NATURALIZATION and Criminal Offenses, Detention, & Removal: 
A Legal Guide For Immigrants & Advocates

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ACKNOWLEDGMENTS

Welcome to *Naturalization and Criminal Offenses, Detention, & Removal: A Legal Guide for Immigrants & Advocates*. The American Bar Association Commission on Immigration created this guide for educational and informational purposes only and nothing herein is to be considered the rendering of legal advice for specific cases; readers are responsible for obtaining such advice from an attorney. This guide was not prepared by any agency within the U.S. government, and it is intended to outline the process of becoming a citizen of the United States and to explain some of the obstacles to naturalization for permanent residents currently in federal immigration detention or with prior criminal offenses.

The Commission on Immigration gratefully acknowledges the work of Elizabeth Keyes, Naima Mian, Andrea Siemens, and Irena Lieberman in developing this guide. Special appreciation is also due to the law firm of Akin Gump Strauss Hauer & Feld LLP, Ann Cusick, and Jarrod Goldfeder. In addition, we would like to thank the Florence Immigrant Rights Project for providing us with several valuable resources, and the Immigrant Legal Resource Center, in particular for giving us permission to include portions of their March 2002 publication in this manual, entitled *Naturalization: A Guide for Legal Practitioners and Other Community Advocates*.

Finally, the Commission would like to thank the Carnegie Corporation of New York for their generosity in funding this project. Without their assistance, we would not have been able to educate immigrant communities on how to avoid detention and removal when seeking to naturalize, especially in the aftermath of 9/11.
FOREWORD

For immigrants and refugees, gaining U.S. citizenship is a profound milestone in both a practical and symbolic sense. Naturalization allows immigrants to become full members of our society. It provides new political and civil rights, and the ability to participate fully in the democratic process. Those who naturalize gain the right to vote, sit on a jury, travel with a U.S. passport, live in the U.S. without fear of deportation, hold public office, obtain certain government jobs, and obtain certain government benefits. In addition, a U.S. citizen can sponsor additional family members to join them in the United States, with shorter waiting times.

Once an immigrant becomes a legal permanent resident, if eligible for naturalization, he or she must go through an in-depth administrative process, which includes written and oral exams on history and civics, as well as an interview. It is therefore crucial for applicants to receive sufficient guidance throughout the naturalization process.

The Commission's guide to naturalization focuses on the concerns of those applying for citizenship who may be in federal immigration detention and who face removal proceedings, or who have criminal offenses that could affect their eligibility to naturalize. In light of rapidly changing immigration laws and policies, this publication serves as an important and timely resource for these individuals.

It is our sincere wish that despite the many challenges immigrants may face along their journey toward citizenship, they feel welcomed into our society with open hearts and open minds.

Robert J. Grey, Jr.
ABA President
PREFACE

We have all heard of the myths that were believed by those who came many generations ago that the streets of America were paved with gold. We know they are not. But they are paved with opportunity. You must best utilize your skills, your knowledge and your hard work to obtain your goals.

And you must always remember that with opportunity comes responsibility. The responsibility of becoming a full-fledged member of American society — a citizen in the fullest meaning of the word. The United States of America is a democracy. Democracies are governments in which every citizen participates. That means it is a government in which you have a say — a government which invites you to voice your views.

And it is imperative that you do so.

You have the responsibility to express your opinions and to help educate those around you. Some of you have come from countries where the opportunity to express your political opinions did not exist or where the average citizen was discouraged from doing so. Here you are encouraged to do so.

Never take for granted the privileges that have been given you. Be active, enthusiastic participants in this great and free country.

For your voices are among the most important in these United States. Unlike native born Americans, you chose to come here. You chose to renounce the lands of your birth and to work arduously to attain your citizenship. You are fully aware of how different this country is from much of the world.

Some of you have known great suffering. Others of you have not had such experiences. But each of you has for one reason or another chosen a new life.

You have life experiences that ought be shared with your fellow Americans. You are and must be a constant reminder of how fortunate we all are to be part of what one of our founding fathers, Thomas Jefferson, called the most important experiment in the history of mankind.

Ilana D. Rovner
Naturalized Citizen and
Judge of the United States Court of Appeals
CHAPTER 1
NATURALIZATION – A GENERAL OVERVIEW

I. WHAT IS NATURALIZATION?

A person can become a United States citizen either by birth or through naturalization, which is the final step of the immigration process. Naturalization provides many rights, including the right to vote in U.S. elections, to travel with a U.S. passport, to not be deported, to hold public office, to obtain certain government jobs, and to obtain certain government benefits. In addition, a U.S. citizen can petition for more categories of family members to immigrate to the United States than a legal permanent resident can, with shorter waiting periods.

Although the advantages are great, there are also some disadvantages to naturalization. A legal permanent resident who decides to become a U.S. citizen may lose her/his citizenship in her/his native country, although some countries permit dual citizenship. In addition, some countries restrict foreign ownership of property, so if an applicant owns property in her/his home country, s/he may be required to sell it if s/he becomes a U.S. citizen. The naturalization process, which includes a U.S. Citizenship and Immigration Services (CIS) interview and examination, can also be intimidating, and preparing for this exam may be time-consuming and stressful. The biggest concern about naturalization, however, is that the CIS can discover information about the applicant that might make her/him removable from the United States.

II. WHO IS ELIGIBLE FOR NATURALIZATION?

To become a naturalized citizen, an applicant must meet ten basic requirements, which are found in the Immigration and Nationality Act (INA) §§ 312 through 337, and Title 8 of the Code of Federal Regulations. The provisions require that an applicant must:

1. Be at least 18 years old.
2. Be a lawful permanent resident.
3. Have continuous residence in the U.S. for at least five years (with certain exceptions).
4. Have been physically present in the U.S. for at least half of the five-year period.
5. Have lived in the district or state where applying for at least three months.
6. Have good moral character.
7. Have an attachment to the principles of the Constitution.
8. Have simple knowledge of English.
9. Be able to pass a test on U.S. history and government.
10. Swear loyalty to the U.S. by taking an oath of allegiance.

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1 Portions of this chapter were excerpted with permission from Naturalization: A Guide For Legal Practitioners and Other Community Advocates, written and published by Immigrant Legal Resource Center, 2002.

2 The INA is the complete body of law dealing with all issues concerning immigration and naturalization. Title 8 of the Code of Federal Regulations contains the corresponding regulations.
A. Age

An applicant must be at least 18 years old.

B. Lawful Permanent Resident Status

Legal permanent residents ("LPRs") are persons who have been lawfully admitted to the United States as immigrants. For purposes of naturalization, the INA defines "lawfully admitted for permanent residence" as being lawfully admitted without this status having changed. Therefore, in order to be eligible for naturalization, a LPR must maintain this status.

Time as an LPR begins on the date the applicant was granted lawful permanent resident status, which is shown on the Permanent Resident Card, formerly known as Alien Registration Card and most commonly known as the "Green Card." Most naturalization applicants must show permanent residence in the United States for at least five years. The applicant also has the burden to show that s/he entered the United States lawfully and when, where, and how s/he entered, which is also usually proven by the applicant’s Permanent Resident Card.

The CIS may investigate whether the applicant was lawfully admitted for permanent residence and whether s/he has maintained that status. The CIS examines the applicant’s immigration file, reviews the information provided in the Application for Naturalization (Form N-400), and interviews the applicant. The CIS also requests a criminal background check from the Federal Bureau of Investigation (FBI) to determine if the individual has a criminal record. If the CIS discovers that the applicant has committed a crime that constitutes a deportable offense, the CIS can place the applicant in removal proceedings, even if the crime occurred many years ago.

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4 INA §§ 316(a) and 318.

5 INA § 101(a)(20).

6 See Appendix 1-C for sample photos of a Permanent Resident Card.

7 INA § 318.
C. Continuous Residence

1. General Requirements

An applicant must have resided in the United States continuously for at least five years as a lawful permanent resident immediately prior to applying for naturalization. Short trips outside the United States, lasting less than six months, do not constitute a break in continuous residence. However, if an applicant leaves the United States for more than six months, s/he has broken her/his continuous residence. If her/his time outside the U.S. is less than one year, s/he can re-enter using her/his Green Card without restriction. If the applicant was outside the United States for more than one year, s/he has disrupted her/his continuous residence and may be eligible to re-enter as a permanent resident if s/he obtained a re-entry permit before her/his departure. None of the time before s/he left counts toward continuous residence, however, unless s/he returns within two years, in which case the last 364 days of her/his time out of the U.S. (one year minus one day) counts toward meeting the continuous residence requirement.

In addition, the continuous residence requirement does not mean that the applicant must remain in the United States after filing his naturalization application for the entire period his/her application is being reviewed. Temporary trips outside the U.S. are permitted as long as the applicant maintains the United States as his/her home.

