

**Challenging Naturalization Denials Based On “Unlawful Acts”**

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**Introduction and Background**

This guide is intended to assist clients who have been denied naturalization based on a lack of good moral character, specifically based on the commission of alleged “unlawful acts” during the statutory good moral character period. CLINIC has begun to see this broad, catch-all provision, found at INA § 101(f) and 8 CFR § 316.10(b)(3)(iii), used against noncitizens in their naturalization cases. This sample cover letter is intended to provide a roadmap for how to challenge such denials at the administrative stage—through an appeal filed on Form N-336. It is focused on scenarios in which U.S. Citizenship and Immigration Services (USCIS) uses the “unlawful acts” provision outside of the scenarios outlined in detail in the USCIS Policy Manual.

This cover letter is not intended for denials when there is a separate statutory or regulatory bar to showing good moral character, when the noncitizen is deportable, or if the applicant is denied naturalization for not being lawfully admitted as a permanent resident. Indeed, practitioners are reminded to screen their clients’ cases comprehensively *prior* to filing to ensure they are not risking enforcement for being deportable. While there may be ways to challenge denials based on other reasons, the attached template cover letter is focused solely on possible responses to the broad use of the “unlawful acts” provision to deny naturalization. Prior to filing any appeal, practitioners should review this USCIS Policy Manual section to understand the agency’s current policy or law in this area: Chapter 5, Conditional Bars for Acts in Statutory Period, Section L, Unlawful Acts [[12 USCIS-PM F.5(L)](https://www.uscis.gov/node/73883#S-L%22HYPERLINK%20%22https://www.uscis.gov/node/73883#S-L)].

Form N-400 denials based on unlawful acts are pernicious because they provide an undue amount of discretion to the USCIS officer. Busy advocates may wrongly assume that the USCIS decision is correct and cannot be challenged. In addition, clients may be hesitant to challenge these denials due to concerns about the cost, the lengthy processing time for USCIS to consider appeals, and worries about increased scrutiny of their case. Some clients may believe—and with some merit—it may simply be easier to wait and refile an N-400 when the alleged “unlawful act” is outside of the statutory good moral character period or when a different administration is in office. Unfortunately, this approach can perpetuate a vicious cycle in which USCIS “gets away” with denials that are not well supported by the facts or case law.

While each case is unique and must be considered on its own merits, CLINIC encourages our affiliates to appeal N-400 denials based on lack of good moral character where appropriate. Doing so can help push back against specious actions by USCIS and ensure that any denial is based on the proper legal standard.

**Process**

An administrative appeal of a naturalization denial must be filed on Form N-336 (with the proper fee or a fee waiver request) within 30 days of the N-400 denial. If the N-336 is unsuccessful, the naturalization denial can be challenged by filing a petition for review in federal district court within 120 days of the appeal decision upholding denial.

The N-336 may be accompanied by supporting documentation to bolster the claim of an erroneous denial. As with the N-400 process, an interview will be scheduled before a USCIS officer.

**Using This Resource**

This resource contains a sample list of documents that should be listed in your cover letter as well as sample legal arguments. Please be sure to modify the template according to the facts and circumstances of your client’s case. The yellow highlighted text in brackets indicates places where you should put client-specific facts and information. Some information or arguments may not apply to your client.

**Sample Cover Letter in Support of Form N-336**

**Sample List of Documents to Include:**

Included with this appeal, please find the following documents:

* Form G-28, Notice of Entry of Appearance;
* Form N-336 with proper fee (or a fee waiver request submitted on Form I-912);
* Additional supporting evidence showing that [CLIENT] is a person of good moral character;
* Evidence showing extenuating circumstances relating to the commission of the alleged unlawful acts:
	+ [May include a statement from the applicant, statements from family members, or any other evidence specifically related to the alleged unlawful act. Note what qualifies as an “extenuating circumstance” differs from case to case. See more in the analysis below and at 12 USCIS-PM F.5(L)(2)];
* Evidence showing that, on balance, [CLIENT] is a person of good moral character:
	+ [May include evidence of steady employment, payment of tax returns, community service, involvement with religious organizations, family ties and caregiving responsibilities, education, length of time in the U.S., etc. See 12 USCIS-PM F.2(B) for factors relevant in assessing an applicant’s current moral character and reformation of character].

