There are Gators in the Bayou: Handling the Risky Naturalization Case

I. LPR STATUS QUESTIONABLY OBTAINED

Applying for naturalization is not always a good idea. As immigration attorneys it is critical to determine, which cases are sound, which are risky, and which are downright dangerous for our clients to file. For the average person, good moral character ("GMC") may not be an issue – the average person will have the requisite "character which measures up to the standards of average citizens of the community in which the applicant resides," USCIS Policy Manual, Volume 12, Part F, Ch. 1A, and will not be statutorily precluded from showing GMC. However, one of the worst things that attorneys can do, even inadvertently, is make assumptions about our clients' lives or past immigration history. The gators lie in the weeds, and if we are unaware of the dangers that lurk in the record then we risk everyone getting hurt. Because the statute and regulations governing the meaning of GMC cover a broad range of conduct and acts, and because officers will be exercising discretion in making a determination, an attorney must carefully review how the client obtained their immigration benefits and GMC to ensure any potential issues are analyzed and properly addressed. This portion of the article will be to examine the dangers when a client's permanent residence was questionably obtained.

To qualify for naturalization, an applicant bears the burden of establishing, among other prerequisites, that (s)he: (1) has resided continuously in the United States for at least five years after being "lawfully admitted for permanent residence," and (2) has been, and still is, "a person of good moral character" during the relevant time periods. INA § 316(a); 8 C.F.R. § 316.2.[1]

LAWFULLY ADMITTED FOR PERMANENT RESIDENCE

The threshold question is to first consider whether your client was lawfully admitted for permanent residence. "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." 8 U.S.C. § 1101(a)(20). The Board of Immigration Appeals ("BIA") has explained that the term "lawfully" "denotes compliance with substantive legal requirements, not mere procedural regularity." In re Koloamatangi, 23 I. & N. Dec. 548, 550 (B.I.A. 2003) (internal quotation marks omitted). According to the BIA, an alien who has obtained legal permanent status ("LPR") status by fraud--or who was otherwise not entitled to it--has not been lawfully admitted. See Id. In other words, even in cases where there is no indication of fraud, an alien has not been "lawfully admitted" if her admission, at the time it was granted, was "not in substantive compliance with the immigration laws." See Shin v. Holder, 607 F.3d 1213, 1217 (9th Cir. 2010).

This interpretation by the BIA has been applied to immigrants who obtained LPR status both through third party or notario fraud, See, e.g., Walker v. Holder, 589 F.3d 12, 19 (1st Cir. 2009) (affirming a BIA order concluding that petitioner had not been lawfully admitted because he had acquired LPR status "through the fraud or misrepresentation of third parties"); as well as to those where a petitioner has received LPR status due to an administrative oversight; Arellano-Garcia v. Gonzales, 429 F.3d 1183, 1186-87 (8th Cir. 2005) (agreeing with a BIA order concluding

[1] Five year is shortened to three years if the applicant is married to a U.S. citizen. INA §319(a).

that petitioner had not been lawfully admitted because his LPR status "was obtained by a negligent mistake made by the government").

Individuals who adjusted status as derivatives may be at risk if any irregularity existed in the principals' adjustment process. Whether an individual obtained LPR status through a spouse's or parent's family-based or employment-based adjustment, it will be important to ensure that the principal's adjustment was legitimately approved. For example, if the principal(s) entered on an employment-based petition, did the beneficiary actually work for the petitioner? See Spyropolos v. INS, 590 F. 2d 1 (1st Cir. 1978) (denying AOS upon finding of no intent to work for petitioning employer). Finally, it is critically important to ensure that your client has never answered the question regarding U.S. citizenship on Form I-9, even inadvertently, as this may very well result in a bar to naturalization under the catch-all provision of INA §101(f) and a revocation of LPR status, regardless of whether the individual was work authorized at the time of the misstatement. See U.S. v. Garcia-Ochoa, 607 F. 3d 371 (4th Cir. 2010).

In some cases, naturalization has been revoked because of crimes committed while in lawful permanent resident status, even though the conviction did not enter until after naturalization was final. See Matter of Gonzalez-Muro, 24 I&N Dec. 472 (BIA 2008); also U.S. v. Ekpin, 214 F. Supp. 2d 707, 715-17 (S.D. Tex 2002) (court found that misrepresentation in naturalization application was material and willful when applicant answered "no" to question regarding crimes for which he had not been arrested, but was later convicted for sexually abusing his daughter during the five year GMC period).

