmissionForNaturalization.pdf

[2] USCIS Policy Manual, Volume 12: Citizenship and Naturalization, Part D, General Naturalization Requirements, Chapter 2, Lawful Permanent Resident Admission for Naturalization [12 USCIS-PM D.2] (hereinafter "Naturalization Policy Guidance"), available at uscis.gov/policy-manual/volume-12-part-d-chapter-2.

[3] INA § 318.

eligibility for permanent resident status at the time when the status was granted.[4] Therefore, merely having a permanent resident card that was obtained in the procedurally proper way through approval of the application by the Department of State, USCIS, or the immigration court is not sufficient. Rather, the applicant must have been legally entitled to the grant of permanent residency at the time it was approved, or "substantively eligible" for permanent residency. If the applicant was not eligible for permanent residency at the time it was granted, USCIS may deny the application for naturalization. This is true even if there was no fraud or misrepresentation by the applicant, all relevant information was properly disclosed during the green card application stage, and the individual was granted residency through government error. Federal courts have generally agreed that USCIS may reconsider the applicant's eligibility for permanent residency at the time of naturalization.[5] Immigration practitioners have long seen the issues of the applicant's substantive eligibility for permanent residency litigated at the naturalization stage, particularly when applicants made a prior misrepresentation impacting their eligibility for lawful permanent residency.

However, the updated November 2020 guidance appears to exceed historical practice in the breadth of examples provided as to when USCIS can find that an individual's admission to the United States was not substantively lawful. The guidance invites agency scrutiny into prior lengthy trips outside the United States, whether at the time of admission the applicant was likely to become a public charge, and a detailed analysis of the case law at the time the individual was granted LPR status. Such a stringent analysis could lead to increased processing times for naturalization applications, more denials, and more litigation. Given that the guidance was issued in the waning days of the prior administration, it is possible that the new administration may withdraw or modify some aspects of the recently issued guidance.

The new guidance provides detailed analysis on several categories that the agency will consider in order to determine an individual's substantive eligibility for permanent residency. These categories will be discussed in further detail below.

a. Assessing Abandonment of LPR status in a Naturalization Proceeding

The updated guidance contains a lengthy discussion and analysis of abandonment issues relating to LPR status. The policy manual states that an applicant who has abandoned his or her permanent

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[4] *See Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003) (finding, in the context of an application for LPR cancellation of removal pursuant to INA § 240A(a), that "lawful admission as an LPR requires "compliance with substantive legal requirements, not mere procedural regularity.").

[5] *Adegoke v. Fitzgerald*, 784 F. Supp. 2d 538 (E.D. Pa. 2011) (finding that applicant who misrepresented his identity and concealed an arrest and deportation when obtaining his visa was not eligible for naturalization because he was not lawfully admitted for permanent residence); *Injeti v. U.S. Citizenship & Immigration Servs.*, 737 F.3d 311 (4th Cir. 2013) (applicant who made a material misrepresentation prior to adjustment of status was not eligible for naturalization because she was inadmissible at the time of adjustment of status); *Turfah v. U.S. Citizenship & Immigration Servs.*, 845 F.3d 668, 670 (6th Cir. 2017) (finding even in the absence of fraud that applicant was ineligible for naturalization because he was granted an immigrant visa as a derivative and entered the United States prior to his father, the principal applicant).

resident status is not eligible for naturalization and that "USCIS may consider any relevant evidence of abandonment to assess whether the applicant is eligible for naturalization." The test for abandonment is whether a lawful permanent resident demonstrates an intent to no longer live in the United States as a permanent resident.[6] The policy manual instructs DHS, consistent with its established Guidance on the Issuance of Notices to Appear (NTAs), to place into removal proceedings a "naturalization applicant [who] has failed to meet the burden of establishing that he or she maintained LPR status."