**Sample Legal Argument**:

1. **The ground cited by USCIS for denial based on unlawful acts is not supported by the USCIS Policy Manual or case law.**

In its denial, USCIS cites the following grounds for denial of the N-400 based on lack of good moral character:

* [List out the reasons for the denial here]

These grounds are insufficient as a matter of law to find that [CLIENT] lacks good moral character.

The USCIS Policy Manual dictates that officers must make a three-step analysis in determining whether there are unlawful acts that bar a finding of good moral character: Step 1 – Determine Whether the Applicant Committed, Was Convicted of, or Was Imprisoned for an Unlawful Act during the Statutory Period; Step 2 – Determine Whether the Unlawful Act Adversely Reflects on Good Moral Character (GMC); and Step 3 – Review for Extenuating Circumstances.

For step 1, the Policy Manual lists 19 grounds that under case law may support a finding that an applicant lacks GMC based on commission of an “unlawful act” during the statutory period. These grounds include:

* Bail jumping;
* Bank fraud;
* Conspiracy to distribute a controlled substance;
* Failure to file or pay taxes;
* Falsification of records;
* False claim to U.S. citizenship;
* Forgery-uttering;
* Insurance fraud;
* Obstruction of justice;
* Sexual assault;
* Social Security fraud;
* Unlawful harassment;
* Unlawfully registering to vote;
* Unlawful voting; and
* Violating a U.S. embargo.

None of these cited grounds are applicable to [CLIENT] and there is no case law supporting the decision that [cite reason for denial] can be used to deny [CLIENT]’s naturalization application based on a lack of GMC. While the policy manual leaves open the possibility that other unlawful acts may support a finding of a lack of good moral character, the decision in this case contains no [[or little]] analysis as to why this alleged unlawful act reflects adversely on the applicant’s GMC. Rather than analyzing, as required by step 2, the decision merely makes a cursory conclusion that the commission of this unlawful act adversely affects [CLIENT]’s GMC.

[Below are specific scenarios that may apply to your client and possible arguments:]

**Dismissed arrest**: USCIS’s denial of [CLIENT]’s naturalization based solely on an arrest that was dismissed is unlawful. Because the arrest was dismissed, there is no evidence that [CLIENT] “committed” an unlawful act during the statutory period. There was no admission by [CLIENT] to committing any offense, there is no other evidence to corroborate the arrest report, and the fact that the charge was dismissed is an indication that the prosecution could not prove [CLIENT]’s guilt beyond a reasonable doubt. Any arrest relating to dismissed charges should not be relied upon to show a lack of GMC because the state court decided that there was insufficient evidence of [CLIENT]’s guilt. Moreover, USCIS should not base its finding of lack of GMC solely on the allegations made in the arrest report; courts have repeatedly found that police reports are inherently unreliable because of the manner in which they are created and the fact that they are one-sided, as they are written solely by the officer.1 This is particularly true when the police reports relate to charges that were dismissed.2

[If there are particular facts about the police report that make it unreliable in your client’s case, such as factual errors, speculation by the officer, or language barriers, list these as well.]

Finally, it defies common sense for USCIS to claim that a dismissed arrest during the statutory period indicates a lack of GMC when the statute, regulations, and Policy Manual clearly contemplate that this should ***not***be sufficient to deny naturalization. The Policy Manual in chapter 5 makes clear that there is no bar to naturalizing, for example, for a person convicted during the statutory period of the following: possession of less than 30 grams of marijuana, a single crime involving moral turpitude that is a petty offense, or a political offense involving incarceration abroad. In addition, there would be no need for the officer to obtain a qualifying “admission” by an individual if the mere fact of an arrest during the statutory period were sufficient to find a lack of GMC. This carefully crafted scheme — making exceptions to the GMC bar for those with less serious criminal offenses — would be utterly defeated if a single arrest during the statutory period were sufficient to find a lack of GMC. Permitting such an approach would allow the exception to swallow the rule. Naturalization is not intended to give so much discretion to an officer as to allow such a minor event to bar an applicant from showing GMC.

**Failure to file a Change of Address form**: Under INA § 266(b), a failure to file a change of address form can involve criminal penalties, but only if the failure to file the form is “willful.” In this case, there is no evidence that the failure to file the required change of address form was willful. As a lawful permanent resident, [CLIENT] would have no reason to fear enforcement by immigration authorities or to hide their proper address. [Include any information, including a statement by the client as to why they neglected to file a change of address, including lack of knowledge about the process or other mitigating factors that would explain it.]