For example:

- Gisela obtained status as a lawful permanent resident on May 1, 1999. She will not be eligible for naturalization until she has been a lawful permanent resident for five years. Thus, on May 1, 2004 she qualifies for naturalization.

- Eldis became a permanent resident on January 1, 1990. She lived in the United States for three years, then returned to the Dominican Republic for one year and three months. She obtained a re-entry permit before leaving the United States so that she would retain her permanent resident status. Eldis re-entered the United States with permanent resident status on April 1, 1994. She is eligible for naturalization on April 2, 1998, four years and one day after she returned to the United States. The last 364 days that she was out of the United States count toward her time as a permanent resident in “continuous residence,” but the three years in the United States before leaving do not.

2. Exceptions

Certain persons do not have to meet the five-year continuous residence requirement. These exceptions include:

- Children of U.S. citizens.

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8 INA § 316(a)(1).
- Spouses of U.S. citizens. The spouse of a U.S. citizen must live in the United States for only three years as a lawful permanent resident. S/he must have been married to the same U.S. citizen for three years, the U.S. citizen spouse must have been a citizen for the entire three years, the marriage must be valid, and the couple must have lived together for the three years immediately before the date of the filing of the application and naturalization interview.

- Lawful permanent residents serving in the U.S. Armed Forces.

- Refugees and Asylees. Refugees are eligible for lawful permanent resident status after they have been in the U.S. for one year, and asylees can apply for lawful permanent resident status one year after their asylum applications are approved. A refugee can start counting her/his five years from the time s/he arrived in the United States, and an asylee can start counting from the year before her/his application for lawful permanent residence was approved.

**D. Physical Presence in the United States**

The applicant must have been physically present in the United States for at least half (30 months) of the five-year residence period discussed above to fulfill this requirement. For example, Mario was denied naturalization because during the last five years (60 months), he was physically present in the U.S. for only 24 months. Mario must wait and reapply when he has been physically present in the U.S. for at least 30 of the 60 months prior to the time he reapplies.

There is a difference between “physical presence” and “continuous residence.” An applicant calculates his/her “physical presence” in the United States by subtracting the total number of days he was outside the United States on all trips taken from the date he acquired LPR status to the date of his/her application. In contrast, “continuous residence” involves counting the number of days the applicant was outside the United States during a single trip; in other words, an applicant maintains his/her residence in the United States by not being outside the country for longer than six months during a single trip. Even if an applicant never took a trip that disrupted his/her “continuous residence,” s/he may have taken many short trips that total more than 30 months and, thus, s/he would not satisfy the “physical presence” requirement.

When counting the total number of days outside the U.S., an applicant must account for all short trips, including to Canada and Mexico, unless the trip lasted less than a day. Generally, a partial day spent in the U.S. counts as an entire day in the U.S.

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9 INA § 316(a)(1).

10 This example was taken from *Naturalization: A Guide For Legal Practitioners and Other Community Advocates*, written and published by Immigrant Legal Resource Center, 2002.
There are several exceptions to the physical presence requirement, including:11

- **Certain unmarried children.**12 Children under 18 years old who are lawfully admitted to the U.S. and have at least one U.S. citizen parent may obtain a certificate of citizenship without fulfilling the physical presence requirements.13

- **The spouse of a U.S. citizen.** A spouse of a U.S. citizen must have been physically present for only half of the three-year residence period (18 months).14

- **A member of the U.S. Armed Forces.** A member of the U.S. Armed Forces who is serving abroad meets the physical presence requirement even if s/he is outside of the U.S. for more than a year.15

- **U.S. nationals.** U.S. nationals can fulfill the requirement through physical presence in an outlying possession of the U.S.; i.e., American Samoa or Swains Island.16

### E. Three Months of Local Residence

Naturalization applicants must live in the district or state in which they are applying for at least three months before applying.17 A district is a geographical area defined by CIS and served by one of the 33 CIS District Offices. If an applicant previously lived for three months in the state or CIS district, that residence does not satisfy this requirement unless, after an absence from the U.S. for several months during which s/he has not abandoned her/his residence, s/he returns to the same state from which s/he had originally departed. Under these circumstances, the three-month state residence requirement may still be met if the absence was for less than one year.18

For example, Esperanza lived in Texas for five years. Following a seven-month visit to Mexico, she returned to Texas. Esperanza can immediately apply for naturalization because she fulfilled the three-month residency requirement prior to her visit to Mexico. However, if she had moved to Arizona rather than returning to Texas after her visit to Mexico, Esperanza would have to live in Arizona for three months before applying for naturalization.

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11 8 CFR §§ 319-331.
12 INA § 101(c) defines “child” for naturalization and citizenship. Adopted children do qualify for certificates of citizenship under INA § 322(b), but stepchildren cannot qualify for a certificate of citizenship under this section.
13 INA § 322(a).
14 INA § 319(a)
15 INA § 328, 8 CFR § 328.2(e)(1).
16 INA § 325, 8 CFR § 325.3(a); INA § 101(a)(29).
17 INA § 316(a)(1), 8 CFR § 316.2(a)(5).
18 8 CFR § 316.5(b)(5)(i).
An applicant can also apply for naturalization three months before s/he is actually eligible. In this case, the applicant does not need to live for three months in the CIS district before s/he files the application. Rather, the applicant must live in the CIS district for three months immediately before her naturalization interview.19

F. Good Moral Character

To be eligible for naturalization, the applicant must be a person of good moral character for the required residency period immediately prior to applying for naturalization.20 For most applicants the period is five years, but if the applicant is married to a U.S. citizen, the period is reduced to three years. The CIS can, however, look into events that occurred before the five (or three) year period when deciding whether the applicant has good moral character.21

The good moral character requirement can be confusing because there is no actual definition of “good moral character.” The INA defines only what is not good moral character and which acts prevent a person from establishing good moral character.22

An applicant can be denied naturalization for lacking good moral character in two ways:

- **Statutory Denial.** An applicant commits an act or falls into a category that is specifically listed as a disqualifying factor in the INA. Statutory bars to naturalization are listed in INA § 101(f) and incorporate some of the acts listed in INA § 212(a). Many of these acts are crimes.

- **Discretionary Denial.** The examiner may decide that the applicant should not be approved for naturalization due to other negative factors, even though they are not included among the disqualifying factors. Although the CIS has broad discretion to find that an applicant lacks good moral character, it should consider both negative and positive aspects of the applicant’s character when making a decision.

The “good moral character” requirement is discussed in more detail in Chapter 2.

G. Attachment to the Principles of the Constitution

19 INA § 334(a); 8 CFR § 316.2(a)(5).

20 INA § 316(a)(3). Under 8 CFR § 316.10(a)(1), an applicant for naturalization must be of good moral character during the statutory period prior to applying, currently, and during the period between the examination and the oath of allegiance.

21 INA § 316(e).

22 INA § 101(f).
The naturalization applicant must be “attached to the principles of the United States Constitution” for the same period as s/he must be an LPR, either five or three years. In other words, the applicant must be willing to support and defend the United States and the Constitution, and can be denied citizenship if s/he is hostile towards the U.S. government or does not believe in the principles of the Constitution. The applicant declares her/his “attachment” to the Constitution when s/he takes the Oath of Allegiance (discussed below). CIS will also examine the applicant’s discharge or desertion from the U.S. Armed Forces (if applicable), and his willingness to register with the Selective Service, if the applicant is a man between the ages of 18 and 26.

H. Simple Knowledge of English

A naturalization applicant must be able to understand English and read, write, and speak simple words and phrases in ordinary usage. According to the law, “no extraordinary or unreasonable conditions shall be imposed upon the applicant,” but evaluating how well the applicant speaks English is a somewhat subjective test. Thus, satisfying this requirement will depend to a certain extent on the CIS examiner conducting the interview.

I. U.S. History and Government

A naturalization applicant must understand the fundamentals of the history, principles, and form of government of the United States. There is an exemption available for those who have a physical or developmental disability or mental impairment. Although an applicant may be exempted from the English language requirement based on the “50/20” or “55/15” rules, s/he must still fulfill the U.S. history and government requirement.

The most common way to satisfy this requirement is by answering questions during the CIS interview. The CIS examiner typically will ask questions taken from the material in the CIS-authorized Federal Textbooks on Citizenship, although there may also be questions about the identity of current officeholders. The examiner will probably select between six and ten questions from a list of one hundred questions the CIS has created to cover the material in the textbooks. Because there are no rules on how many questions an applicant must answer correctly to pass the exam, the decision is left to the examiner’s discretion.