In January 2021, the Biden administration rescinded the June 2018 NTA Guidance Memo issued by the Trump administration and indicated that the 2011 Guidance on Issuances of Notices to Appear by the Obama administration will be in effect.[7] While the new administration is still working on its more detailed guidance for overall enforcement priorities, it is doubtful that litigating years-old issues of abandonment will be considered a top priority. The November 2011 NTA Guidance Memo prioritizes certain categories of non-citizens for NTA issuance, including what it deems "egregious public safety cases," certain individuals removable under other criminal grounds if specific criteria are met, and cases where a Statement of Findings substantiating fraud is part of the record. In contrast, the 2018 NTA Guidance Memo allowed for the issuance of an NTA, among other circumstances, for any removable non-citizen upon denial of an application for benefits, which would include those LPRs who the agency alleges have abandoned their status.[8] There is no mention in the November 2011 NTA Guidance Memo of issuance of NTAs in cases involving LPR abandonment, particularly those that come to the attention of the agency during the naturalization stage. Therefore, it seems likely that the Biden administration will be less interested in issuing NTAs based on claims that the individual has abandoned his or her LPR status, especially for a person who fulfills the statutory requirements for naturalization and has evinced an interest in becoming a U.S. citizen by actually applying to become a citizen.

i. Statutory Eligibility for Naturalization vs. Abandonment

Although this portion of the Naturalization Policy Guidance may not be followed as closely as under the prior administration, it is still useful to summarize the law surrounding abandonment of LPR status and how that may intersect with an applicant's statutory eligibility to naturalize, even where it is less likely to result in the issuance of an NTA.

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[6] *Matter of Huang*, 19 I&N Dec. 749 (BIA 1988).

[7] Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, available at uscis.gov/sites/default/files/document/memos/NTA%20PM%20(Approved%20as%20final%2011-7-11).pdf (hereinafter "November 2011 NTA Guidance Memo"); Executive Order, "Revision of Civil Immigration Enforcement Policies and Priorities, available at govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01768.pdf.

[8] See "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens" (hereinafter "June 2018 NTA Guidance Memo"), *available at* uscis.gov/sites/default/files/document/memos/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf.

The statute has certain requirements relating to continuous and physical presence in the United States that are separate and distinct from the abandonment analysis. With respect to the naturalization requirements, physical presence requires that the applicant be present in the United States at least one half of the statutory period (generally five years or three years if the applicant is married to a U.S. citizen or is eligible under the VAWA provisions) preceding the filing of the application.[9] An applicant is presumed to disrupt the period of continuous residence with an absence of more than six months but less than a year, but that presumption can be rebutted. An applicant disrupts the period of continuous residence with an absence of more than one year with no opportunity to overcome that finding until sufficient time has passed and the trip is outside of the statutory period.[10]

With respect to the abandonment analysis, the Naturalization Policy Guidance provides that USCIS can review the following factors to determine whether an applicant intended to abandon his or her LPR status: purpose of travel outside of the United States; intent to return to the United States as an LPR; and continued ties to the United States. The length of an extended absence is an important factor in determining intent, and a single visit every year to the United States may not be sufficient to preserve LPR status. An LPR should have a "definite reason for proceeding abroad temporarily," including, according to the guidance, a "short vacation" or a "to visit an ill family member." The guidance also discusses that an applicant's activities should be consistent with an intent to return to the United States as soon as is practicable.

The Naturalization Policy Guidance also discusses the importance of maintaining connections to the United States, including through filing federal and state income tax returns as a resident of the United States; maintaining property and business affiliations in the United States; maintaining a driver's license with a U.S. address of record; and immediate family members residing in the United States who are U.S. citizens, LPRs, or seeking citizenship or LPR status. USCIS will also review whether the applicant maintains connections outside of the United States, which could be considered factors in determining whether the individual has abandoned his or her status. Applicants who voluntarily claim "nonresident alien" status or fail to file tax returns because they consider themselves to be "nonresident aliens" raise a rebuttable presumption of abandonment of LPR status. The applicant may overcome that presumption with evidence showing that he or she did not abandon his or her status. In addition, according to the Policy Guidance, applicants who have previously filed Form I-407 will be placed into removal proceedings and have their application for naturalization denied. However, the absence of Form I-407 will not preclude a finding of abandonment of status.

