CHAPTER 6

GOOD MORAL CHARACTER AND STATUTORY BARS TO ELIGIBILITY

This chapter includes:

§ 6.1 Introduction

This chapter covers some of the areas that most often cause problems for naturalization applicants. They include **good moral character**, certain statutory bars, and categories of lawful permanent residents who are ineligible for naturalization. Some of the bars are temporary while others are permanent. In this chapter, we also consider certain factors that are relevant to whether or not discretion will be exercised in the applicant's favor. In any of these cases, the applicant's history is important.

IMPORTANT NOTE: The Immigration and Naturalization Service (INS) was for many years the main federal government agency that administered US immigration law. However, effective March 1, 2003, Congress dissolved the INS, and all of its functions were assumed by the newly created Department of Homeland Security (DHS). Immigration laws are now administered and enforced by three separate divisions within the DHS: the U.S. Bureau of Customs and Border Protection (CBP), the U.S. Bureau of Citizenship and Immigration Services (CIS), and the U.S. Bureau of Immigration and Customs Enforcement (ICE).

The CBP's main responsibility is apprehending aliens attempting to enter into the U.S. illegally, and, especially, preventing terrorists from entering the U.S. The ICE's mission includes managing investigations of document, identity, visa, and immigration fraud; investigating

immigration violations and migrant smuggling, detaining, prosecuting, and removing undocumented, and other removable aliens. CIS's mission is the adjudication of all petitions previously adjudicated by the INS, including naturalization and citizenship applications.

The Risk of Applying for Naturalization: Potential Loss of Lawful Permanent Resident Status. It is absolutely crucial to make sure that a naturalization applicant not only has good moral character, but also is not *deportable*. The worst thing that can happen to an applicant without good moral character is that she must wait some time until she can demonstrate good moral character and then apply again for naturalization. In contrast, if an applicant is deportable, DHS might begin removal (deportation) proceedings against her, take away her lawful permanent resident status, and deport her. DHS uses the naturalization process as a way to identify individuals subject to deportation. Some people even have been arrested during their naturalization interviews! It is, therefore, critical to first determine whether an applicant is deportable (usually based on prior criminal history) before you even evaluate whether she possesses good moral character. We will remind you several times in this chapter of the importance of getting expert advice before applying for naturalization if there is any possibility that an applicant might be deportable. See **§ 6.8** for a discussion on deportability issues.

Establishing Good Moral Character Is a Three-Step Process. First, the applicant must not be deportable or she could be placed in removal proceedings and risk losing her lawful permanent residence status. Second, the person must prove that under the statute, she is not automatically disqualified from showing good moral character. In other words, the applicant must demonstrate that she is not statutorily barred from showing good moral character. Third, even if the applicant doesn't fall into one of the automatic bars to good moral character, she must still show that she does have good moral character in order to be granted naturalization. In examining good moral character it is important to consider the following questions:

1) Is the person deportable? If so, does the person have a viable defense against deportation?
2) Is the person statutorily barred from establishing good moral character, and if so, for how long?
3) If the person is not statutorily barred from establishing good moral character, can the person convince the examiner that his or her good moral character meets the community's standard?

The discussion that follows will help you ascertain the answers to the above questions. If you are not clear as to the answers to any of the questions, or if you find the person to be deportable (regardless of whether or not there appears to be a solution to the deportability issue), you should consult the recommended books or refer the client to an immigration expert if you are not one.

§ 6.2 The Good Moral Character Requirement -- An Overview

The naturalization applicant must demonstrate that during the required statutory period (five years for most people, three years for spouses of U.S. citizens)[1] she has been and still is a person of good moral character.[2] This required statutory period occurs immediately prior to filing the application for citizenship.[3] The applicant must also demonstrate and maintain good moral character from the time the citizenship application is filed until the applicant actually takes the oath of allegiance to become a U.S. citizen.[4] The applicant bears the burden of showing that he or she is eligible for naturalization "in every respect,"[5] and doubts "should be resolved in favor of the United States and against the claimant."[6] Any applicant who cannot satisfy the good moral character requirement or who is statutorily barred from proving so will not be allowed to naturalize.

The fact that the applicant must have good moral character for five years (or three years) does not mean that CIS is limited to only looking at the applicant's activities during that statutory period.[7] In fact, the Immigration and Nationality Act (INA) explicitly states that the government is not limited to the five- or three-year period immediately before the application is filed.[8] CIS often does look beyond the statutory period to determine if the applicant has good moral

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[1] See Chapter 5 for a thorough discussion of residency and physical presence requirements. The statutory period for showing good moral character may vary for some individuals, but in general, most applicants have to establish good moral character for a five-year period and spouses of U.S. citizens have to establish good moral character for a three-year period. Persons serving or who have served in the military can fall under special rules.

[2] INA § 316(a)(3).

[3] Note, however, where there is an unreasonable delay in the adjudication of the citizenship application, the court may find that the good moral character statutory period moves forward with time and no longer always applies to the statutory period that falls immediately preceding filing of the application. See *Jalloh v. Department of Homeland Security*, No. Civ.A.04-11403, 2005 WL 591246 (D. Mass. Mar. 11, 2005) (CIS delayed so long in acting upon the petitioner's application that by the time it got around to rendering a final decision, the conduct upon which the denial was based was so far away that it fell outside of the statutorily prescribed look-back period).

[4] 8 CFR § 316.10(a)(1); see also *Jean-Baptiste v. United States*, 395 F.3d 1190, 1192 (11th Cir. 2005); *United States v. Dang*, No. Civ. S-01-1514, 2004 WL 2731911 (E.D. Cal. Nov. 15, 2004) (noting that if criminal offenses are committed prior to the oath, the person can still be subject to denaturalization even if the conviction occurs after the oath of citizenship).

[5] *Berenyi v. INS*, 385 U.S. 630, 637 (1967). See also 8 CFR § 316.2(b) ("The applicant shall bear the burden of establishing by a preponderance of the evidence that he or she meets all of the requirements for naturalization[.]").

[6] *Berenyi*, *supra*, at 637.

[7] *Nyari v. Napolitano*, 562 F.3d 916, 920 (8th Cir. 2009) ("an applicant's 'conduct and acts' prior to the statutory period may be considered for purposes of the moral character determination 'if the conduct of the applicant during the statutory period does not reflect that there has been reform of character from an earlier period or if the earlier conduct and acts appear relevant to a determination of the applicant's present moral character'") (quoting 8 CFR § 316.10(a)(2)).

[8] INA § 316(e). See also *INS Interpretations* 316.1(f)(2).

character. Thus, the applicant's good behavior during the past five years, while critical, is not the last word on her good moral character.

CIS recognizes that when Congress created the requirement that naturalization applicants demonstrate good moral character during a specified period, it intended to allow the eventual naturalization of those individuals who in the past engaged in some wrongdoing but who have now "reformed."[9] However, CIS reasons that in order to determine if these individuals have reformed, activities prior to the statutory period will be considered. Thus, past behavior may reflect on current character.

On the other hand, the *INS Interpretations*[10] state and some courts[11] have held that the applicant's behavior before the five or three-year period cannot be the *only* reason to deny naturalization. As long as the applicant has shown "exemplary" conduct within the required statutory period, he or she must be found to have good moral character.[12] CIS must evaluate each application on a case-by-case basis.[13] And advocates can argue that if CIS determines that an

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[9] *INS Interpretations* 316.1(f)(1).
[10] *INS Interpretations* 316.1(f)(2).
[11] See, e.g., *Ikenokwalu-White v. INS*, 316 F.3d 798, 805 (8th Cir. 2003) (explaining that conduct predating the relevant statutory time period may be considered relevant to the moral character determination, but that such conduct cannot be used as the sole basis for an adverse finding); *Matter of Carbajal*, 17 I&N Dec. 272 (RC 1978) (noncitizen's prior immigration violations standing alone are insufficient to find that he is not of good moral character).
[12] *INS Interpretations* 316.1(f)(2) (where conduct has been exemplary during the statutory period and the only adverse facts occurred outside of the period, a denial of naturalization is generally precluded). See also *Hovespian v. Gonzales*, 422 F.3d 883, 886–87 (9th Cir. 2005) (finding applicants of good moral character despite convictions for conspiracy to transport explosive materials in interstate commerce because they occurred 20 years prior and applicants had shown significant rehabilitation through positive contributions to the Armenian community, employment, rejection of the use of violence to express a political view, and remorse for their actions); *Santamaria-Ames v. INS*, 104 F.3d 1127, 1131–32 (9th Cir. 1996) (reversing the District Court's adverse good moral character determination based exclusively on lengthy criminal history outside of the statutory period and remanding to give the applicant the opportunity to show he was of good moral character); *Marcantonio v. United States*, 185 F.2d 934, 937 (4th Cir. 1950) (reversing the judge's finding that applicant was not of good moral character based on three convictions relating to unlawful liquor business and a conviction for assault with intent to murder with a three-year prison sentence where the crimes were committed outside of the statutory period and the applicant demonstrated that he was rehabilitated through lawful employment, attending church, and taking care of his family); *Gatcliffe v. Reno*, 23 F.Supp.2d 581, 585 (D.V.I. 1998) (reversing INS decision that the applicant could not establish good moral character based solely on convictions for arson and conspiracy to damage and destroy a building and driving while intoxicated with sentences of imprisonment over two years, both of which occurred outside the five-year statutory period where applicant had convincing testimony of rehabilitation); *Tan v. INS*, 931 F.Supp. 725, 731–32 (D. Haw. 1996) (reversing immigration judge's denial of naturalization due to a fraudulent marriage scheme that occurred outside of the statutory period where applicant showed exemplary conduct by serving honorably in the military for over 12 years and receiving numerous letters of appreciation, letters of commendation, and medals.)
[13] 8 CFR § 316.10(a)(2).

applicant does not have good moral character, CIS should issue a written decision that follows 8 CFR § 336.1(b) and lists the pertinent facts and legal bases upon which the denial was based.[14]

The good moral character requirement can be very confusing. One of the reasons for this confusion is that there is no actual statutory definition of what good moral character means. The INA only defines what good moral character does *not* mean and what individuals will not be allowed to establish good moral character.[15] It is clear, however, that to prove good moral character a person does not have to demonstrate moral excellence or perfection.[16] Instead, CIS takes the position that in determining good moral character, the "standards of average citizens of the community in which the applicant resides" will be applied.[17] Since "community standards" change over time, the definition of good moral character also changes over time.[18]

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[14] See *Settlement in Class Action Challenging Naturalization Denials; USCIS Agrees to Pay Attorneys' Fees and Cost*, 82 *Interpreter Releases* 1932 (Dec. 5, 2005).

[15] INA § 101(f).

[16] See, e.g., *Matter of T*, 1 I&N Dec. 158 (BIA 1941) ("Good moral character does not mean moral excellence"); *Klig v. United States*, 296 F.2d 343, 346 (2d Cir. 1961) ("We do not require perfection in our new citizens.")

[17] 8 CFR § 316.10. See *Ragoonanan v. USCIS*, No. 07-3461, 2007 U.S. Dist. LEXIS 92922 at *12 (D. Minn. Dec. 18, 2007) (finding that driving under the influence in the wrong lane for several blocks is not a situation where the community would be "rightfully outraged"); *Cajiao v. Bureau of Citizenship and Immigration Services*, No. H-03-2582, 2004 U.S. Dist. LEXIS 29734 (S.D. Tex. Mar. 30, 2004) (finding that applicant was a person of good moral character under the standards of the average citizen in Harris County, Texas); *Matter of T*, 1 I&N Dec. 158 (BIA 1941) ("A good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen. Moral standards differ from time to time and place to place. In the determination of an alien's moral character, we apply the standard of the average American citizen as it exists today. Reputation that will pass muster with the average man is required. It need not rise above the level of the common mass of people."); *Brukiewicz v. Savoretti*, 211 F.2d 541, 543 (5th Cir. 1954) (finding that petitioner did not prove good moral character because his character did not measure up to the average citizen); *Repouille v. United States*, 165 F.2d 152, 153 (2d Cir. 1947) (good moral character exists when a person's life as a whole conforms to generally accepted morals of his time).

[18] *INS Interpretations* 316.1(e)(1). For example, prior to the repeal of INA § 101(f)(2) on December 29, 1981, adultery was a mandatory bar to establishing good moral character. *INS Interpretations* 316.1(f)(6). Currently, it is CIS' position that while adultery is no longer a mandatory bar, a finding of a lack of good moral character will be found where adultery destroys a viable marriage, is grossly incestuous, is commercialized, or causes public notoriety and public scandal. See *INS Interpretations* 316.1(g)(2)(viii) for the complete description of the Immigration Service's current position on adultery. Many of these "criteria" may be challenged.
The Ninth Circuit has held that having sexual relations with a common law wife and fathering a child out of wedlock are not proper negative considerations in a discretionary decision (in that case, an application for 212(c) relief). See *Yepes-Prado v. INS*, 10 F.3d 1363 (9th Cir. 1993). The CIS rule is to penalize only persons who, with full knowledge and willful disregard, break up a "viable" marriage by committing adultery. See *INS Interpretations* 316.1(f)(6).

WARNING: Beware of Assisting Naturalization Applicants Who Are Deportable or Were Inadmissible When They Last Entered the Country, Even if They Can Show Good Moral Character. Good moral character is not the only issue to look for in evaluating your clients past life. In the course of investigating the naturalization application CIS might discover those things and put your client in removal proceedings. Needless to say, if this happens, your client's naturalization application may be denied. Remember that the grounds of deportation and inadmissibility include more areas than does good moral character, so a person might have good moral character, but still be deportable or inadmissible. See **Chapter 4**.

Example: Yosh Tsukamoto, who had never been to the U.S. before, was admitted as a lawful permanent resident in 2000. In 2004, he visited relatives in Japan, and while there he was arrested for possession of cocaine and served three months in jail. The immigration officials at the airport asked him for his I-551 card ("green card") when he arrived back in the United States. When he showed it, they said it was okay for him to re-enter the U.S. Should Mr. Tsukamoto apply for naturalization now that he has been a lawful permanent resident for more than five years and only left the country for four months?

No. Mr. Tsukamoto is deportable because he has been convicted of a controlled substance offense after he was admitted to the United States (this includes foreign convictions). He also is deportable because the conviction caused him to be inadmissible when he re-entered the United States from his trip to Japan. He does not appear to have any possible waiver or relief from removal.

WARNING: Expungements and Some Other Ways of "Erasing" a Conviction Will Only Work in Very Limited Cases. Many people might be found ineligible to show good moral character or even deportable because of a criminal conviction. In the past, individuals who were deportable due to a conviction were able to "expunge" or otherwise erase the conviction in order to avoid deportability. However, in 1998 and 1999 the BIA and in 2005 the Attorney General ruled that many types of state court proceedings such as rehabilitative relief that erase a conviction will not be accepted for immigration purposes.[19] There is a very limited exception in the Ninth Circuit for a first time state conviction for drug possession or lesser drug offenses such as possession of paraphernalia and giving away a small amount of marijuana, but not being under the influence.[20] In order to qualify for this exception:

[19] *Matter of Marroquin-Garcia*, 23 I&N Dec. 705 (A.G. 2005); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999); *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (rejecting argument that Texas deferred adjudication statute was not a conviction for immigration purposes).

[20] See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (*en banc*) overturning *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (possession); *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (BIA 2000) (lesser offense); 21 USC § 841(b)(4) (giving away a small amount of marijuana); *Ramirez-Altamirano v. Mukasey*,

- The conviction must be entered before July 14, 2011 and later expunged, dismissed or withdrawn under a state rehabilitative relief program.
- The immigration hearing must be held in the Ninth Circuit.[21] This means that even if a person had a conviction arising in a state in the Ninth Circuit that was later erased by rehabilitative relief, if the person applies for naturalization outside of the Ninth Circuit he or she is at risk of being deportable.
- Even if rehabilitative relief is ultimately obtained under state law, the individual must not have violated conditions of his or her probation[22] or had prior pre-plea diversion.[23]

This also applies to foreign relief for a first foreign conviction of these offenses.[24] See further discussion at **§ 6.8 (C)(1)**, below.

The important point is: Any naturalization applicant who went through criminal proceedings and is counting on some kind of diversion, expungement, vacation of judgment, or deferred adjudication to wipe out his or her conviction must consult with an expert to make sure the conviction is really gone! Only in very limited circumstances will such relief actually erase a conviction. For more information on this topic, please see the ILRC's manual entitled *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws*.

PRACTICE TIP: Explain the good moral character requirement to your client. Encourage her to ask questions. Your client should understand the requirement as well as the importance of being honest about any prior encounters with law enforcement or DHS.

Your client may think that something she did in the past is insignificant or will not affect her application, or she may simply be embarrassed to talk about it. The incident may indeed be insignificant in the sense that it would not ultimately affect her ability to naturalize. However, if the item is more serious, knowing about it in advance may enable you and the client to clean up the situation. Another reason for learning about negative factors ahead of time is that CIS takes the position that a petition will be recommended for denial under INA § 101(f) if the applicant deliberately fails to be honest in responding to questions.[25] In fact, CIS takes the position that

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554 F.3d 786 (9th Cir. 2009) (possession of drug paraphernalia). *Nunez-Reyes* held that convictions for "under the influence" even if it is eliminated by rehabilitative relief will remain a conviction for immigration purposes. For more information, see ILRC's Practice Advisory on the effect of the *Nunez-Reyes* decision, available at: www.ilrc.org/crimes.

[21] *Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002).

[22] *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009).

[23] *Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007).

[24] *Dillingham v. INS*, 267 I&N Dec. 996 (9th Cir. 2001) (foreign offense).

[25] *INS Interpretations* 316.1(g)(3)(ii). INA § 101(f)(6) states that a person who, during the required statutory period, (which includes the entire naturalization application process until the oath of allegiance is taken) gave false testimony for the purpose of obtaining an immigration benefit, will be found to lack good moral

even if the lie concerns facts which, had CIS known about them, would not have led to a denial of the naturalization application, the application will still be recommended for denial.[26]

Remind the client that CIS will conduct various background checks, including the FBI fingerprint check, the Interagency Border Inspection System (IBIS) name check, and the FBI name check,[27] as part of the naturalization process, and thus CIS most likely will know about all arrests and convictions. It is better to tell the truth about something that may not seem important because CIS may deny the application if they find out that the person lied—even if the lie was not that significant.

Often it is best for a client and his or her advocate to send in a request for the client's criminal record, especially if the client says that he or she has been arrested in the past. They should send this request to both the FBI *and* the Department of Justice in the state where the client has been living and has lived. See **Appendix 6-A**. Obtaining all of these various rap sheets is important because the FBI federal rap sheet often does not contain accurate or complete information about state arrests and convictions. This way, the client and his or her advocate will have the criminal background information necessary to determine if it advisable for the client to apply for naturalization.

§ 6.3 Criminal Convictions and Conduct that Are Statutory Bars to Establishing Good Moral Character under INA § 101(f)

Many of the statutory bars to proving good moral character and the grounds of deportability relate to criminal convictions. This area of the law is increasingly complicated. The immigration penalties for certain crimes—including relatively minor offenses—can be terribly severe. Penalties can include denial of the naturalization application, loss of a green card and deportation with no chance ever to enter the U.S. again, mandatory detention lasting for months or years, and in some cases federal criminal penalties (if a person illegally re-entered the U.S. after having been convicted of an aggravated felony and deported). Also, court rulings have limited the effectiveness that expungements and some other state relief have on avoiding criminal

character. For example, a client who testifies falsely at the citizenship interview about something he did in the past, will be statutorily barred under this section from proving good moral character.

[26] *INS Interpretations* 316.1(g)(3)(ii). *Kungys v. United States*, 485 U.S. 759, 789–80 (1988) (noting lack of materiality requirement for false testimony); *Berenyi v. INS*, 385 U.S. 630, 637–38 (1967) (applicant's failure to answer truthfully a question about his membership in and connection with a Communist party in and of itself constituted false testimony even though a truthful answer would not have disqualified him from naturalization); *In re Petition of Haniatakis*, 376 F.2d 728, 730 (3d Cir. 1967) (reversing the lower court's grant of naturalization because applicant falsely testified under oath that she was unmarried even though the marriage itself would not have barred her application).

[27] These three checks allow CIS to determine if there are any criminal or security related issues in the applicant's background that affect eligibility for naturalization. There has been considerable delay in name checks, and this has led to suits and decisions in the district courts. See Chapter 11.

deportation grounds. For more information on this topic, please see discussion of deportability in **§ 6.9** and the ILRC's manual entitled *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* and the National Immigration Project of the National Lawyers' Guild's manual entitled *Immigration Law and Crimes* (West Publishing).

If you are not an attorney, accredited representative, or supervised legal worker who has expertise in this area, do not attempt to analyze the case alone. Refer the case to an expert, or consult with an expert to see if referral is required. To be safe, an expert should review the case of any person who has ever been arrested for a crime.

A. Statutory Bars to Proving Good Moral Character

Under INA § 101(f), certain people are automatically barred from showing good moral character, and thus cannot apply for naturalization.[28] Individuals are automatically disqualified from showing good moral character if *during the period that good moral character is required*, they have:

- been convicted of an aggravated felony—see warning below and discussion at **§ 6.8(B)**;
- been convicted of, admitted committing, or admitted the essential elements of a drug offense (except a single conviction of possession of 30 grams or less of marijuana)—see discussion below and **Appendix 6-D** for further information;
- been convicted of, admitted committing, or admitted the essential elements of a crime involving moral turpitude[29] (other than a purely political offense), with important exceptions—see discussion below;[30]

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[28] Some of these grounds are found in INA § 212(a), but are incorporated into § 101(f).

[29] A crime involving moral turpitude does not have a statutory definition, but has been defined by case law to refer to "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." See *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). In general, courts will rule that a crime involves moral turpitude if the crime, as it is defined in the criminal statute, involves intent to commit fraud; intent to commit theft where there is an intent to permanently deprive; intent to do great bodily harm; lewd intent in some sex offenses, or in some cases recklessness or malice. See also *Miller v. United States Immigration and Naturalization Service*, 762 F.2d 21 (3rd Cir. 1985)(petitioner had been convicted of welfare fraud, a crime of moral turpitude, and thus was disqualified from showing good moral character); *Grageda v. U.S. Immigration and Naturalization Service*, 12 F.3d 919 (9th Cir. 1993) (spousal abuse is a crime of moral turpitude). But see *Jalloh v. Department of Homeland Security*, 2005 WL 591246 (D. Mass. 2005) (finding good moral character despite the admission of sufficient facts to constitute assault and battery where charges were later dismissed because there was a lack of knowledge that the victim was in harm's way and thus, they were not crimes involving moral turpitude).

[30] A person who has committed a crime of moral turpitude will not be barred from showing good moral character if the person committed only one crime and *either*: a) the person was under 18 when the crime was committed, and both the crime was committed and the person was released from confinement more than five years before the date he applies for naturalization; OR b) the maximum sentence possible for the crime was less than one year in jail and, if the person was convicted, the sentence given (regardless of time served) was

- spent 180 days or more in jail as a result of one or more convictions, no matter when the offenses were committed—see discussion below;
- been convicted of two or more offenses (other than for a purely political offense) for which the applicant received a total sentence of five years or more—see discussion below;[31]
- came to the U.S. to engage in prostitution or has engaged in or profited from the business of prostitution—see discussion below;
- engaged in alien smuggling—see **Practice Tip** below for definitions and exceptions;
- been a habitual drunkard;[32]
- given false testimony (referring to sworn statements or testimony under oath) to get or retain immigration benefits;
- lived off of, or had two or more convictions for, illegal gambling;[33]
- came to the U.S. (or is coming) to practice polygamy—see discussion below,[34] and
- CIS has acquired "reason to believe" they are or were a drug trafficker—see discussion below.[35]

WARNING: A Conviction for an Aggravated Felony Is a Permanent Bar to Establishing Good Moral Character if the Conviction Occurred on or after November 29, 1990. A conviction for murder is a permanent bar regardless of the date of conviction. See **§ 6.8(B)**. Determining whether an offense is an aggravated felony is complex and even a minor offense could fall within the aggravated felony category. For this reason, advocates should consult with or refer the case to an immigration attorney knowledgeable in this area of law.

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six months or less. INA § 212(a)(2)(A)(ii). For more information, please see the ILRC's manual entitled *Defending Immigrants in the Ninth Circuit*.