**Speeding tickets and traffic citations**: An applicant should not be found to lack GMC based solely on traffic violations. Traffic citations are common and widespread in the United States. Police pull over more than 50,000 drivers on a typical day, which amounts to more than 20 million motorists every year.3 With many more traffic citations, such as speeding tickets, now issued via camera and without the involvement of patrolling police, there are likely tens of millions of additional traffic citations issued each year. Receiving traffic tickets — which are almost always civil and not criminal infractions — is extremely common, in line with the standards of the average member of the community, and does not reflect a lack of GMC by [CLIENT]. [If relevant:] Further, because of [his/her/their] occupation as a [OCCUPATION], [CLIENT] spends more time than the average person driving and is thus more likely to receive traffic violations. Indeed, [NUMBER] of the violations cited in the denial were obtained during the course of [CLIENT]’s work.

**Debt issues and civil judgments:** There is no case law to support a finding of lack of GMC based on an applicant’s debt, bankruptcy, or civil judgments filed against them.Rather, district courts that have considered the issue have found the opposite.*See, e.g.*, *Puciaty v. INS*, 125 F. Supp. 2d 1035 (D. Haw. 2000) (finding that the applicant’s failure to satisfy or get set aside a default judgment, in and of itself, was insufficient to deny the applicant’s naturalization application for lack of GMC); *Angel v. Chertoff*, No. 07-CV-168JPG, 2007 WL 3085962 (S.D. Ill. Oct. 22, 2007) (holding that consent agreement entered into with Department of Labor in response to accusations that applicant owed back wages to certain employees was not probative of GMC because it was in response to a civil lawsuit, and applicant complied with the terms of the judgment). A denial on this basis is thus contrary to the law.

1. **Even if the cited reasons for the denial were sufficient, USCIS erred in failing to consider extenuating circumstances.**

The USCIS Policy Manual makes clear that extenuating circumstances must be considered before a denial based on unlawful acts can be issued. In laying out the three steps that USCIS officers should engage in when making a case-by-case analysis as to whether unlawful acts committed during the statutory period adversely reflect on GMC, the manual dedicates step three entirely to considering extenuating circumstances.

Extenuating circumstances are defined as those “which render the crime less reprehensible than it otherwise would be or the actor less culpable than he or she otherwise would be” and which “mitigate the effect of the unlawful act on the applicant’s moral character.” Extenuating circumstances are those present at the time of or prior to the commission of the act, not “conduct or equities (including evidence of reformation or rehabilitation) subsequent to the commission of the unlawful act.”

[Option 1: The officer did not consider extenuating circumstances]

While the Policy Manual requires that “[t]he officer . . . provide the applicant with an opportunity during the interview to provide evidence and testimony of extenuating circumstances in relevant cases[,],” the USCIS officer in this case made no attempt to elicit information on extenuating circumstances before issuing a denial.

Had the officer provided an opportunity for [CLIENT] to provide extenuating circumstances, they would have discovered that the following extenuating circumstances exist in the present case: [describe the extenuating circumstances and cite to relevant evidence that was provided to USCIS].

[Option 2: The officer erred in finding [CLIENT]’s extenuating circumstances to be insufficient]

While the denial recognizes that [CLIENT] presented extenuating circumstances, it finds that these extenuating circumstances are insufficient to mitigate the adverse effect of the unlawful act on [CLIENT]’s GMC. However, the adjudicating officer failed to explain the reasoning behind this decision. If USCIS determines that an applicant does not have GMC, USCIS should issue a written decision that follows 8 CFR § 336.1(b) and lists the pertinent facts and legal bases on which the denial is based.

By failing to do so, the officer overlooked how [CLIENT]’s extenuating circumstances clearly mitigate the impact of their behavior on the assessment of their moral character: [note each extenuating circumstances and explain how they mitigated the client’s behavior].

[NOTE FOR PRACTITIONER: Be sure to focus your arguments on whether there were factors that existed at the time of the conduct that made the acts “less abhorrent.” Presenting extenuating circumstances is not a balancing of other positive factors unrelated to the conduct at issue nor a consideration of hardship the client will face based on a denial. Balancing of other positive factors can be considered below.]