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23 INA § 316(a)(3).
24 8 CFR § 312.1(a).
25 INA § 312(a)(1).
26 8 CFR § 312.2(a).
27 INA § 312(b)(2), which exempts persons who, at the time of filing their applications, are over 50 years old and have lived in the United States for periods totaling 20 years after being lawfully admitted for permanent residence, or are over 55 years old and have lived in the U.S. a total 15 years.
28 8 CFR § 312.2(c)(2).
29 See Appendix 1-D for sample civics questions.
When asking questions about U.S. history and government, however, the examiner must consider the applicant’s education, background, age, length of residence in the U.S., opportunities available and efforts made to learn the required material, and any other factors relevant to evaluating the extent of the applicant’s knowledge and understanding. The examiner should base the choice of subject matter, phrasing, and evaluation of the questions on the applicant’s education. For example, an applicant with little education or an elderly applicant should be evaluated by an easier standard.

NOTE: If a CIS examiner asks questions that do not come from the Federal Textbook on Citizenship, and decides that the applicant did not pass the exam because s/he failed to answer such questions, this is a violation of CIS procedure. If this occurs, the applicant should send a written account of the incident to the Branch Director of the local CIS office.

There are no blanket exceptions to the U.S. history and government examination based solely on age and long-term LPR status, so applicants who are exempt from the English language requirement based on the “50/20” or “55/15” rules (discussed in Chapter 2) still must take the U.S. history and government test. Some special conditions may apply to some applicants, however, including a physical or mental impairment exception, some native language testing, and some age-related conditions.

J. Oath of Allegiance

The final step in the naturalization process is taking the oath of allegiance to the United States, at which point the applicant becomes a U.S. citizen and receives a Certificate of Naturalization. An applicant takes this oath at a naturalization ceremony, in front of either a judge or a CIS official, thereby declaring his attachment to the U.S. and its Constitution. The Oath of Allegiance is found at 8 CFR § 337.1(a) and reprinted below.

The Oath of Allegiance to the United States of America

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen;

that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic;

that I will bear true faith and allegiance to the same;

that I will bear arms on behalf of the United States when required by the law;

30 8 CFR § 312.2(c)(2).
31 8 CFR § 312.2(a).
32 INA § 316(a)(3).
that I will perform noncombatant service in the Armed Forces of the United States when required by the law;

that I will perform work of national importance under civilian direction when required by the law; and

that I take this obligation freely without any mental reservation or purpose of evasion;

so help me God.

Taking the oath does not require the applicant to give up the citizenship of his birth country, but rather, that the applicant must support the structure of the U.S. government and obey its laws. Although dual citizenship is not encouraged, the United States does not require that a naturalizing citizen give up the citizenship of another country.

III. OVERVIEW OF THE APPLICATION PROCESS

A. The N-400 Application for Naturalization

The first step in applying for naturalization is to complete the application, called an “Application for Naturalization,” or Form N-400. It is often helpful to start by completing the “Naturalization Eligibility Worksheet,” which will help the potential applicant decide if s/he is eligible to apply for naturalization. Once the applicant believes s/he is eligible, s/he should complete the application (in black or blue ink or on a typewriter or computer). If an advocate is assisting the applicant, s/he should have the applicant complete a draft on his own, first translating the application into the applicant’s language if necessary. Afterward, the applicant and advocate should review the draft together and complete the final copy for submission to CIS.

If an item on the application does not apply to the applicant, he should write “N/A” (not applicable). However, if the applicant’s answer to the question is “none,” s/he should write “none” in the blank. In addition, the applicant should write his alien registration number (“A” number) at the top of each page of the application.

The following section reviews some parts of Form N-400, with an emphasis on areas that may cause problems for some applicants.

33 See Appendix 1-A for sample of Form N-400.

34 See Appendix 1-F for sample of this worksheet.

35 This review of Form N-400 is reprinted, with minor modifications, from the Immigration Legal Resource Center’s manual, Naturalization: A Guide for Legal Practitioners and Other Community Advocates (2002).
1. Your Name

Section A of the form asks for the applicant’s current legal name; i.e., the name that is on the applicant’s birth certificate, or the name the applicant has adopted through a legal name change or through marriage.

Section B asks for the name as it appears on the applicant’s Green Card, even if it is misspelled.

Section C asks for other names that the applicant has used. An applicant should write his/her maiden name if s/he uses her married name now.

Section D provides a space for the applicant to write the name that s/he wants to use in the future if it is different from her/his present legal name. When an applicant naturalizes, s/he has an opportunity to legally change her/his name through the federal court that is naturalizing her/him.

2. Information About Your Eligibility

Here, the applicant checks the basis upon which s/he is applying for naturalization. It is very important that the applicant check the correct category, as the CIS adjudicator will ask her/him questions during the interview to make sure s/he qualifies on the basis s/he claimed.

3. Information About You

This section asks questions about eligibility for citizenship. Much of the information can be found on the applicant’s Green Card. If the applicant is applying as the spouse of a U.S. citizen, s/he must indicate her/his marital status as “married.”

In Section A, the applicant must provide her/his social security number. It is important that s/he provide only a valid social security number that was issued to her/him. An applicant should not provide a false social security number that s/he may have used in the past.

Section C asks for the date the applicant became a lawful permanent resident, which is not always easy to determine. Many Green Cards list the date on the back in the middle of the first line of what looks like a code, such as “P26 LAS 890714 245 9099001001.” This indicates that the person was admitted to lawful permanent resident status on July 14, 1989, shown by the first group of numbers after the three letters (for port where admitted), and written year/month/day.

Section D asks for the applicant’s country of birth.

Section E asks for the applicant’s current nationality (i.e., citizenship), which may not be the country of birth.

Section F asks if the applicant’s parents are U.S. citizens.
Section H asks whether the applicant is applying for a waiver of the English and/or civics and history tests based on the applicant’s disability. Applicants also should state their requests for such waivers in a cover letter attached to the Form N-400 application.

Section I asks the applicant if s/he is requesting an accommodation to the naturalization process because s/he has a disability. Under federal law, CIS must make reasonable accommodations to the naturalization process for applicants with disabilities. The applicant should note on the application her/his disability and the accommodation s/he needs. If possible, the applicant should also submit a letter from a doctor verifying her/his disability and the need for accommodation. An applicant requesting a waiver of the oath requirement due to a disability should check the fourth box and include a short explanation, such as “I am unable to take an oath of allegiance because of ______________(describe disability) and I therefore request a waiver of the oath requirement.”

There is no special place on the application for an applicant to indicate that s/he qualifies for the English language exemption or the easier history and civics exam due to age and length of residence in the United States or other exceptions. Thus, an applicant who qualifies for an exception should include this information in Section I and in a cover letter attached to her/his naturalization application. Additionally, when applicable, an applicant should write the following in red ink at the top of the first page of the Form N-400: “I qualify for an exemption from the English language requirement.”

4. Addresses and Telephone Numbers

This question asks for the street address where the applicant lives, as well as the best mailing address to use if it is different from the street address.

5. Information for Criminal Records Search

Information provided in this part will assist the FBI conduct its criminal record search on the applicant, which is part of the good moral character determination.

6. Information about Your Residence and Employment

Section A: The applicant should list the addresses where he has lived for the last five years or for as long as he has been a lawful permanent resident, whichever is less. Start with the current address, and then the one before it, and so on. This information will help the CIS examiner determine whether the applicant has actually lived in the U.S. for the required length of time to meet the continuous residence period. The examiner will ask the applicant at the interview about any gaps in the information he provides in this part.

Section B: The applicant should list his/her employers for the last five years, going in reverse chronological order with the present employer first. If the applicant is a homemaker, s/he should write that in this section. If the applicant is retired or on disability, s/he should indicate
this and specify her/his last employment (if s/he had one) before retiring or acquiring the disability. This will show some connection to the workforce and, thus, provide some positive equities for the applicant. CIS will often inquire how a non-working applicant is supporting herself or himself.

7. Time outside the United States (Including Trips to Canada, Mexico, and the Caribbean)

Section C of this part asks the applicant to list every absence since gaining LPR status, not just during the last five years. This information will assist the examining officer to determine whether the applicant has met the continuous residence requirement of either five or three years, the physical presence requirement of two and a half or one and a half years, and whether the applicant’s LPR status has been invalidated by an abandonment of residence.

Trips to Mexico and Canada are considered trips outside the U.S., even if the trips lasted a short period of time. In Sections B and C, however, the applicant does not have to list any absence from the U.S. that lasted less than 24 hours.

If the applicant left the U.S. for periods of between six months and a year, s/he will have to establish to the satisfaction of the examiner that s/he did not break the continuity of her/his residence. If s/he cannot establish this, s/he will have to wait five years (or three years if the spouse of a U.S. citizen) after s/he returned to file an application for naturalization in order to meet the residency requirements.36

If the applicant was outside the United States for longer than one year, s/he will not be able to naturalize until four years and one day (or two years and one day if married to a U.S. citizen) after s/he returned to the United States.37

If the applicant has been absent from the U.S. more than ten times, s/he should list these absences on a separate sheet of paper and attach it to the application.