[31] "Sentence" is defined in INA § 101(a)(48) and means any period of incarceration or confinement ordered by a court even if the sentence is suspended, such that a defendant who does not actually spend time in jail or prison could still fall under this category if the requisite sentence is imposed by the court.

[32] Merely being someone who drinks a lot is not sufficient. ILRC argues that one must be found to be a habitual drunkard by a medical professional. See *Matter of H-*, 6 I&N Dec. 614 (BIA 1955) (relying on psychiatrist testimony that on the basis of hospital records that stated that petitioner escaped the hospital several times and began drinking heavily, petitioner was a habitual drunkard).

[33] The person's primary source of income has to come from illegal gambling activities. See *Matter of S-K-C-*, 8 I&N Dec. 185 (BIA 1958) for more information on what activities would trigger this statutory bar.

[34] Polygamy does not include someone who failed to get a divorce from the first spouse, has since remarried, and, some would claim, has thus (usually secretly) committed bigamy. It refers to the belief and practice that people should have multiple spouses. *Matter of G*, 6 I&N Dec. 9 (1953).

[35] See *Nuñez-Payan v. INS*, 811 F.2d 264 (5th Cir. 1987). Although under the immigration law at the time, a guilty plea expunged pursuant to a state rehabilitative statute did not constitute a "conviction," the petitioner's guilty plea to transporting drugs into the U.S. was sufficient reason for the INS to believe he was a drug trafficker. Thus he was disqualified from showing good moral character. *Id*. at 266.

1. Crimes involving moral turpitude, drug offenses and reason to believe an individual was engaged in drug trafficking bar good moral character even without a conviction

The statutory bar under INA § 101(f)(3) may be triggered where the applicant *admits* the elements of a controlled substance offense or crime involving moral turpitude. This is true even where there is no conviction and the charges are later dismissed. Once the person makes the admission voluntarily, he cannot retract it.[36]

The standard of "reason to believe" is lower than that required for an admission to a crime. For instance, someone who CIS ever suspected dealt drugs in the past, even as a juvenile and without a conviction, can be statutorily barred from proving good moral character. CIS, however, must have more than a mere suspicion—they must have "reasonable, substantial, and probative evidence," that the person engaged in drug trafficking.[37] This means that an arrest or charge of drug trafficking by itself should not suffice as substantial evidence to prove inadmissibility and bar good moral character under "reason to believe." The government must support the charge with other evidence such as a police report or other documentation of the drug trafficking, testimony from police, detectives, or other officers, or admissions from the person himself.[38] Because any information can be used against a client under this ground, it is important that you

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[36] *Matter of I-*, 4 I&N Dec. 159 (A.G. 1950); *Matter of R-*, 1 I&N Dec. 359 (BIA 1942).

[37] *Matter of Rico*, 16 I&N Dec. 181, 185–86 (BIA 1977); *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000). See also *Singh v. Holder*, 313 Fed.Appx. 57 (9th Cir. 2009) (unpublished) (explaining that under Ninth Circuit law, the appropriate way to measure whether an immigration judge and the BIA had reason to believe that an alien was participating in drug trafficking is to determine whether the conclusion is based on reasonable, substantial, and probative evidence); *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (government's knowledge or reasonable belief that an individual has trafficked in drugs must be based on "credible evidence"); *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979).

[38] *Garces v. US Att. Gen*, 611 F.3d 1337 (11th Cir. 2010) [finding that evidence did not support "reason to believe" where person entered an *Alford* plea (permitting entry of plea while maintaining innocence) with nothing in the record showing that he admitted facts to establish drug trafficking and the allegations in the arrest report lacked corroborating evidence]; *Igwebuike v. Caterisano*, 230 Fed.Appx. 278 (4th Cir. 2007) (unpublished) (holding that the drug sale charges for which the petitioner was acquitted were alone insufficient to constitute "reason to believe," and that "reason to believe" charge triggering inadmissibility must be based on facts underlying an arrest and those facts must be cited in support of the charge); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1211 (9th Cir. 2004) (finding sufficient reason to believe the alien had committed illegal acts underlying previous drug trafficking arrest because the government submitted documents describing the police surveillance of the person and the person's subsequent attempt to escape with 147 pounds of marijuana); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (in addition to a previous arrest for drug trafficking, two undercover detectives testified that they had personally arranged drug deals with the petitioner); *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979) (applicant admitted to participating in an attempt to smuggle a kilogram of marijuana into the United States); *Matter of Rico*, *supra* (BIA did not rest on evidence of arrest for drug trafficking, but testimony of the Border Patrol Agent and the Customs Inspector that he frequently drove the car in which 162 pounds of marijuana was found as well as testimony of special agents of the Drug Enforcement Administration in the investigation of the incident).

look closely at the client's criminal history to review any arrests and charges even if they were dismissed, to investigate the underlying facts and documents in the case, and to guard against admissions of engaging in these activities, since statements by police and others may be considered a bar to good moral character.

2. Giving false testimony under oath with the subjective intent to obtain immigration benefits is a bar to good moral character

False testimony refers only to spoken testimony, not to a written misrepresentation.[39] The false testimony does not necessarily have to relate to a naturalization application, but can be testimony that relates to obtaining any immigration benefit even if done in the distant past.[40] And the false testimony need not be material in order to preclude the person from showing good moral

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[39] See *INS Interpretations* 316.1(g)(3)(iii) ("false statements in an application, whether or not under oath, do not constitute "testimony"); *Kungys v. United States*, 485 U.S. 759, 780 (1988) (testimony is limited to oral statements made under oath and does not include "other types of misrepresentations or concealments, such as falsified documents or statements not made under oath"); *Ordonez Torres v. Mukasey*, 305 Fed.Appx. 481 (9th Cir. 2008) (unpublished) (applicant falsely signed cancellation application, but court held that signing of the application did not meet the definition of "false testimony" as indicated under the statute); *Medina v. Gonzales*, 404 F.3d 628, 633–37 (2d Cir. 2005); *Beltran-Resendez v. INS*, 207 F.3d 284 (5th Cir. 2000) (false statement in I-9 not covered); *Torres-Guzman v. INS*, 804 F.2d 531, 533 (9th Cir. 1986) (presentation of false birth certificates in application for U.S. passports not false testimony); *Phinpathya v. INS*, 673 F.2d 1013, 1018–19 (9th Cir. 1981), rev'd on other grounds in 464 U.S. 183 (1984) (false statement in application for suspension of deportation not false testimony); *Matter of L-D-E-*, 8 I&N Dec. 399 (BIA 1959) (false statements in application for United States passport whether or not under oath do not constitute false testimony).
Although the ILRC believes that to trigger the false testimony statutory bar the statements must be verbal and not written, two cases have blurred the distinction between verbal and written misrepresentations. In *United States v. Hovespian*, 422 F.3d 883, 887–88 (9th Cir. 2005) (*en banc*), the Ninth Circuit addressed the government's argument that the applicants had given false testimony for the purpose of obtaining an immigration benefit, namely that they made inaccurate statements and omissions in their naturalization applications, and therefore they were statutorily barred from establishing good moral character. Instead of focusing on the issue that the statements were written and not oral, the court focused on whether there was a subjective intent to deceive in order to obtain immigration benefits, determining that there was not. In *Edem-Effiong v. Acosta*, No. Civ.A. H-04-2025, 2006 U.S. Dist. LEXIS 13967 (S.D. Tex. Mar. 13, 2006), the district court held that the applicant was statutorily barred under 101(f)(6) for giving false testimony although the underlying misrepresentation was written. The court based its denial not only on this omission but also on the applicant's false testimony at the citizenship interview when he denied that he had ever provided false or misleading information. *Id.* at *14–20. Although both of these cases confuse written and oral misrepresentations, advocates should argue that the plain reading of the statutory bar as interpreted by CIS and the U.S. Supreme Court require that the false testimony be oral and not written. Note, however, that false written testimony can still serve as a basis to deny good moral character in the matter of discretion. See § 6.7.
[40] Note, however, that the Ninth Circuit in an unpublished decision held that use of a false social security number in order to work in the U.S. does not preclude one from establishing good moral character. *Jimenez v. Gonzales*, 158 Fed.Appx. 7 (9th Cir. 2005) (unpublished).

character.[41] However, if the testimony is immaterial then the Government has a more difficult burden to prove such testimony was made with the subjective intent to obtain immigration benefits.[42]

The oral false testimony has to be made under oath. "Under oath" includes not only statements in administrative or judicial court proceedings such as deportation proceedings,[43] but it also could mean statements made in the course of routine question-and-answer interviews by immigration officers as long as they were made under oath.[44] For instance, the BIA held that false statements that a person makes in an asylum interview constitute false testimony under oath, barring good moral character.[45]

The misrepresentations must also be made with a subjective intent to deceive in order to obtain immigration benefits.[46] To "obtain" an immigration benefit also includes attempts to avoid losing an immigration benefit[47] and a petitioner's attempt to gain benefits for family members.[48]

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[41] *Kungys v. United States*, 485 U.S. 759 (1988); *Berenyi v. Immigration Director*, 385 U.S. 630 (1967) (applicant's failure to answer truthfully a question about his membership in and connection with a Communist party in and of itself constituted false testimony even though a truthful answer would not have disqualified him from naturalization); *United States v. Terrazas*, 570 F.Supp.2d 550 (S.D.N.Y. 2008) (stating that false testimony statutory bar does not include an implied element of materiality); *In re Petition of Haniatakis*, 376 F.2d 728, 730 (3d Cir. 1967) (reversing the lower court's grant of naturalization because applicant falsely testified under oath that she was unmarried even though the marriage itself would not have barred her application).

[42] See, e.g., *Gonzalez-Maldonado v. Gonzales*, 487 F.3d 975 (5th Cir. 2007) (Petitioner's false testimony that he lived in California instead of New Mexico by claiming his attorney's address as his own was found to be immaterial and did not statutorily bar him from establishing good moral character because it had no effect on obtaining immigration benefits and the reason for giving the California address was to facilitate the process of his lawyer receiving court appearance notices).

[43] *Matter of Barcenas*, 19 I&N Dec. 609, 612 (BIA 1998) (false statements uttered orally under oath at deportation hearing constitute false testimony).

[44] See *INS Interpretations* 316.1(g)(3)(ii); *Toribio-Chavez v. Holder*, 611 F.3d 57, 63 (1st Cir. 2010) (applicant provided oral testimony at his adjustment interview); *Medina v. Gonzales*, 404 F.3d 628, 634–35 (2d Cir. 2005) (statements made to CIS officers in asylum interview); *Akinwande v. Ashcroft*, 380 F.3d 517, 523 (1st Cir. 2004) (false testimony made in a removal proceeding before an immigration judge); *Ramos v. INS*, 246 F.3d 1264, 1265–66 (9th Cir. 2001) (statement made in asylum interview); *Bernal v. INS*, 154 F.3d 1020, 1023 (9th Cir. 1998) (statements at naturalization interview under oath made to CIS examiner); *Liwanag v. INS*, 872 F.2d 685 (5th Cir. 1989) (false testimony to INS officer during an investigation); *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (false statement under oath to Border Patrol agent even though not a quasi-judicial setting); *Matter of Ngan*, 10 I&N Dec. 725, 726–27 (BIA 1964) (false testimony to INS officer in interview for processing of visa application). But see *Phinpathya v. INS*, 673 F.2d 1013, 1018–19 (9th Cir. 1981), rev'd on other grounds in 464 U.S. 183 (1984) (holding that the oral statements must be made in a "court or tribunal"). The BIA in turn has held that an asylum officer is a member of a tribunal. See *Matter of R-S-J-*, 22 I&N Dec. 863, 868–69 (BIA 1999).

[45] *Matter of R-S-J-*, 22 I&N Dec. 863 (BIA 1999). See also *Gonzalez-Maldonado v. Gonzales*, 487 F.3d 975, 977 (5th Cir. 2007) (false testimony made to an asylum officer).

[46] *Kungys v. United States*, 485 U.S. 759, 780 (1988).

[47] *Liwanag v. INS*, 872 F.2d 685, 689 (5th Cir. 1989).

Willful misrepresentations made for other reasons such as embarrassment, fear, or a desire for privacy are not sufficient to find that the person lacks good moral character under this section.[49] There are also arguments based on various court decisions that inaccuracies or omissions resulting from faulty memory, misinterpretation of a question, or innocent mistake;[50] from confusion due to misunderstandings of cultural and legal concepts and processes as they are commonly understood in this country;[51] or due to diminished mental capacity[52] should not bar good moral character under this section. Additional factors that can influence whether or not the person has the subjective intent to deceive including the history of a person's character and the materiality of the statement made in influencing the outcome of the case.[53]

An applicant should be able to avoid triggering the false testimony statutory bar if he or she makes a voluntary and timely retraction of the false statement. Under Board of Immigration Appeals precedent, effective retraction is limited to the situation where the applicant retracts his

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[48] *Matter of Ngan*, 10 I&N Dec. 725, 729 (BIA 1964); *Matter of W-J-W-*, 7 I&N Dec. 706, 707 (BIA 1958).
[49] *Kungys*, *supra.* See also *Tamayo-Menchaca v. Holder*, 327 Fed.Appx. 43, 45 (9th Cir. 2009) (unpublished).
[50] See, e.g., *Ihejirika v. Klapakis*, No. 10-3190, 2011 WL 4499311, at *4 (E.D. Pa. Sept. 29, 2011) (finding petitioner's limited command of English coupled with her nervousness to be credible bases for inadvertently providing false testimony); Gonzalez-*Maldonado v. Gonzales*, 487 F.3d 975 (5th Cir. 2007) (Petitioner's claiming lawyer's address as his own to facilitate the receipt of immigration notices to lawyer held to be akin to a misrepresentation to avoid embarrassment, fear, or to protect one's privacy rather than a false statement made to obtain immigration benefits); *United States v. Hovsepian*, 422 F.3d 883, 887–88 (9th Cir. 2005) (reversing denial of good moral character for omissions made on naturalization application because they were products of honest oversight and reasonable misinterpretations of questions); *Plewa v. INS*, 77 F.Supp.2d 905, 912–13 (N.D. Ill. 1999) (reversing adverse naturalization decision for lack of good moral character where applicant failed to list arrest because of erroneous advice given by immigration lawyer).
[51] *Chan v. INS*, No. 00 MISC 243, 2001 WL 521706 (E.D.N.Y. May 11, 2001) (unpublished).
[52] *Zheng v. Chertoff*, No. 08-0547, 2008 WL 4899342 (E.D. Pa. Nov. 12, 2008) (applicant's diminished mental capacity also called into question the assertion that he made misrepresentations with the intent of receiving immigration benefits).
[53] In *Gonzalez-Maldonado v. Gonzales*, 487 F.3d 975 (5th Cir. 2007), the Fifth Circuit was influenced by the fact that the record demonstrated Petitioner's spotless record as an employee, husband, and father and lacked any evidence of bad moral character in concluding that Petitioner did not have the subjective intent to deceive. The court also held that the Government had a tougher burden to prove Petitioner's subjective intent to deceive since his misrepresentation of his address, which was really his lawyer's, was not material. The misrepresentation was found to be made to facilitate the immigration process and not to influence the asylum officer's decision in the case. In *Zheng v. Chertoff*, No. 08-0547, 2008 WL 4899342 (E.D. Pa. Nov. 12, 2008), the court explained that it was unclear what benefit the applicant, who had diminished mental capacity, stood to gain by denying that he previously made contradictory statements, especially when the average person in his position would have realized that CIS was already aware of the contradictions in his record when it questioned him. Moreover, the court noted that the applicant had no arrests, was married with two children, and had maintained a steady work history since his arrival to the United States. To prevent him from naturalizing because he lied about not lying in the past, when the record reflected not only his hardworking history, but also his limited intelligence, would amount to injustice.

false testimony prior to completion of the statement.[54] The Third Circuit in an unpublished opinion has gone even further to hold that a voluntary correction of false testimony made almost two years after it was presented was effective because it came prior to exposure by the government and the misstatements would not have been revealed but for the admission.[55] However, CIS may not agree with this interpretation, since at least for inadmissibility purposes, it considers a retraction timely only if it is voluntary and without delay.[56]

CIS often charges false testimony based on the applicant's failure to disclose information on the N-400 application or in the naturalization interview. For instance, in one case, CIS charged an individual with providing false testimony in answering the question on the N-400 that asks whether or not the person has ever committed a crime for which he or she has not been arrested.[57] Advocates should argue that any false information provided in the N-400 application does not trigger the false testimony statutory bar since it only applies to oral misrepresentations and not written ones. Nonetheless, individuals should be careful in how they answer similar questions at the interview so as to avoid making any oral false statements. Some court decisions have held that failure to disclose arrests in certain circumstances does *not* trigger this statutory bar.[58]

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[54] *Matter of M-*, 9 I&N Dec. 118 (BIA 1960). Respondent in an interview with an immigration officer at an airport tried to establish that he was lawfully residing in the U.S., but, before completing his statement, he volunteered that he had entered the U.S. unlawfully. Based on this timely retraction, the court found that he was not barred from establishing good moral character. Compare with *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (retraction after a year and where disclosure of falsity of statements was imminent, was not timely nor voluntary); *Matter of Ngan*, 10 I&N Dec. 725, 727 (BIA 1964) (retraction made three and a half years later not timely); *Llanos-Senarillos v. United States*, 177 F.2d 164, 165–66 (9th Cir. 1949) (retraction during examination not timely or voluntary where witness realized that the false testimony would not deceive).

[55] *Costa v. Attorney General of the United States*, 257 Fed.Appx. 543 (3d Cir. 2007) (unpublished). In *Costa*, the petitioner presented a false asylum claim and did not retract his statements to the asylum officer, but instead to the immigration judge during removal proceedings almost two years later. It is important to note that a driving factor in the Court's decision was that the Immigration Judge would have found him eligible for cancellation of removal but for the false testimony claim since there was evidence that his deportation would constitute exceptional and unusual hardship to his wife and two children since the children has already endured the trauma of the loss of their paternal father.

[56] CIS Interoffice Memorandum dated March 3, 2009, *Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators*, p. 21.

[57] *Lora v. USCIS*, No. 05 CV 4083, 2007 U.S. Dist. LEXIS 37345 (E.D.N.Y. Apr. 18, 2007). In this case, the judge rejected CIS' argument that Lora gave false testimony by answering "no" to a question on the N-400 that asks whether a person has ever committed a crime for which he or she has not been arrested since Lora admitted to selling drugs on five occasions but was only arrested and prosecuted for two of the five sales. The court found that he did not give false testimony because the case alleging two of the sales covered all five sales he made.

[58] See, e.g., *Lora*, *supra*; *Plewa v. INS*, 77 F.Supp.2d 905, 912 (N.D. Ill. 1999) (failure to disclose arrest based on wrongful advice by attorney did not preclude good moral character finding).

Advocates also should be aware of any false claims of U.S. citizenship made by the client since they could potentially trigger this statutory bar and other immigration consequences such as deportation. See discussion in **§ 6.10** and **Appendix 6-D**. Generally, when someone makes a false claim of U.S. citizenship, he does so in writing such as with a signature on an employment application or voter registration card that specifically asks the question "Are you a U.S. citizen?" or a written declaration under oath or penalty of perjury that the person was a U.S. citizen. These written misrepresentations will *not* trigger the false testimony bar.

If, however, false claims to U.S. citizenship were made orally *and* under oath, even in response to questioning by an officer, the person will be barred from establishing good moral character.[59] There is an exception, however, for individuals who meet the following requirements:

1) Each natural/adoptive parent of the person is or was a citizen;
2) The person began to reside permanently in the U.S. before the age of sixteen; and
3) The person reasonably believed at the time of such statement, violation, or claim that he or she was a citizen of the United States. (A reasonable belief must take into consideration the totality of the circumstances.)[60]

3. A person who is inadmissible for polygamy *is barred from establishing good moral character*

Note that polygamy (the ideology or religious practice of having many wives) is different from bigamy (the crime of being married to more than one person at a time). Only people who believe in the ideology of polygamy and intend to practice it in the U.S. are barred from establishing good moral character.[61]

4. Effect of drunk driving convictions on good moral character

Over the past several years much attention has been paid to what the immigration consequences of *drunk driving convictions* (driving under the influence or "DUIs")[62] should be. CIS has not issued a national written policy on this issue, however, DHS has increasingly prioritized DUIs. In any case, it has been mostly up to each district office, with influence from case law, to develop its own position on the effect DUIs should have on the ability of a naturalization applicant to establish good moral character. Some districts treat DUIs merely as a factor in the discretionary determination of good moral character while others also consider DUIs to be evidence that the person is a *habitual drunkard* and hence barred from establishing good

[59] See, e.g., *United States v. Damrah*, 334 F.Supp.2d 967 (N.D. Ohio 2004) (affirming denaturalization of defendant who unlawfully obtained U.S. citizenship by making false statements to INS official when he applied for citizenship).
[60] INA § 101(f), as amended by Child Citizenship Act of 2000, Pub. L. No. 106-395 (Oct. 30, 2000).
[61] See, e.g., *Matter of G-*, 6 I&N Dec. 9 (BIA 1953).
[62] In some states drunk driving offenses are referred to as "Driving while Intoxicated" or "DWI."

moral character.[63] A survey of case law shows that a single DUI conviction does not statutorily bar an applicant from good moral character when he or she has been candid about the conviction.[64] One court has gone even further finding that there is no authority for CIS to determine that a single DUI conviction is a non-statutory basis to deny for lack of good moral character.[65] However, the BIA and some courts have held that conviction of an offense that includes the elements of driving under the influence *with the knowledge* that one's driver's license has been suspended or restricted due to a prior DUI offense is a crime of moral turpitude, which, unless it comes within the petty offense exception, is a statutory bar to establishing good moral character.[66]

In the past the BIA held that a DUI conviction with a sentence of a year or more imposed was an aggravated felony as a "crime of violence," and deported hundreds of people for such convictions. In 2004, the Supreme Court held that a DUI—even one that results in injury—is not a crime of violence, not a ground of deportability as an aggravated felony, and therefore not a permanent bar to establishing the good moral character required for naturalization.[67] See

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[63] In *Rico v. INS*, 262 F.Supp.2d 6 (E.D.N.Y. 2003), the court held that the applicant's DUI conviction, failure to accept responsibility for his past crimes, failure to establish his claim of rehabilitation, and lack of candor precluded a finding of good moral character in accord with current conventions. In *Le v. Elwood*, No. 02-CV-3368, 2003 WL 21250632 (E.D. Pa. Mar. 24, 2003), the court explained that while by themselves the applicant's two DUI convictions could not disqualify him from being a person of "good moral character," they were negative factors, and coupled with the fact that material portions of the applicant's testimony lacked credibility to a serious degree, the naturalization application could be denied.

[64] *Rangel v. Barrows*, No. 07-cv-279, 2008 WL 4441974 (E.D. Tex. Sept. 25, 2008) (holding that in the absence of aggravating factors, a single DUI conviction did not suffice to prevent an applicant from naturalization based on a lack of good moral character, where in this case, the applicant accepted responsibility for his conviction and was involved with his church, was married with a young son, and had been steadily employed); *Ragoonanan v. USCIS*, No. 07-3461, 2007 U.S. Dist. LEXIS 92922 at *10–11 (D. Minn. 2007) (reversing CIS statutory denial of good moral character that stated that applicant posed a threat to the property, safety, and welfare of others based on a single driving under the influence conviction resulting in a year probation); *Rico v. INS*, 262 F.Supp.2d 6, 10 (E.D.N.Y. 2003) (denying naturalization application where DUI conviction fell in five-year statutory period and was one of five DUI convictions in a ten-year period); *Puciaty v. INS*, 125 F.Supp.2d 1035, 1039–40 (D. Haw. 2000) (granting naturalization where applicant had two DUI pleas and unpaid civil judgment); *Le v. Elwood*, No. 02-CV-3368, 2003 U.S. Dist. LEXIS 6635 at *2 (E.D. Pa. 2003) (denying naturalization where applicant failed to disclose two DUI convictions).

[65] *Ragoonanan*, *supra* at *9.