Bottom line, attorneys should determine whether their client established he or she was lawfully admitted for permanent residence and understand that the client must do more than simply show that he or she was granted LPR status. Therefore, before filing for naturalization attorneys should check to make sure that their client's grant of permanent resident status was "in substantive compliance with the immigration laws." See Shin, 607 F.3d at 1217. If your client was not in substantive compliance at the time of entry or adjustment then they may fall within one or more classes of aliens inadmissible by the law existing at such time rendering them deportable, INA § 237(a)(1)(A); therefore, they will not qualify under section 316 of the Act as a lawfully admitted permanent resident of the United States for at least 3 or 5 years.

Further, if your client is unprepared for the naturalization interview and an officer brings up past discrepancies or misrepresentations,[2] whether material or not, then your client may unwittingly give false testimony to the officer. Giving false testimony during a naturalization interview is a bar from establishing good moral character pursuant to INA §101(f)(6). To constitute false testimony, the untrue statements must be made (1) under oath, (2) orally, and (3) to obtain immigration benefits. Matter of Ngan, 10 I&N Dec. 725 (BIA 1964). Answers given to a Service officer under oath in response to questions asked in connection with the review of an application for benefits constitute "testimony for the purpose of obtaining immigration benefits." Id. However, an applicant is not barred by section 101(f)(6) of the Act from establishing good moral character where he or she has made a voluntary and timely retraction of attempted false testimony in a statement made before an immigration officer. Matter of R-R, 3 I&N Dec. 823

[2] Some lies are not as harmful as others. See e.g. Kungys v. U.S., 485 U.S. 759 (1988).

(BIA 1949). Corrections must be made "prior to any exposure of his false testimony" to be considered timely. Id. There are many nuances regarding what constitutes "false testimony" for purposes of denying GMC. The important thing is to be aware of them and consider them before your client files for naturalization.

So beware when taking the naturalization case for the client with a discrepancy or misrepresentation at the time of adjustment.[3] What do you do when your client failed to list military service at the time of adjustment?[4] What if your client had two A numbers and a prior order of removal at the time of adjustment, but failed to disclose that information?[5] Should your client apply for naturalization if he or she lied about her marital status on a prior application like on an I-589? What if that marital status was not relative to the claim for asylum? If the false information does not rise to the level of material misrepresentation to trigger 212(a)(6)(C)(i), what happens when the officer asks your client about it during the naturalization interview? If your client fails to tell the truth then he or she will lack good moral character as a person who gives false testimony under oath to obtain an immigration benefit. That in itself is a bad day, but it can get worse when the Service goes on to say your client is deportable because he or she procured prior status through fraud or willfully misrepresenting a material fact.

This article is too short to get into defenses or possible arguments against a Service denial. Just make sure you ask the questions when you agree to represent someone for naturalization. First, did your client lawfully obtain LPR status. Second, is your client a person of good moral character? GMC is "incapable of exact definition," Posusta v. United States, 285 F.2d 533, 535 (2nd Cir. 1961), and extremely complex. You and your client may decide it is best not to kick that gator after all.

II. CRIMES:

In naturalization there are crimes that outright bar a person from receiving US citizenship and some that will raise serious questions about whether the person has the necessary GMC. A criminal record from overseas counts as well.

Crimes that permanently bar applicants from citizenship will most likely also land the client in removal proceedings. These include murder, or any aggravated felony (if conviction was after November 29, 1990).

Some crimes make a person only temporarily ineligible for citizenship. However, USCIS can still consider the applicant's past actions in reviewing the application and choose to deny

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[3] See Injeti v. USCIS, 737 F.3d 311, 318 (4th Cir. 2013) (because 8 CFR 103.2(a)(2) requires an applicant to certify that all information contained in the application "is true and correct," an applicant fails to comply with the relevant legal requirements for admission when material information is omitted on his application, "regardless of whether the misrepresentation on [his] application was willful.").

[4] A misrepresentation is material 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." Matter of Kai Hing Hui, 15 I&N Dec. 288, 289 (BIA 1975)

[5] Koszelnik v. Sec'y, Dept. of Homeland Sec. No. 14-4816 (3rd Cir. 2016) (USCIS did not have jurisdiction over the I-485 due to the prior removal order. The held it was "clear Koszelnik's initial admission into permanent residence did not conform to substantive legal requirements and was therefore no lawful for the purposes of naturalization.")

naturalization even if those crimes occurred outside the GMC statutory period of 3 or 5 years. At least in this case the applicant *should* have a chance to prove that the good side of his or her character outweighs past bad acts.

Crimes encompassed at INA section 212(a)(2) will most likely prevent an applicant from establishing the necessary GMC during the required period of three or five years. In addition, if the crime falls under section 237 of the Act then a client may be placed in removal proceedings.

