Snags in the Naturalization Process

By Bruce A. Coane and Daniel J. Gierut

There are many traps, and snags, for the unwary in the naturalization process. An applicant for naturalization must show that he was, and still is, a person of good moral character("GMC").[1] There is no uniform definition of GMC for naturalization purposes but circumstances which support a finding that the applicant has not demonstrated GMC are more obvious. Categorical grounds for denying naturalization based upon a failure to show GMC are found in 8.U.S.C §1101(f). Most of the bars found in 8.U.S.C §1101(f), such as whether the applicant has been convicted of an aggravated felony, are relatively straightforward. However, even though an applicant clears the aforementioned statutory obstacle, naturalization may still be denied based on discretionary, nonstatutory grounds.

A. Failure to Support Dependents

The failure to support dependents is a discretionary GMC determination that has led to denials of naturalization for lack of good moral character regardless of whether the support was court-ordered. "Courts have concluded that parents have a moral and legal obligation to provide support for their minor children, and a willful failure to provide such support demonstrates that the individual lacks GMC."[2] This requirement is not only limited to supporting dependents in the

[1] 8 U.S.C §1427(a)(3).
[2] U.S. Citizenship and Immigration Services. "USCIS Policy Manual, Volume 12, Citizenship and Naturalization Guidance." http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12.html (Accessed October 2015).

United States, but abroad as well.[3] The failure to support dependents includes deserting a minor child,[4] failing to pay any support,[5] and paying an obviously insufficient amount.[6]

The regulation at 8 C.F.R. 316.10(b)(3)(i) states "Unless the applicant establishes extenuating circumstances, the applicant shall be found to lack good moral character if, during the statutory period, the applicant: (i) Willfully failed or refused to support dependents; . . . ." One key in the analysis is the word "willfully." In trying to overcome the issue of support for one's dependents, the attorney must be prepared to submit evidence that the failure to provide support was not willful. Another is the phrase, "extenuating circumstances." In determining whether extenuating circumstances exist, the government has taken into consideration:

a) The applicant's unemployment and financial inability to pay the child support;[7]
b) Cause of the unemployment and financial inability to support dependents;
c) Evidence of a good-faith effort to reasonably provide for the support of the child;[8]
d) Whether the nonpayment was due to an honest but mistaken belief that the duty to support a minor child had terminated;[9] and

[3] See Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.
[4] See U.S. v. Harrison, 180 F.2d 981 (9th Cir. 1950). [Moral feelings now prevalent generally in this country would be outraged by the immoral and criminal conduct of appellee where he deserted wife and minor children.]
[5] See In re Malaszenko, 204 F. Supp. 744 (D.N.J. 1962) [Man owes moral obligation to support his natural children and willful failure to give any support shows individual not to be of good moral character essential to citizenship.]
[6] See In re Halas, 274 F. Supp. 604 (E.D. Pa. 1967).[Where petitioner for naturalization sent payments totaling only $840 over period of five years as support for his wife and six children, petitioner was not a person of "good moral character" and he was not entitled to naturalization.]
[7] See In re Huymaier, 345 F. Supp. 339 (E.D. Pa. 1972). [Failure to make all required child support payments does not in and of itself show absence of good moral character on petition for naturalization.]
[8] See Petition of Perdiak, 162 F. Supp. 76 (S.D. Cal. 1958). [Where alien arranged for care of her children and sent small sums of money at regular intervals alien was a person of "good moral character" as to be admitted to citizenship.]
[9] See In re Valad, 465 F. Supp. 120 (E.D. Va. 1979). [Good moral character of applicant for naturalization was established even though he ultimately stopped forwarding child support payments under a misguided theory that he was under no duty to continue.]

e) Whether the nonpayment was due to a miscalculation of the court-ordered arrears.[10]

Even if the applicant willfully failed or refused to support dependents, the statute offers some flexibility. Those who can establish that they failed to support dependents on account of extenuating circumstances may still have a chance at having their naturalization application approved.