[66] The Ninth Circuit in *Marmolejo-Campos v. Gonzales*, 558 F.3d 903, 915–16 (9th Cir. 2009) (*en banc*) deferred to the BIA's decision in *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) that the Arizona offense of aggravated driving under the influence, which prohibits driving under the influence while knowingly driving on a suspended, canceled, revoked or limited license to drive, is a crime involving moral turpitude. However, the offense is divisible: if the record shows that the person was convicted of this offense and was not driving at the time, e.g., sitting in a parked car, then it is not a crime involving moral turpitude. See *Marmolejo-Campos*, *supra* at 906, clarifying *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1118 (9th Cir. 2003).

[67] *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 (2004) (negligent driving under the influence is not an aggravated felony even if a sentence of one year or more is imposed, because it does not require the intent to use

discussion in **§ 6.8(B)**. For a more thorough discussion of the effects of DUIs on a person's immigration status see **Appendix 6-D**.

5. A person who has actually spent 180 days or more in a penal institution during the statutory period and as a result of one or more convictions[68] is barred from showing good moral character

This statutory bar requires that the person serve all of the 180 days during the statutory period. If the client has a sentence of confinement of over 180 days, because the statutory period keeps moving on, an applicant can wait until the remaining days of custody in the period drops below 180 days and then file for naturalization. This is true regardless of whether the crime or crimes were committed within the statutory period and the conviction(s) also occurred within this period. (Note, however, that the person might still be denied naturalization for failing to show good moral character because the crime fell under one of the statutory bars to good moral character (committing an unlawful act during the statutory period) unless he can show extenuating circumstances. CIS may also determine based on its discretion that he doesn't have good moral character. See **§ 6.5(C)**.

> **Example:** In 2009, Raul was convicted of a crime and was sentenced to jail for 200 days. He served the 200 days in jail that summer and was released on September 1, 2009. Raul does not have to wait until September 1, 2014, five years after the end of his sentence, to apply for citizenship because he will already have less than 180 days of confinement during the statutory period before that time. In fact, Raul can apply at the very beginning of August 2014 and not be statutorily barred.

To be denied naturalization under this section, the naturalization applicant has to actually serve 180 days in prison or jail as a result of one or more convictions.[69] Only the actual time the person spent in custody, and not the sentence imposed by the judge, is the measure. Thus if a person is sentenced to seven months but is released after 120 days due to good behavior or jail overcrowding, the person has served 120 days for this purpose.

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violent force required for a "crime of violence"). However, recently Congress introduced, but not yet passed, legislation to make a third DUI conviction with a sentence of a year or more an aggravated felony. See also discussion in Appendix 6-D. As discussed above, however, a DUI offense that also has as an element knowledge that the person was not permitted to drive at all could be a CIMT. In *Matter of Torres-Varela*, 23 I&N Dec. 78, 83–86 (BIA 2001), the BIA held that a conviction under another Arizona DUI statute where intent was not an element to the crime was not a crime of moral turpitude. See discussion at § 6.8.

[68] A conviction for immigration purposes is defined at INA § 101(a)(48)(A). See also Appendix 6-D.

[69] *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 885–86 (9th Cir. 2005); *Rivera-Zurita v. INS*, 946 F.2d 118, 121–122 (10th Cir. 1991) (placement in custody of sheriff as well as thirty-day confinement in jail count as confinement to a penal institution); *Matter of Valdovinos*, 18 I&N Dec. 343, 344 (BIA 1982) (incarceration in a minimal security area with work furlough counts towards the 180 days).

Custody time includes the time served on the original sentence as well as on a probation violation. It does not include time merely spent on probation.[70]

The time spent in custody must be a result of a conviction or convictions. The time in custody will include any time spent in pre-detention (that is, detention while awaiting trial and/or the disposition of the sentence) only if it is later credited as time served in the sentence imposed as a result of the conviction.[71] For example, a person who serves 180 days while his case is pending, is convicted, and during sentencing is credited for those 180 days served, and is subsequently released even though he spent no time in custody after sentencing, is still barred by this ground. If the person had "waived credit for time served," the time would not have counted. Also, where no conviction results the time a person spent in pre-detention before dismissal of the charges does not count towards the 180 days.[72]

Time spent in jail or prison from different convictions can be added together to make up the 180 days or more.[73]

> **Example:** Sandra is applying for naturalization. Over the last five years she has been convicted once for petty theft and twice for driving under the influence of alcohol (DUI). For her last DUI conviction she was sentenced to 200 days in jail. With time off for good behavior, she got out of jail after 140 days. If she adds those 140 days to all the other days she has spent in jail for her convictions, the total is 179 days in jail over the last five years. Sandra is still eligible to show good moral character and can apply for naturalization. If she had been in jail more than 179 days, she would not be eligible. The key here is not what sentence was imposed, but how many days she actually spent incarcerated.

Situations such as these illustrate the importance of taking the time to explain the law to your client and of including your client as much as possible in the entire process. If the "180 day rule" had not been explained to Sandra, she may only tell you that she was sentenced to 200 days in jail, without telling you that she only spent 140 days in jail. You might then tell her that she is ineligible for naturalization, when under the "180 day rule" she is not ineligible.

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[70] *Matter of Gantus-Bobadilla*, 13 I&N Dec. 777, 780 (BIA 1971), rev'd on other grounds; *Matter of Franklin*, 20 I&N Dec. Dec. 867 (BIA 1994).
[71] *Fontilea v. Mukasey*, 275 Fed.Appx. 642, 642 (9th Cir. 2008) (unpublished) (holding that credit for time spent in custody be considered as confinement as a result of conviction); *Arreguin-Moreno v. Mukasey*, 511 F.3d 1229, 1232–33 (9th Cir. 2008) (petitioner's pre-detention time of 18 months counted towards the 180 days although at sentencing she received credit for the 18 months she served and thereafter only spent two or three weeks in custody); *Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982) (holding that pre-sentence confinement occurring before a conviction, which in some cases is later credited when determining the release from custody, will be counted for purposes of the 180-day statutory bar).
[72] *Gomez-Lopez v. Ashcroft*, *supra.*
[73] *Valdovinos*, *supra*.

Sandra may still have problems with discretionary good moral character because of her three convictions. Showing positive equities such as successful participation in Alcoholics Anonymous and volunteer activities may help Sandra convince CIS that she has good moral character. (Note that while the BIA in the past has held that a DUI with a sentence of a year or more imposed is an aggravated felony, the United States Supreme Court has overruled this decision and held that it is not. See **Appendix 6-D** for further discussion.)

Finally, Sandra's conviction for theft is a crime involving moral turpitude if it involves an intent to permanently deprive. See discussion in **Appendix 6-D**. Someone must analyze how that affects her case, depending upon when the conviction occurred, and what sentence was possible and was imposed. Sandra could actually be deportable, depending on the circumstances.

Appendix 6-C contains a flyer for naturalization applicants that includes some of the ways that one can be denied naturalization because of a lack of good moral character. It is in English and Spanish.

6. Multiple criminal convictions with an aggregate sentence of five years or more

To be subject to this statutory bar the applicant must (1) have been convicted of two or more crimes (other than purely political offenses), and (2) the aggregate period that the person was *sentenced* to imprisonment is five years or more regardless of whether they actually spent that time confined or not. These convictions do not have to be for a crime involving moral turpitude or any other particular type of offense, and can result from the same criminal case ("single scheme of criminal misconduct") and still trigger this bar.

7. Prostitution

A person who comes to the U.S. to engage in prostitution or has worked as a prostitute abroad within ten years of application for naturalization is barred from establishing good moral character. The State Department defines prostitution as "engaging in promiscuous sexual intercourse for hire."[74] The Ninth Circuit has held that conduct that falls outside of this definition, such as sexual conduct other than intercourse for hire, does not fall within this section.[75] Also, a casual, one-time encounter or one conviction for a single act of prostitution

[74] 22 CFR § 40.24(b). See also *Matter of R-M-*, 7 I&N Dec. 392, 395–96 (BIA 1957) (prostitution not limited to just procuring or importing prostitutes but also covers procuring customers for prostitutes for purpose of sexual intercourse); *Matter of C-*, 7 I&N Dec. 432, 433 (BIA 1957) (nurses who routinely work at prostitution houses do not fall within this ground if the purpose of their work is to promote a foreign country's health regulations); *Yang v. Mukasey*, 279 Fed.Appx. 575 (9th Cir. 2008) (BIA erred in concluding that petitioner "engaged in prostitution" where the evidence relied upon by the BIA did not establish that she performed sexual intercourse for hire).

[75] *Kepilino v. Gonzales*, 454 F.3d 1057, 1061–1062 (9th Cir. 2006).

does not amount to "engaging in" prostitution according to case law and State Department regulations.[76]

This statutory bar does not just punish "criminal behavior," but even work as a prostitute in countries where it is legally permitted. A conviction is not needed to establish that the person has regularly engaged in prostitution. Additionally, a conviction for prostitution is not necessarily conclusive evidence that the person falls within this section where the offense covers broader acts than the definition of prostitution was intended to cover.[77] Advocates should nonetheless guard against admissions of engaging in prostitution, since statements by police and others may be considered in the naturalization process to bar good moral character. Note also that an admission or conviction of prostitution (but generally not as a customer[78]) will trigger the statutory bar for a crime involving moral turpitude (see note 34 above).

8. Alien smuggling

The question of alien smuggling has presented a problem for some naturalization applicants. Alien smuggling can pose a problem in a few ways. A finding of alien smuggling, even without a conviction, can be a statutory bar to establishing good moral character and trigger deportation. See discussion on deportability below and in **Appendix 6-D**. With a conviction, alien smuggling will be a permanent bar to establishing good moral character as an aggravated felony if the conviction occurred on or after November 29, 1990.

A conviction for alien smuggling of any kind is an aggravated felony and a permanent bar to establishing good moral character, unless it was a first offense for smuggling only a parent, spouse or child. See INA § 101(a)(43)(N); see also aggravated felony discussion at **§ 6.8 (B)**. Even if there is no conviction, a person who commits alien smuggling within the previous five years (or three years, if applying as the spouse of a U.S. citizen) is barred from establishing good moral character under

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[76] See *Matter of T-*, 6 I&N Dec. 474 (BIA 1955). See also *Matter of Gonzalez-Zoquiapan* 24 I&N Dec. 549, 544 (BIA 2008) (holding that a single act of soliciting prostitution on one's own behalf does not render one inadmissible under INA § 212(a)(2)(D)(ii) and does not bar one from establishing good moral character). State Department regulations, issued to guide officers granting visas abroad, provide that "[t]he term 'prostitution' means engaging in promiscuous sexual intercourse for hire. A finding that a noncitizen has 'engaged' in prostitution must be based on elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts." 22 CFR § 40.24(b).

[77] In *Kepilino*, *supra*, the Ninth Circuit held that a Hawaii prostitution conviction did not trigger inadmissibility under INA § 212(a)(2)(D)(i) (which in turn is referenced in the statutory bar for good moral character) for coming to the U.S. to engage in prostitution because the offense criminalized sexual conduct (including touching of another's intimate parts through clothing) for a fee and covered more acts than what was intended to be encompassed by the definition of prostitution.

[78] But see *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012) (holding that a conviction for soliciting a prostitute as a customer is a crime involving moral turpitude).

INA § 101(f).[79] Unlike the crime involving moral turpitude and controlled substance good moral character bars discussed above, the person does not have to admit to or be convicted of alien smuggling to be barred from establishing good moral character.[80]

The definition of alien smuggling is very broad. Any person who knowingly has "encouraged, induced, assisted, abetted, or aided" any other person to enter the U.S. (or to try to enter) is an "alien smuggler." This definition requires an affirmative act of help, assistance, or encouragement, such as paying alien smugglers, making the arrangements to get aliens across the border, or providing false information and documents to immigration authorities.[81] Alien smuggling has extended beyond providing affirmative assistance after a person enters the U.S. For example, one circuit court held that alien smuggling includes an agreement by a family member to pay a smuggler after the person is already in the U.S., but before the smuggler releases or ceases to transport the person.[82] There are arguments, however, that alien smuggling does not cover the acts of merely harboring or transporting others within the United States.[83]

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[79] The statutory bar will be triggered under the alien smuggling category. Alien smuggling is not a crime involving moral turpitude and therefore, will not trigger the statutory bar under this ground. *Matter of Tiwari*, 19 I&N Dec. 875, 880–81 (BIA 1989).

[80] In *Angel v. Chertoff*, No. 07-cv-168-JPG, 2007 U.S. Dist. LEXIS 78084 (S.D. Ill. Oct. 22, 2007), the court held that CIS could not support an adverse finding of good moral character based solely on the fact that DHS brought removal proceedings against the applicant twice for assisting illegal immigrants, who worked for his company, in entering the country because both cases were dismissed. *Id.* at *14–15. But after considering the "extenuating circumstances," the court found the conduct behind the dismissed charges was satisfactorily explained, supporting a finding of good moral character. *Id.* at *16.

[81] See, e.g., *Ramos v. Holder*, 660 F.3d 200 (4th Cir. 2011) (finding lack of good moral character based on the wire transfer of between $3,000 and $4,000 to children to cross border); *Chambers v. Office of Chief Counsel*, 494 F.3d 274 (2d Cir. 2007) (upholding finding of inadmissibility based on alien smuggling where the noncitizen lied at the border about another person's residency and the whereabouts of his passport, admitted to the border patrol officers that she previously agreed to accompany the other person at the Canadian border as he tried to enter the United States, and was aware the other person had previously been deported); *Altamirano v. Gonzales*, 427 F.3d 586, 591–96 (9th Cir. 2005) (reversing finding of inadmissibility under the alien smuggling ground based solely on her presence in vehicle knowing that someone was hiding in the trunk); *Tapucu v. Gonzales*, 399 F.3d 736, 739–43 (6th Cir. 2005) (reversing finding of inadmissibility of legal permanent resident who shared driving responsibilities with three friends, one of whom was an illegal immigrant that the lawful permanent resident believed could legally travel across the border).

[82] *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 748–49 (9th Cir. 2007) (upholding a lack of good moral character finding for petitioner who knew that his brother planned on crossing the border illegally and arranged for payment following his brother's arrival in the country but prior to the completion of the "alien smuggling venture.")

[83] See, e.g., *Rodriguez-Gutierrez v. INS*, 59 F.3d 504, 509 n. 3 (5th Cir. 1995) (conviction for illegally transporting undocumented immigrants does not trigger inadmissibility because the statute only refers to aiding and abetting); *Matter of I-M-*, 7 I&N Dec. 389 (BIA 1957) (transporting undocumented persons within the U.S. does not necessarily make the person transporting them inadmissible).

CIS Can Raise This Issue in the Case of Naturalization Applicants Who May Have Helped Others Enter the United States without Inspection. Clients must be made aware of this because it is possible that an applicant will be asked questions about whether she has helped friends or relatives (including children) enter the country unlawfully. Remember, however, that even if the applicant does not admit to alien smuggling, if CIS has evidence that the applicant was an alien smuggler, it could find the applicant barred from establishing good moral character.

The only exception to the statutory bar to establishing good moral character based on alien smuggling is where the naturalization applicant could have qualified for Family Unity under the 1990 Act[84] and, before May 5, 1988, encouraged, induced, assisted, abetted, or aided only his or her spouse, parent, son, or daughter to enter the U.S. illegally.[85] If the applicant qualifies for this exception, he or she will not fall within the statutory bar for good moral character. If CIS finds that the applicant was an alien smuggler and cannot fit within this narrow exception, however, CIS may statutorily bar the applicant from establishing good moral character for the requisite statutory period, and, if the action comes within the alien smuggling deportation ground, may refer the person to removal proceedings.

In contrast to the above exception, a discretionary *waiver* of inadmissibility or deportability for alien smuggling will not help a naturalization applicant establish good moral character. The Ninth Circuit reversed an earlier opinion, which had suggested that the smuggling waiver could prevent the smuggling from being a statutory bar to good moral character.[86] Instead, the person will have to amass another five, or three, years of good moral character after the smuggling before he or she will be eligible to naturalize.

Alien Smuggling Deportation Ground. (Note: this discussion is limited to the alien smuggling deportation ground and does not include the aggravated felony ground of deportation mentioned above.) A person who *commits* alien smuggling, even if there is no conviction, might not only be statutorily barred, but also be found deportable if it occurred at the time of any entry, prior to any entry, or within five years of any entry.[87] There is, however, a discretionary waiver

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[84] To qualify under this Act the person must have been the parent, spouse, or child of someone legalized through the amnesty program; been physically present in the U.S. on May 5, 1988; immigrated as a second preference, Legalization beneficiary, or an immediate relative; or be someone who is applying for Family Unity.

[85] INA § 212(a)(6)(E)(ii).

[86] INA § 101(f)(3), "… a member of one or more of the classes of persons, *whether inadmissible or not*, described in paragraphs … (6)(E)"…) (emphasis added). See *Sanchez v. Holder*, 560 F.3d 1028, 1032 (9th Cir. 2009) ("8 USCS § 1182(d)(11) [INA § 212(d)(11)] authorizes the Attorney General to waive inadmissibility if an alien has only smuggled immediate family members, but does not authorize the Attorney General to waive the 'alien smuggling' bar to establishing good moral character for purposes of cancellation of removal. A statute giving the Attorney General discretion to grant relief from *inadmissibility* does not give the Attorney General discretion to grant relief from *removal*") (emphasis in original).

[87] INA § 237(a)(1)(E). See, e.g., *Barradas v. Holder*, 582 F.3d 754, 759 (7th Cir. 2009).

to deportation.[88] The waiver is available to lawful permanent residents (LPRs) who helped smuggle a qualifying relative.[89] More importantly, the waiver is only available if the lawful permanent resident encouraged, assisted, abetted or aided the person's spouse,[90] parent, son or daughter (and no other individual) at the time to enter the country in violation of the law.[91] The person must have had that status *at the time the smuggling occurred.* Therefore, someone who smuggles his alien fiancé and later marries her would not be eligible for this waiver. See **Appendix 6-D**, **§ 1.11** for more on alien smuggling.

Most lawful permanent residents can only request the smuggling waiver from an immigration judge. Therefore in order to take advantage of the waiver, a naturalization applicant who discloses the fact that he or she smuggled a qualified relative, or whose record indicates that he or she did so in the past, would have to be placed in removal proceedings in order to obtain the waiver. Since the waiver is discretionary, there is no guarantee that the judge would grant the waiver instead of ordering the individual deported. The applicant might decide to apply for naturalization and risk being placed into removal proceedings if he or she has a strong waiver case. After careful discussion with an experienced immigration attorney, the applicant could decide to go this route because CIS might grant the naturalization application without referring the person to removal proceedings, or, if CIS denies naturalization, the applicant could have a good chance of obtaining relief from deportation while in immigration court.

> **Example:** Alicia, a lawful permanent resident, helped her son cross the border illegally into the United States ten years ago. Alicia went to Mexico, obtained a false green card for her son and tried to re-enter the United States with him. The Immigration Service stopped Alicia and her son at the border. Alicia's car was confiscated and her son was returned to Mexico. The Immigration Service released Alicia and eventually returned her car. In reviewing Alicia's file, the CIS naturalization adjudicator sees that Alicia attempted to smuggle her son into the United States. Although Alicia is not statutorily ineligible to establish good moral character (the smuggling offense took place more than

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[88] Note that some persons might not be deportable in the first place if they fit within a limited exemption and, therefore, do not need to even obtain this discretionary waiver. The exception applies to individuals who immigrated through the IRCA Family Unity Legalization Program. INA § 237(a)(1)(E)(ii).

[89] INA § 237(a)(1)(E)(iii). Note that even if the deportability waiver applies, the inadmissibility waiver for good moral character may not transfer for alien smuggling. *Sanchez v. Holder*, 560 F.3d at 1032 (overruling *Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005), and stating that an applicant for cancellation of removal cannot demonstrate good moral character notwithstanding participation in family-only smuggling, based upon the plain meaning of INA §§ 240A(b), 101(f), and 212(a)(6)(E)). See also Appendix 6-D, § 1.11 for more on alien smuggling.

[90] For acts of smuggling occurring after May 5, 1988, the "family member" waiver does not apply to a spouse who was not a spouse at the time of the smuggling. *Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005) rev'd on other grounds in *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (*en banc*).

[91] See, e.g., *Perez Suriel de Batista v. Gonzales*, 494 F.3d 67 (2d Cir. 2007) (explaining that even if the alien smuggler treated her nephew as though he was her son, the alien smuggler could not receive a waiver of inadmissibility under INA § 212(d)(11), because the child she attempted to smuggle was not her biological or adopted son).

five years ago and thus outside the statutory period), she is deportable.[92] Therefore, instead of granting the naturalization application, the officer placed Alicia in removal proceedings. Alicia will need to ask the judge to grant her a waiver for having smuggled her son.

CIS has some discretion in deciding whether or not to place a person in removal proceedings. In sympathetic cases such as Alicia's, CIS often may choose to deny naturalization, but not to place the person in removal proceedings. It is also possible that the deportable person might be naturalized even without being put into removal proceedings because the naturalization officer thinks the person has a strong waiver case and will be granted relief by an immigration judge. However, individuals who have smuggled relatives in the past and who are applying for naturalization need to be aware of the risks of applying for naturalization, including that CIS could choose to place them in removal proceedings.

§ 6.4 Denial of Naturalization Based on a Discretionary Finding of a Lack of Good Moral Character

Once a naturalization applicant has shown that she is not statutorily prevented from establishing good moral character, the job is not over. Even if the applicant does not fall into one of the automatic bars to establishing good moral character under INA § 101(f), the applicant can still be found to lack good moral character.[93]

A. Balancing the "Good" and the "Bad"

Many kinds of evidence have bearing on what is considered good moral character.[94] For example, a CIS memorandum listed some factors to consider in determining good moral character with regards to an applicant's unlawful voting or false representation as a U.S. citizen:

- Length of time in the U.S.;
- family ties and background;
- absences or presence of other criminal history;
- education and school records;
- employment history;

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[92] Alicia is deportable for having been inadmissible at the time of entry. INA § 237(a)(1)(A).
[93] INA § 101(f) provides that "[t]he fact that any person is not within any of the foregoing classes [of automatic bars] shall not preclude a finding that for other reasons such person is or was not of good moral character." See, e.g., *In re Guadarrama de Contreras*, 24 I&N Dec. 625 (BIA 2008) (holding that a person who has made a false claim of U.S. citizenship may be considered a person who is not of good moral character, but the catch-all provision does not automatically mandate such an outcome).
[94] See *Torres-Guzman v. INS*, 804 F.2d 531 (9th Cir. 1986). "Where … the petitioners have not committed acts bringing them within [§ 101(f)]'s enumerated categories, the Board must consider all of petitioners' evidence on factors relevant to the determination of good moral character." *Id.* at 534.

- other law-abiding behavior like paying taxes;
- community involvement; and
- credibility of the applicant.[95]

The applicant should present evidence of good moral character to counteract any evidence of bad character.

The Legal Standard: A Balancing Test. CIS is supposed to balance the evidence of good and bad moral character to get a picture of the applicant's life as a whole.[96] An applicant will not necessarily be denied naturalization just because she has done something "bad." The BIA has held, however, that the more serious the past misconduct of the person, the more rehabilitation and good conduct time is needed to establish good moral character.[97] Nonetheless, the examiner can use her discretion to decide whether or not the person should be naturalized. The goal is to present your client in the best possible light, considering all aspects of her life.

Documenting Good Moral Character. Remember that a person may present any kind of evidence to show good moral character. You and your client can be very creative when thinking about good moral character. For example, the person may be a community leader, an excellent employee, a devout church member, a volunteer in her child's classroom, or someone who helps an elderly neighbor by shopping for him. Documentation of what appears to be a person's plain and ordinary life can be great evidence of good moral character. For example, letters from a work supervisor and copies of paycheck stubs can show a steady, hardworking, and productive member of society.

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[95] Policy Memorandum No. 86, William Yates, *Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully of Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote* (Mar. 7, 2002).

[96] See, e.g., *Torres-Guzman*, *supra* at 534; *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 365 (BIA 1991) (evaluating good moral character involves evaluating "both favorable and adverse" evidence); *Matter of B-*, 1 I&N Dec. 611, 612 (BIA 1943) (regarding good moral character, "We do not think it should be construed to mean moral excellence, or that it is destroyed by a single lapse. Rather we think it is a concept of a person's natural worth derived from the sum total of all his actions in the community.")