Lengthy absences outside of the country, therefore, have the potential not only to impact an applicant's eligibility for naturalization but also eligibility to maintain LPR status. The updated Naturalization Policy Guidance expands the inquiry for the adjudicating officer beyond the relatively

[9] INA § 316(a); INA § 319(a).
[10] INA § 316(b).

straightforward question of whether the applicant meets the statutory continuous and physical presence requirements for naturalization to whether the applicant has abandoned LPR status.

These considerations may overlap but are not entirely the same, as the following scenarios will show:

- Consider an applicant who applies for naturalization on Jan. 2, 2021. During the five years preceding this application, the applicant has spent more than half of her time physically present in the United States. However, on March 1, 2020, she returned from a trip outside the United States that lasted eight months. She had no problem re-entering the United States, beside getting a comment from the CBP officer that she should be careful not to spend too much time outside the United States. When the applicant attends her interview at USCIS, she should be prepared to answer questions both about whether she disrupted the period of continuous residence for purposes of eligibility for naturalization *and* whether she abandoned her lawful permanent resident status by being outside the United States for a lengthy period of time.

The issue of abandonment may also be present for individuals who have no trouble meeting the statutory physical presence and continuous residence requirements for naturalization. The following example illustrates this possibility:

- Consider a different applicant who applies for naturalization on Jan. 2, 2021. During the past five years, this applicant traveled outside the United States on only one occasion, for a two-week period to attend a family wedding. However, from 2008-2013, he spent a significant amount of time outside the country. He attended college overseas, returning to the United States only during the summers. He had a re-entry permit, but it was valid for only two years and did not cover the entire time he was outside the United States. After college, he worked in a temporary position overseas before flying to the United States in 2013. During inspection at the airport after this last flight, his travels were scrutinized intensely. He was warned that this was his "last chance" to be admitted to the United States and that if he continued spending most of his time outside of the United States, he would lose his green card. After that warning, this applicant became frightened of losing his LPR status and remained in the United States except for the short two-week trip described above. While he fulfills the continuous residence and physical presence requirements for naturalization, his trips from 2008 to 2013 may subject him to scrutiny as to whether he abandoned his LPR status when he spent significant time outside of the United States.

The law around abandonment is focused on the applicant's intent to maintain residence in the United States, and intent can be determined by objective factors such as residence in the United States, family ties, financial connections, and employment ties. Practitioners should be aware that even in the new administration, issues of abandonment of LPR status may come up during the naturalization proceeding, and they should be prepared with relevant documentation to establish that the applicant intended to maintain his or her residence in the United States.

b. Effects of Changes in Law on an Applicant's Eligibility for Naturalization

The Naturalization Policy Guidance also contains a section analyzing the impacts that a change in case law may have on an applicant's eligibility for naturalization, stating that "the interpretation and applicability of new case law may vary," and that officers should consult with USCIS counsel regarding the interpretation and application of new case law in a naturalization proceeding.

A specific example provided in the guidance is the varying court and agency interpretations relating to Temporary Protected Status ("TPS") holders and their eligibility for adjustment of status pursuant to INA § 245(a). Since there is a circuit split regarding whether TPS itself constitutes an "admission" for 245(a) adjustment of status eligibility, the policy guidance explains that USCIS will consider whether the applicant's adjustment was in line with the law of the particular circuit at the time of adjustment.

USCIS has also recently issued a precedent decision holding that a TPS recipient's return to the United States on advance parole does not satisfy the "inspected and admitted or paroled" language of the statute for purposes of section 245(a) adjustment.[11] However, since the case applies only to those who departed and returned to the United States after Aug. 20, 2020, USCIS states that those who adjusted status pursuant to a grant of advance parole who are not subject to the new decision will be considered "lawfully admitted" for purposes of naturalization.

c. Scrutiny of the Underlying Basis of Admission

The policy guidance explains that during the naturalization proceeding the officer should verify the underlying immigrant visa petition or other basis for immigrating that formed the basis of that individual's grant of LPR status to determine that the admission to the United States was lawful. The guidance allows the officer to scrutinize the underlying family or employment-based petition to ensure that the LPR status was correctly and lawfully approved. In the case of an applicant who entered the United States on a K-1 fiancé(e) visa and later adjusted his or her status to that of an LPR, the officer should also confirm that all substantive eligibility requirements under the K-1 visa program were met.[12] For those who obtained LPR status based on a marriage, the officer is also permitted to review conduct pertaining to the intent of the parties at the time they married. The officer can also look into whether the marriage was entered into in good faith and its underlying validity.