B. Failure to Register with the Selective Service

Aside from the statutory and nonstatutory discretionary grounds for denying naturalization for failure to show GMC, failing to register with the Selective Service has resulted in an adverse moral character determination and denial of naturalization. The regulation at 8 C.F.R. § 316.11(a) states, "An applicant for naturalization must establish that during the statutorily prescribed period, he or she has been and continues to be attached to the principles of the Constitution of the United States and favorably disposed toward the good order and happiness of the United States."[11] Further, the USCIS Policy Manual makes clear that "an applicant who refused to or knowingly and willfully failed to register for Selective Service negates his disposition to the good order and happiness of the United States, attachment to the principles of the Constitution, good moral character, and willingness to bear arms on behalf of the United States."[12]

[10] See Etape v. Napolitano, 664 F.Supp.2d 498, 517 (D Md 2009). [Arrears for child support unrelated to previous nonpayment and based on calculation error cannot be used to deny naturalization.] See http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter5.html.
[11] See 8 C.F.R. 316.11.
[12] http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD-Chapter7.html. See INA 316(a) and INA 337(a)(5)(A). See the Military Selective Service Act of 1940.

Under 50 U.S.C. App. §§ 453(a) and 456(a), "all males between the ages of 18 and 26 who are citizens *or residing in the United States*, except aliens in lawful nonimmigrant status, must register for the Selective Service."[13] A male applicant for naturalization between 18 and 26 years of age, who fails to register with the Selective Service during the statutory GMC period, may be denied naturalization on account of an adverse moral character determination, refusing to bear arms pursuant to INA 337 (a)(5)(A) and not being disposed to the good order and happiness of the U.S. pursuant to INA 316(a)(3).

Failing to register does not automatically disqualify an applicant for naturalization. If the applicant is under the age of 26 when applying for naturalization, he must simply register by the time of his interview. The situation becomes more troublesome if the applicant is between the ages of 26 and 31 because he can no longer register with the Selective Service and is still within the statutory 5-year GMC period. All hope is not lost for those applicants. Section 12(g) of the Military Selective Service Act provides "A person may not be denied a right, privilege, or benefit under Federal law by reason of failure to present himself for and submit to registration…if… the person shows by a preponderance of the evidence that the failure of the person to register was not a *knowing* and *willful* failure to register."[14] Those applicants for naturalization who are between the ages of 26 and 31 and have not registered must prove, by a preponderance of the evidence, that the failure to register was not knowing and willful. This can usually be done with a sworn declaration from the applicant and sworn declarations from supporters. Submitting the Selective Service's postcard registration form as a sign that the failure to register was not willful is also good practice.

[13] Presidential Proc. No. 4771 of July 2, 1980 § 1-101, 94 Stats. 3775 (1980) (emphasis added).
[14] 50 U.S.C. app. § 462(g) (emphasis added).

Finally, male applicants for naturalization who are over 31 years of age "should ordinarily be found eligible for naturalization" even though they failed to register for the Selective Service because the applicant's failure to register fell outside the 5-year statutory period.[15] Of course, it is well-settled that Yates memos do not constitute law (nor regulations), so one should not overly rely on a Yates memo. The Selective Service has a postcard registration form which we have our clients submit if they failed to previously register, simply as a sign that they did not willfully fail to register. We make a copy of the postcard and date it, before mailing.

C. Appeals to Federal Court and Mandamus Litigation of Naturalization Cases

Applications for naturalization may be denied for a number of reasons. Appeals of decisions on an N-400, Application for Naturalization, are made on Form N-336 and should be filed within 30 days from the date of the decision. If the initial administrative appeal is unfavorable, the applicant may appeal to district court. "The INA specifies only two points in the naturalization process at which a district court may intervene: first, when the INS has denied a naturalization application and that denial has been affirmed on administrative appeal, INA § 310(c); 8 U.S.C. § 1421(c), or second, where an applicant for naturalization has been examined by the INS and more than 120 days have elapsed without decision."[16]

District courts have jurisdiction to review an administrative decision denying naturalization.[17] Before getting the district court to review a denial of naturalization, the

[15] Memo, Yates, Deputy Exec. Assoc. Comm., Field Operations (June 18, 1999), published on AILA InfoNet at Doc. No. 99010740.(emphasis added).
[16] INA § 336(b); 8 U.S.C. § 1447(b)." Baez–Fernandez v. I.N.S., 385 F.Supp.2d 292, 294 (S.D.N.Y.2005).
[17] INA 310(c), 336, 8 U.S.C. 1421(c), 1447. Tieri v. INS, 457 F.2d 391 (2d Cir. 1972).

applicant must exhaust administrative remedies.[18] The statute dictates that district courts review cases de novo[19] and the applicant has the burden of proof.[20] The regulation at 8 C.F.R. § 316.2(b) provides that the standard of proof is a preponderance of the evidence.[21] Once an action is filed under 1447(b), the court, not the agency, has exclusive jurisdiction over the matter and it may either determine the matter or remand it to USCIS for a decision.[22]