[97] *Matter of Sanchez-Linn*, *supra* at 365. See, e.g., *Lora v. USCIS*, No. 05 CV 4083 (JG), 2007 U.S. Dist. LEXIS 28523 (E.D.N.Y. Apr. 18, 2007) (finding that despite a serious juvenile delinquency disposition for sale of cocaine in 1990 and a conviction for shoplifting in 1997, Lora possessed good moral character contrary to the government's argument because: the drug conviction occurred 17 years prior when he was only 17 years old, more than 10 years had elapsed since his shoplifting conviction in 1997, he owned his own home, he conducted charitable work in the community, he supported his future wife and their child, and was a law-abiding and hardworking member of the community); *Lawson v. USCIS*, 795 F.Supp.2d 283 (S.D.N.Y. 2011) [finding that a highly-decorated Vietnam veteran established good moral character despite the manslaughter conviction, from twenty-five years ago, for killing his wife while suffering from PTSD and substance abuse by demonstrating that he had turned his life around and been rehabilitated and rejecting that the conviction was a permanent bar to establishing good moral character because he was not convicted of murder and, although an aggravated felony, it occurred in 1986 (an aggravated felony after November 29, 1990 is permanent bar)].

To document these aspects of good moral character, the client should try to get letters from work or volunteer supervisors, co-workers, teachers, other volunteers, or those who benefit from her activities (such as school children, church members, or neighbors). If the client has won any awards or been recognized in any other way (articles, letters of appreciation, etc.) then these documents should be included as well. Your client should talk about these important activities in her interview.

> **Example:** At the end of their first meeting, Araceli the Advocate handed Consuelo the Client a few sheets of paper and asked her to go home and list all the ways she contributes to the United States, including her help to relatives, friends, employers, and others (positive equities). At home Consuelo wrote down the following positive equities: she is a good mother, cares for her elderly father, is an outstanding employee, belongs to her church choir, and volunteered in a day care center where her son attends. A copy of the sheet Araceli gave to Consuelo and the sheet Consuelo completed is at **Appendix 6-B**. It is best for Consuelo and Araceli to obtain proof of Araceli's claims such as a letter from her church documenting her participation in the choir, a letter from her employer showing her as a good and honest employee, and a letter from the day care center where she volunteers proving her volunteer work.

B. Factors That May Show "Bad" Moral Character

Since INA § 101(f) permits CIS to go beyond the language of the statute and consider other negative factors in assessing good moral character, it is useful to have a sense of what might work against a client. In the past, courts have found an absence of good moral character when a person:

- Willfully failed to pay child support;[98]
- failed to file tax returns;[99]
- committed adultery which destroyed a viable marriage;[100]
- sold liquor illegally in his restaurant (even though the law was not enforced in his community);[101]
- refused to respond to questions regarding his history, associations, and activities;[102] and
- had a DUI conviction coupled with aggravating circumstances.[103]

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[98] *In re Malaszenko*, 204 F.Supp 744 (D.N.J. 1962). Cited in *INS Interpretations* 316.1(f)(5).
[99] *Sumbundu v. Holder*, 602 F.3d 47 (2d Cir. 2010); *Gambino v. Pomeroy*, 562 F.Supp 974 (D.N.J. 1982).
[100] *INS Interpretations* 316.1(g)(2)(viii). See also 8 CFR § 316.10(b)(3)(ii).
[101] *Petition of Orphanidis*, 178 F.Supp 872 (N.D. W. Va. 1959).
[102] *Gambino v. INS*, 419 F.2d 1355 (2d Cir. 1970) (noting the petitioner's numerous arrests also factored into the decision to find that he lacked good moral character).
[103] Federal courts have largely rejected the notion that a simple DUI conviction prevents one from establishing good moral character for naturalization purposes, but some courts have upheld denials of naturalization applications when the DUI is accompanied by other factors, such as lacking candor or providing untrustworthy testimony. See, e.g., *Rico v. INS*, 262 F.Supp.2d 6 (E.D.N.Y. 2003); *Le v. Elwood*,

If anything negative stands out, check reported court opinions to see if bad precedent exists. Whether or not there is bad case law, you may still be able to argue that despite the problem, the applicant is of good moral character based on all the evidence of good moral character submitted.

Similarly, actions that at first glance may appear to tarnish a person's good moral character sometimes have little relevance to establishing good moral character. For example, a default judgment against an individual in a civil case or bankruptcy more often than not is immaterial to eligibility for naturalization.[104] Also, alleged or actual repeated immigration violations by themselves do not necessarily establish that the person does not possess good moral character.[105]

Not telling the truth during the naturalization interview itself, especially about any criminal arrests or convictions, is a common basis for denying naturalization applicants as providing false testimony, a statutory bar to proving good moral character. See § 101(f) and **§ 6.3** of this chapter. Courts have found that "lying" in a naturalization interview is a sign of bad moral character if the lie is coupled with intent to deceive for the purpose of obtaining citizenship or other benefits under the act.[106] In fact immigration authorities also have moved to denaturalize

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No. 02–CV–3368, 2003 WL 21250632, at *2 (E.D. Pa. Mar. 24, 2003). See also Danielle L.C. Beach, *'Twas the Season to be Jolly: The Immigration Consequences of Excessive Libations*, 87 No. 17 *Interpreter Releases* 873 (Apr. 26, 2010).

[104] See, e.g., *Puciaty v. INS*, 125 F.Supp.2d 1035 (D. Haw. 2000) (finding that the applicant's failure to satisfy or set aside a default judgment, in and of itself, was insufficient to deny the applicant's naturalization application). See also *Angel v. Chertoff*, No. 07-cv-168, 2007 U.S. Dist. LEXIS 78084 at *13 (S.D. Ill. Oct. 22, 2007) (consent agreement entered into with Department of Labor in response to accusations that applicant owed back wages to certain employees was not probative of good moral character because it was a response to a civil lawsuit and applicant complied with the terms of the judgment).

[105] See, e.g., *Angel*, *supra* at *14 (removal proceedings initiated against the applicant twice for alien smuggling of employees since both cases were dismissed); *Matter of Lee*, 17 I&N Dec. 275 (BIA 1978) (several unlawful entries and deportation order); *Matter of Carbajal*, 17 I&N Dec. 272 (BIA 1978) (several entries without inspection for which the person was granted voluntary departure several times and was also deported); *Matter of T-*, 1 I&N Dec. 158 (BIA 1941) (three deportations and a conviction for illegal reentry after deportation). But where immigration fraud is involved, the person will be considered to lack good moral character. See *Matter of Pimentel*, 17 I&N Dec. 482 (BIA 1980).

[106] See, e.g., *In re De la Cruz*, 565 F. Supp. 998 (S.D.N.Y. 1983); *Bernal v. INS*, 154 F.3d 1020 (9th Cir. 1998). See also cases referenced in § 6.3(A)(2). But see *Plewa v. INS*, 77 F.Supp.2d 905 (N.D. Ill. 1999). (ruling that a naturalization applicant who had not disclosed his arrest record based on the wrongful advice by his attorney did not lie to obtain an immigration benefit and, therefore, was not barred from demonstrating good moral character); *Chan v. INS*, No. 00 MISC 243, 2001 WL 521706 (E.D.N.Y. May 11, 2001) (concluding that the applicant's lack of education and confusion about American culture, coupled with the complexity of the matters in question were likely the cause of the misstatement; therefore, the applicant was eligible for naturalization even with the misrepresentations); *Zheng v. Chertoff*, No. 08-0547, 2008 WL 4899342 (E.D. Pa. Nov. 12, 2008) (noting applicant's diminished mental capacity called into question the assertion that he made misrepresentations with the intent of receiving immigration benefits and, considered against applicant's equities, should not bar naturalization).

persons who have become U.S. citizens when it discovered that the persons did not tell the truth, even about small convictions that would not have hurt their case.[107] (See **Chapter 13** for more information on the denaturalization process.)

The moral is: *arm the client with knowledge.* If there is any chance the client has a past arrest or conviction, obtain the client's criminal record and give a copy to the client to review. Get the client to practice with you or another person answering questions about the record. If needed, the client can bring the record to the interview. Practice is important because answering these questions can be very embarrassing, and the client should not have to face saying the information out loud for the first time at the naturalization interview.

Finally, help the client think about how to make her case. If there are "bad" events in her life, ask your client to explain to you why she should be allowed to naturalize. Ask her what things about her life she thinks the interviewer will look at most closely. If any of those things could be viewed negatively, ask her to explain why the situation was not really so bad or why it will not happen again. If she practices telling you, she will be better prepared to explain it to the interviewer.

C. The Commission of Acts Listed in 8 CFR 316.10 That Can Cause a Lack of Good Moral Character: Extra-Marital Affairs, Willful Failure to Support Dependents, Being on Probation or Parole and the Commission of Other Unlawful Acts

As stated above, some actions which are not statutory bars to establishing good moral character can have the practical effect of keeping individuals from naturalizing. This is because INA § 101(f) not only provides a list of statutory bars, but also a catch-all category which may preclude a finding of lack of good moral character for other reasons not listed.[108] In order to provide more guidance to immigration officials as to what can fall into this catch-all category and serve as negative factors in determining good moral character, CIS has listed many of them.[109] See 8 CFR § 316.10. It is important to note, however, that these negative factors do not create situations where people are automatically denied naturalization for failure to show good moral character like the statutory bars under INA § 101(f).[110] Nonetheless, when a naturalization

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[107] See, e.g., *Fedorenko v. United States*, 449 U.S. 490 (1981) (noting that failure to strictly comply with the citizenship requirements renders the certificate of citizenship illegally procured and may be set aside through the denaturalization process); *United .States. v. Jean-Baptiste*, 395 F.3d 1190 (11th Cir. 2005) (holding that criminal offenses committed during the statutory period for good moral character but for which the indictment and the conviction occurred after naturalization is a basis for denaturalization for lack of good moral character); *United States v. Mwalumba*, 688 F.Supp.2d 565 (N.D. Tex. 2010) (same).

[108] INA § 101(f). "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

[109] While some of these other bases to consider in denying good moral character are listed at 8 CFR § 316.10, others are not but, nonetheless, are bases that CIS officials consider in moral character determinations. Anything can be a negative factor in determining good moral character.

[110] See, e.g., *Matter of Guadarrama de Contreras*, 24 I&N Dec. 625 (BIA 2008) (holding that a non-citizen who has made a false claim of citizenship may be lacking good moral character, but the catch-all provision

applicant falls under these bases it is more likely than not that applicants will be denied naturalization for lack of good moral character, except where the applicants can show extenuating circumstances and/or in the balance test described above, the positive factors involved in granting the naturalization application outweigh the negative factors. The bases for denying naturalization included in the CIS regulations include:

- Willful failure to pay child support;
- Receipt of public benefits where fraud was involved;
- Commission of unlawful acts;[111]
- The applicant had an extra-marital affair which tended to destroy an existing marriage (comes up less frequently); and
- Being on probation or parole on the day of the interview. This will result in a denial of naturalization.[112]

Note: There are more bases for denial not in the regulation, which are discussed in below.

See **§ 6.4** below for more on probation and parole.

PRACTICE TIP: If your client falls into any of the categories discussed above, it is common that CIS is going to deny the naturalization application for lack of good moral character. However, the client might be able to get around these bases if he shows "extenuating circumstances,"[113] (see discussion below) or, when using the balance test (explained above), the positive equities in granting naturalization outweigh the negative ones. Another way to get around these bases is if the applicant can prove that he otherwise does not fall within the basis for denial (see arguments below).

Extenuating Circumstances. Under 8 CFR § 316.10, a person who falls into the non-statutory bases to deny good moral character is entitled and required to establish "extenuating circumstances" to explain his or her conduct and avoid an adverse moral character determination.[114]

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of INA § 101(f) does not automatically mandate such a finding). See also *BIA Finds False Claim of Citizenship May Indicate Lack of Good Moral Character*, 85 No. 38 *Interpreter Releases* 2552 (Sept. 29, 2008).

[111] 8 CFR § 316.10(b)(3); *INS Interpretations* 316.1(f).

[112] 8 CFR § 316.10(c)(1).

[113] 8 CFR § 316.10(b)(3). *Jean-Baptiste v. United States*, 395 F.3d 1190, 1195–96 (11th Cir. 2005) (noting that appellant's extenuating circumstances need to pertain to the offense that was the basis for his lack of good moral character, and do not include the extreme hardship his wife and children would suffer if he was denaturalized.)

[114] *Ragoonanan v. USCIS*, No. 07-3461, 2007 U.S. Dist. LEXIS 92922, *11–12 (D. Minn. Dec. 18, 2007) (unpublished) (holding that when CIS examines an applicant's criminal behavior under the catch-all category

CIS has provided guidance in a memo as to what is required of a naturalization applicant to prove extenuating circumstances for acts that might indicate a lack of good moral character. See **Appendix 6-G**, CIS Memorandum on Amendment to AFM 73.6(d)(3)(B) regarding Application of the "Unlawful Acts" Regulation in Naturalization Determinations, Yates (September 19, 2005). Extenuating circumstances must directly relate to the applicant's commission of the act at issue, i.e., failure to pay child support, or failure to register for the Selective Service. To be directly related, the extenuating circumstance must take place before or during the same time as the commission of the act. Also, evidence of the extenuating circumstance must relate to the reasons for lacking of good moral character. For example, an extenuating circumstance could be that a person did not register for the Selective Service because he did not have adequate notice that he was supposed to. Nothing that occurs after the act is committed, such as the consequences of the act, will be considered an extenuating circumstance. This means that reformation, rehabilitation, and other effects such as hardship resulting in ineligibility for citizenship[115] will not be considered extenuating circumstances. For some examples of what are considered to be valid extenuating circumstances see **§ 6.5(C)(2)** "Commission of unlawful acts and conviction or imprisonment for such," below. Finally, it is important to note that extenuating circumstances will be given further credence if many positive equities exist in the case because of the necessity of CIS to employ a balance test before determining whether or not the applicant has good moral character.

1. Willful failure to support one's dependents (willful failure to pay child support)

CIS views the "willful" (i.e., deliberate) failure to support one's dependents, absent extenuating circumstances, as a failure of good moral character.[116] This typically involves the non-payment of child support. CIS is required to look at the reasons why someone has not supported his children.[117] If an applicant has not been paying child support because he has been unemployed or is otherwise financially unable to do so or his family is self-supporting, the failure to pay child support should not be considered willful, and thus CIS should not find the applicant is lacking in good moral character.[118] Additionally, the ILRC would argue that if someone has made a reasonable effort to provide child support but has not been able to for some reason (such as he cannot find his family or the family refuses his assistance), the failure to pay child support should not be considered willful,

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he is entitled to establish extenuating circumstances); *Angel v. Chertoff*, No. 07-cv-168, 2007 U.S. Dist. LEXIS 78084, *15–16 (S.D. Ill. Oct. 22, 2007) ("Angel must still satisfactorily explain away his unlawful actions by showing extenuating circumstances.")

[115] *Jean-Baptiste v. United States*, 395 F.3d 1190 (11th Cir. 2005).

[116] 8 CFR § 316.10(b)(3)(i); see also *INS Interpretations* 316.1(f)(5).

[117] CIS's position is that failure to provide support will add to the weight of other evidence to sustain a finding of lack of good moral character. See *INS Interpretations* 316.1(f)(5). It is important to note that the standard is not merely failing to pay child support, but "willful failure to pay child support." In determining whether the failure to support dependents warrants a finding of a lack of good moral character, some courts have taken into account extenuating circumstances such as unemployment or financial inability to pay. See *INS Interpretations* 316.1(f)(5) for examples.

[118] See *Immigration Law and Procedure*, Gordon & Mailman § 95.04[1][b][iii] and *INS Interpretations* 316.1(e)(5).

and CIS should not deny the case for lacking good moral character.[119] Therefore, always ask your client why he has not been paying child support and see if the explanation is one that CIS should or will accept.

It would be wise to advise clients who have not been paying child support to start paying before applying for naturalization. This is sound advice assuming the client is able to pay, or at least start making, the child support payments.

In instances where someone has not been paying child support and there aren't extenuating circumstances, it is the ILRC's position that CIS should still conduct a balance test, balancing the negative factors involved in the applicant's character against the positive factors before denying the application.[120] But, in most CIS offices, failure to pay child support without extenuating circumstances is often enough to support a negative finding of good moral character and thus deny the naturalization application.

2. Commission of unlawful acts and conviction or imprisonment for such

CIS can find that an applicant lacks good moral character if, during the statutory period, he or she committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, unless the person can demonstrate extenuating circumstances.[121] Two courts have held that under this provision, an applicant whose unlawful act(s) is being examined is entitled and required to establish "extenuating circumstances" to explain his or her conduct to avoid an adverse moral character determination.[122] Unlawful acts only include illegal acts or acts against the law.[123] These unlawful acts do not have to result in a

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[119] *Id.*

[120] See, e.g., *Torres-Guzman v. INS*, 804 F.2d 531, 534 (9th Cir. 1986); *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 365 (BIA 1991) (evaluating good moral character involves evaluating "both favorable and adverse" evidence); *Matter of B*, 1 I&N Dec. 611, 612 (BIA 1943) (regarding good moral character, "We do not think it should be construed to mean moral excellence, or that it is destroyed by a single lapse. Rather we think it is a concept of a person's natural worth derived from the sum total of all his actions in the community.")

[121] 8 CFR § 316.10(b)(3)(iii). See also *United States v. Suarez*, No. 07-cv-6431, 2010 U.S. Dist. LEXIS 88627 (N.D. Ill. Aug. 27, 2010); *United States v. Mwalumba*, 688 F.Supp.2d 565 (N.D. Tex. 2010) (referring to the catch-all provision pertaining to commission "unlawful acts," the court reasoned that the defendant's crimes so qualified because they involved fraud, and the defendant had not offered any extenuating circumstances to explain his conduct); *United States v. Okeke*, 671 F.Supp.2d 744 (D. Md. 2009); *Meyersiek v. USCIS*, 445 F.Supp.2d 202, 207 (D.R.I. 2006); *United States v. Dang*, No. Civ.S-01-1514, 2004 WL 2731911 (E.D. Cal. Nov. 15, 2004).

[122] *Ragoonanan v. USCIS*, No. 07-3461, 2007 U.S. Dist. LEXIS 92922, *11–12 (D. Minn. Dec. 18, 2007) (holding that when CIS examines an applicant's criminal behavior under the catchall category he is entitled to establish extenuating circumstances); *Angel v. Chertoff*, No. 07-cv-168, 2007 U.S. Dist. LEXIS 78084, *15–16 (S.D. Ill. Oct. 22, 2007) ("Angel must still satisfactorily explain away his unlawful actions by showing extenuating circumstances.")

[123] Many of the acts that come up under the unlawful acts non-statutory base involve criminal conduct that do not otherwise fall into the statutory criminal grounds at 101(f). One such example is a single driving under the influence (DUI) conviction (but note that this might fall into habitual drunkard statutory bar if

conviction, fall within the other statutory bars discussed **§ 6.3**, or trigger deportation in order to be considered.[124]

CIS has issued a memo to provide further guidance on this non-statutory base to deny good moral character. See **Appendix 6-G**, CIS Memoranda Amendment to AFM 73.6(d)(3)(B) regarding Application of the "Unlawful Acts" Regulation in Naturalization Determinations, Yates (September 19, 2005). The memo states that adjudicators should not deny an applicant for lack of good moral character based on minor unlawful acts without engaging in an individualized analysis as to whether those acts actually adversely reflect on the person's good moral character. This individualized analysis must take into consideration the nature and magnitude of the unlawful act and the circumstances, including mitigating and favorable factors, surrounding the act. Even if there is a finding that the unlawful acts reflect negatively on moral character, the adjudicator must still give the applicant an opportunity to show extenuating circumstances. The extenuating circumstances must directly relate to commission of the unlawful act and not to the later consequences of the act.

Some examples of extenuating circumstances that have been upheld by courts in the context of commission and conviction for unlawful acts have included: an applicant's first and only conviction for driving under the influence resulting from familial stress induced by the applicant mother's illness and death as well as the separation from his wife and child;[125] and a conviction for failing to report over $90,000 in cash that was hidden in an ice chest when crossing

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there are multiple DUI convictions). Another example includes unlawful harassment. *Sabbaghi v. Napolitano*, No. C08-1641Z, 2009 U.S. Dist. LEXIS 115861, *16–17 (W.D. Wash. Dec. 11, 2009) (non-citizen attempting to establish good moral character could not where, within five years before his application, he was found by a state court to have engaged in unlawful harassment which had resulted in an anti-harassment protective order against him).

[124] The Ninth Circuit considered a challenge to the constitutionality and validity of the unlawful acts non-statutory basis for denying good moral character in *United States v. Dang*, 488 F.3d 1135 (9th Cir. 2007). A woman, who was subject to denaturalization proceedings for commission of unlawful acts during the statutory good moral character period for which she was later convicted and imprisoned, argued that this unlawful act regulatory provision is *ultra vires* to INA § 101(f). Specifically, she argued that because 101(f) already provides statutory bars to proving good moral character for those who are convicted of or admit to committing certain offenses during the statutory period, Congress prohibited adverse good moral character findings based on conduct underlying convictions that occurred outside of the five-year period. The Ninth Circuit rejected this argument and found the regulation valid in light of a plain reading of the statute. The court reasoned that because 101(f) includes a catch-all category that specifically allows the agency to consider other reasons to deny good moral character, it was permissible for the agency to expand this list of acts to include others, both legal and illegal. The Ninth Circuit in this case also considered other challenges to the unlawful acts regulation including being void for vagueness, being impermissibly overbroad, and running afoul of the Uniformity Clause of the Constitution. The court rejected all of them. It appears that the extreme facts of the case (convictions of arson, fraud, and willful injury of child as a result of intentionally burning herself and her four month year old son with the specific intent to defraud her insurance carrier) significantly influenced the court's decision.

[125] *Ragoonanan v. USCIS*, No. 07-3461, 2007 U.S. Dist. LEXIS 92922 at *11–12 (D. Minn. Dec. 18, 2007) (unpublished).

the border about which the applicant explained that he was unaware of reporting requirements, had legally acquired the money, and planned to exchange it in Mexico then use it to buy a new car for his extended family and host a baptismal party for his infant son.[126] These extenuating circumstances were considered alongside the positive equities of the applicants.[127]

It is important to note again that in any instance when CIS denies naturalization due to a lack of good moral character based on acts that are not specifically listed in INA § 101(f) (such as the case with "unlawful acts"), CIS must first check to see if there were any extenuating circumstances involved in the applicant's negative actions, but also CIS should still conduct a balance test balancing the negative factors involved in the applicant's character against the positive factors before denying the application.[128]

Advocates should warn their clients that they risk being denied naturalization if they have committed unlawful acts at any time during the statutory period, up to and including the period between the filing of the application and the oath of citizenship. Advocates should also warn their clients of the risks of denaturalization if the unlawful act is committed during the statutory period (including the period between the naturalization interview and the oath ceremony) and is not disclosed, but is discovered by CIS after the applicant becomes a U.S. citizen, even if no conviction ever results or if the conviction occurs long after naturalization has been granted.[129]

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[126] *Angel v. Chertoff*, No. 07-cv-168, 2007 U.S. Dist. LEXIS 78084 at *15–16 (S.D. Ill. Oct. 22, 2007) (unpublished).

[127] In *Ragoonanan*, *supra* at *12–13, the District Court considered that this was the applicant's first and only arrest and conviction in the U.S., he was found to be a good employee, committed to but missed his family, an owner of property, involved in the community, honest and forthright regarding the offense, and willing to take responsibility. In *Angel*, *supra* at *13, the District Court considered that this was the only criminal conviction on his record in the 30 years he had been in the U.S. and he had a stable marriage and home life, established a thriving business, and paid all of his taxes.

[128] See, e.g., *Torres-Guzman v. INS*, 804 F.2d 531, 534 (9th Cir. 1986); *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 365 (BIA 1991) (evaluating good moral character involves evaluating "both favorable and adverse" evidence); *Matter of B-*, 1 I&N Dec. 611, 612 (BIA 1943) (regarding good moral character, "We do not think it should be construed to mean moral excellence, or that it is destroyed by a single lapse. Rather we think it is a concept of a person's natural worth derived from the sum total of all his actions in the community.")