8. Information about Your Marital History

CIS uses this information to determine whether a marriage that formed the basis of lawful permanent resident status (where gained by marriage to a U.S. citizen or lawful permanent resident) is valid and whether an applicant qualifies to apply for naturalization after only three years as an LPR. However, an applicant must complete this section even if s/he did not obtain lawful status via marriage and is not applying under the three-year rule. At Section E, which asks for the immigration status of the spouse if s/he is not a U.S. citizen, the applicant should check the “Other” box if his spouse is not an LPR and write her/his immigration status or “Alien” if s/he is undocumented.

36 8 CFR § 316.5(c)(1)(i) and (ii).
37 8 CFR § 316.5(c)(1)(i) and (ii).
If the applicant has committed marriage fraud—marrying only to obtain a Green Card—the CIS could deny her/his naturalization application and place him/her in removal proceedings.

In Section B, the applicant must supply his/her date of marriage. If the applicant immigrated as the unmarried child, son, or daughter of a U.S. citizen (immediate relative or first preference) or as the unmarried child, son, or daughter of a permanent resident (second preference) but was, in fact, married, the applicant could be denied naturalization and placed in removal proceedings for having committed visa fraud. Individuals in this situation should not apply for naturalization before consulting an attorney.

Item 4 in both Sections F and G asks for the date when the applicant’s previous marriage ended and when his/her present spouse’s previous marriage ended. This is significant if the applicant immigrated as a spouse under an immediate relative petition or second preference petition and either the applicant’s or spouse’s previous marriage actually ended after the applicant and her/his current spouse were married. If this is the case, the applicant would not have been legally married to the person who petitioned for him/her. Thus, the applicant could be denied naturalization and placed in removal proceedings for not having been eligible for LPR status.

In addition, if it appears that the applicant’s spouse is in the U.S. illegally, CIS could ask at the naturalization interview whether the applicant helped his spouse enter the U.S. An applicant could be denied naturalization and removed from the U.S. if s/he helped smuggle someone across the border illegally, even if the applicant merely helped his/her spouse (or children) enter the United States illegally by sending money to pay a professional smuggler.

9. Information about Your Children

The information provided in this section will help CIS determine whether the applicant’s children will automatically derive citizenship from the parent(s), referred to as “derivative citizenship.” Even if the children are not entitled to automatically derive citizenship, it is important that the applicant lists all of his/her children, including step, adopted, and illegitimate children, whether married or unmarried, in order to facilitate petitioning for them as “immediate relatives” after s/he naturalizes. The application instructions state that applicants should list even children who are deceased or missing.

Alien smuggling issues may be a concern here as well. If it appears that the applicant’s child is in the U.S. without legal status, the CIS examiner may ask whether the applicant helped his/her child enter the U.S. illegally. An applicant who has engaged in alien smuggling can be denied naturalization and placed in removal proceedings.

Applicants should also be aware of child support issues. If a minor child is listed on the application as living at an address different from the applicant’s, the CIS examiner may ask whether the applicant pays child support. If the applicant has failed to pay child support, the examiner may determine that s/he lacks good moral character and deny the naturalization application.

38 INA § 320.
10. Additional Questions

This part focuses on good moral character issues, political affiliations, military and selective service registration issues, previous deportation, removal and exclusion issues, and oath of allegiance requirements. Generally, naturalization may be denied to applicants who are not of “good moral character,” have voluntarily participated in communist or totalitarian organizations or organizations that advocate or teach opposition to all organized government, or have used their lawful permanent resident status to avoid military service.

If the applicant answers “yes” to any of the items in Part 10, s/he needs to provide a detailed explanation and should consult with an expert to determine whether or not he should apply for naturalization. In particular, an applicant with any criminal convictions should obtain a copy of his criminal records before applying for naturalization. (See Chapter 4 for more information.) This will enable the applicant to analyze all of the relevant positive and negative facts in his/her case. Issues in this section that are commonly raised or are particularly problematic are discussed below.

Section A: General Questions

- Most of these questions relate to the applicant’s good moral character. If the applicant answers “yes” to any of these questions, the CIS could deny his/her application. In addition, a “yes” answer to questions 1-3 could result in CIS placing the applicant in removal proceedings. Thus, it is vital for anyone answering “yes” to any of these questions to consult an immigration attorney before applying for naturalization.

Section A, Questions 4 and 5: Payment of Taxes

- If an applicant was required to file a federal, state, or local tax return but did not do so, s/he must mark “yes” and provide an explanation. Failure to pay taxes may be considered showing a lack of good moral character.

- Although an applicant must indicate “yes” if s/he has ever failed to file her federal, state, or local tax returns, CIS is primarily concerned with the last five years; i.e., the period during which good moral character is required (three years for applicants married to U.S. citizens). Any applicant who failed to file a tax return should consult an immigration attorney for assistance in determining whether to file his/her past tax returns before applying for naturalization. In addition, some CIS offices require that applicants bring copies of tax returns for the three years preceding the interview. The applicant should confirm if his/her jurisdiction requires applicants to submit tax returns.

- Individuals with incomes below a certain threshold are not required to file income tax returns. They may mark “no” in response to this question and provide an explanation on the application such as, “I was not required to file an income tax return because my income was low.” At the naturalization interview, if the examiner asks the applicant if s/he has always paid her taxes, the applicant should respond that s/he did not owe any taxes because her/his income was too low.
Section A, Question 7: Legal Competence

- CIS can deny naturalization to applicants who are not legally competent at the time of the naturalization interview or oath. If an applicant was declared legally incompetent before the interview and/or oath, he can demonstrate to CIS during the interview that s/he is now legally competent and may be granted naturalization. If the applicant is unable to understand the oath of allegiance, however, s/he may apply for a waiver of the oath requirement.

Section B: Affiliations

- This section asks the applicant to list membership or affiliation with any group, both in the U.S. and elsewhere. There are two purposes for these questions. First, membership in some groups can be a reflection of good moral character. For instance, if the applicant is active in her child’s parent-school organization or volunteers at the local Red Cross, CIS will consider these activities a positive factor when determining good moral character. The second, and more common, purpose of these questions is to determine whether the applicant has been a member of a Communist, totalitarian, anarchist, or Nazi group, or any group committed to the overthrow of the U.S. government.

- If the applicant needs additional space to list her memberships or affiliations, s/he should use a separate piece of paper.

Section C: Continuous Residence

- Filing a non-resident tax return is evidence that an applicant has abandoned his lawful permanent resident status. A person who marks “yes” to this question should see an immigration attorney before applying for naturalization. If CIS determines that a person has abandoned his/her residence, s/he risks having his LPR status revoked, being placed in removal proceedings, and being deported.

Section D, Questions 15-21: Good Moral Character

- It is very important for applicants to report any arrests, regardless of how long ago, seemingly insignificant the offense, or whether the charges were dropped or erased (“expunged” or “vacated”) from the applicant’s record. The questions ask whether the applicant was ever arrested, cited, or detained, not just convicted.

- Question 16 asks “Have you ever been arrested, cited, or detained by any law enforcement officer (including INS and military officers) for any reason?” Although traffic citations without arrests or any other problems (such as driving while intoxicated) should not affect

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39 8 CFR § 316.12.

40 INA § 313.
the assessment of an applicant’s good moral character, s/he should nevertheless note any traffic citations on the application. In addition, s/he should mention these citations when under oath during the interview to avoid the risk of having his application denied for giving false testimony under oath.

- CIS will know from the criminal history check based on an applicant’s fingerprints whether s/he was ever arrested, and can deny the application if the applicant has lied about his arrest record. A person who answers “yes” should consult an immigration attorney, as his/her naturalization application may be denied and s/he could be removed from the U.S. if s/he has been convicted of certain crimes. An immigration attorney may, however, be able to help the applicant resolve some issues.

- A person who was arrested by Department of Homeland Security (DHS) officers and left the U.S. under “voluntary departure” should consider this an arrest when answering Question 16. As with all arrests, the applicant should provide an explanation of the circumstances of the arrest and departure. Generally, voluntary departure will not affect a naturalization application.

Section D, Questions 22-24: Good Moral Character

- These questions relate to the applicant’s good moral character and involve issues such as alien smuggling, failure to pay child support, giving false testimony to come to or stay in the U.S., prostitution, polygamy, illegal gambling, and the sale and/or smuggling of controlled substances, illegal drugs, or narcotics. CIS can deny naturalization to applicants who have engaged in some of these activities, such as being a “habitual drunkard” or willfully failing to support one’s dependents. Further, CIS can deny naturalization and remove from the U.S. applicants who have engaged in activities such as alien smuggling or selling illegal drugs. A conviction for any of these offenses is not necessary for CIS to deny the naturalization application and/or remove the applicant from the U.S.; mere commission of some of these acts is sufficient.