This additional scrutiny applies not only to a principal applicant but also a derivative beneficiary. For example, the guidance states that there are certain circumstances when a derivative beneficiary did not obtain LPR status properly based on the principal's status, including when a derivative became an

[11] *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020).

[12] The general requirements are that the applicant was free to marry and intended to marry the U.S. citizen fiancé(e) within 90 days of admission and they met in person within two years immediately preceding the date of filing the petition (unless the requirement to meet in person was waived pursuant to the provisions provided in the statute).

LPR prior to the principal; when a derivative adjusted to LPR status after the principal naturalized; when the principal's LPR status was rescinded; when a principal was denaturalized for not having been lawfully admitted; or when the principal committed misrepresentation in order to obtain their LPR status. That derivative, even if blameless or unaware of the misrepresentation by the principal applicant, may also be denied naturalization.

The policy guidance also includes an extensive discussion of those who were inadmissible at the time of admission or adjustment of status and failed to obtain a waiver, including those who were inadmissible under health-related grounds, criminal and related grounds, security and related grounds, public charge, failure to possess a labor certification, illegal entrants and immigration violators, those ineligible for citizenship, and non-citizens previously removed. These individuals will be considered not to have been "lawfully admitted" to the United States and are therefore ineligible for naturalization.

A few examples of those whom USCIS may deem inadmissible at the time of admission or adjustment of status and thus ineligible for naturalization are summarized below.

- *Inadmissibility Based on Public Charge:* According to the policy guidelines, officers should scrutinize at the time of naturalization whether the applicant was in fact inadmissible based on likelihood to become a public charge. The officer should consider the relevant guidance at the time the application for adjustment of status was filed to see whether the more stringent guidance of Feb. 24, 2020 (requiring submission of Form I-944) or the 1999 Interim Field Guidance applied to the applicant. In addition to that analysis, the officer would need to establish whether the applicant was subject to the public charge ground of inadmissibility or was statutorily exempt as an asylee, refugee, special immigrant juvenile, or in some other category. The Naturalization Policy Guidance states that if an applicant is receiving public benefits after obtaining LPR status "officers should not assume that the applicant should have been found inadmissible on the public charge ground…" It is unclear what documents would be requested in order to make the determination that the applicant was inadmissible at the time of admission due to likelihood to become a public charge. However, it is likely that, if they remain in place, these policy guidelines on public charge will have a chilling effect on LPRs' acceptance of public benefits or the use of applications for fee waivers in connection with a naturalization application, even if they are legally entitled to such benefits or a fee waiver. This chilling effect may have been the intent behind this portion of the guidance.

- *Inadmissibility Based on Misrepresentation:* USCIS may raise the issue of fraud at the time of the naturalization application, as it has taken to reviewing prior visa records and applications for adjustment of status for fraud issues. Examples of misrepresentation may include the following: consciously concealing or willfully misrepresenting a previous immigration record (A file number) or previous order of removal; presenting a fraudulent identity document to an immigration officer; obtaining LPR status based on an employment-based immigrant petition that contained material misrepresentations as to the applicant's qualifications;

misrepresenting marital status, particularly in those immigrating in a preference category that requires the applicant to be single; obtaining a divorce solely for immigration benefits; misrepresenting material facts to obtain asylum or refugee status; misrepresenting material facts to conceal group membership; or misrepresenting material facts to conceal inadmissibility for having engaged in terrorist activity.