[129] *Mwalumba*, *supra* (holding that the defendant's previously accorded naturalization would be revoked, because he had committed criminal acts prior to filing his naturalization application, even though he was not prosecuted and convicted until after he became a naturalized citizen); *United States v. Lemos*, No. 08 Civ. 11144, 2010 WL 1192095 (S.D.N.Y. 2010) (defendant's conviction for illicit trafficking in a controlled substance constituted such a felony, and he illegally procured naturalization since he had been statutorily barred for this benefit when he received it); *United States v. Okeke*, 671 F.Supp.2d 744. (D. Md. 2009) (revoking the defendant's naturalization because he procured his naturalization by concealing material facts concerning his criminal conduct, since his sexual battery offenses against a minor, which resulted in convictions after the naturalization was granted but were committed before his swearing-in ceremony, constituted crimes that would have statutorily barred him from naturalization); *Jean-Baptiste v. United States*, 395 F.3d 1190 (11th Cir. 2005) (commission of conspiracy to distribute crack cocaine during statutory period negated good moral character and was basis for denaturalization regardless of the fact that it ultimately resulted in a conviction a year after the oath of allegiance); *United States v.*

3. The effect of being on probation or parole

Individuals who were on *probation or parole* or a suspended sentence during all or part of the statutory five or three year period should not be automatically disqualified from establishing good moral character.[130] However, the applicant must ensure that she is not still on probation or parole by the time of the naturalization interview or else she will be denied naturalization.[131] In practice, this means that a person who is or has been on probation or parole within the last three or five years can file a naturalization application, but should be prepared to present additional evidence showing good moral character to offset any bad implication CIS might make of the probation or parole based on the balance test for determining good moral character.[132] You should be aware that if the person is on probation or parole during the statutory period, it gives CIS even more reason to look back at the underlying criminal conduct outside of the period to see whether or not the person is of good moral character. CIS might decide to deny the application in its discretion based on the probation/parole, and the person then would have to re-apply for naturalization at a later time. Based on all of these considerations, sometimes (but certainly not always) it may be best to wait until the individual has not been on probation or parole at all during the statutory period before applying for citizenship.

In instances where someone has been on probation or parole for some of the statutory period, but at the time of the naturalization is not on probation or parole any longer, CIS should still conduct a balance test balancing the negative factors involved in the applicant's character against the positive factors before denying the application.[133]

Lekarczyk, 354 F.Supp.2d 883 (W.D. Wis. 2005) (defendant who committed bank fraud, forgery, and bail jumping during statutory period and was not convicted until 6 and 7 years later after taking the oath of allegiance subject to denaturalization because they adversely affected his good moral character and he failed to provide any evidence of extenuating circumstances at the time).

[130] 8 CFR § 316.10(c)(1). See also *INS Interpretations* 316.1(f)(4); *Ragoonanan v. USCIS*, No. 07-3461, 2007 U.S. Dist. LEXIS 92922 at *9 (D. Minn. Dec. 18, 2007) ("… [T]he regulations do not direct that naturalization must be denied when a candidate applies while on probation, but rather direct that the 'application will not be *approved*' until probation is completed."); *Angel v. Chertoff*, No. 07-cv-168, 2007 U.S. Dist. LEXIS 78084 at *12 (S.D. Ill. Oct. 22, 2007) (in rejecting CIS' per se denial of an naturalization application of an applicant on parole, the Court stated that CIS would have exceeded its authority if the regulation was either a per se good moral character bar for those on probation or parole or a statutory requirement that the person complete any period of probation or parole before he can be naturalized); *Matter of Gantus-Bobadilla*, 13 I&N Dec. 777 (BIA 1971); *Petition of Sperduti*, 81 F. Supp. 833 (W.D. Pa. 1949); *In re Paoli*, 49 F. Supp. 128 (N.D. Cal. 1943). But see *In re McNeil*, 14 F. Supp. 394 (N.D. Cal. 1936) (good moral character precluded if on parole during statutory period).

[131] 8 CFR § 316.10(c)(1). But see *Angel*, *supra*. See, e.g., *United States v. Rebelo*, 646 F.Supp.2d 682 (D.N.J. 2009) (where the defendant was on probation when he naturalized but because 8 CFR § 316.10(c)(1) disqualifies one from naturalization while the individual is on probation, he was subject to denaturalization).

[132] *Angel*, *supra* (treating the fact that applicant was currently on probation as just one factor among many in the good moral character balance test).

[133] See, e.g., *Torres-Guzman v. INS*, 804 F.2d 531, 534 (9th Cir. 1986); *Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991) (evaluating good moral character involves evaluating "both favorable and adverse"

D. The Commission of Other Acts That Typically Cause a Lack of Good Moral Character: Receipt of Public Benefits Where Fraud Is Involved, Willful Failure to Register for Selective Service and Failure to File Taxes

CIS can deny naturalization for a number of other acts that are not enumerated in the CIS regulations including a failure to demonstrate good moral character due to receiving public benefits where fraud is involved, willful failure to register for the selective service, and/or failure to file one's tax returns. In these cases, CIS must still use a balance test in which the negative factor(s) showing that the naturalization applicant lacks good moral character outweighs the positive factor(s) showing that the applicant has good moral character. See **§ 6.4 A** and **B** above for a full explanation of the balance test.

1. Receipt of public benefits

Receipt of public benefit has a negative effect on good moral character *only if fraud is involved.* However, some CIS offices might incorrectly use receipt of public benefits as a basis for refusing to find good moral character. This is against CIS national policy and should be challenged aggressively. **Appendix 6-E** contains a sample CIS Memorandum explaining the Los Angeles CIS office's position on how the receipt of public benefits affects good moral character. This memo explains the same policy that we think all CIS offices should adopt and probably have adopted.

In San Francisco, advocates were able to convince naturalization authorities to change their policy regarding receipt of public benefits as a basis for denial. For an example of a legal argument, see **Appendix 8-K**, a sample letter in response to an INS denial based partly on the basis of receipt of public benefits.

2. Failure to register for the selective service

Since 1980, all young men between the ages of 18 and 26 have been required to register for the military with Selective Service, including men without lawful immigration status. Not only do U.S. citizens and lawful permanent residents have to register for the Selective Service, but any male refugee, asylee, parolee or undocumented immigrant who is in the U.S. and is between the ages of 18 and 26 must also register.[134] Note however, that an individual who entered the U.S. on a non-immigrant visa (under INA § 101(a)(15)) and who remained a non-immigrant through the age of 26 is not required to have registered. Also, any male who entered the U.S. after the age of 26 is not required to have registered.

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evidence); *Matter of B-*, 1 I&N Dec. 611, 612 (BIA 1943) (regarding good moral character, "We do not think it should be construed to mean moral excellence, or that it is destroyed by a single lapse. Rather we think it is a concept of a person's natural worth derived from the sum total of all his actions in the community.")

[134] The Military Selective Service Act is found at 50 USC App. § 460, et seq.

A 1987 INS memorandum stated that failure to follow this law will be evaluated as evidence of bad moral character.[135] Many CIS offices have followed the memorandum and instituted a policy of giving men between 18 and 26 years of age, who have not registered, the opportunity to register before their naturalization application is denied. For men 26 to 31 years of age who should have registered but did not, the Immigration Service adjudicators would evaluate whether their failure to register with Selective Service was willful or knowing or whether they did not understand or know that they had a duty to register. Men who were over 31 years old (or over 29 if applying for naturalization as the spouse of a U.S. citizen) and who failed to register did not generally face consequences from failing to register.

However, some CIS offices refused to accept applicants' explanations regarding why they had failed to register for Selective Service and instead had a policy of blanket denials for anyone who had not registered. These blanket denials were arguably illegal. The Federal Selective Act *requires* that no one be denied a federal right or benefit if he shows by preponderance of the evidence that his failure to register for Selective Service was not knowing or voluntary.[136]

In 1998 and 1999 opinions, the INS offered further information about the effect of failure to register. See **Appendix 6-F**, INS memorandum on Effect of Failure to Register for Selective Service on Naturalization Eligibility, Yates (June 18, 1999) and INS memorandum presenting the opinion of INS General Counsel Paul W. Virtue (April 27, 1998). Both of these memos state that failure to register for Selective Service bars naturalization only if the applicant refused or knowingly and willfully failed to register. INA § 316(a) mandates that an applicant must demonstrate that he possesses, and has possessed for the statutory period, good moral character; is attached to the principles of the U.S. Constitution; and is well disposed toward the good order and happiness of the United States.[137] Moreover, INA § 337(a)(5)(A) requires applicants to declare under oath their willingness to bear arms on behalf of the United States when required by law. Consequently, the 1999 INS memo provided that "INS will find an applicant ineligible for naturalization on account of failure to register for Selective Service if a male applicant refuses to or knowingly and willfully failed to register during the period for which the applicant is required to establish his disposition to the good order and happiness of the United States, [which] coincides with the more familiar good moral character period."[138] Whether a male applicant refused to or knowingly and willfully failed to register during the required period depends on the

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[135] See memorandum entitled, "Eligibility for naturalization of persons who fail to register under the Military Selective Service Act," sent to all CIS offices on July 22, 1987 by the INS Associate Commissioner for Examinations, reprinted in 64 *Interpreter Releases* 921 (Aug. 10, 1987), hereafter referred to "INS Memorandum." See also Letter from R. Michael Miller to Robert F. Belluscio, Esq., dated October 19, 1987, reprinted in 64 *Interpreter Releases* 1330 (Nov. 23, 1987), hereafter referred to as "INS Letter."
[136] 50 USC App. § 462(g).
[137] Yates, Policy Memorandum No. 52, *Effect of Failure to Register for Selective Service on Naturalization Eligibility* (June 18, 1999), available at www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-33844.html.
[138] *Id.*

applicant's age. The memos examine three different time periods and give officers instructions on how to evaluate cases.

From ages 18 to 26, men are required to register for the draft unless they are in the U.S. on non-immigrant visas. The memos state that the Immigration Service is justified in denying naturalization applicants of this age only after providing them with an opportunity to register and in response, the applicant still refuses to register. The decision denying the application must specify that the applicant refused to register even after being provided an opportunity to do so, and so the applicant is not eligible to naturalize because he is not well disposed to the good order and happiness of the United States.[139]

From ages 26 to 31, if the failure to register for Selective Service still occurred within the statutory period (that is, the last five years for most naturalization applicants and three years for those applying as the spouse of a U.S. citizen), CIS can deny naturalization based on the failure. The memos state that CIS can presume that the failure to register was knowing or willful, *unless the applicant shows otherwise* by a preponderance (majority) of the evidence. Therefore, the applicant has the burden of proof to show that either he was not required to register or that he did not knowingly and willfully fail to register.

Generally, applicants who are in this age range at the time of filing and who do not show a letter of registration with the Selective Service will be requested to do so. This means that the applicants will have to obtain status information letters from the Selective Service System before CIS can conclude that there was a failure to register. Once the failure to register is established, then CIS must determine whether or not it was knowing and willful. CIS must continue the examination to give the applicant an opportunity to show that it was not knowing and willful and it must consider all persuasive evidence pertaining to the failure to register. The 1999 memo also states that, at a minimum, CIS must "take a statement under oath from an applicant in order to determine whether or not failure to register was knowing and willful." (It is the ILRC's view that if the applicant's failure to register was not willful, but was because he did not know about the requirement or sincerely believed that it did not apply to him, he must bring in evidence to prove this fact to CIS. This could include his testimony, the testimony of others who know him, or other evidence. Many CIS examiners will accept the applicant's testimony as sufficient to demonstrate he didn't willfully and knowingly fail to register.) However, if the applicant cannot demonstrate that his failure to register was not knowing and willful, then his application must be denied for "failure to demonstrate during the requisite period before filing his application that he was well disposed to the good order and happiness of the United States."[140]

After age 31, the test changes again. First, if CIS finds that failure to register was not knowing and willful, there should not be a problem. Second, even if the failure to register was knowing and willful, it is not an absolute bar because it is outside the five year (or three year) statutory period. While the agency can consider bad conduct outside the five years, it must

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[139] *Id.*
[140] *Id.*

explain specifically why it does so. Additionally, if CIS has other evidence that the applicant does not have good moral character, is not attached to the principles of the Constitution of the United States, and/or is not well disposed to the good order and happiness of the United States, CIS could deny the application when viewing these factors with the failure to register. According to the memos, under no circumstances should the failure to register be considered a permanent bar to naturalization.

a. Willful failure to register

Most applicants who failed to register with the Selective Service probably just did not know that they were required to register. CIS offices continue to have different standards for determining whether failure to register for Selective Service was knowing and therefore "willful." For example, in some district offices CIS adjudicators generally will accept an applicant's statement that he did not know he was supposed to register and will ask him to fill out a form affidavit to that effect.[141] In other district offices, examiners generally will not accept an applicant's statement that he did not know he was supposed to register for the draft. Additionally, if there is evidence in the person's file that CIS told him of the Selective Service requirement in his own language the officer might deny the application.

In a federal district court case in California[142] the court found that an applicant who has failed to register has the burden to prove by a preponderance of the evidence that: (1) he possessed neither actual or constructive[143] knowledge of the Selective Service registration requirement; and (2) he did not have the intent to fail to register by producing evidence negating this intent such as evidence that he made a good faith attempt to comply with the Selective Service requirement before the age of 26 if it was possible in the case.[144] This is a high burden for many clients to meet. Although CIS does not have to follow this case because it is not a federal circuit court case, it could provide guidance for CIS in some offices in the future. You should check legal standards in your jurisdiction.

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[141] Some offices also require that applicants submit a registration even if no longer eligible to register. A copy of the notice sent to males registering after reaching the age of 26 is included in Appendix 6-G.
[142] *Patel v. Still*, No. C04-0138, 2005 WL 1910926 (N.D. Cal. Aug. 10, 2005) (unpublished).
[143] "… [K]nowledge can be inferred if the evidence shows that the person had information that would lead a reasonably prudent person to inquire as to the facts, despite a lack of evidence that the person had actually inquired and learned the facts … [and] by circumstantial evidence relating to a party's conduct or activities." *Id.* at 4–5.
[144] The burden was not met in *Patel* because the applicant had actual knowledge of the requirement. He signed a notice of duty to register at a visa interview abroad and orally acknowledged that he understood the requirement. At the time of applying for naturalization, he had the opportunity to inquire about the requirement mentioned in the application and to review the requirement in the INS booklet in preparation for the test. He also received and read a notice from the INS stating that he must bring evidence of Selective Service registration to his interview. Further, he waited over five years to register despite numerous reminders.

Many CIS offices assert that all permanent residents are warned, in a manner that they can understand, of the requirement at the time they gain permanent residency. For example, special rules applied to some persons applying under the "amnesty" programs of the 1980's.[145] Some CIS examiners argue that therefore all failures to register by permanent residents are knowing and willful. These officers may insist that even if the person did not understand such a warning, the person should have understood and should be penalized.

The question, however, should be whether *the individual person actually understood the requirement.* A person's statement that he did not understand the requirements should contain details about the applicant's own experience and feelings and not just be a "boilerplate" statement. In all cases the applicant should be prepared to explain in detail why he did not believe he had to register. For example, if the applicant attended high school in the U.S. and heard of the requirement, but thought that it did not apply to undocumented or permanent resident aliens, he should be ready to discuss that. If his immigration record states that he was informed of the requirement when he immigrated, but he does not remember this or did not understand it, he should be ready to discuss any limitations in terms of understanding English or of literacy he had at that time. We suggest that naturalization applicants who may be affected by this (males between 26 and 31 who did not register) and who live in an CIS jurisdiction that is strict about accepting the applicant's statement as to why he failed to register for the Selective Service, should file a FOIA (Freedom of Information Act) request with CIS to review the person's CIS file. If there is some written record of a warning in the applicant's native language, this will give the applicant time to think about the warning and remember if in fact he understood the warning, and if not, why not. Instructions for filing a FOIA request are at **Appendix 7-B**.

b. Legal objections to the policy

It is the ILRC's opinion that the CIS policy on failure to register for the Selective Service has some flaws. First, we assert that even if the person failed to register within the statutory period (that is the previous five years for most applicants, or three years for those applying as the spouses of a U.S. citizen), e.g., if the applicant is still between the ages of 26 to 31, CIS cannot deny naturalization without first applying a balance test and give the applicant the opportunity to show positive equities. Even if the person admits or CIS decides that the person did "willfully" fail to register, this should not mean an automatic denial of the application. CIS, as in all good moral character cases in which the applicant doesn't fall within one of the statutory bars to good moral character, must weigh evidence of bad moral character against evidence of good moral character.[146] The person must be permitted to attempt to offset the "bad act" of willful failure to

[145] People who became permanent residents under the amnesty or legalization program because they lived here since before 1982 were required to register for Selective Service to qualify for amnesty and the question appeared on the amnesty form. Persons who gained amnesty through the SAW program because they were farmworkers were not required to register as a condition of getting amnesty, and the question did not appear on their application forms.

[146] See *Torres-Guzman v. INS*, 804 F.2d 531, 543 (9th Cir. 1986); *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 365 (BIA 1991); *Matter of B-*, 1 I&N Dec. 611, 612 (BIA 1943). See discussion and footnote in Part A of this section.

register with the "good acts" of stable employment, support of family, participation in church or civic activities, and other evidence of good moral character.

> **Example:** Carlos walks into the office of Araceli Advocate and tells her that he wants to apply for naturalization. He is 30 years old and has been a lawful permanent resident for 5 years. In the course of explaining the requirements for naturalization and answering his questions, Araceli informs Carlos of the Selective Service requirements. She tells Carlos that one of the questions on the naturalization application asks whether he has ever failed to comply with the Selective Service laws.
>
> Araceli tells Carlos that if he knew about having to register with the Selective Service and didn't register, then he probably will be denied naturalization, most likely on the basis that he lacks good moral character. Araceli also tells Carlos that if he didn't register because he didn't know he was required to register, then CIS shouldn't automatically deny his application for naturalization, but that he should be prepared to explain to CIS why he didn't register, and why he does have good moral character.[147] Carlos then explains that he came to the U.S. when he was 24 years old, but that he didn't register because he never knew that he was required to do so. He tells Araceli that had he known, he would have registered.
>
> Note that if Carlos were instead currently between the ages of 18 and 26 and had not registered, you should encourage him to immediately register at the nearest post office.

When the applicant is over 31, it has been more than five years since the applicant failed to register, and thus, CIS should not deny naturalization solely on the basis of conduct outside this five-year period. Yet, assuming there are other negative factors in the applicant's case that occurred within the last five years, if one failed to register more than five years ago, the failure to register will still be considered a negative factor in the discretionary balance test.[148] Similarly, for someone applying as the spouse of a U.S. citizen when the person is over 28 and it has been more than three years since the applicant failed to register, CIS should not deny naturalization solely on the basis of conduct outside this three year period. Please note that even if someone applying for naturalization under the three-year rule (see **Chapter 5**) failed to register more than three years ago, the failure to register is still considered a negative factor in the discretionary balance test, only assuming there are other negative factors in the applicant's case that occurred within the last three years.

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[147] See *Interpreter Releases*, November 23, 1987, Appendix V, where the INS Deputy Assistant Commissioner for Adjudications states that "failure to register, as required by the Military Selective Service Act, does not constitute an automatic denial recommendation, but will alert the [INS] Naturalization examiner to closely scrutinize the applicant's good moral character, or lack thereof, and his attachment to the principles of the Constitution."
An applicant should be prepared to give an explanation for his failure to register because CIS usually raises the issue. The applicant should also be prepared to show why, despite his failure to register, he still has good moral character.

[148] See § 6.5(a), "Balancing the Good and the Bad."

PRACTICE TIP: If you have any questions regarding the requirements for registering with the Selective Service, or if you want to ask a question about a specific person, you can contact the Selective Service Systems at: PO Box 94638, Palatine, Illinois, 60094-4638 or by calling 1-847-688-6888. You can also visit them on the web at www.sss.gov.

4. Failure to file taxes

CIS considers failure to file income taxes evidence of lack of good moral character. Therefore, if a person has failed to file income taxes in the five years preceding his or her application for naturalization, proving good moral character will be an issue.[149] Anyone who has knowingly provided fraudulent information on his income tax returns, for example, by underreporting, will have difficulty showing he is a person of good moral character.[150]

a. Not everyone is required to file income taxes

Individuals who make under a certain amount are exempt from having to file taxes. The amount varies from year to year. Therefore, applicants must verify with the Internal Revenue Service (IRS) or a tax expert whether their earnings were below the threshold for a given year. An applicant who was exempt from filing taxes should indicate that he has not failed to file income taxes on his application for naturalization. Some jurisdictions require applicants to bring proof of tax filing to the interview. Therefore, applicants who were exempt from filing should bring proof of their exemption in lieu of tax filing records.

b. What applicants who failed to file taxes can do

Applicants should strongly consider filing late taxes and making arrangements with the IRS to pay any past due taxes. The applicant also should be ready to offer a reasonable

[149] *Sekibo v. Chertoff*, No. H-08-2219, 2010 U.S. Dist. LEXIS 52801 at *10 (S.D. Tex. May 26, 2010) (applicant failed to file federal tax returns during the five years preceding his application for naturalization, and he did not acknowledge this failure on his naturalization application or during his interview with CIS, leading to a denial); *El-Ali v. Carroll*, 83 F.3d 414 (4th Cir. 1996) (unpublished table decision); *Gambino v. Pomeroy*, 562 F. Supp. 974 (D.N.J. 1982).

[150] *Sumbundu v. Holder*, 602 F.3d 47, (2d Cir. 2010) (denying applicants' cancellation applications based on a finding that they lacked good moral character due to underreporting of their income on their tax returns); *Matter of Locicero*, 11 I&N Dec. 805 (BIA 1966) (person who fraudulently understated his income in two tax returns to avoid payment of a substantial sum in U.S. income taxes was not a person of good moral character). But see *Lora v. USCIS*, No. 05 CV 4083, 2007 U.S. Dist. LEXIS 28523 (E.D.N.Y. Apr. 18, 2007) (rejecting government's argument that Lora was not a person of good moral character because he underreported his income on his tax returns and falsely claimed charitable deductions on his returns, finding instead that while Lora's unemployment compensation was not reported and he could not present the requisite back up for his charitable contribution deductions, he, nonetheless, relied in good faith on the tax preparers in filing his returns).

explanation why he or she failed to file taxes. CIS is more likely to overlook a failure to file if the person has made efforts to correct the situation. Ultimately, whether or not corrective action will be sufficient to avoid an adverse finding of good moral character depends on local district policy and the specifics of the case.[151]

Advocates should be aware that tax evasion is a crime.[152] Anyone who has not paid his or her taxes or has not filed a tax return may need to be referred to a tax expert. Moreover, a conviction for violating the federal tax laws has been found to be crimes of moral turpitude rendering the person susceptible to deportation.[153] Even without a conviction, tax evasion can also be a statutory bar to establishing good moral character if it occurred within the statutory period and the person admits to these violations. See **Appendix 6-D**, **§ 1.4**.

c. Filing for non-resident status

Although rare, some individuals file non-resident status forms to avoid tax liability. An applicant who is a lawfully admitted permanent resident of the United States, but who voluntarily claims nonresident alien status to qualify for special exemptions from income tax liability, or fails to file either federal or state income tax returns because he or she considers himself or herself to be a nonresident alien, raises a rebuttable presumption that the applicant has relinquished the privileges of permanent resident status in the United States. In such a case, the naturalization applicant must consult with an immigration law expert. See 8 CFR 316.5(c)(2) and **Chapter 5** for a discussion of abandonment of lawful permanent resident status.

E. Unlawful Voting and False Claims to U.S. Citizenship

Unlawful voting and false claims to U.S. citizenship also can be negative factors in the good moral character determination. This could be the case even without a conviction for unlawful voting or making a false claim to U.S. citizenship. Please see a more complete discussion of these topics in § 6.9, Non-Citizen Voting, and § 6.10, False Claims to U.S. Citizenship. Also, be aware that both unlawful voting and false claims to citizenships can cause the applicant to be deportable. See §§ 6.9 and 6.10.

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[151] Some CIS offices may require applicants to have paid back any past-due taxes before being allowed to naturalize. Other districts only require that the person have a payment arrangement with the IRS and that the applicant is abiding by the payment plan. In some districts, a willful failure to file or pay taxes during the statutory period may result in CIS finding the person to lack good moral character.