Section E: Removal, Exclusion, and Deportation Proceedings

- A person who has been deported, excluded, or removed previously should consult an immigration attorney before applying for naturalization.

- A person in deportation or removal proceedings or under an order of removal or deportation cannot naturalize until the proceedings have terminated.

Section G: Selective Service

- In addition to those with U.S. Citizenship, every male with Legal Permanent Resident status in the United States between the ages of 18 and 26 must register with the Selective Service (the “draft”). CIS considers the knowing and willful failure to register with the Selective Service an indication that the applicant lacks good moral character.
Section H: Oath of Allegiance

- In order to become a U.S. citizen, the applicant must be willing to undertake the responsibilities of citizenship. This includes the willingness to serve in the U.S. Armed Services or provide alternative service if he is “religiously” opposed to bearing arms.41 If the applicant answers “no” to any question, s/he should provide a full explanation.

11. Your Signature

By signing the form, the applicant is certifying that the information provided and documents submitted are correct to the best of his or her knowledge.42 Knowingly providing false information is grounds for revocation of naturalization or for permanent denial of naturalization. The signature must be legible. If an applicant cannot sign in the Latin alphabet, s/he should sign in his/her native alphabet. If an applicant is unable to write in any language, s/he should sign with an “X.”

12. Signature of Person Who Prepared This Application for You

If relevant, the person who prepared the application for the applicant should complete this section.

B. Required Documentation

An applicant must enclose the following with the completed N-400 application:

- Photos. Photos of the applicant must be taken within thirty days before filing the application. The name of the applicant and his/her alien registration number should be written lightly in pencil on the back of the photos. Most CIS offices require the applicant to submit two photos, but applicants should check with their district office to confirm how many are required. If the applicant does not send the required number of photos with her application, the CIS will return the application.

- Application Fee. The current base filing fee (as of April 30, 2004) for the naturalization application is $320. The fee must be paid by check or money order made payable to “U.S. Citizenship and Immigration Services.” CIS does not accept cash.

- Fingerprint Fees. All applicants except those 75 years and older must also pay a $70 biometric fingerprinting fee. The CIS service center will schedule an appointment for the applicant to have his/her fingerprints taken at a CIS fingerprint facility.

41 INA § 337.

42 8 CFR 335.2(e). The oath in this section reads, “I swear (affirm) and certify under penalty of perjury under the laws of the United States of America that I know that the contents of this application for naturalization subscribed by me, and the evidence submitted with it, are true and correct to the best of my knowledge and belief.”
• **Copy of Green Card.** The applicant must enclose a copy of both sides of his/her Permanent Resident Card (Green Card). If the applicant has lost his/her card, s/he should include an explanation. As LPRs are required to carry their Green Cards with them at all times, a lost card may create the following problems:

  - CIS files are organized by alien registration number and not the person’s last name. Thus, an applicant who has lost his/her card and cannot provide his alien registration number may have his/her application returned by the CIS.
  - CIS service centers have returned applications as incomplete because the applicant did not enclose a copy of his/her Green Card. In order to qualify for naturalization, however, only LPR status is required, not the Green Card itself indicating this status. Therefore, if CIS returns an application because a copy of the Green Card was not included, the applicant should resubmit the application with a request that CIS accept it even though the applicant lost his/her card.

• **Additional Documents.** The CIS may sometimes require additional documents before it will schedule an interview. The applicant should be prepared to provide the following documents if they are requested:

  - Police and/or court records, if the applicant has a criminal record (original certified copies).
  - A letter from the agency from which an applicant received public benefits indicating that s/he was eligible to receive benefits, if applicable.
  - Proof of child support payments or proof that no child support was required, if the applicant has children who do not reside with him/her. The applicant should also have birth certificates for her children, as well as marriage, divorce, and death certificates for herself or himself and her/his spouse, as applicable.
  - Proof of a spouse’s U.S. citizenship status, if the applicant applied for naturalization as the spouse of the U.S. citizen.
  - Proof of the continued relationship and shared residence, if the applicant applied for naturalization as the spouse of a U.S. citizen.
  - Tax returns for the three-year period preceding the submission of the application.

Applicants may benefit from preparing a “To Do List,” which will help them remember all of the documents they need to send with their application or have available in the event the CIS requests them. It is important that applicants make a copy of their applications and supporting documents and keep them in a secure place.

See also “Document Check List” in Appendix 1-B.
When complete, the applicant should send her/his application and supporting documentation to the CIS Service Center with jurisdiction over her/his state of residence. S/he should send the application by certified mail, return receipt requested, or by a form of express mail, so that s/he will have a record of the date of receipt. The Service Center will also send a receipt for the fee.

The mailing addresses for N-400 applications and the states they cover are:

- **For applicants in California, Nevada, Arizona, Hawaii, and the Territory of Guam**
  
  U.S. Department of Homeland Security  
  United States Citizenship and Immigration Services  
  California Service Center, N-400 Unit  
  P.O. Box 10400  
  Laguna Niguel, CA 92607-1040

  **Express mail address:**

  US Department of Homeland Security  
  United States Citizenship and Immigration Services  
  California Service Center  
  24000 Avila Rd., 2nd. Floor, Rm. 2302  
  Laguna Niguel, CA 92677

- **For applicants in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Oklahoma, Tennessee, and Texas**

  U.S. Department of Homeland Security  
  United States Citizenship and Immigration Services  
  Texas Service Center  
  P.O. Box 851204  
  Mesquite, TX 75185-1204

  **Express Mail Address:**

  US Department of Homeland Security  
  United States Citizenship and Immigration Services  
  Texas Service Center  
  4141 North St. Augustine Rd.  
  Dallas, TX 75227

- **For applicants in Alaska, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming**

  U.S. Department of Homeland Security
IV. THE CIS INTERVIEW

Applications are reviewed by a CIS Service Center officer. CIS will mail the applicant a fingerprint appointment notice, and then an interview appointment notice informing him/her of the date and place to appear for the interview. The interview, which typically lasts about ten to twenty minutes, is described in greater detail in Chapter 2.

V. AFTER THE CIS INTERVIEW

The CIS interviewing officer may inform the applicant at the end of the interview that s/he will be granted citizenship. The applicant will later receive a notice informing her where the naturalization ceremony will take place (although some office conduct the ceremony the same day at the CIS office). If CIS denies the application, the applicant will receive a written notice explaining the basis for the denial. Grounds for denial include the applicant’s lack of good moral character, failure to pass the English test, or failure to pass the history and government tests. If the grounds for denial were failure to pass the English or history and government tests, the examiner must schedule a re-examination within ninety days following the initial exam. If the applicant fails for a second time, her application will be denied.

Once the applicant has taken the oath, s/he will receive a Certificate of Naturalization. This document is proof that the applicant is now a United States citizen. Please note that if the

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44 8 CFR § 312.5(a).
Certificate of Naturalization is lost, it can take up to one year to receive a replacement. Therefore, after the applicant has been naturalized, s/he should apply for a U.S. passport as soon as possible so that s/he has additional evidence of U.S. citizenship.
CHAPTER 2

TIPS ON HOW TO HANDLE THE NATURALIZATION INTERVIEW

I. OVERVIEW

Although the naturalization interview can be a stressful experience for some immigrants, the applicant will be more confident if s/he knows something about the interview process beforehand. The process begins when the applicant’s local CIS service center receives the N-400 application and reviews it, along with the applicant’s immigration file. If the CIS examiner determines that s/he needs additional information, s/he will request specific documents or instruct the applicant to bring these documents to the naturalization interview. In addition, the applicant will be instructed to have his/her fingerprints taken, which the FBI will use to conduct a criminal background check.

After the CIS review of the file and the criminal background check are completed, the applicant will receive notice by mail of the date, time, and location of the naturalization interview. If the applicant moves, it is important that s/he immediately provide her new address to CIS to ensure that s/he receives the notice of the interview, as CIS will not send a second notice.

Most interviews last about ten to twenty minutes, depending on the CIS interviewer, and will generally follow the steps described below, although the specific order may vary.45

- The applicant enters the waiting room and places his/her appointment slip in a box.
- When an examiner takes the applicant’s appointment slip out of the box, s/he will call his/her name and tell him/her which room to go to for the interview.
- The examiner may then administer the oath, instructing the applicant to remain standing and raise his/her right hand, and asking him/her if s/he promises to tell the truth. The applicant should answer “yes” or “I do.”
- The examiner may ask to see the applicant’s Green Card, passport, or other form of identification.
- The examiner will review the N-400 application and add any new information provided by the applicant, after which the applicant will sign the application.
- The applicant will be given the English and History tests (discussed in more detail below).
- If the applicant is approved, s/he will be scheduled for the Oath Ceremony.