If the applicant commits a crime that is not encompassed in section 212(a)(2), there is good and bad news. The good news is that the crime should not automatically bar an applicant from citizenship. The bad news is that USCIS can still use its discretion to claim the applicant's crimes demonstrate a lack of GMC.

If the applicant committed a crime prior to naturalization, the attorney must carefully evaluate whether it is safe to file the naturalization application. Was the crime properly adjudicated prior to adjustment? If not, then your client may not have been properly admitted to permanent residence and then put in removal proceedings. If the crime was committed after adjustment, was that crime a deportable offense pursuant to section 237 of the Act? If the crime committed is encompassed under section 212(a)(2) of the Act, not section 237, then your client must wait until (s)he has a clean record for the three or five-year statutory period. Even after that time, USCIS can still claim your client lacks GMC, and the attorney needs to evaluate whether the applicant can demonstrate that the good of his or her character outweighs the bad.

III. HAS MY CLIENT ABANDONED LPR STATUS?

The concept of being a permanent resident can be misleading to clients. Many believe that once they have a green card, they can travel and work abroad without any restrictions. Therefore, you may encounter clients who have questionable permanent resident status; especially when a client is seeking to naturalize. This has become increasingly common as the global economy and opportunities have grown considerably. This article is written as a practice pointer to aid in identifying cases that may fall into this category. But first, we need to quickly review the relevant regulations.

Who is a permanent resident?

INA § 101(a) (20) states that "the status of having been lawfully accorded the privilege of resident permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

Additionally, INA § 101(a) (27), states "a returning resident is considered a "special immigrant, an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad."

There is an exception to the above under INA § 101(a) (13) (C), that states, "an alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking admission into the United States for purposes of the immigration laws unless the alien;

INA § 101 (a)(C) (i) has abandoned or relinquished that status OR

INA § 101(a) (13) (C)(ii) …has been absent from the United States for a continuous period in excess of 180 days…"

How does one abandon permanent residency?

1. Moving to another country after permanent residency.

As practitioners you will occasionally see an individual who has for all practical purposes moved to another country. The most common scenario is one where the individual after obtaining LPR status, leaves the US and rarely travels back the US to "maintain" their green card. This individual may not have a residence, employment and may not file income taxes in the US. The individual may also not have any family ties in the United States. Majority of the person's ties and employment may be based in their home country. This person may no longer qualify for naturalization and the the person may be removed from the United States.

2. Multiple/Frequent trips abroad (What does that mean?)

It is not uncommon for green card holders to make trips outside the United States to see their relatives. There is really no set time period to measure how long a person's absence can be found to have abandoned his residence.[6] All absences outside the United States should be carefully examined.

As you evaluate your client's case, check to see the trips are not in excess of 180 days. If the trip(s) were in excess of 180 consecutive days, ask if the trip was temporary and the purpose of the trip. Ask your client if he had the intent to return home and to their employment at the time of their departure. Also inquire further to truly determine if the trip was temporary.

The concept of temporary visit abroad is very flexible in nature and "cannot be defined in terms of elapsed time along."[7] The intent of your client, when it can be determined will control. In the *Matter of Kane*, the BIA described some of the elements to determine "temporariness".[8]

Some of the factors used to determine "temporariness" are as follows;

- Reason for absence – Your client should have a clear definite reason for travelling abroad temporarily
- Termination or end date- Your client's visit should have ended within a short time once the objective of their trip was concluded.

[6] See Matter of Huang, 19 I&N Dec 749 (BIA 1988).
[7] Matter of Huang, 19 I.&N. Dec 749 (BIA 1988).
[8] See Matter of Kane, 15 I&N. Dec 258 (BIA 1975).

- Home or Employment– Your client must have a fixed address or place or place of employment
- Client needs to have had a continuous, uninterrupted intention of returning to the US after the visit if event does not occur within a relatively short period of time.

There are circumstances where naturalization may be a very bad idea. When an individual has remained outside the United States in excess of one year without a re-entry permit, filing for naturalization may put their LPR status at risk.

What type of evidence is helpful to look for to establish intent and unrelinquished residence in US?

- Length of time your client has lived in the US
- Does your client have a valid state driver's license or ID, issued in the past year?
- Does your client have a job where he/she was paid within a reasonable period of time?
- Does your client have children enrolled in school?
- What about taxes?

If a client is gone for an extended visit abroad, prepare proactively by requesting evidence to support continued US residence.