[152] 26 USC § 7206(1).

[153] *Matter of W-*, 5 I&N Dec. 759 (BIA 1954) (tax evasion); *Carty v. Ashcroft*, 395 F.3d 1081 (9th Cir. 2005) (holding willful failure to file state income taxes was a CIMT); but see *Matter of R-*, 4 I&N Dec. 176 (tax evasion under German law was not a CIMT where statute had no intent to defraud).

§ 6.5 Dealing with Clients Who May Have a Criminal Record -- Obtaining Records

You can see from the list of automatic bars under INA § 101(f) that the most common reason for which people are disqualified from establishing good moral character is that they were involved in some sort of criminal activity. Therefore, the topic of arrests and convictions is an important one to raise with naturalization clients.

If your client has had a criminal history, several steps should be taken. First, someone must gather as much official information as possible about the incident. The client can go to the court where she made her appearance and request the court record, i.e., the documents showing the charges and outcome of her case. If there is any possibility that a conviction occurred, you should run both an FBI check and a check with the state's Justice Department to clarify the information. The forms necessary to do the check with the FBI and with the California Department of Justice can be found at **Appendix 6-A**.

Next, you should research or consult with an expert to find out if the particular crime(s) involved will trigger deportation for your client. For more information on this issue and for a list of resources refer to the ILRC Manual, *Defending Immigrants in the Ninth Circuit* or materials on the law of your state. To access online resources on criminal and immigration law join www.defendingimmigrants.org and www.immigrationadvocates.org and see the resources in the library.

Finally, if the crime does not trigger deportability, determine whether it is one of the crimes that will automatically disqualify your client from showing good moral character. You can begin with the list in § 6.3.A. If the crime is one that will disqualify your client from establishing good moral character find out if there is any argument that the statutory bar does not apply including whether there is an immigration exception. If not, you may have to advise your client to wait until the statutory period in which the crime occurred to pass before applying for naturalization.

Too often applicants do not share information about their criminal history and other personal facts because they do not think it is important, do not know the consequences of such acts, or do not know (because of confusion surrounding the proceedings) that they were actually convicted of a crime. This makes client education on these issues critical. They need to know that even arrests without convictions and minor criminal offenses, such as petty theft, could possibly bar them from becoming U.S. citizens and have even worse consequences, such as deportation. The advocate has to take the responsibility to share this information with clients and together determine which, if any, bars apply to them and what action to take. For a sample of a flyer in English and Spanish which explains some of the grounds for which applicants can be denied naturalization, please see **Appendix 6-C**.

Remember that a person who may not be able to meet the good moral character requirement now may be able to do so at some time in the future. In those cases, the prospective applicant may wisely choose to wait a while before seeking naturalization.

§ 6.6 Temporary Ineligibility to Naturalize

Many applicants choose to wait before pursuing naturalization because they have a better chance of establishing good moral character at a future time. In that sense, the good moral character requirement is properly viewed as a temporary bar to naturalization. Other temporary preclusions are discussed in this section.

CIS is not authorized to naturalize a person who has an outstanding **deportation or removal order** against her or also a person who has a deportation or removal proceeding pending at the time she applies for naturalization.[154] Although an Immigration Judge is not authorized to grant naturalization, he or she can terminate removal proceedings once certain requirements are met to allow an otherwise eligible naturalization applicant to proceed with naturalization.[155] See § 6.8(E)(1) and **Chapter 11** for a more thorough explanation of this topic.

People who have been involved in certain **political activities** in the ten years before applying for naturalization are also barred from citizenship.[156] For example, people who have advocated anarchism or totalitarianism cannot be naturalized. A person who is or has been a member of or affiliated with the Communist Party in the ten years before submitting her application is also barred from citizenship. People participating with certain other political groups are also affected by this ten-year ban.[157] INA § 313 must therefore be reviewed carefully.[158]

The ten-year bar has an important exception. Naturalization is not precluded if (1) the applicant participated in the prohibited activity involuntarily; (2) the prohibited activity occurred and terminated before the applicant reached 16 years of age; (3) the membership was by operation of law; *or* (4) she had to participate so that she could get food, a job, or other necessities.[159]

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[154] INA § 318. However, the argument has been made that while INA § 318 forbids the Attorney General from considering a naturalization application while removal proceedings are pending, it does not preclude the courts from exercising jurisdiction to review denials of naturalization applications when removal proceedings are pending. See *Gonzalez v. Napolitano*, 684 F.Supp.2d 555 (D.N.J. 2010); *Kestelboym v. Chertoff*, 538 F.Supp.2d 813 (D.N.J. 2008). For more information, please see Chapter 11, § 11.3.
[155] 8 CFR § 1239.2(f).
[156] INA § 313. Note that the Ninth Circuit has held that a naturalization applicant cannot refuse to answer questions pertaining to his organizational affiliations. *Price v. INS*, 962 F.2d 836 (9th Cir. 1992).
[157] INA § 313(c).
[158] Note that the prohibition on certain political activities not only addresses activities during the ten years prior to the filing of the naturalization application, but also creates bars to naturalization for individuals who engage in these political activities after filing the application and before taking the oath.
[159] INA § 313(d).

§ 6.7 Permanent Ineligibility to Naturalize

Certain actions, mostly connected with military service, can make a person permanently ineligible for U.S. citizenship.[160] (Note that these are different from simple failure to register for selective service, discussed above.) Discussed in the next section are convictions for certain offenses that are permanent bars to establishing good moral character and thus make a person permanently ineligible for naturalization.[161]

Deserters from the armed forces and draft evaders are permanently ineligible to become U.S. citizens.[162] In order to be barred from citizenship under this section, the desertion or draft evasion must have occurred (or will occur) when the United States has been or shall be at war and there is a conviction by a court martial or other court.[163]

Some draft dodgers and draft deserters are permanently ineligible for citizenship under another section.[164] The ineligible group is very small. It includes only people who requested an exemption from compulsory service in the U.S. armed forces on the ground of being an alien, or people who deserted the U.S. armed forces during the period 1971–1973, World War II, and during other conflicts.[165] Note that the amnesty given by President Jimmy Carter to individuals who avoided the draft during the Vietnam War also protects eligible aliens from this exclusion.

A person who has applied for and received certain exemptions from compulsory, but not voluntary U.S. military service based on being an alien is also permanently ineligible for citizenship.[166] Keep in mind that while many different kinds of exemptions from military service are available, only a few of them bar a person from citizenship. Ask your client carefully what kind of exemption he received, and talk to a draft counselor if you are not certain what immigration consequences are involved.

In addition, some people who received an exemption from military service may still be eligible for naturalization. The Ninth Circuit held that a person who is exempted or discharged on the basis of voluntary service as opposed to compulsory service is not barred from

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[160] Permanent bars are discussed at INA § 101(a)(19).
[161] See § 6.8(B) for a discussion of aggravated felonies, which may also create permanent ineligibility to naturalize. Note also that under 8 CFR § 316.10(b)(1), anyone who has ever been convicted of murder cannot establish good moral character.
[162] INA § 314.
[163] INA § 314.
[164] INA §§ 212(a)(8), 314, and 315.
[165] See, e.g., *Cernuda v. Neufeld*, 307 Fed.Appx. 427 (11th Cir. 2009) (non-citizen filed an Application by Alien for Relief from Training and Service in the Armed Forces with his local Selective Service office, which was accepted, but the court found that while he could be a permanent resident, he would never be eligible for naturalization).
[166] INA § 315; *Gallarde v. INS*, 486 F.3d 1136 (9th Cir. 2007) (holding that INA § 315 bars citizenship for only those who request and receive exemption, relief, or discharge from liability for the draft and not those who request early release from voluntary military service).

naturalizing.[167] A person might also still be eligible for citizenship if: (1) at the time of the exemption the person was not bound by law to serve;[168] or (2) the person did not knowingly request the waiver nor understand the results of the exemption.[169] Although there has not been a draft in the U.S. in many years, make sure your clients do not fall into any of the above categories.

§ 6.8 Deportability Issues

A. Grounds of Deportation

If a naturalization applicant is deportable, DHS may decide to deny naturalization, place the person into removal (formerly deportation) proceedings, and "remove" (deport) the person. It is important for all advocates helping people apply for naturalization to have some familiarity with the grounds of deportation.

One way to discuss these grounds with naturalization applicants is to use a flyer describing the "Red Flag Areas." At a minimum, the advocate should help the applicant identify if any of the "red flags" might be a problem for her, and then find a referral if the advocate is not able to represent the applicant. Copies of this flyer in English, Spanish and Chinese are reprinted at **Appendix 2-B**. A more thorough overview of the grounds of deportation is provided at **Appendix 6-D**.

The grounds of deportability appear in INA § 237(a). A summary list of the grounds of deportability includes:

- Conviction of certain crimes.[170] This includes crimes with any relation to drugs or firearms; "crimes involving moral turpitude" (offenses that have as an element fraud, theft with intent to permanently deprive,[171] threat of great bodily injury, and in some cases lewdness, recklessness or malice); aggravated felonies; and other offenses.

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[167] *Gallarde*, *supra*.
[168] *INS Interpretations* 315.3(a).
[169] *INS Interpretations* 315.3(a)(5).
[170] INA § 237(a)(2).
[171] A conviction for theft will be a crime involving moral turpitude only when a permanent taking is intended. *Matter of V-Z-S-*, 22 I&N Dec. 1338, fn. 12 (BIA 2000); *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941) (temporary intent to deprive does not involve moral turpitude); *Matter of S*, 5 I&N Dec. 678 (BIA 1954) (theft involving permanent intent is a crime involving moral turpitude). Advocates should examine the offense to determine if it could be violated by temporary intent to deprive and thus might not be a CIMT. If, however, the theft offense by definition must involve permanent intent to deprive, the theft offense will be a CIMT.

- Conviction of domestic violence and child abuse:[172] Conviction of almost any offense that involves violence or the threat of violence against a person with whom the accused had a domestic relationship; conviction of an offense against a child that could be termed abuse, neglect or abandonment; a civil finding that the person violated a domestic violence protective order. (This applies to convictions, or behavior that violated the protective order, occurring on or after September 30, 1996.)

- Alien smuggling, which means helping or encouraging any alien to cross into the U.S. illegally, even if the person was not convicted for doing this. (There is a discretionary waiver for permanent residents who smuggled only their parent, spouse or child.)[173]

- Being the subject of a civil order finding that the person used false documents to get an immigration benefit (e.g., false social security number to get a job, fake papers to get a visa, completed an immigration form with misinformation).[174]

- Making a false claim to U.S. citizenship for any purpose or benefit under the Immigration and Nationality Act or any federal or state law (on or after September 30, 1996). [Note: there is a very limited exemption for individuals who were adopted by U.S. citizens and who believed that they were U.S. citizens because the adopting parents were U.S. citizens.][175] See discussion at § 6.10.

- Unlawful voting in violation of federal, state or local laws. [Note: Some of these laws require that the unlawful voting was *knowing*, as opposed to mistakenly thinking one was qualified to vote. Check the local law. In addition, there is a very limited exemption for individuals who were adopted by U.S. citizens and who believed that they were U.S. citizens because the adopting parents were U.S. citizens.][176] See discussion at 6.9.

- Having been a drug addict or abuser at any time since admission to the U.S.[177]

- Deportable for having been inadmissible when the person last was admitted to the U.S. Some permanent residents who took trips outside the U.S. may be subject to an even stricter standard if they had criminal convictions or wrongdoing before leaving the U.S.[178]

Please note: **Appendix 6-D** describes in more detail the grounds of deportability, how to obtain criminal records, and other information.

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[172] INA § 237(a)(2)(E).
[173] INA § 273(a)(2)(F).
[174] INA § 273(a)(3).
[175] INA § 237(a)(3)(D)(ii).
[176] INA § 237(a)(6)(B).
[177] INA § 273(a)(2)(B)(ii).
[178] INA § 237(a)(1).

Lying on a Naturalization Application or during an Interview May Trigger the Crime Involving Moral Turpitude Ground of Removal. Lying on a naturalization application or in an interview may not only be a basis to deny citizenship or cause denaturalization,[179] but if a conviction results it may also trigger the crime involving moral turpitude ground of deportation.

If someone lies on a naturalization application or in an interview, he may be found guilty of one of two federal offenses. *18 USC § 1546(a) criminalizes knowingly making a false statement of material fact in a naturalization application* and *18 USC § 1425 criminalizes "knowingly procur[ing], contrary to law," naturalization*. This latter offense requires that the person either knew he was not eligible for naturalization due to a prior act or prior criminal conviction, or knowingly misstated a material fact such as a criminal record on his application or in his interview.[180] If convicted of either crime, it may trigger deportation under the crime involving moral turpitude ground of deportation. One court has held specifically that a conviction under 18 USC § 1425(a) is a crime involving moral turpitude warranting deportation.[181] See **Appendix 6-D** for a discussion generally on the crime involving moral turpitude ground of deportation.

B. Aggravated Felonies

Anyone who has been convicted of an "aggravated felony" on or after November 29, 1990[182] is forever barred from showing good moral character,[183] and therefore is forever barred from naturalizing to U.S. citizenship. A person convicted of murder at any time is permanently barred from showing good moral character.[184] Even if the conviction is expunged (but not vacated for legal error) under state law, it remains an aggravated felony conviction and a bar to establishing good moral character.[185] Moreover, a person convicted of an aggravated felony is

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[179] Lying on either a naturalization application or in an interview most likely will bar naturalization. Lying under oath may trigger the false testimony under oath statutory bar (see above discussion on statutory bars to good moral character), other unlawful acts (see section above on this topic), or the discretionary bar to good moral character. Moreover, if it is later discovered that citizenship was illegally procured by lying on the application or in the interview, the person could be denaturalized.

[180] *Amouzadeh v. Winfrey*, 467 F.3d 451(5th Cir. 2006); *United States v. Pasillas-Gaytan*, 192 F.3d 864, 868 (9th Cir. 1999) (reversing the noncitizen's conviction under 18 USC § 1425 for stating in his naturalization application that he had never been convicted of any crime other than a motor vehicle infraction when he also had a second-degree theft conviction because it was not proven that he either knew he was not eligible for naturalization due to the theft conviction or that he knowingly misstated the fact since he said that his misrepresentation was an innocent mistake due to poor understanding of English and limited education).

[181] *Amouzadeh*, *supra* at *19.

[182] The date of conviction for purposes of this section is the date of "sentencing at the earliest, or the filing of a Judgment in a Criminal Case, which takes place soon after sentencing." *Puello v. Bureau of Citizenship and Immigration Services*, 418 F.Supp.2d 436, 438 (SD NY 2005).

[183] INA § 101(f)(8); 8 CFR § 316.10(b)(ii).

[184] INA § 101(f)(8); 8 CFR § 316.10(b)(i); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 306(a)(7) (murder is a permanent bar regardless of date of conviction); *Castilglia v. INS*, 108 F. 3d 1101 (9th Cir. 1997).

[185] *Phan v. Holder*, 667 F.3d 448, 454 (4th Cir. 2012); see also discussion in next section, § 6.8(C).

deportable and subject to severe penalties. Usually before CIS will even consider the naturalization application of someone who has been convicted of an aggravated felony, CIS will issue a Notice To Appear and place the applicant in deportation proceedings. One exception is in the Ninth Circuit where the court in *Ledezma-Galicia v. Holder*, 636 F.3d 1059 (9th Cir. 2010), found that the aggravated felony ground of deportation does not apply to convictions that occurred prior to November 18, 1988. Note, however, that such an individual could be deportable under a different criminal ground of deportability. For more information on aggravated felonies and the criminal grounds of deportability, please see Chapter 9 of the ILRC's manual entitled, *Defending Immigrants in the Ninth Circuit*.

WARNING: Anyone who is not an attorney with expertise in criminal/immigration laws should be referring clients with criminal convictions, and especially clients with aggravated felonies, to an immigration attorney with expertise in the immigration consequences of crimes. The penalties for conviction of an aggravated felony include, in *almost* all cases, automatic removal/deportation from the U.S., with no possibility of return. If the person was deported and then re-entered illegally after being convicted of an aggravated felony, the person is subject to up to 20 years in federal prison just for the illegal re-entry.

C. Effect of Post-Conviction Relief and Diversion Schemes

1. Expungements and other rehabilitative relief

Different states have different ways that a person may be able to "erase" his or her record of conviction to get a clean criminal record through expungements or deferred adjudication, even if there was no legal error in the conviction. These are known as forms of "post-conviction rehabilitative relief." Rehabilitative relief is a dismissal of charges generally for the successful completion of probation or other program. In 1999 the BIA ruled that many types of state court proceedings erasing a conviction as rehabilitative relief would no longer be accepted for immigration purposes and thus the convictions would remain valid for immigration purposes.[186] This ruling was upheld by almost all Circuit Courts of Appeal.

A very limited exception applies in the Ninth Circuit only. A conviction entered before July 14, 2011 for a first offense for simple possession of a controlled substance which is later erased or dismissed under state rehabilitative relief will no longer be a conviction for immigration purposes.[187] Offenses that qualify are simple possession of a controlled substance or

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[186] *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

[187] The Ninth Circuit *en banc* overruled its decade old rule in *Lujan-Armendariz v. INS*, but did so prospectively only. See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (*en banc*). Thus, the old *Lujan* rule will remain helpful to those who were convicted before July 14, 2011. For more information, see ILRC's Practice Advisory on the effect of the *Nunez-Reyes* decision, available at: www.ilrc.org/crimes.

paraphernalia, or giving away a small amount of marijuana for free, but a conviction for under the influence even if expunged will not qualify and remains a conviction under immigration law.[188]

The conviction will not be eliminated for immigration purposes if a person violated probation (even if he or she later successfully finished it)[189] or if a person had any prior rehabilitative drug disposition, even one that never required a guilty plea.[190] (Note that if the conviction is for possession of less than 30 grams of marijuana, it is not a deportable offense and a discretionary waiver of inadmissibility may be available, so that the person does not necessarily need the expungement.)[191]

Convictions entered after July 14, 2011 and offenses that do not qualify as first offense simple possession of a controlled substance or lesser offense in the Ninth Circuit will be considered convictions regardless of expungement or other rehabilitative relief, thereby exposing the individual to deportability and statutory bars to good moral character.[192] The Ninth Circuit ruled that expungements will not eliminate non-drug related convictions in 2001.[193] In addition, individuals residing outside of the Ninth Circuit will not benefit from this Ninth Circuit rule. Finally, an immigration expert should assist naturalization applicants hoping to benefit from this limited rule since not all drug-related convictions that are expunged are covered by it.

PRACTICE TIP on Expungements: An expungement does not mean that the applicant never committed the offense and therefore, it still could be considered for purposes of good moral character. Even where the person falls within the Ninth Circuit rule, the expunged conviction can still be considered in the discretionary good moral character decision as an adverse factor and it must be disclosed to the CIS examiners. See below for more information on this subject.

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[188] *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (possession); *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (BIA 2000) (lesser offense); 21 USC § 841(b)(4) (giving away a small amount of marijuana); *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009) (possession of drug paraphernalia); *Nunez-Reyes*, (not under the influence).
[189] *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009).
[190] *Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007).
[191] But see *Rodriguez v. Holder*, 619 F.3d 1077 (9th Cir. 2010) (explaining that the statutory personal use exception, which exempts from removability those convicted of only a single offense involving possession for one's own use of 30 grams or less of marijuana, did not apply to non-citizens with more than one drug conviction).
[192] 8 CFR § 316.10(c)(3)(i) (expungement of drug offenses (except a conviction entered before July 14, 2011 for a first time simple possession or lesser drug offense in the Ninth Circuit) are still convictions for purpose of the statutory bars]; 8 CFR § 316.10(c)(3)(ii)(two or more crimes of moral turpitude still precludes good moral character even though one such offense has been expunged).
[193] *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001).

2. Other ways to avoid good moral character statutory bars for criminal convictions

a. Vacating a conviction for legal error

Recent court rulings have *not* encroached upon all post-conviction relief. There may be ways to vacate the conviction on other legal and constitutional grounds and not for rehabilitative purposes, such as failure to supply an interpreter or to advise the client about his or her rights including the immigration consequences of the plea.[194] However, this usually is a difficult and expensive process, requiring the help of an experienced criminal defense attorney.

b. Full and unconditional executive pardon

An applicant will not be barred from establishing good moral character if he has received a full and unconditional executive pardon prior to the beginning of the statutory period as long as he demonstrates that reformation and rehabilitation occurred prior to the statutory period.[195] The applicant is not automatically barred, however, if the pardon is granted during the statutory period, but he must demonstrate "extenuating and/or exonerating circumstances."[196] A pardon will work for a murder conviction assuming it meets the above conditions.

c. No conviction for immigration purposes

It also may be possible that a "conviction" never occurred. This might be true, for example, if the client participated in a "diversion" or other court proceeding in which there *never was a finding of guilt or guilty or no contest plea.* It can be complicated to figure out whether this occurred. For example, until January 1, 1997 California had a pre-trial diversion program that the BIA recognizes would not result in a conviction, even if a drug offense had been charged. After January 1, 1997, the California drug diversion program changed to require a guilty plea, although some counties can opt for a non-guilty plea "drug court" process. Therefore diversion granted in California on or after that date may or may not be a conviction for immigration purposes and should be analyzed on a case-by-case basis. To see the definition of a conviction for immigration purposes see **Appendix 6-D**. There are different rules in different states. For instance, in New York, deferred adjudication granted to a non-citizen under state law for attempting to illegally bring aliens into the country did not constitute a "conviction" under immigration law, where the pre-trial diversion agreement did not require the non-citizen to plead guilty or to admit to facts surrounding the charge.[197] On the other hand, in Texas, courts have

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[194] See *Padilla v. Kentucky*, 559 U.S. __, 130 S.Ct.1473 (2010) (holding that the Sixth Amendment of the U.S. Constitution requires that defense counsel affirmatively and competently advise of the immigration consequences of a criminal case).
[195] 8 CFR § 316.10(c)(2)(i).
[196] 8 CFR § 316.10(c)(2)(ii).
[197] *Iqbal v. Bryson*, 604 F.Supp.2d 822, 827 (E.D. Va. 2009).

held that deferred adjudication granted to non-citizens under Texas law qualified as "convictions" for purposes of immigration law.[198]

d. Convictions resulting from juvenile delinquency proceedings

A person whose case was handled in *juvenile delinquency proceedings* instead of adult proceedings does not have a conviction for immigration purposes.[199] Although a youth may still have to disclose juvenile delinquency arrests and dispositions on his or her application for naturalization, it is not always advisable to include the actual juvenile delinquency records as part of the application. In many states, a juvenile record can be sealed with the relevant state entity in order to prevent the juvenile delinquency record from being shared with the federal government. In addition, many states have confidentiality laws that prevent counsel from legally disclosing juvenile records in immigration proceedings without obtaining the local court's permission. For further discussion on sealing records and confidentiality see ILRC's manual entitled, *Special Immigrant Juvenile Status and Other Immigration Options for Children & Youth*, § 16.12.

e. Infractions

An infraction might not be a conviction for immigration purposes. It will depend on whether the conviction was entered in "genuine criminal proceedings," where the judge has the power to enter a guilty judgment and impose a punishment.[200] If the constitutional safeguards usually present in criminal proceedings are lacking, such as the requirement that the prosecutor prove guilt beyond a reasonable doubt, it will not be a conviction.[201] Other constitutional protections that must be present are the right to defense counsel for those who could face jail time and a right to a jury trial at some stage in the criminal case.[202]

While the absence of a conviction may keep your client from being statutorily ineligible to establish good moral character, CIS still can consider the underlying facts surrounding an arrest in making a discretionary decision about good moral character.[203] The applicant has a duty to report on the N-400 that the arrest occurred.[204] This is the case even if the state diversion or

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[198] *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321 (5th Cir. 2004); *Moosa v. INS*, 171 F.3d 994, 1006 (5th Cir. 1999) (explaining that the defendant's "deferred adjudication was a conviction for purposes of the immigration laws.")

[199] *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

[200] *Matter of Cuellar-Gomez*, 25 I&N Dec. 850, 852 (BIA 2012).