Discovery of these problems at the naturalization stage leads to complications because there is no easy or quick fix for them. For example, consider an applicant who is married to a U.S. citizen and made a material misrepresentation on an application for a nonimmigrant visa prior to entering the United States. If this misrepresentation was disclosed by the applicant or otherwise discovered by USCIS prior to adjustment of status, the applicant would have been eligible to file an application for a fraud waiver on Form I-601 and may have had this ground waived. However, USCIS takes the position, reiterated in its policy guidance, that once the applicant has reached the stage of applying for naturalization, an unlawful LPR admission or adjustment of status cannot be cured by filing the waiver at the time of the naturalization proceeding.

The guidance also provides specific factors to consider in the event of those who acquired LPR status pursuant to the Cuban Adjustment Act (CAA) or as refugees.

- *Cuban Adjustment Act Applicant*: With respect to the CAA, the policy guidelines state that the applicant must have accrued at least one year of physical presence in the United States at the time of filing the adjustment of status application. USCIS will deny a naturalization application for an individual who after Nov. 18, 2020 acquired LPR status under the CAA and did not accrue one year of physical presence before filing the application. The guidance also provides that additional documentation may be needed for an LPR granted adjustment under the CAA who was born outside of Cuba to a Cuban parent. USCIS will deny a naturalization application if the applicant was not in fact a Cuban citizen at the time of adjustment.

- *Refugees*: With respect to refugees, USCIS indicates that, as of Nov. 15, 2018, it stopped accepting adjustment of status applications from refugees before their accrual of one year of physical presence in the United States but may have accepted these applications prior to that date. Therefore, an applicant for naturalization who filed for adjustment of status on or after Nov.15, 2018 without having accrued one year of physical presence would not have been lawfully admitted and is not eligible for naturalization.

d. Applicants Considered Lawfully Admitted

The guidance does provide a few limited examples of times when the applicant should be considered lawfully admitted for permanent residence, despite procedural errors in the process. These specific examples may arise out of federal court litigation that limited DHS's ability to claim that the applicant was not lawfully admitted to the United States.

- *DOS Failure to Allocate a Specific Visa Number:* The guidance states that if an officer did not specifically request the visa number from the Department of State or the Department of State did not allocate the visa number, but the visa number was available at the time of filing and decision, the applicant will be considered to have been lawfully admitted to the United States for permanent residence.[13] USCIS will also consider the applicant lawfully admitted if the officer annotated the wrong class of admission code, but there was still a visa number available to the applicant.

- *Failure to pay 245(i) penalty fee*: The guidance provides that an applicant who adjusted status pursuant to INA § 245(i) but did not pay the required statutory penalty fee prior to adjustment of status may be eligible for naturalization.[14] USCIS in its discretion may allow the applicant to submit the penalty fee if this is the only potential eligibility issue with respect to the naturalization application.

III. Practice Pointers for Practitioners Prior to Filing the Naturalization Application

For practitioners operating in a world of heightened scrutiny of their clients' LPR status, it is very important to be aware of the ways that this scrutiny could impact clients' eligibility for naturalization. Naturalization applicants should be advised that USCIS will be looking into how they obtained their green card, and therefore it is important for practitioners to know this information as well. Some applicants may not understand that what they see as long past issues are still relevant to their application for naturalization. There is no statute of limitations for USCIS scrutinizing many of these issues of abandonment or ineligibility for LPR status. This conversation should be part of the initial screening process.

a. Screening for issues as part of intake process

Practitioners screening applicants for naturalization should always ask their clients how they obtained LPR status, since this issue will be front and center during the naturalization process. The answer will determine the appropriate follow-up questions. For example, if a client has obtained residency through a U.S. citizen or LPR spouse, practitioners should ask if they are still married. If not, when did they divorce? If they obtained a green card through employment, how long did they work at that particular job? If a client obtained residency through a grant of asylum, practitioners should also ask the basis for their grant so they can obtain an understanding of their claim.[15] These early screening

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[13] *See Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003) (stating that there is no indication that possession of an allocated visa number is an eligibility requirement for adjusting status).

[14] *See Agarwal v. Napolitano*, 663 F. Supp. 2d 528 (W.D. Tex. 2009) (stating that USCIS could not deny naturalization to applicants who had failed to pay the 245(i) penalty fee at the time of adjustment of status when they were not notified that payment of the fee was required).