For example, evidence of;

- Unforeseen circumstances such as their own illness, or relative's illness was the cause of the extended visit abroad (medical records)
- Employment contract expiration abroad (e.g. 2 year teaching position abroad)
- Copies of income taxes for past years
- If a political situation caused a delay because they were unable to safely leave (obtain affidavits and country reports)
- Was there a re-entry permit obtained
- Utilities, health insurance, car insurance and bank accounts active?
- Lack of employment abroad
- Lack of property abroad
- Solid employment record in US prior to departure

For the record, disrupting continuous residence is NOT the same thing as abandoning permanent residence. Disrupting continuous residency only affects eligibility for naturalization and will not make the applicant removable.

In conclusion, while many naturalization cases may seem straightforward and simple, our role as attorneys is to lead clients safely through the weeds and bogs of the immigration process.

Checklist for Naturalization Cases

- When did you become a LPR?

- How did you become a LPR?
  - Through marriage?
    - When married?
    - When divorced? [Red flag if divorce date is prior to or just shortly after two year anniversary of residence]

  - Through employer?
    - When did employment begin?
    - Has employment relationship ended? If so, when? [Red flag if employment relationship ended before or within one year of LPR – and MAJOR ALARM if beneficiary did not work for petitioner]

  - Through parent
    - How did parent get LPR?
      - Through marriage? See above
      - Through employer? See above
      - Through "amnesty" or SAW program?
      - Through a family-based petition?
        - Was parent married or single at time LPR was granted? [Red flag if parent was single with kids – inquire regarding status of other parent]
  - Through asylum
    - Was your spouse included on your asylum application (if applicable)?
    - Were all of your children – biological and adopted - included on your asylum application (if applicable?) [Red flag if answer to either of these is no]
    - Were your spouse and children (if applicable) included on your AOS application? [MAJOR ALARM if no]

- Who helped you/your family obtain LPR? [Red flag if notario]

- Have you ever held another status besides LPR? [Red flag if yes – inquire regarding how/when initial visa status was obtained and probe for irregularities]

- Have you ever worked without permission in the USA? [Red flag if yes – ensure no misrepresentation regarding this issue in the AOS process]

- Have you ever claimed to be a U.S. Citizen? [RED FLAG – did client obtain waiver of misrep at AOS? If not, or if not eligible for waiver (because occurred after April 1, 1997), DO NOT FILE]

- Have you ever marked "U.S. Citizen" on your form I-9? [MAJOR ALARM IF YES – DO NOT FILE]

- Have you ever petitioned for a spouse?
    - Date of marriage?
    - Date of divorce? [Red flag if divorce occurred shortly after date of spouse's LPR]

- Have you ever been arrested? [Red flag if yes]
    - If crime resulted in conviction for immigration purposes, does the crime fall within INA §212(a)(2)? [Red flag if yes]
    - If crime resulted in conviction for immigration purposes, does the crime fall within INA § 237? [MAJOR ALARM IF YES]
    - If crime resulted in a conviction, is it one for which USCIS is likely to deny naturalization for lack of GMC? [Red flag if yes]

- Red flags on tax issues for five-year GMC period:
    - Filing as head of household when married and living with spouse – amend before filing natz.
    - Claiming child tax credit for children not living in home – amend before filing natz.
    - Claiming dependents other than relatives – confirm those relatives live with the client for the entire tax year. If not, amend before filing natz.
    - Claiming dependents who are of working age – confirm they had less than $4000 income (or designated max amount for that tax year). If not, amend before filing natz.
    - Claiming dependents for whom client did not provide at least ½ of all support – amend before filing natz.
    - Any amended tax returns during five year GMC period – ensure client has paid off majority of what is owed or be prepared to fight this as a GMC issue

- Red flags on travel history:
    - Trips outside the U.S.A. in excess of 180 days?
        - What was the purpose for the trip?
        - Did you work abroad? [Red flag if yes – was income reported? Was the travel employment-related?]
        - Where did you live while abroad?
        - Did you maintain a home in the USA? A bank account? Family members? Insurance policies? Other ties? [Red flag getting very hot if answer to all of these is no]
        - Did you obtain a re-entry permit? [Red flag if no – MAJOR ALARM if length of trip was more than 365 days and no re-entry permit]

    - Trips outside the USA in excess of 365 days?
        - What was the purpose for the trip?

- Did you work abroad? [Red flag if yes – was income reported? Was the travel employment-related?]
- Where did you live while abroad?
- Did you maintain a home in the USA? A bank account? Family members? Insurance policies? Other ties? [Red flag getting very hot if answer to all of these is no]
- Did you obtain a re-entry permit? [MAJOR ALARM if no]