[201] See *Matter of Cuellar-Gomez*, 25 I&N Dec. 850 (BIA 2012); *Matter of Eslamizar*, 23 I&N Dec. 684, 687–88 (BIA 2004).

[202] *Matter of Cuellar-Gomez*, 25 I&N Dec. 850, 853-54 (BIA 2012).

[203] "… [A]lthough the conviction and confinement are no longer conclusive statutory bars to finding of good moral character, the unlawful acts are not obliterated and the question of their commission is still relevant to the determination of whether good moral character has been established." *INS Interpretations* 316.1(g)(4)(iv).

[204] Although the applicant has the duty to report any arrests, failure to do so will not necessarily lead to a denial of good moral character in certain circumstances. See, e.g., *Lora v. USCIS*, No. 05 CV 4083(JG),

expungement law expressly states that once the diversion or other program is completed, the person has the legal right to deny the arrest ever took place.[205] For more information on these issues, please refer to the ILRC manual *Defending Immigrants in the Ninth Circuit*, or other materials listed at the end of this chapter (**Appendix 6-D**).

D. Effect of Immigration Relief

Immigration relief that provides that a conviction no longer is a ground of deportability or inadmissibility might not preclude the underlying offense from being a statutory bar to good moral character. INA § 101(f)(3) bars any person from establishing moral character if he or she is "… a member of one or more of the classes of persons, *whether inadmissible or not* …" (emphasis added). This suggests that a noncitizen who has received a waiver of inadmissibility in removal proceedings still can fall within the scope of the good moral character bars. The Third Circuit held that a person who has received 212(h) to forgive a crime that also falls within the statutory bars will be statutorily barred from proving good moral character.[206] Also, while the Ninth Circuit had held that a person who is statutorily barred from proving good moral character for alien smuggling can overcome this by receiving a discretionary inadmissibility waiver,[207] it recently reversed that holding and explained that 8 USC § 1182(d)(11) does not permit a waiver of the "alien smuggling" bar to establishing good moral character for purposes of cancellation of removal.[208]

Essentially, a conviction will remain a bar to good moral character even if it has been waived for purposes of inadmissibility or deportability, for example under INA 212(h), 212(i),[209] former INA 212(c),[210] or cancellation.

U.S. Dist. LEXIS 28523 (E.D.N.Y. April 18, 2007). In this case, the judge rejected CIS' argument that Lora gave false testimony by answering no to question 15 on the N-400 which asked whether a person has ever been committed a crime for which he or she has not been arrested since Lora admitted to selling drugs on five occasions, but was only arrested and prosecuted for two of the five sales. The court found that he did not give false testimony because the case alleging two of the sales covered all five sales he made. See also *Plewa v. INS*, 77 F.Supp.2d 905 (N.D. Ill. 1999) (failure to disclose arrest based on wrongful advice by attorney did not preclude good moral character finding).

[205] *Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994) (in making a discretionary decision the INS can consider a person's conduct that led to his arrest, even if the person received California diversion and so never was "convicted" of the offense and had the right under California law to deny the arrest).

[206] *Miller v. INS*, 762 F.2d 21, 24 (3rd Cir. 1985) ("Congress has not only chosen not to apply the section 212(h) waiver to section 101(f), it has also chosen not to confer authority on the Attorney General to waive the 'good moral character' requirement as defined in section 101(f).…")

[207] *Moran v. Ashcroft*, 395 F.3d 1089, 1094 (9th Cir. 2005) overruled in *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (holding that where an applicant either qualifies under the automatic exception or the discretionary waiver for alien smuggling, the person is no longer barred from showing good moral character for purposes of qualifying for cancellation of removal for non-legal permanent residents.)

[208] *Sanchez v. Holder*, 560 F.3d 1028, 1032 (9th Cir. 2009).

[209] *Socarras v. U.S. Department of Homeland Security*, 672 F.Supp.2d 1320 (S.D. Fla. 2009) (a grant of a 212(i) waiver allowing a non-citizen to become a legal permanent resident, despite her prior conviction for

Based on all of these authorities, a waiver of inadmissibility or removability received for any conviction will probably not eliminate any statutory bars. The person, however, can wait until the five years has passed since the conviction occurred (unless an aggravated felony) and then apply for naturalization. It is also important to note that even in cases where the underlying conviction does not trigger a deportability finding, CIS will still determine if the person is of good moral character.[211]

E. Possible Defenses for Deportable Naturalization Applicants

This discussion is intended for skilled practitioners who are representing persons in deportation or removal hearings (meaning attorneys, accredited representatives, or others permitted to practice in immigration court). Others helping immigrants may wish to understand these to be able to spot the possibility of the defense and refer the applicant to a qualified representative. In some cases, applicants might be so motivated to naturalize (for example, to immigrate their sick mother) that they would be willing to attempt naturalization if they thought they had a chance of escaping deportation. Sometimes there are defenses to deportability.

1. Termination of removal/deportation proceedings under 8 CFR § 1239.2(f) [formerly 8 CFR § 239.2(f) and 8 CFR § 242.7(e)]

This is a defense theory that might help a naturalization applicant who is deportable for a crime or other reasons. It might be available to persons convicted of an aggravated felony before November 29, 1990 unless the conviction was for murder.

When a person is put in removal proceedings either because he or she is found removable through the naturalization process or other means, CIS cannot consider his or her naturalization application. INA **§** 318 states:

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an aggravated felony, had no bearing on her separate application for naturalization whereby the use of the prior conviction could serve as a basis for showing that she failed to establish good moral character).

[210] *Gorenyuk v. U.S. Department of Homeland Security*, No. 07C 1190, 2007 U.S. Dist. LEXIS 82951 at *13 (N.D. Ill. Nov. 8, 2007) (listing cases that concluded that an aggravated felony conviction waived under INA § 212(c) may be considered in determining whether an individual possesses good moral character to qualify for naturalization); see also *Chan v. Gantner*, 374 F.Supp.2d 363, 367 (S.D.N.Y. 2005) ("Although the government faces some limitations as to the use of [an aggravated felony conviction that has received 212(c) treatment] in future removal proceedings … there is no authority for the proposition that it should be foreclosed from considering that conviction in determining the completely unrelated question of fitness for naturalization.…") See also Letter, Miller, Acting Asst. Comm. Adjudications HQ 316-C (May 5, 1993), reprinted in 70 *Interpreter Releases* 769–70 (June 7, 2003).

[211] See, e.g., *Rico v. INS*, 262 F.Supp.2d 6 (E.D.N.Y. 2003) (drunk driving conviction occurring in the statutory period taken together with failure to accept responsibility for past crimes outside of statutory period precluded good moral character finding).

> "No application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act."[212]

Federal regulation, however, permits an immigration judge presiding over a removal hearing (until April 1, 1997 called a deportation hearing) some flexibility in dealing with a naturalization applicant who is deportable and in removal proceedings. The regulation provides that:

> "An immigration judge may terminate removal proceedings to permit the respondent to proceed to a final hearing on a pending application or petition for naturalization, when the respondent has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the deportation hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings."[213]

In other words, the judge may decide simply to close the person's removal case and let the person continue on to naturalize if he or she can show that he or she is *prima facie* eligible for naturalization and there are exceptional factors in the case.

In 2007, however, the Board of Immigration Appeals significantly limited the Immigration Judge's ability to terminate the proceedings under this regulation by ruling that the judge does not have the authority to determine whether the person is *prima facie* eligible for naturalization.[214] Now, in order to establish *prima facie* eligibility for naturalization, the person must rely on DHS to issue an affirmative statement stating that the applicant is *prima facie* eligible.[215] The Second, Third, Fourth, Fifth, Sixth and Ninth Circuits have validated this interpretation.[216] On the issue of whether the declaration of *prima facie* eligibility can come from

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[212] 8 CFR § 318.1 provides that a Notice to Appear shall be regarded as a warrant of arrest.
[213] See 8 CFR § 1239.2(f) [formerly 8 CFR §§ 239.2(f) and 242.7(e)]; see also INS Operations Instructions 318.2(c)(1)(ii).
[214] *Matter of Acosta Hidalgo*, 24 I&N Dec. 103 (BIA 2007).
[215] *Id.* Note that this *prima facie* eligibility determination if made may not necessarily bind CIS as to the final decision of the naturalization application once removal proceedings are terminated. *Cuong Quang Le v. McNamee*, No. 06-CV-49_BR, 2006 WL 3004524 *6–7 (D. Or. Oct. 20, 2006).
[215] *Shewchun v. Holder*, 658 F.3d 557, 565 (6th Cir. 2011); *Barnes v. Holder*, 625 F.3d 801, 808 (4th Cir. 2010); *Zegrean v. Attorney General of U.S.*, 602 F.3d 273, 274 (3rd Cir. 2010); *Ogunfuye v. Holder*, 610 F.3d 303 (5th Cir. 2010); *Perriello v. Napolitano*, 579 F.3d 135 (2d Cir. 2009) (the regulation does not allow an IJ to terminate removal proceedings unless the alien has obtained an affirmative communication from DHS stating *prima facie* eligibility for naturalization); *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 934–35 (9th Cir. 2007) (holding that the BIA's plain reading of 8 CFR § 1239.2(f) in *Acosta Hidalgo* was not clearly erroneous because the text of the regulation does not specifically authorize Immigration Judges to evaluate *prima facie* eligibility).
[216] *Shewchun v. Holder*, 658 F.3d 557, 565 (6th Cir. 2011); *Barnes v. Holder*, 625 F.3d 801, 808 (4th Cir. 2010); *Zegrean v. Attorney General of U.S.*, 602 F.3d 273, 274 (3rd Cir. 2010); *Ogunfuye v. Holder*, 610

a district court or not, some circuit courts have held that district courts cannot make the *prima facie* determination.[217]

In some cases CIS mistakenly adjudicates naturalization applications while removal proceedings are pending.[218] Because CIS does not have authority under INA § 318 to consider the application while removal proceedings are pending, the BIA held that an adjudication of the naturalization application itself is not considered an affirmative communication from CIS.[219] In other words, CIS can simply refuse to provide a statement, thus preventing immigration judges from exercising their discretion to terminate removal proceedings. The BIA and Ninth Circuit have both agreed that CIS has this veto power.[220] This means in practice that it will probably be unlikely that many people will be able to obtain a termination of their removal proceedings to move forward with a naturalization application. Moreover, the Second Circuit has clarified that once removal proceedings have commenced, DHS may not consider a naturalization application, so it would be impossible for a non-citizen to establish *prima facie* eligibility.[221]

F.3d 303 (5th Cir. 2010); *Perriello v. Napolitano*, 579 F.3d 135 (2d Cir. 2009) (the regulation does not allow an IJ to terminate removal proceedings unless the alien has obtained an affirmative communication from DHS stating *prima facie* eligibility for naturalization); *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 934–35 (9th Cir. 2007) (holding that the BIA's plain reading of 8 CFR § 1239.2(f) in *Acosta Hidalgo* was not clearly erroneous because the text of the regulation does not specifically authorize Immigration Judges to evaluate *prima facie* eligibility).

[217] *Barnes*, 625 F.3d at 804–06 (DHS has *sole* authority to make the *prima facie* determination); *Saba-Bakare v. Chertoff*, 507 F.3d 337, 341 (5th Cir. 2007); but see *Hernandez de Anderson*, 497 F.3d at 933–34, n.2 (declining to address whether district courts can make the *prima facie* determination). See also *Matter of Acosta Hidalgo*, 24 I&N Dec. 103, 105 (BIA 2007).

[218] See, e.g., *Matter of Acosta Hidalgo*, *supra* and *Saba-Bakare*, *supra*.

[219] *Matter of Acosta Hidalgo*, 24 I&N Dec. at 106–07.

[220] In *Hernandez de Anderson*, *supra*, the Ninth Circuit held that such veto power does not violate 8 CFR § 1239.2(f) because if DHS fails to state that the person is *prima facie* eligible then the DHS is virtually certain to deny naturalization. The court also rejected an argument that DHS has been given too much authority over naturalization and removal decisions in this context reasoning that Congress has plenary power over immigration to delegate immigration decision-making authority. See also *Matter of Acosta Hidalgo*, 24 I&N Dec. at 107–08.

[221] *Perriello v. Napolitano*, 579 F.3d 135 (2d Cir. 2009). In *Perriello*, the court explained that the 1990 Immigration Act reformed the naturalization process, eliminating final hearings in federal court and establishing that the sole authority to naturalize persons as citizens was conferred upon the Attorney General. *Id.* at 139. Also, the Immigration Act froze the processing of naturalization applications while removal proceedings were pending. *Id.* at 140. The court noted that in *Matter of Acosta Hidalgo*, the BIA did not take into consideration the Immigration Act's changes, which "limited administrative review of naturalization applications while removal proceedings [were] pending." *Id.* The court held that non-citizens could "no longer apply for naturalization after removal proceedings have commenced and then move for termination of the removal proceedings," for once removal proceedings have commenced, "DHS [was] barred by the [Immigration Act] from considering an alien's application." *Id.* at 141. See also *Zegrean*, 692 F.3d at 274.

If a person somehow can obtain a *prima facie* eligibility determination from CIS, termination can be useful in at least two situations: (a) where a permanent resident is brought into removal proceedings and, before there is a final order of removal, she applies for naturalization, and (b) where someone first applies for naturalization and then is charged during the naturalization process with being deportable and placed in removal proceedings. In both cases, CIS has the power to determine that the person is *prima facie* eligible for naturalization and the judge then should have the discretion to terminate removal proceedings and send the person on to continue naturalization. The *prima facie* eligibility statement, however, does not necessarily bind CIS to grant the naturalization application.

In sum, it is up to the discretion of CIS to determine if they want to make a *prima facie* eligibility determination at all.[222] It is unclear whether the applicant can appeal such a determination if made.[223] There are at least three possible scenarios that practitioners should know could occur under such circumstances.

1. If CIS determines that the person is *prima facie* eligible, the immigration judge can terminate the removal proceedings and CIS could then adjudicate the naturalization application. If the application is denied, the person may appeal the decision to the district court.[224]

2. If CIS determines that the person is not *prima facie* eligible, it remains unclear whether the person can appeal such a decision to federal court. At least four circuit courts have held that the denial of an application of naturalization can be appealed to the district court even if there is a pending removal proceeding. However, review is limited to such denial and cannot extend to determining a naturalization application on the merits.[225] One circuit court has ruled that when removal proceedings are pending a district court cannot review a denial of a naturalization application.[226]

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[222] *Quang Le v. McNamee*, No. 06-CV-49-BR, 2006 WL 3004524, at *6–7 (D. Or. Oct. 20, 2006) (finding that CIS has the authority to exercise its discretion to make a *prima facie* determination when removal proceedings are pending).

[223] See, e.g., *Saba-Bakar v. Chertoff*, 507 F.3d 337, 341 (5th Cir. 2007) ("If the statutory framework created by Congress renders the determination of prima facie eligibility for naturalization unreviewable by any court, this may indeed present a persuasive equitable concern. But this concern should be addressed to Congress, not this court.")

[224] INA § 310(c); 8 CFR § 310.5(b).

[225] *Ajlani v. Chertoff*, 545 F.3d 229, 236 (2d Cir. 2008); *Saba-Bakare*, 507 F.3d at 340–41; *Bellajaro v. Schiltgen*, 378 F.3d 1042, 1046–47 (9th Cir. 2004); *Zayed v. U.S.*, 368 F.3d 902, 906 (6th Cir. 2004). Another argument has been made that while INA § 318 forbids the Attorney General from considering a naturalization application while removal proceedings are pending, it does not preclude the courts from exercising jurisdiction to review denials of naturalization applications when removal proceedings are pending. See *Kestelboym v. Chertoff*, 538 F.Supp.2d 813 (D.N.J. 2008), *Gonzalez v. Napolitano*, 684 F.Supp.2d 555 (D.N.J. 2010). For more information, please see Chapter 11, § 11.3.

[226] *Barnes v. Holder*, 625 F.3d 801, 806–07 (4th Cir. 2010).

3. CIS could deny a naturalization application based on other grounds such as lack of good moral character. The person could appeal the denial to federal court.

Also, while there is never a guarantee that CIS will issue a *prima facie* eligibility statement or an immigration judge will terminate proceedings after it is issued, some practitioners in the past have had successes in this arena. At least one federal court ordered CIS to find that an applicant had good moral character so that the applicant could request termination of proceedings.[227]

How Does This Provision Affect Persons Convicted of an Aggravated Felony? Conviction of an aggravated felony is a "permanent" bar to establishing good moral character if, and only if, the conviction occurred on or after November 29, 1990. (The only exception is murder, which is a permanent bar to establishing good moral character regardless of the date of conviction.)[228] For example, a person who was convicted of drug trafficking on November 28, 1990 has been convicted of an aggravated felony for many purposes, but not for the purpose of the permanent bar to good moral character. If the person indeed has no other problems within the last five years (or three if applying as the spouse of a U.S. citizen) that would bar a finding of good moral character, and otherwise is eligible for naturalization, the judge arguably has the authority to terminate proceedings under 8 CFR § 1239.2(f) after the person receives a *prima facie* eligibility statement from CIS. If however, the aggravated felony conviction occurred on or after November 29, 1990, the person is permanently barred from establishing good moral character and thus cannot qualify for naturalization.

If a person has established exemplary character during the required five year period (or three years for persons married to U.S. citizens, or one year for persons who served in the military

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[227] *Gatcliffe v. Reno*, 23 F.Supp.2d 581 (D.V.I. 1998), reported in *Interpreter Releases*, November 9, 1998, p. 1553 (reversing INS conclusion that the naturalization applicant could not establish good moral character solely based on events outside the five year period and remanding the case so that the applicant could apply to terminate proceedings and proceed to naturalization). See also *Ngwana v. Attorney General*, 40 F.Supp.2d. 319 (D. Md. 1999) (holding that the district court could remand the case to INS to comply with an order to naturalize the applicant even if deportation proceedings were pending because the district court retained authority to review denial of naturalization applications). But some circuit courts have held that the federal district courts have limited ability to review a naturalization application when DHS will not grant relief due to pending removal proceedings. Specifically, if the agency did not adjudicate the naturalization application on the merits of the application or the agency did not have the power to adjudication the application under INA § 318, then on appeal that application may not be adjudicated by a district court either. *Saba-Bakare*, 507 F.3d at 340–41; *Bellajaro v. Schiltgen*, 378 F.3d 1042 (9th Cir. 2004); *Tellez v. INS*, 91 F.Supp.2d 1356 (C.D. Cal. 2000) (upholding denial of applicant's motion to terminate removal proceedings).

[228] Immigration Act of 1990 § 509(b) (aggravated felony convictions dating before November 29, 1990 are not permanent bars to good moral character); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 306(a)(7) (murder is a permanent bar regardless of date of conviction). See also *Castilglia v. INS*, 108 F. 3d 1101 (9th Cir. 1997).

during certain times of war),[229] then CIS may not deny naturalization based solely on convictions or other events that took place before the good moral character period.[230]

G. Cancellation of Removal or Other Waivers of Deportation

"Cancellation of removal" under INA § 240A(a) is a relief for long-time permanent residents. The rules governing who is eligible for this relief are somewhat complex. For information on this relief, as well as an update on information about the § 212(d)(11) waiver for certain persons who smuggled only a parent, spouse or child, see **Appendix 6-D**. In general, a person convicted of an aggravated felony is ineligible for cancellation and almost any immigration relief. Lawful permanent residents with aggravated felony convictions before April 24, 1996 may want to consider requesting "INA § 212(c)" relief. See below.

Note that even if cancellation or some other waiver is granted, the naturalization applicant may still have good moral character problems. The waivers may help them to avoid deportation, but CIS could still argue that the person lacks good moral character for naturalization purposes. See the discussion of this topic above.

H. INA § 212(c) Relief

Before the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), lawful permanent residents who were deportable for an offense that had a parallel ground of exclusion (inadmissibility), had resided in the U.S. for seven years and who possessed positive equities were allowed to retain lawful permanent status despite the convictions. Section 212(c) could even be used to waive deportability for an aggravated felony or a drug conviction. With the enactment of the IIRIRA, Congress eliminated § 212(c) completely. The U.S. Supreme Court, however, in *INS v. St. Cyr*[231] ruled that § 212(c) could not be reduced or eliminated for certain individuals who had pled guilty to a deportable offense before the enactment of the Antiterrorism and Effective Death Penalty Act of April 24, 1996 (AEDPA). Therefore, lawful permanent residents with certain convictions prior to AEDPA's enactment date, or in some cases the effective date of IIRIRA, April 1, 1997, can request § 212(c) relief as long as they would have been eligible for § 212(c) relief at the time they pled guilty and regardless of when they are placed in removal proceedings.

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[229] See 8 CFR § 329.2.

[230] See, e.g., *Hovespian v. Gonzales*, 422 F.3d 883, 886 (9th Cir. 2005) (*en banc*); *Santamaria-Ames v. INS*, 104 F.3d 1127 (9th Cir. 1996). See § 6.2 for a list of all cases. A subsequent case, *Castiglia v. INS*, 108 F.3d. 1101 (9th Cir. 1997) holds that conviction of murder is a permanent bar to establishing good moral character regardless of the date the conviction occurred, so that a person convicted of murder never will qualify for naturalization. Some dicta in that case may appear to imply that conviction of any aggravated felony—and not just of murder—is a permanent bar, but that is not the holding of *Castiglia* and is explicitly not the rule under the statute. See above footnote.

[231] 533 U.S. 289 (2001).

I. Political Asylum, Family Immigration and Other Relief

It is possible that a deportable applicant still would be eligible for other forms of immigration relief. See **Chapter 14** for a general summary of types of immigration relief. The person should have a full consultation with an expert practitioner.

§ 6.9 Non-Citizen Voting

With very few exceptions,[232] only U.S. citizens are qualified to vote in federal, state, and local elections. Consequently, when a non-citizen votes in an election, he or she may face adverse immigration consequences: grounds of inadmissibility or deportability, criminal sanctions, or a finding of bad moral character for naturalization purposes.

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) added inadmissibility and deportability provisions to the INA to address unlawful voting.[233] This ground is retroactive and therefore applies to voting before, on, or after September 30, 1996. Non-citizens who violate these provisions may also face criminal sanctions, as IIRIRA created 18 USC § 611, which establishes criminal penalties for aliens who have voted in any federal election. It should be cautioned that a non-citizen who votes unlawfully, but who has not been convicted under 18 USC § 611 may still face removal charges.[234]

The Child Citizenship Act of 2000 (CCA) created a narrow exception to both grounds of inadmissibility and deportability that applies only if the non-citizen satisfies all of the following conditions:

1) each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization),
2) the alien permanently resided in the United States prior to attaining the age of 16, and
3) the alien reasonably believed at the time of such violation that he or she was a citizen.[235]

In addition, the CCA also established an exception to the criminal provision, 18 U.S.C § 611(c), for persons who meet the above criteria.[236] The criminal provision exception only

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[232] Some municipalities allow lawful permanent residents and/or nonresident aliens to vote in municipal elections. For more information, see Virginia Harper-Ho, Note, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (Summer 2000); Tara Kini, Note, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 271 (Jan. 2005).
[233] INA § 212(a)(10)(D)(i) states that "[a]ny alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible." INA § 237(a)(6)(A) explains that "[a]ny alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable."
[234] See Policy Memorandum No. 86, *supra*, at 2.
[235] See INA §§ 212(a)(10)(D)(ii) and 237(a)(6)(B), as amended by Child Citizenship Act of 2000 (CCA), Pub. L. 106-395, 114 Stat. 1631 (Oct. 30, 2000).

applies to convictions that became final on or after October 30, 2000, when the CCA was enacted.[237]

A. CIS' Procedure for Handling Unlawful Voting Cases

CIS has provided guidance for adjudicators on handling naturalization applications of aliens who have unlawfully voted or have falsely represented themselves as being U.S. citizens for the purpose of registering to vote or by voting.[238] See § 6.10 for further discussion on false claims to citizenship by registering to vote. The analysis a CIS adjudicator should follow includes:

- The adjudicator should first determine if the non-citizen:
  (1) actually voted in violation of the relevant election law, or
  (2) made a false claim of citizenship when registering to vote or voting in any federal, state, local election any time on or after 9/30/96.[239]

- If either (1) or (2) applies, then the non-citizen is removable, unless an exception under INA § 212(a)(10)(D)(ii) or § 237(a)(a)(6)(B) applies. The exception applies where both parents of the non-citizen are citizens, the non-citizen was an LPR before age 16, and the non-citizen reasonably believed she was a citizen.