In addition, the examiner will ask the applicant questions about his/her application and, therefore, s/he should be completely familiar with it, including any changes in circumstances or information since the application was completed. Before the interview, the applicant should study his/her application and practice reviewing it in English with a friend or legal services provider. During the interview, the examiner may also ask him/her questions about his/her background, the evidence supporting his/her application, where s/he lives and how long s/he has lived there, his/her character, his/her attachment to the Constitution, and whether s/he is willing to take the Oath of Allegiance.

II. HISTORY/GOVERNMENT AND LITERACY TESTS

A. History/Government Test

The examiner will ask the applicant questions about U.S. history and government, although s/he may ask the applicant to take a written multiple-choice test instead. As discussed in Chapter 1, these questions will usually be taken from the CIS-authorized Federal Textbooks on Citizenship.

B. Literacy Test

The examiner will also test the applicant’s command of English. The literacy examination consists of the following parts:

- **Verbal Skills.** The examiner will ask questions in English about information provided by the applicant in his application and about U.S. history and government. The examiner determines if the applicant has demonstrated a sufficient understanding of English based on his/her answers to the questions. If the applicant does not understand the questions, the questions must be repeated and elaborated “until the officer conducting the examination is satisfied that the applicant either fully understands the questions or is unable to understand them in English.”

- **Reading and Writing Skills.** The applicant must write a sentence dictated to him/her by the examiner in English. To test the applicant’s ability to read and write English, the examiner must use excerpts from one or more parts of the CIS-authorized Federal Textbooks on Citizenship written at the elementary literacy level.

EXAMPLES OF SIMPLE ENGLISH SENTENCES

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46 See Appendix 1-D for sample history/government questions.

47 8 CFR § 312.1(c)(2). These textbooks may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, and are available at certain public educational institutions. They are also online at www.uscis.gov.

48 8 CFR § 335.2(c).
I live in a blue house.

I want to be a United States citizen.

I go to work every day.

There are three branches of government.

The American flag is red, white, and blue.

There are fifty states in America.

People in America have the right to freedom.

My sister goes to school in the morning.

C. Exempt Applicants

The following categories of applicants are exempt from the English language requirement:

- A person who, on the date of filing of his application for naturalization, is over 50 years old and has been living in the United States for at least 20 years as an LPR. This is referred to as the “50/20 rule.”

- A person who, on the date of filing of her application for naturalization, is over 55 years old and has been living in the U.S. for at least 15 years as an LPR. This is referred to as the “55/15 rule.”

- An applicant who cannot fulfill the literacy requirement (as well as the U.S. history and government requirement) due to a “physical or developmental disability” or a “mental impairment.” This is known as the “disability exception.”

- A person who qualifies for the Hmong Veterans’ Naturalization Act of 2000, which provides an exemption from the English language requirement and special consideration for civics testing for certain Laotian refugees and their spouses who served alongside U.S. military forces in Southeast Asia between 1961 and 1978.

49 8 CFR § 312.1(b)(1).

50 8 CFR § 312.1(b)(2).

51 INA § 312(b).

52 The disability exception does not automatically apply to every naturalization applicant with a disability. An applicant must apply for the exception by filing a “Medical Certification for Disability Exceptions” form (N-648) with his naturalization application.

53 Hmong Veterans’ Naturalization Act of 2000, Pub. Law. 106-207 (May 26, 2000). Only the first 45,000 qualified applicants who submit an application will benefit under this act.
D. Preparing for the Interview

In order to better prepare for the interview, the applicant can:

- Register for a citizenship class or ask an immigrant support group for assistance.
- Conduct a mock interview with an immigration advocate, with the advocate playing the role of the CIS examiner and asking questions that may be asked during the actual interview. The advocate should ask difficult questions to better prepare the immigrant and provide feedback on his/her answers and demeanor.
- Watch the video “Will They Pass?,” which includes an example of a naturalization interview and tips on the interview. To order the video, call 1-800-448-8878.
- Make a list of all documents and information that s/he should bring to the interview. Documents that are generally required for all naturalization interviews include:
  - the applicant’s Green Card;
  - photo identification;
  - any travel documents issued by the CIS, if the applicant has traveled outside the U.S.;
  - income tax returns for the most recent three years;
  - proof of registration with the Selective Service System, if the applicant is (or while the applicant was) a male between the ages of 18 and 26;
  - proof of child support, if the applicant has minor children (under age 18) who do not live with him/her; and
  - original, certified police and/or court records, including records that have been sealed or expunged, if the applicant has a criminal record.

III. APPLICANTS WITH CRIMINAL CONVICTIONS

Before the naturalization interview, CIS will send the applicant’s fingerprints to the FBI, which will check them for any records of an arrest or conviction. During the naturalization interview, the examiner will question the applicant about arrests and criminal convictions. Therefore, it is very important that the applicant disclose all arrests and convictions on his/her naturalization application and during the interview, even if s/he believes that his arrest or conviction was for something minor or not his/her fault. If the applicant has been arrested and does not disclose it, his/her naturalization application could be denied. If the applicant has been convicted of a crime and does not disclose it, s/he could be deported. Even if the applicant was informed that the conviction was expunged, the FBI will still have a record of it and, therefore, the applicant should not assume that his record is clean for immigration purposes.

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54 The video was produced by New Readers Press, Syracuse, New York.
If the examiner asks an unexpected question about the applicant’s criminal history during the naturalization interview, the applicant can request that the interview be postponed. This will provide the applicant an opportunity to gather information to respond to the question, although if the applicant has prepared thoroughly for the interview, this should not be necessary. Not all criminal convictions automatically make the applicant deportable or ineligible for naturalization, but if the CIS examiner determines that the applicant’s criminal conviction does make him/her deportable, the applicant may be placed in mandatory detention.

IV. SUMMARY: GENERAL TIPS FOR THE NATURALIZATION INTERVIEW

The applicant should:

- Review his/her N-400 Application for Naturalization before the interview.
- Remember that s/he is under oath, and to tell the truth during the interview, as citizenship will be denied if s/he fails to tell the truth.
- Speak clearly when answering or asking questions.
- Know how to say “yes, that is correct,” and “no, that is not correct.”
- Look at the examiner and make eye contact when s/he is speaking, even if that is not customary in the immigrant’s culture, to demonstrate that s/he is paying attention and not being evasive.
- Know his/her phone number and address and know how to write them if asked.
- Know how to sign his/her name and write it in cursive. This is an example of cursive signature.
- Politely request the examiner to repeat the question if s/he does not understand it. S/he may also ask the examiner to speak more clearly or slowly.
- Tell the examiner that, although s/he studied hard for the exam, s/he cannot remember the answer to a particular question and ask for another question, if necessary.
- Ask for additional time to think about the answer to a question, if necessary.
- Dress appropriately: s/he should wear a suit if s/he has one, or dress as for a job interview.
- Have the phone number of an immigration lawyer or free legal service provider in the event that s/he is detained.55

55 See “Phone Rights Memo” attached in Appendix 5-A.
CHAPTER 3

CRIMINAL OFFENSES THAT INTERFERE WITH NATURALIZATION

Criminal offenses may affect naturalization by showing that an applicant does not have the “good moral character” required for naturalization, and establishing that the applicant is actually deportable and thereby triggering removal proceedings. During removal proceedings, the law may require that the applicant be detained. Therefore, it is critically important to understand which crimes have immigration consequences and what those consequences are.

This chapter provides background information on how criminal convictions can affect immigration status in general. It also provides detailed analyses of the specific problems that convictions may pose for establishing good moral character and information for avoiding removal from the United States.56

I. IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

Many, but not all, criminal convictions can trigger various immigration consequences. For immigration purposes, crimes are divided into two categories: aggravated felonies and crimes involving moral turpitude (CIMTs).

A. Aggravated Felonies

For immigration purposes, the Immigration and Nationality Act (INA) defines aggravated felonies at § 101(a)(43) to include crimes such as:

- Murder;
- Rape;
- Sexual abuse of a minor;
- Illicit trafficking in a controlled substance;
- Illicit trafficking in firearms or destructive devices or in explosive materials;
- Money laundering;
- Crimes of violence for which the term of imprisonment is at least one year (except for “purely political offenses”);
- Theft for which the term of imprisonment is at least one year; and
- Crimes relating to child pornography, racketeering, prostitution, and fraud.