[15] It is particularly important to review previously submitted asylum applications, as many questions relevant to an applicant's eligibility for asylum are also relevant at the naturalization stage. For example, an applicant whose asylum

questions will start to give practitioners a better sense of their clients' background and identify any potential areas of concern.

b. Freedom of Information Act (FOIA) Requests

In addition to the initial screening, it is generally a good idea to file requests for copies of the client's A file with the Department of Homeland Security, particularly if the client has a complicated immigration history or has previously been in immigration court proceedings. This can be the best way for a practitioner to truly understand clients' prior immigration proceedings and to flag any problem areas that may arise during the naturalization process. The fastest way to obtain A file records is through submission of an electronic request to USCIS, but practitioners may also choose to submit the request through the mail or email.[16] FOIA requests are generally prepared by the practitioner by filing Forms G-28 and Form G-639, which provides USCIS the necessary information to obtain the individual's A file.[17] Practitioners may also wish to request Department of State visa records, although these can be harder to obtain and processing times can be lengthy.[18] Practitioners should also request immigration court records through the Department of Justice, Executive Office for Immigration Review, for individuals previously in removal proceedings.[19]

Unfortunately, agencies can take a very long time responding to FOIA requests. While best practice is to await FOIA results, at the very least it is advisable to ask the client to obtain prior copies of any applications filed with USCIS, such as green card or asylum applications. They may have copies of these applications in their personal records, or they may need to obtain them from previous counsel. This is important to ensure consistency between applications that have been filed and provides the practitioner more in-depth information about their clients' immigration history.

c. Comparison with prior applications filed

Once these records are obtained, practitioners should look for any prior acts or nondisclosure of information that may have impacted the client's initial grant of LPR status. If the client was subject to a ground of inadmissibility, was the issue disclosed prior to the grant of LPR status? If a waiver was necessary, was the waiver filed and approved?

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application indicates that he was active in an opposition political party in his home country and who was arrested three times for his political activities will want to answer these questions on the N-400 application in a manner that is consistent with the prior asylum and adjustment applications.

[16] The most up-to-date information on requesting A file records through USCIS can be found on its website. uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act.

[17] Form G-639 is not required, and practitioners may also choose to submit a letter describing the types of records they are seeking.

[18] Information on requesting records from the State Department can be found on its website: foia.state.gov/Request/ThirdPartyAuthorization.aspx.

[19] Information on requesting immigration court or BIA records can be found on EOIR's website: justice.gov/eoir/foia-facts.

Practitioners should also look for consistency in terms of disclosure of all relevant family members — for example, is the information regarding the number of marriages and divorces that a client is listing on the N-400 application consistent with information previously listed on an I-485 or DS-260 application? Is the information regarding the number of children the applicant has consistent between the applications?[20] Even comparing addresses between the two applications can be important, as officers can scrutinize whether the applicant's address history matches up with addresses listed on the I-485 form or to see whether the applicant properly filed AR-11 change of address forms.[21]

Of course, minor inconsistencies between the applications do not necessarily mean that the applicant's N-400 case is doomed. Issues that were not *material* should not be a bar to naturalization, even if they were not mentioned on the I-485 application. The test for materiality is not as simple as arguing that disclosure would not have changed the decision.[22] The proper test for materiality is if it "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded."[23] This is why a careful review of prior applications is so vital. If a practitioner notices inconsistency between applications, he or she should discuss this with the client to better understand the reasons for the inconsistency and whether it was material to the client's eligibility for LPR status. It is important, to the extent possible, to have a sense of the client's history to limit surprises for the client and the representative at the time of the naturalization examination.

IV. Strategies for Denials

An applicant whose N-400 application is denied has appeal options and rights. Before representing a client in an appeal, the practitioner should assess the reasons for the denial, what legal arguments are available, and whether pursuing an appeal is in the client's best interests.