- If the non-citizen does not meet an exception, then the adjudicator should determine whether the applicant's case merits prosecutorial discretion, which is further explained in a November 17, 2000 memo by then-Immigration and Naturalization Service Commissioner Doris Meissner titled "Exercising Prosecutorial Discretion" and more recently in a June 2011 memo on prosecutorial discretion issued by ICE director John Morton.[240]

- If the applicant merits prosecutorial discretion, the adjudicator should proceed with adjudication of the N-400 and must assess the applicant's eligibility for naturalization, looking at whether the applicant's conduct precludes a finding of good moral character

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[236] See Policy Memorandum No. 86, *supra*, at 2.
[237] *Id.*
[238] Policy Memorandum No. 86, William Yates, Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully of Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote (May 7, 2002). See also 87 *Interpreter Releases* 1252 (June 21, 2010).
[239] Policy Memorandum No. 86, *supra*, at 4.
[240] Doris Meissner, Dep't of Justice, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion* (Nov. 17, 2000), available at www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00; John Morton, Immigration and Customs Enforcement of the Department of Homeland Security, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011) available at AILA InfoNet Doc. No. 11061731 (posted June 23, 2011).

and determining whether the applicant is exempt from a finding that he or she does not have good moral character based on the exceptions in INA§ 101(f).[241]

B. What Constitutes Unlawful Voting?

The definition of unlawful voting in both INA § 212(a)(10)(D)(i) and INA § 237(a)(6) does not require guilty knowledge, and it may even include people who innocently believed that they were entitled to vote (a not uncommon occurrence). Unlawful voting requires that the noncitizen actually voted and the act of voting violated the relevant election law.

Whether an applicant has voted in violation of the relevant election depends on the provisions governing voting, eligibility to vote and the requirements that must be met to impose penalties for unlawful voting. The latter will vary by jurisdiction and may or may not include a specific intent requirement.[242] The act of voting alone does not establish that the applicant voted unlawfully, and so adjudicators must determine the applicable election law. If the election law penalizes the actual act of voting, the fact that applicant has voted suffices to establish that he has voted unlawfully. On the other hand, if the law penalizes the act of voting only upon the additional finding that the applicant acted with some kind of intent, then adjudicators should first determine whether the applicant had the requisite intent for unlawful voting under the election law.[243] Even if the state law has no "knowing" or "willful" requirement, practitioners should urge CIS to exercise prosecutorial discretion, especially if the applicant registered to vote or voted due to a good faith error.[244]

> **Example:** Teresa, who is not a U.S. citizen, voted in the 2010 California gubernatorial election. When she had filled out a driver's license application in 2007, she mistakenly believed that she could also register to vote in the state. Because she had received a voter registration card, she believed that the state was permitting her to vote in the state

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[241] Policy Memorandum No. 86, *supra*, at 4.
[242] *Id.* at 5. See, e.g., Cal. Elec. Code § 18560(a) (2011) ("Every person is guilty of a crime punishable by imprisonment in the state prison for 16 months or two or three years, or in county jail not exceeding one year, who … [n]ot being entitled to vote at an election, fraudulently votes or fraudulently attempts to vote at that election."); H.R.S. § 19-3.5(2) ("The following persons shall be guilty of a class C felony: Any person who knowingly votes when the person is not entitled to vote."); NY Elec. Code § 17-132 (2008) ("Any person who [k]nowingly votes or offers or attempts to vote at any election, when not qualified … is guilty of a felony."); Tex. Elec. Code § 64.012(a)(1) (2012) ("A person commits an offense if the person votes or attempts to vote in an election in which the person knows the person is not eligible to vote.")
[243] Policy Memorandum No. 86, *supra*, at 5. Some things to consider include: (1) how, when, and where the applicant registered to vote; (2) extent of the applicant's knowledge of election laws; (3) whether the applicant received any instructions or was questioned verbally about eligibility to vote; (4) who provided the applicant with information about election laws or eligibility to vote; (5) whether election registration form and/or voting ballot has specific question asking if the applicant is U.S. citizen, requires the applicant to declare under penalty of perjury that he is a US citizen, requires the applicant to be qualified to vote and lists specifically the requirement of US citizenship elsewhere on the form. *Id.*
[244] See *id.* at 4.

election. The California Constitution provides that "[a] United States citizen 18 years of age and resident in this state may vote."[245] California law also explains that unlawful voting occurs where one who is not entitled to vote fraudulently votes or attempts to vote in an election.[246] Practitioners should argue that where the elements of the state law's voting provisions require specific intent for a finding of unlawful voting, such as California's "fraudulent" requirement, the adjudicator should not find that the applicant voted unlawfully unless the unlawful voter had the requisite *mens rea*. An opinion issued by the California Attorney General explains that the "use of the term 'fraudulently' in subdivision (a) of § 18560 requires proof of specific intent, i.e., the intent to defraud."[247] Therefore, in California, for a non-citizen to be removable for voting in a California state or local election, the adjudicator should first find that the applicant intended to defraud the state when casting his or her vote.[248] Since Teresa genuinely believed that the state permitted her to vote in the state election, the practitioner should argue that Teresa did not intend to defraud the state.

There is at least one federal case analyzing the illegal voting removal provision that practitioners should consult. In *McDonald v. Gonzales*, 400 F.3d 684 (9th Cir. 2005), the Ninth Circuit considered whether a woman was deportable for voting in violation of a Hawaii election law which provided that, "any person who knowingly votes when the person is not entitled to vote" is guilty of a felony. While the Ninth Circuit did not explicitly hold that guilty knowledge or other specific intent is actually required to fall under the illegal voting ground, it did find that a court must find that the noncitizen violated all of the provisions of the law at issue to be removable and could not apply its own standard. In that case, the court found that the Immigration Judge erred by applying his own knowledge standard requiring that the petitioner merely be aware that it is practically certain that her voting would result in a violation of law. The court held that the correct standard under the Hawaiian law at issue not only required that the petitioner knowingly voted, but also that she knew she was not entitled to vote. Because the woman was not aware that she was ineligible to vote, she was not deportable.[249]

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[245] Cal. Const. art. II, § 2 (2009).
[246] See, e.g., Cal. Elec. Code § 18560(a) ("Every person is guilty of a crime punishable by imprisonment in the state prison for 16 months or two or three years, or in county jail not exceeding one year, who … [n]ot being entitled to vote at an election, fraudulently votes or fraudulently attempts to vote at that election.")
[247] Office of the Cal. Atty. Gen., Opinion No. 98-505, 1998 Cal. AG LEXIS 94, 81 Ops. Cal. Atty. Gen. 321 (Nov. 16, 1998).
[248] See, e.g., *McDonald v. Gonzales*, 400 F.3d 684 (9th Cir. 2005) (explaining that Hawaii election law requires a knowing and willful violation, and holding that applicant did not have the requisite *mens rea* because, when she voted, she was unaware that she was ineligible to vote).
[249] In *McDonald*, the petitioner mistakenly registered to vote on a drivers' application because she thought she was a U.S. citizen based on her marriage to one. When she received a voter registration form in the mail, after conferring with her husband, she changed her answer to say she was not a U.S. citizen. Nonetheless, she received a Notice of Voter Registration and believed that the government was allowing her to vote even though it had learned she was not a citizen. She then voted and was not aware that she could was not eligible to vote.

Practitioners should be aware that 18 USC § 611 makes voting by an alien in a federal election unlawful, with no intent or knowledge requirement.[250] A Department of Justice Manual on election fraud states that § 611 "is a strict liability offense in the sense that the prosecution must only prove that the defendant was not a citizen when he or she registered or voted. Section 611 does not require proof that the offender was aware that citizenship is a prerequisite to voting."[251] A non-citizen, therefore, who voted in a federal election could be found removable even if she did not have any knowledge that she was prohibited from doing so.[252]

> **Example:** Teresa, who is not a U.S. citizen, voted in the 2008 presidential election. When she had filled out a driver's license application in 2007, she mistakenly believed that she could also register to vote. Because she had received a voter registration card, she believed that the state was permitting her to vote. Since she voted in a federal election, she could be charged with violating § 611. It may not matter that she genuinely believed she was eligible to vote in the presidential election, since § 611 does not have a specific intent requirement. As a result, she faces criminal sanctions and deportation. Nevertheless, practitioners may urge CIS to recognize the unfairness in targeting individuals who made an innocent mistake when voting, like Teresa, and did not intend to do anything wrong, even if the relevant election statute does not impose a *mens rea* requirement like that in *McDonald* or under California law.

It is important to note that some municipalities allow lawful permanent residents and/or nonresident aliens to vote in municipal elections,[253] so practitioners should check whether the non-citizen voted in a federal, state, or municipal election since the intent requirements differ depending on the type of election the non-citizen voted in.

C. Unlawful Voting and Good Moral Character

If the adjudicator determines that the applicant unlawfully voted under the applicable election law, then the applicant is removable. The adjudicator should follow local procedures for issuing a Notice to Appear, but continue (i.e., not process) the naturalization application pending the outcome of removal proceedings.[254] However, as outlined above, the adjudicator may find

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[250] 18 USC § 611 states in part: "It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate" for federal officers listed in statute. Policy Memorandum No. 86, *supra*, at 8 ("Because it is unlikely that a conviction under 18 USC 611 is a CIMT, such conviction will not preclude the applicant from establishing GMC under these provisions.")

[251] Craig C. Donsanto & Nancy L. Simmons, Department of Justice, *Federal Prosecution of Election Offenses* (7th ed. 2007), at 69.

[252] Policy Memorandum No. 86, *supra*, at 5 ("Federal election laws provide that only U.S. citizens can vote. Clearly, if an applicant is convicted under 18 USC § 611, which governs federal elections, the applicant has voted in violation of the law.")

[253] *Id.* See Virginia Harper-Ho, Note, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (Summer 2000); Tara Kini, Note, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 271 (Jan. 2005).

[254] Policy Memorandum No. 86, *supra*, at 7.

that the applicant falls within the narrow exception to removal created by the CCA. Or, the adjudicator may decide that despite the applicant's susceptibility to removal, the case deserves a favorable exercise of prosecutorial discretion.[255] In these situations, the adjudicator should proceed with the adjudication of the naturalization application.

In order to meet the criteria for naturalization, the applicant must be found to possess good moral character. Even if the applicant's prior unlawful voting does not serve as a basis for removal, it may be used to assess the applicant's good moral character.

As always, when assessing good moral character, the adjudicator should analyze:

- whether the applicant is statutorily barred from establishing good moral character,
- whether the applicant qualifies for an exception to 101(f);[256] and
- whether the unlawful conduct warrants a discretionary denial of good moral character, after analyzing the totality of the circumstances.

Statutory Bars to Good Moral Character. INA §§ 101(f)(3) read together with 212(a)(2)(A)(i)(I) explain that individuals convicted of or admit to committing crimes involving moral turpitude (CIMT) are statutorily barred from establishing good moral character.[257] Since 18 USC § 611 does not have a particular intent requirement involving fraud or lying, it is not likely that a conviction under § 611 will constitute a CIMT, and such conviction will not necessarily preclude the applicant from establishing good moral character.[258] However, applicants convicted under § 611 should also be cautioned about §§ 101(f)(3) and 212(a)(2)(B), which preclude a finding of good moral character for individuals who have been convicted of multiple crimes for which the aggregate sentence exceeds five years, regardless of whether the offenses involve moral turpitude; and § 101(f)(7), which precludes a finding of good moral character if an individual has been confined in a penal institution for 180 days or more during the statutory period.[259]

Discretionary Good Moral Character. Although not a statutory bar, unlawful voting may be considered a discretionary negative factor in the good moral character determination even without a conviction.[260] Adjudicators should examine the totality of the circumstances and consider factors such as: (1) family ties and background; (2) the absence or presence of other criminal history; (3) education and school records; (4) employment history; (5) other law-abiding behavior, e.g., meeting financial obligations, paying taxes, etc.; (6) community involvement; (7)

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[255] *Id.*
[256] *Id.* at 8.
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*

credibility of the applicant; and (8) length of time in United States.[261] The adjudicator might consider the applicant's prior unlawful voting in determining discretionary good moral character. It is the ILRC's position that, as with all discretionary good moral character decisions, the adjudicator must employ a balance test that balances the negative and positive factors (please see **§ 6.4(A)**, **(B)** for more information).

Exception to INA § 101(f). If the applicant's 18 USC § 611 conviction became final before October 30, 2000, or if the applicant has not been convicted under that statute, then adjudicators should determine whether the applicant falls under the § 101(f) exception, which is identical to the exception for removal created by the CCA.[262]

§ 6.10 False Claims to U.S. Citizenship

In addition to unlawful voting as a ground of deportability and inadmissibility, IIRIRA also created a ground of deportability and inadmissibility for false claims of U.S. citizenship.[263] The CCA added exceptions to the removal grounds for false claims to U.S. citizenship that are described above in § 6.9.[264]

To be deportable or inadmissible for making a false claim to U.S. citizenship, the person must have actually falsely represented himself or herself as a U.S. citizen on or after September 30, 1996 and such representation must have been made for the purpose of gaining a benefit under the INA, or federal or state law. Compared to INA § 212(a)(6)(C)(i), which covered making a false claim or misrepresenting a material fact prior to September 30, 1996 in connection with an attempt to obtain entry into the U.S., a U.S. passport, other documentation, or some other benefit under the INA, the false claim to U.S. citizenship inadmissibility and deportability ground

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[261] *Id.* at 9. The memo provides two examples: an officer might find that an applicant who: (1) unlawfully registered to vote in a federal election fifteen years ago; (2) signed the voter registration card without understanding that he or she was claiming to be a U.S. citizen by doing so; (3) was specifically told by a community organization that he or she was entitled to vote; (4) has been a law-abiding citizen in all other respects; and (5) has no other criminal history, can establish good moral character in spite of making a false claim to U.S. citizenship. Alternatively, an officer might find that an applicant who: (1) voted unlawfully but was not convicted; (2) has failed to pay taxes in the past 15 years; (3) has 50 unpaid traffic tickets; and (4) owes $20,000 in back child support, cannot establish good moral character even if the officer determines that the applicant is eligible for the CCA exceptions to 101(f) for long-term residents because the applicant's other bad acts cumulatively reflect that he or she lacks good moral character as a matter of discretion. *Id.*

[262] *Id.* at 9–10.

[263] INA § 212(a)(6)(C)(ii) states that "[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including § 274A) or any other Federal or State law is inadmissible." INA § 237(a)(3)(D) explains that "[a]ny alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this Act (including § 274A) or any Federal or State law is deportable."

[264] See INA §§ 212(a)(6)(C)(ii)(II), 237(a)(3)(D)(ii). See also Policy Memorandum No. 86, *supra* note 2, at 2.

"significantly expands the scope of the ineligibility related to false claims to U.S. citizenship."[265] It can apply to false claims to U.S. citizenship made for any purpose or benefit under the INA or even under federal or state law, thereby encompassing things such as obtaining welfare benefits or false representations made for the purpose of voting in an election.[266]

By its plain language, the false claim to U.S. citizenship ground requires a showing that the false representation was made for a specific purpose—to satisfy a legal requirement or obtain a benefit that would not be available to a noncitizen under the INA or any other state or federal law. This requirement also suggests that the individual must have knowledge that the representation is false.[267] Nevertheless, the Fifth Circuit held that false claim to citizenship under the INA does not require the same level of intent as the federal crime of false claim to citizenship under 18 USC § 911, which expressly requires a willful misrepresentation. *Theodros v. Gonzales*, 490 F.3d 396, 401 n. 7 (5th Cir. 2007). The Fifth Circuit acknowledged that there "is no clear ruling by any of the circuits addressing whether [INA § 212(a)(6)(C)(ii)], when applied to an alien who falsely represented his or her circumstances of birth in a passport application in a manner that implied United States citizenship, requires evidence of an alien's intent to misrepresent himself as a United States citizen.… The BIA has not provided clear guidance regarding its intended interpretation of this statute."[268] Even though the court did not decide on whether the statute requires evidence of the non-citizen's intent to falsely claim U.S. citizenship, it found that the petitioner's conduct more than sufficed to show that, if evidence of intent is required, the BIA's determination that she had possessed that intent, if required, was reasonable.[269]

NOTE: Advocates should also be aware that a conviction (or absent a conviction, a formal admission) of a false claim to U.S. citizenship where fraud is involved could have the additional consequence of being a crime of moral turpitude triggering inadmissibility and/or deportability. The BIA has also found that a false claim to citizenship may, but does not necessarily, bar a person from establishing good moral character under INA § 101(f).[270]

A. False Claim to US Citizenship on the I-9

Until April 3, 2009 the I-9 form required for employment asked, "Are you a citizen *or a national*." CIS recognizes that the fact that someone answered this question "yes" does not

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[265] Dept. of State Cable, Vol. 2, No. 19, Pg. 807 (Sept. 17, 1997), 2 *Bender's Immigr. Bull.* 807.
[266] *Id.* See also CIS Memorandum, Appendix 74-8, Section 212(a)(6)(C)(ii) Relating to False Claims to U.S. Citizenship (Apr. 6, 1998).
[267] See 73 No. 45 *Interpreter Releases* 1641.
[268] *Barcenas-Barrera v. Holder*, 394 Fed.Appx. 100, 106 (5th Cir. 2010) (unpublished).
[269] *Id.*
[270] *Matter of Guardarrama*, 24 I&N Dec. 625 (BIA 2008).

necessarily mean that he or she has made a false claim to U.S. citizenship.[271] However, if an individual states that he or she meant to claim citizenship, then he or she would be found to have made a false claim.[272] CIS recognizes that a timely retraction will eliminate a false claim to U.S. citizenship.[273] The retraction must be timely and without delay.[274] Currently the I-9 employment verification form list U.S. citizen as its own category. Thus, by checking this box on the I-9, a noncitizen would be deportable under the false claim ground.

A conviction under 18 USC § 1015(e) which penalizes making a false claim to be a citizen or a national for the purpose of gaining employment or any other benefit under federal or state law triggers two grounds of deportability. This offense would be a deportable ground under the false claim ground if the record clearly showed the conviction was for claiming to be a citizen, not a national. However, even it is not clear that the offense was for claiming to be a citizen, 18 USC § 1015(e) could be deportable as a crime involving moral turpitude.

B. False Claims to U.S. Citizenship in the Voting Context

Making a false claim differs from the actual act of unlawful voting. In the voting context, a non-citizen can only be found to have violated the provision if his or her conduct would be found unlawful under the relevant federal, state, or local election law. In contrast for false claims, the adjudicator need not look at the election law that was violated, but need only establish that the applicant:

- actually falsely represented himself or herself as a U.S. citizen on or after September 30, 1996, and
- that such representation was made for the purpose of registering to vote or voting.[275]

The IIRIRA also established criminal penalties for any non-citizen who makes a false claim to U.S. citizenship in order to vote or register to vote in an election,[276] and the CCA added exceptions to the removal grounds for false claims to U.S. citizenship.[277] See § 6.9(A)(2). If an

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[271] CIS Interoffice Memorandum dated March 3, 2009, *Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators*, p. 26, citing *United States v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004).
[272] See *Ateka v. Ashcroft*, 384 F.3d 954, 957 (8th Cir. 2004); *Rodriguez v. Mukasey*, 519 F.3d 773, 777 (8th Cir. 2008).
[273] CIS Interoffice Memorandum dated March 3, 2009, p. 28, citing *Matter of R-R-*, 3 I&N Dec. 823 (BIA 1949); see also *Matter of M-*, 9 I&N Dec. 118 (BIA 1960).
[274] *Id.*
[275] Policy Memorandum No. 86, *supra*, at 3.
[276] 18 USC § 1015(f) states: "Whoever knowingly makes any false statement or claim that he is a citizen of the United States in order to register to vote or vote in any Federal, State, or local election (including an initiative, recall, or referendum) -- Shall be fined under this title or imprisoned not more than five years, or both."
[277] See INA §§ 212(a)(6)(C)(ii)(II), 237(a)(3)(D)(ii). See also Policy Memorandum No. 86, *supra* note 2, at 2.

applicant has been convicted of violating 18 USC § 1015(f), which deals with making a false claim to U.S. citizenship in order to vote or register to vote, then the applicant faces the possibility of removal.[278] However, absent a conviction, information about whether an applicant actually falsely claimed to be a U.S. citizen can come from his or her own admissions under oath or from independent documentary evidence, such as voter registration forms.[279]

Unlike unlawful voting, which applies retroactively, false claims to U.S. citizenship apply only on or after September 30, 1996.

Voter Registration. Many non-citizens may mistakenly register to vote, especially when applying for driver's licenses (see the Motor Voter Act). CIS may use the voter registration against naturalization applicants, since voter registration forms may specifically ask whether or not the applicant is a U.S. citizen. An answer in the affirmative would, arguably, constitute a false claim to U.S. citizenship. Even if CIS determines that the non-citizen made a false representation of U.S. citizenship, advocates should urge the adjudicator to exercise prosecutorial discretion, particularly where the non-citizen mistakenly or inadvertently registered to vote. CIS guidance on prosecutorial discretion lists factors that adjudicators should consider, including: the alien's immigration status, length of residence in the U.S., community service, and immigration history (i.e., non-citizens without a past history of violating the immigration laws warrant favorable consideration).[280] See discussion of CIS' procedures for handling false claims to citizenship on voter registration forms in § 6.9(A).

C. False Claims to U.S. Citizenship and Good Moral Character

Should the adjudicator decide to continue adjudicating the N-400, despite the applicant having made a false claim to U.S. citizenship on the voter registration card, the applicant must still meet the requirements for naturalization, which includes possessing good moral character.

Statutory Bars to Good Moral Character. CIS has determined that 18 USC § 1015(f), which penalizes making a false claim to citizenship in order to register to vote or to vote, is a crime involving moral turpitude.[281] A conviction for 18 USC § 1015(f) would be a statutory bar against showing good moral character if the applicant committed the offense within the statutory period (unless the applicant qualifies for the 101(f) exception).[282] In addition, an admission to the essential elements of 18 USC § 1015(f) would also be a statutory bar.[283] As with unlawful voting, applicants should also be aware that falling under INA § 101(f)(7) may statutorily bar them from demonstrating good moral character.

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[278] Policy Memorandum No. 86, *supra*, at 6.
[279] *Id.*
[280] Doris Meissner, Exercising Prosecutorial Discretion (Nov. 17, 2000), at 7–8.
[281] Policy Memorandum No. 86, *supra*, at 4.
[282] *Id.* at 8.
[283] 18 USC § 1015(f) provides, "Whoever knowingly makes any false statement or claim that he is a citizen of the United States in order to register to vote or to vote in any Federal, State, or local election (including an initiative, recall, or referendum)" is an felony offense punishable with a sentence of five years.

Discretionary Good Moral Character. Although making a false claim to citizenship is not a per se bar to establishing good moral, it can be a discretionary basis for finding lack of good moral character.[284] While the adjudicator may look unfavorably on the fact that the applicant indicated on the voter registration card that he or she was a U.S. citizen that fact should not be the only circumstance the adjudicator examines in determining discretionary good moral character. As with the factors listed for unlawful voting, the adjudicator should examine the totality of the circumstances. A CIS example of someone who may be able to demonstrate good moral character, despite having made a false claim to U.S. citizenship, involves an applicant who:

> "(1) unlawfully registered to vote in a federal election fifteen years ago;
> (2) signed the voter registration card without understanding that he or she was claiming to be a U.S. citizen by doing so;
> (3) was specifically told by a community organization that he or she was entitled to vote;
> (4) has been a law-abiding citizen in all other respects; and
> (5) has no other criminal history."[285]

It is the ILRC's position that as with all discretionary good moral character decisions, the adjudicator must employ a balance test that balances the negative and positive factors (please see **§ 6.4(A), (B)** for more information).

[284] *Matter of Guadarrama de Contreras*, 24 I&N Dec. 625 (BIA 2008) (holding that a non-citizen who has made a false claim to U.S. citizenship may not be able to establish good moral character, but the catch-all provision in INA § 101(f) does not mandate such a finding.)
[285] Policy Memorandum No. 86, *supra*, at 9.