The most thorough analysis of aggravated felonies can be found in Dan Kesselbrenner and Lory D. Rosenberg (Norton Tooby, updating ed.), IMMIGRATION LAW AND CRIMES (National Lawyers Guild, last updated 2004). The book also examines the ambiguities in the law that could help an immigrant challenge an aggravated felony conviction. While this book is a very useful tool for a lay person, immigrants who wish to challenge a conviction are still strongly encouraged to seek

56 Chapter 5 discusses means of eliminating the immigration consequences of criminal convictions, such as vacating or expunging a conviction.
legal representation. For those without access to the book or legal representation, below is a summary of the crimes that constitute aggravated felonies.

1. Murder, Rape, or Sexual Abuse of a Minor

- Any conviction under state or federal law for murder, rape, or sexual abuse of a minor is an aggravated felony for immigration purposes.

- Aggravated sexual assault may sometimes be defined as “rape,” but other state convictions such as sexual abuse likely do not constitute aggravated felonies under the INA.\(^{58}\)

- For immigration purposes, even a misdemeanor conviction of sexual abuse of a minor constitutes an aggravated felony.\(^{59}\)

2. Illicit Trafficking in Controlled Substances

- Crimes falling under this provision include:
  - Transportation, distribution, and importation;
  - Sale and possession for sale;
  - Possession of over five grams of cocaine base (which differs from possession of cocaine);
  - Two convictions for simple possession of drugs, under certain circumstances.

- This crime is defined in the INA in reference to 18 USC § 924(c)(2), which in turn references the Controlled Substances Act.

- Both state and federal drug convictions fall within this provision. The elements underlying the state conviction must be identical to the elements in the federal statutes (the state law must be an “analogue” to the federal law).\(^{61}\)

- There are three criteria for state drug trafficking convictions to qualify as aggravated felonies:
  - The state offense must involve a controlled substance on the federal schedules;\(^{62}\)
  - The state conviction must be punishable under federal law;\(^{63}\) and

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\(^{57}\) INA § 101(a)(43)(A).

\(^{58}\) Kesselbrenner and Rosenberg, Immigration Law and Crimes at § 7:25.


\(^{60}\) INA § 101(a)(43)(B).


- The conviction must be a felony. The BIA looks to the law of the relevant circuit court to interpret when a drug conviction is a felony.\textsuperscript{64} Thus, the result in a particular case will depend upon which circuit is hearing it.\textsuperscript{65}

- Even if a state drug conviction constitutes a misdemeanor conviction, it may nonetheless be considered an aggravated felony for immigration purposes.

3. Illicit Trafficking in Firearms, Destructive Devices, or Explosive Materials

- These crimes are also defined in reference to federal statutes.

- For state firearms convictions to constitute aggravated felonies, the elements underlying the convictions must be identical to the elements of the federal statutes referred to in this provision.
  - For example, the Ninth Circuit found that a Washington state firearms law criminalized some conduct that was not criminalized by the federal statute, and held that the state conviction did not constitute an aggravated felony.\textsuperscript{66}
  - However, the BIA held that a conviction under the California state firearms statute did constitute an aggravated felony, even though the state statute lacked one jurisdictional element—that the crime had to affect interstate or foreign commerce—present in the federal statute. The BIA found that the statutes were substantially the same, even if the state law “lack[ed] the jurisdictional element of the federal statute.”\textsuperscript{67}

4. Fraud and Income Tax Evasion

- Fraud and income tax evasion are aggravated felonies where the loss to the victim is over $10,000\textsuperscript{68} and where there is intent to defraud.\textsuperscript{69}

5. Failure to Appear in Court

- Failure to appear for service of sentence for an underlying offense that is punishable by imprisonment for a term of five years or more constitutes an aggravated felony.\textsuperscript{70}

\textsuperscript{64} \textit{In re Yanez-Garcia}, 23 I\&N Dec. 390 (BIA 2002).

\textsuperscript{65} The First, Second, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits all hold that state felony drug convictions that have a federal analogue are aggravated felonies under the INA. The Third Circuit holds that only convictions that would be felonies if prosecuted in federal courts constitute aggravated felonies under the INA. The remaining circuits (Fourth, Sixth, Seventh, and D.C.) have not yet addressed this issue. For cases arising in these circuits, the BIA applies the rule from the majority circuits; i.e., that state felony drug convictions that have a federal analogue are aggravated felonies under the INA.

\textsuperscript{66} \textit{United States v. Sandoval-Barajas}, 296 F.3d 853 (9th Cir. 2000).

\textsuperscript{67} \textit{In re Vasquez-Muniz}, 23 I\&N Dec. 207 (BIA 2002).

\textsuperscript{68} INA § 101(a)(43)(M).

\textsuperscript{69} \textit{Valansi v. Ashcroft}, 278 F.3d 203 (3d Cir. 2002).

\textsuperscript{70} INA § 101(a)(43)(Q).
Failure to appear in court pursuant to a court order to answer or disprove a felony charge for which a sentence of two years or more may be imposed constitutes an aggravated felony.\textsuperscript{71}

6. Crimes for Which the Immigrant Received a Sentence of One Year or More

- Theft, receiving stolen property, and burglary.\textsuperscript{72}
  - State burglary statutes must contain the same elements as the uniform federal definition of burglary.\textsuperscript{73}
  - State theft statutes must conform to the federal definition of theft to constitute an aggravated felony.
  - For immigration purposes, a state misdemeanor theft conviction is an aggravated felony.\textsuperscript{74}

- Crime of violence.\textsuperscript{75}
  - A crime of violence is defined as “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”\textsuperscript{76}
  - This provision does not include “purely political offenses.”
  - The BIA has interpreted the statutory definition of crimes of violence using a two-part test. Something is a crime of violence if (1) it is a felony, and (2) “the nature of the crime—as elucidated by the generic elements of the offense—is such that its commission would ordinarily present a risk that physical force would be used against the person or property of another irrespective of whether the risk develops or harm actually occurs.”\textsuperscript{77}

- Document fraud.

- Obstruction of justice, perjury, or bribing a witness.\textsuperscript{78}

- Commercial bribery, counterfeiting, forgery, or trafficking in stolen vehicles with altered identification numbers.\textsuperscript{79}

\textsuperscript{71} INA § 101(a)(43)(T).

\textsuperscript{72} INA § 101(a)(43)(G).

\textsuperscript{73} United States v. Taylor, 495 U.S. 575 (1990).


\textsuperscript{75} INA § 101(a)(43)(F).

\textsuperscript{76} 18 U.S.C. § 16.


\textsuperscript{78} INA § 101(a)(43)(S).

\textsuperscript{79} INA § 101(a)(43)(R).
- Gambling crimes (if the person has another gambling conviction).

7. Other Aggravated Felonies

- Money laundering, defined in reference to federal money laundering statutes (18 USC §§ 1956-1957), if the amount of money involved exceeds $10,000.\^80
- Demand for or receipt of ransom.\^81
- Child pornography.\^82
- RICO (racketeering) offenses.\^83
- Involuntary servitude, slavery, and certain aspects of prostitution.\^84
- National defense offenses.\^85
- Entry of alien at improper time or place (as defined by INA §275(a)) or re-entry of removed alien (as defined by INA § 276).\^86
- Document fraud, unless it is a first offense and the offense was for the purpose of helping the immigrant’s spouse, parent, or child.

8. Important Points to Remember About Aggravated Felonies

- The definitions of aggravated felonies in the INA apply to offenses “whether in violation of Federal or State law.”\^87

- Whether a crime is an aggravated felony is dependent on the elements of the particular crime as defined by the state where the conviction occurred and in the person’s record of conviction. Thus, “an aggravated felony determination relating to an offense in one jurisdiction and to one particular individual’s record of conviction may not offer a conclusive answer for an offense of the same name in another jurisdiction.”\^88

\^80 INA § 101(a)(43)(D).
\^81 INA § 101(a)(43)(H).
\^82 INA § 101(a)(43)(I).
\^83 INA § 101(a)(43)(J).
\^84 INA § 101(a)(43)(K).
\^85 INA § 101(a)(43)(L).
\^86 INA § 101(a)(43)(N).
\^87 INA § 101(a)(43).
A state may label a particular crime a “felony” or a “misdemeanor,” but these labels are not conclusive as to whether a conviction is an aggravated felony for immigration purposes. Rather, the determination depends on whether “the full range of conduct encompassed by [the state statute] constitutes an aggravated felony” as defined in the Immigration and Nationality Act.89

The state statute need not be identical to the federal aggravated felony definition, but “the conduct has to be substantially similar enough so that the federal crime may be fairly said to be ‘described in’ the state statute, and the conduct criminalized by the state law must be included within the conduct criminalized by the federal law.”90

An aggravated felony makes the applicant deportable from the United States. INA § 237(a)(2)(A)(iii) states that “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.” Thus, an applicant with an aggravated felony conviction on his record will automatically be placed in removal proceedings and will not be permitted to continue with the naturalization process. The conviction will also bar the remedy of cancellation of removal. Moreover, aggravated felonies trigger mandatory detention while removal proceedings are underway. The crimes that trigger mandatory detention are described in detail below. Finally, and most important for those wishing to naturalize, aggravated felonies may constitute a permanent bar to a finding of good moral character, which is required for naturalization.