1. **The balance of the evidence shows that [CLIENT] is a person of good moral character.**

[IF CLIENT IS IN THE NINTH CIRCUIT]

The balance of the evidence shows that CLIENT is a person of good moral character. In the Ninth Circuit, the jurisdiction of this case, USCIS must apply a balancing test when determining whether the applicant is a person of GMC. *See* *Hussein v. Barrett*, 820 F.3d 1083, 1088-1089 (9th Cir. 2016). USCIS must consider all factors that relate to an applicant’s good moral character.  *Id.* Indeed, the Ninth Circuit has held that an isolated incident of poor conduct by a noncitizen that does not fall within any of the enumerated categories within INA § 101(f) cannot *by itself* support a finding that they lack GMC. *Torres-Guzman v. lNS*, 804 F.2d 531, 534 (9th Cir. 1986). Rather, a determination of GMC “requires the fact finder to weigh and balance the favorable and unfavorable facts or factors, reasonably bearing on character, that are presented in evidence.” *Torres-Guzman*, 804 F.2d at 534. Relevant factors may include, but are not limited to, the noncitizen’s family background, length of residence in the United States, employment history, financial status, criminal record (if any) and their rehabilitation and expression of remorse for their misconduct. *See id*. at 533.

The evidence submitted in this case demonstrates that [CLIENT] is a person of good moral character. [Note the evidence that was submitted and specify how that evidence establishes the client’s good moral character].

[IF CLIENT IS IN ANOTHER CIRCUIT]

USCIS failed to properly apply a balancing test when determining whether [CLIENT] is a person of good moral character. The USCIS Policy Manual states that only in the Ninth Circuit is a balancing test required in accordance with *Hussein v. Barrett*, 820 F.3d 1083 (9th Cir. 2016). However, it is decidedly ***not*** the case that in every other circuit USCIS is free to ignore substantive, probative, and relevant evidence that reflects on the applicant’s good moral character. Indeed, the Eighth Circuit has also used the Ninth Circuit’s “totality of the circumstances” test in *Haciosmanoglu v. Tritten*, No. 21-2584, 2022 WL 781047 (8th Cir. Mar. 15, 2022). Although an unpublished decision, the court agreed that “[i]f a non-enumerated category is being considered then the court is required to also consider all evidence relevant to the applicant's character.” *Id.* at \*3, citing *Hussein v. Barrett*, 820 F.3d at 1089. The Ninth and Eight Circuit have agreed that, for non-enumerated offenses, failing to look at the totality of the circumstances constitutes legal error.

The Policy Manual instructs “USCIS officers [to] determine on a ***case-by-case basis*** whether an unlawful act committed during the statutory period is one that adversely reflects on moral character,” as compared “against the ***standards of an average member of the community.***” 12 USCIS-PM F.5(L) (emphasis added). *See also* 8 CFR § 316.10(a)(2). A determination of whether an applicant’s character overall is lesser than the average citizen by its nature requires balancing of the positive and negative factors. No community member, much less the average community member, is perfect. As noted above, an enduring understanding in immigration law is that GMC does not require moral excellence. *See Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991); *Matter of B-*,1 I&N Dec. 611, 612 (BIA 1943); *Matter of T*, 1 I&N Dec. 158 (BIA 1941); *In re Hopp*, 179 F. 561, 563 (E.D. Wis. 1910). Rather, good moral character has long been held to be the “***sum total*** of all [an applicant’s] actions in the community.” *Matter of B-*, 1 I&N Dec. 611, 611 (BIA 1943) (emphasis added).

When assessing whether conduct is “average,” that conduct cannot be viewed in a vacuum. The term “average” requires a comparison; the issue is what balance of positive and negative factors is “average,” and where does the applicant’s balance of positive and negative factors lie on the spectrum of the “average” community member. In considering unlawful acts, the USCIS officer must determine whether any unlawful acts committed by the applicant, in balance with countervailing positive factors, have caused the individual to tip from “average community member” to “below average community member”— or, more favorably for the applicant, “above average community member.” [Discuss the client’s countervailing positive factors and how that renders their good moral character average or above average].

**Conclusion:**

Based on the above, I request that you grant [CLIENT]’s application for naturalization.