The first level of review for a denied naturalization application is an administrative review pursuant to INA § 336(a). The administrative appeal is filed on Form N-336 within 30 days of the agency's

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[20]This issue has often been raised for naturalization applicants who received LPR status pursuant to the diversity visa because of regulations requiring the listing of children. These regulations generally contain a warning that failure to submit the proper information, including information about children, results in disqualification of the lottery entry. Therefore, the government has argued that the failure to list children essentially automatically renders the applicant inadmissible at the time of entry to the United States and therefore ineligible for naturalization. *See Tumoe v. Barr*, 474 F.Supp 3d 997 (S.D. Iowa 2020) (denying government's motion for summary judgment when fact issues remained as to whether applicant's failure to list his children on his application for diversity immigrant visa was willful and material).

[21] In rare cases, there have been reports of USCIS finding that a failure to file a change of address form in accordance with the law constitutes unlawful conduct showing a lack of good moral character. Officers may also scrutinize addresses for an applicant who obtained permanent residency through marriage. A lack of consistency as to where the applicant lived may lead to doubts about the underlying validity of the marriage-based green card.

[22] *Injeti v. U.S. Citizenship & Immigration Servs.,* 737 F.3d 311, 316 (4th Cir. 2013) (finding that a misrepresentation is material does not require concluding that it necessarily would have changed the relevant decision).

[23] *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289 (BIA1975) (*quoting Matter of S— & B—C—,* 9 I&N Dec. 436, 448–49 (A.G.1961)).

decision, along with the proper filing fee.[24] The regulations provide the officer in the administrative proceeding the authority to review the application, interview the applicant, and either affirm the findings and determination of the original officer or redetermine the decision in whole or in part.[25] The review hearing must be scheduled within 180 days of the date of appeal. In order to preserve the right to appeal to federal court, an applicant for naturalization must first exhaust his or her administrative remedies.[26]

If the denial is affirmed following the administrative appeal, the applicant may file a petition for review of their denied naturalization application in the federal court having jurisdiction over their place of residence. District courts have *de novo* jurisdiction over an administrative decision to deny naturalization. USCIS must inform the applicant of available judicial remedies. The regulations provide that the review must be filed within 120 days of the Department of Homeland Security's denial of the naturalization decision, although at least one circuit has held this regulatory time limit invalid and held that the general six-year statute of limitations under the Administrative Procedure Act applies.[27]

During the course of the administrative appeal or federal court litigation, practitioners may sometimes find that DHS counsel is amenable to a solution to resolving the matter in a way that may potentially "fix" what DHS sees as the underlying issue with the client's case. While this may not resolve the naturalization application at issue favorably, it may cure the underlying defect in the client's status and put them back on the road to eventually being able to naturalize. Of course, this type of resolution is not available in every case and depends on the facts of each client's situation. If an agreement with DHS counsel is not possible, the client may pursue their case in district court as discussed above and appeal to the Circuit Court of Appeals in the event of an adverse decision from the district court.

Here are possible examples of ways that an underlying defect in status could be corrected:

- *Rescission of LPR status*: In the case of an individual who has been an LPR for less than five years, DHS may rescind client's LPR status without referral to immigration court if certain criteria are met. DHS cannot rescind LPR status after more than five years have passed. If the client was inadmissible at the time of admission for an offense that was waivable, is married to a U.S. citizen, and has a basis to re-adjust, the client may accept recission of status and re-file for adjustment of status with a waiver of inadmissibility. In this scenario, the client would

[24] The most up-to-date version of the N-336 form and information about the filing fee can be found on the USCIS website, uscis.gov/n-336. USCIS is temporarily providing an extension on the filing time for the N-336 related to the Coronavirus pandemic. At least until March 30, 2021, USCIS will consider a Form N-336 or Form I-290B received up to 60 calendar days from the date of the decision.
[25] 8 CFR § 336.2
[26] 8 CFR § 336.9(d).
[27] 8 CFR § 336.9; *Nagahi v. INS*, 219 F.3d 1166 (10th Cir. 2000).

have to accrue a new period of continuous residence as an LPR before re-filing for naturalization.[28]