Mandamus jurisdiction is invoked under 28 U.S.C. 1361 "to compel an officer or employee of the United States or another government agency to perform a nondiscretionary duty owed to a plaintiff". In the immigration context, mandamus petitions are typically filed against DHS to compel them to adjudicate the application.[23]

"Mandamus is a 'drastic' remedy, 'to be invoked only in extraordinary circumstances.'"[24] A mandamus action must establish: (1) a clear and certain claim; (2) that the duty owed is ministerial and so plainly prescribed as to be free from doubt; (3) that no other adequate remedy is available.[25] The party seeking mandamus has the burden of showing that "its right to issuance of the writ is clear and indisputable."[26]

---

[18] 8 C.F.R. 336.9(d) [denied N-400 "shall not be subject to judicial review until the applicant has exhausted those administrative remedies available"]; Escaler v. USCIS, 582 F.3d 288 (2d Cir. 2009) [action to reopen naturalization nunc pro tunc denied for failure to exhaust.]

[19] INA 310(c).

[20] Berenyi v. Dist. Dir., INS, 385 U.S. 630, 637 (1967) ["it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect"].

[21] 8 C.F.R. § 316.2(b) (providing that the applicant for naturalization "shall bear the burden of establishing by a preponderance of the evidence that he or she meets all of the requirements for naturalization, including that the applicant was lawfully admitted as a permanent resident to the United States, in accordance with the immigration laws in effect at the time").

[22] INA 336(b), 8 U.S.C. 1447(b).

[23] Kurzban's Immigration Law Sourcebook (Am.Immig.Council., 13th ed.2012) pp. 1380.

[24] Fornaro v. James, 416 F.3d 63, 69 (D.C.Cir.2005) (quoting Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980)).

[25] Belegradek v. Gonzales, 523 F.Supp.2d 1364 (N.D. Ga. 2007).

[26] Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289, 108 S.Ct. 1133, 1143, 99 L.Ed.2d 296 (1988) (internal quotations and citations omitted).

When a court grants mandamus relief, it usually will direct USCIS to adjudicate an application or petition within a certain period of time, or order the agency to promptly process an application or petition without providing a deadline. In Ajmal v. Mueller[27], the plaintiff's naturalization application was delayed for almost two years on account of a pending final background check. That court found jurisdiction for the complaint and ordered USCIS to take action on the application.

"Mandamus is a cause of action of last resort. Even if a plaintiff establishes that a defendant owes him a clear and enforceable duty, mandamus is available only if the plaintiff has no other remedy."[28] Courts have denied mandamus relief in the immigration context because the Administrative Procedure Act itself provides a remedy for unlawfully delayed agency action, so plaintiffs in immigration-delay cases have a remedy available other than mandamus.[29] In addition, some courts have refused to compel USCIS to process naturalization applications because "there is no statutory or regulatory time period in which the USCIS must act on an application for naturalization, until the examination is complete"[30] even though many courts find that an agency has an obligation to act within a "reasonable" time period.[31] Moreover, Congress set an expectation that naturalization applications be completed within 180 days of filing.[32]

[27] Ajmal v. Mueller, No. 07-206, 2007 U.S. Dist. LEXIS 52046 (E.D. Pa. July 17, 2007).
[28] Ali v. Frazier, 575 F.Supp.2d 1084, 1087 (D.Minn.2008).
[29] See Ali v. Frazier, 575 F.Supp.2d 1084. [Mandamus Act claims in alien's action to compel government to expedite adjudication of his naturalization application would be dismissed; claims were duplicative of his Administrative Procedure Act (APA) claims, which also provided a remedy.]
[30] Omar v. Mueller, 501 F.Supp.2d 636, 640 (D.N.J.2007).
[31] See Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C.Cir.1984).
[32] 8 U.S.C. § 1571(b) ("[i]t is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application").

D. Conclusion

An applicant for naturalization must show that he was, and still is, a person of good moral character. Nonsupport of dependents has led to denials of naturalization for lack of good moral character but is remediable if the applicant establishes extenuating circumstances. Failure to register with the Selective Service has also resulted in denial of naturalization but this issue may be resolved in a number of ways. Finally, district courts have jurisdiction to review an administrative decision denying naturalization but may intervene at only two points in the naturalization process. In the immigration context, mandamus petitions are typically filed against DHS to compel them to adjudicate the application but are a cause of action of last resort and is only available if the plaintiff has no other remedy.