- *Referral to removal proceedings for a 237(a)(1)(H) waiver*: In at least some cases, a referral to removal proceedings can be the only way to "fix" the underlying defect in the applicant's immigration status. For example, consider the example of the applicant who committed a material misrepresentation on a visa application and thus was denied naturalization for being inadmissible at the time of admission for fraud. Filing an I-601 waiver at the time of a naturalization proceeding will not "cure" the applicant's status. Furthermore, if more than five years have passed since the grant of LPR status, DHS cannot institute rescission proceedings. However, a waiver pursuant to section 237(a)(1)(H) may be able to cure the underlying defect, as this waiver is used precisely for those inadmissible at the time of admission due to fraud or misrepresentation.[29] This waiver can only be granted by an immigration judge in removal proceedings. For those statutorily eligible for the waiver, then, this can be a way to clear the underlying defect and pave the way for naturalization, particularly since once granted, the waiver renders the LPR status valid from the date of the initial grant.[30]

- *Referral to removal proceedings for other relief:* Practitioners should consider whether other relief is available to a client in removal proceedings. For example, consider an applicant who failed to disclose a conviction for a crime involving moral turpitude on an application for adjustment of status. The applicant is not eligible for a section 237(a)(1)(H) waiver because he or she was not "otherwise admissible" as the statute requires. However, the applicant may have a basis to adjust status through a U.S. citizen spouse and could seek re-adjustment of status in conjunction with the proper waivers of inadmissibility in removal proceedings. Other clients may have asylum claims if placed into removal proceedings.

Clients should be aware that there is no guaranteed result in removal proceedings and a referral to court is inherently risky. Practitioners should assess what they know about their local immigration courts, as well as the clients' statutory and discretionary eligibility for relief when deciding how to proceed. If a referral to immigration court proceedings is in the client's best interests, the 2011 NTA Guidance provides that an applicant who is denied naturalization may request a Notice to Appear in writing.

In general, USCIS will not consider the merits of any application for naturalization for an applicant in removal proceedings. The Nov. 18, 2020 Naturalization Policy Guidance clarifies that

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[28] INA § 246(a).

[29] Applicants for a 237(a)(1)(H)(i) waiver must establish that they are the spouse, parent, son, or daughter of a U.S. citizen or LPR, and, at the time of their admission, they were in possession of an immigrant visa or equivalent document and are otherwise admissible except for the fraud or misrepresentation and any grounds of inadmissibility under INA § 212(a)(5)(A) (not in possession of a labor certification) and (7)(A) (not in possession of a valid immigrant visa or other required documents) that were a direct result of that fraud or misrepresentation. INA § 237(a)(1)(H)(i)(I)-(II).

[30] *See Matter of Sosa-Hernandez*, 20 I&N Dec. 758 (BIA 1993).

naturalization applications for an individual in removal proceedings will be denied, except for certain applications based on military service or their residence within the jurisdiction of the Ninth Circuit.[31] This guidance conflicts with the 2011 NTA Guidance, to which the agency has reverted in January 2021. The 2011 NTA Guidance allowed for certain circumstances in which the N-400 would be placed on hold, instead of denied, when an applicant is in removal proceedings, including instances where an applicant is statutorily eligible to naturalize but is also deportable. However, whether the N-400 is denied or merely placed on hold in certain limited circumstances, USCIS will generally not consider the merits of the N-400 application until removal proceedings are terminated.

V. Conclusion

The agency's November 2020 Naturalization Policy Guidance expands the agency's ability to vet an LPR's underlying status. Regardless of whether the agency modifies any aspects of this guidance under this new administration, it is always advisable for practitioners and their clients to understand that the clients' LPR status is subject to review at the naturalization examination stage. This practice advisory reviewed the possible pitfalls for applicants during the naturalization process as well as strategies for practitioners when preparing applications or challenging denials.

[31] INA § 328(b)(2); *Yith v. Nielson*, 881 F.3d 1155 (9th Cir 2018). A discussion of the Ninth Circuit's law regarding naturalization applicants in removal proceedings is beyond the scope of this practice advisory.