B. Crimes Involving Moral Turpitude

“Crimes involving moral turpitude” (“CIMTs”), unlike aggravated felonies, are not specified in the INA, although a general definition has emerged from many years of case law. The Board of Immigration Appeals defines a CIMT as an act that is “inherently base, vile or depraved and contrary to the accepted rules of morality and the duties owed between persons or to society in general ....”91 The following characteristics of a crime may indicate that the crime is a CIMT:

- Intent to commit fraud or theft;
- Intent to do great bodily harm;
- Reckless infliction of great bodily harm;
- Lewd intent (in most sex offenses); and
- Recklessness or malice.

When determining whether a crime is a CIMT, the elements of any given crime are more important than the label given to a crime. For example:

89 United States v. Sandoval-Barajas, 206 F.3d 853 (9th Cir. 2000), quoting United States v. Lomas, 30 F.3d 1191 (9th Cir. 1994).

90 Id.

A Georgia conviction for writing a bad check is a CIMT, because in Georgia fraud is an element of the crime. In contrast, a conviction for writing a bad check in Pennsylvania is not a CIMT because there is no fraud element.92

Controlled substances distribution is not a CIMT when the statute is regulatory in nature, but it is a CIMT when the statute is criminal in nature.93

Who Committed a CIMT?

One person structured financial transactions worth tens of thousands of dollars to avoid currency reporting requirements.

Another person writes a check for less than $50, without having sufficient funds in his account to cover the check.

The second person committed a CIMT because the crime included intent to defraud. The volume of money involved makes no difference to the finding of moral turpitude—it is the “evil intent” that matters.

For an in-depth discussion of this complex topic, please refer to Kesselbrenner and Rosenberg, Immigration Law and Crimes. ICE detention standards require that this resource be available in detention facility law libraries.94

1. Crimes that Constitute CIMTs

Examples of CIMTs include, but are not limited to:

- Rape and statutory rape;95
- Voluntary manslaughter;96
- Murder;97


93 Compare Matter of Abreu-Semino, 12 I&N Dec. 775 (BIA 1968) (holding that a conviction under 21 U.S.C. § 331(q)(2) was not a CIMT because the statute was regulatory in nature) with In re Khourn, 21 I&N Dec. 1041 (BIA 1997) (holding that a conviction under 21 U.S.C.A. § 841(a)(1) was a CIMT because the statute was criminal in nature).


95 Wing v. United States, 46 F.2d 755 (7th Cir. 1931) (holding that rape “manifestly involves moral turpitude”).

96 DeLucia v. Flagg, 297 F.2d 58 (7th Cir. 1961) (holding that “so long as the homicide is voluntary and not justifiable, no amount of provocation can remove it from the class of crimes involving moral turpitude”).
Larceny;\textsuperscript{98}
Writing bad checks (when fraud is an element);\textsuperscript{99} and
Receiving stolen property (where it is known to have been stolen).\textsuperscript{100}

2. Crimes that Generally Do Not Constitute CIMTs

By contrast, the following crimes are not considered CIMTs:

- Simple assault;\textsuperscript{101}
- Gambling;\textsuperscript{102}
- Illegal entry;\textsuperscript{103}
- Vagrancy;\textsuperscript{104}
- Joy-riding;\textsuperscript{105}
- Transporting illegal immigrants (does not necessarily include fraud or evil intent);\textsuperscript{106} and
- Possessing fraudulent immigration documents (unless an intent to use the documents unlawfully is required by the statute).\textsuperscript{107}

3. Inchoate Crimes versus Accessory After the Fact Crimes

\textsuperscript{97} Matter of Awaijane, 18 I\&N Dec. 117, 119 (BIA 1972) (holding that attempted murder is a CIMT because “there is no distinction for immigration purposes in respect to moral turpitude, between the commission of the substantive crime and the attempt to commit it.”).

\textsuperscript{98} Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929) (holding that larceny is a CIMT regardless of value. “An act that was at common law intrinsically and morally wrong, malum in se, does not become any more or any less so by reason of the fact that the Legislature may see fit to call it a felony, if the thing stolen is of a value exceeding a given amount, or to call it a misdemeanor, if the thing stolen is of less value. In either case the offense is one involving moral turpitude.”).


\textsuperscript{100} Compare De Leon-Reynoso v. Ashcroft, 293 F.3d 633 (3d Cir. 2002) (holding that where the immigrant knew or believed property was stolen, his possession of it was a CIMT) with In Re K, 2 I\&N Dec. 90 (BIA 1944) (holding that a “conviction may be founded upon the negligent receipt of property by a person acting in good faith, and that such a crime was not one of moral turpitude.”).

\textsuperscript{101} Matter of Short, 20 I\&N Dec. 136 (BIA 1989); In the Matter of R –, 1 I\&N Dec. 352 (BIA 1942). But see In the Matter of Z –, 5 I\&N Dec. 383 (BIA 1953) (assault with a weapon is a CIMT); In the Matter of P –, 3 I\&N Dec. 5 (BIA 1947) (assault with intent to injure is a CIMT).

\textsuperscript{102} United States. v. Chu Kong Yin, 935 F.2d 990 (9th Cir. 1991); In re G –, 1 I\&N Dec. 719 (BIA 1964).

\textsuperscript{103} In re R –, 1 I\&N Dec. 118 (BIA 1941).

\textsuperscript{104} Matter of G – R –, 5 I\&N Dec. 18 (BIA 1952); In the Matter of V – S –, 2 I\&N Dec. 703 (BIA 1946). But see United States v. Cox, 536 F.2d 65 (5th Cir. 1976) (vagrancy for prostitution is a CIMT).

\textsuperscript{105} In the Matter of M –, 2 I\&N Dec. 868 (BIA 1946); In the Matter of P –, 2 I\&N Dec. 887 (BIA 1947).

\textsuperscript{106} Matter of Tiwani, 19 I\&N Dec. 875 (BIA 1989).

The BIA has generally held that an inchoate crime (a crime “before the fact,” such as solicitation, facilitation, and accessory before the fact) is a CIMT when the underlying substantive crime is a CIMT. For example, conviction for facilitation of larceny is a CIMT because larceny itself is a CIMT.

However, the same is not necessarily true for “after the fact” crimes. As the BIA has stated, “the gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime.... The very definition of the crime also requires that the felony not be in progress when the assistance is rendered because then he who renders assistance would aid in the commission of the offense and be guilty as a principal.”

Citing Batista-Hernandez, one commentator argues that:

If the conviction is for the offenses of accessory after the fact, solicitation, misprision of a felony, and possibly facilitation or aiding and abetting the commission of a CMT, since the pertinent ground of inadmissibility lists substantive CMT offenses, and attempt and conspiracy to commit them, but no other classes of inchoate offenses.... This argument is strongest if the sentence imposed was less than one year.

4. The Immigration Consequences of CIMTs Convictions

CIMT convictions often make an immigrant deportable, inadmissible, and subject to mandatory detention. They may also create a bar to naturalization if they establish that an applicant does not have the required “good moral character.”

If an applicant was convicted of committing a single CIMT within five years of any entry to the United States for which a sentence of one year or more could have been imposed, the applicant is deportable under INA § 237(a)(2)(A)(i). If the applicant has two or more CIMT convictions (not arising out of the same scheme of criminal conduct), he is deportable under INA § 237(a)(2)(A)(ii).

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For example:

- **Entry**: An LPR entered the United States for the first time in 1990. In 1994, 1997, and 1998, she traveled to see family in her home country. In 1999, she was convicted of receiving stolen property and received an 18-month sentence. She is deportable because a sentence of one year or more could have been imposed and the crime occurred within 5 years of an entry into the United States. It does not matter that she committed the crime more than 5 years after her original entry.\(^{111}\)

- **Sentence**: An LPR arrived in the United States in 2000. In 2001, he was convicted of writing a bad check and served a one-month sentence, although the maximum possible sentence was one year. He is deportable because the crime occurred within 5 years of entry and the maximum sentence was one year. It does not matter that he was sentenced to only one month.

- **Single Scheme of Conduct**: An LPR applied for 13 different credit cards under false names and was convicted of fraud at one trial. She is deportable because these 13 actions were “separate schemes,” and it does not matter that they were all tried together.\(^{112}\)

There are several important immigration consequences when an individual’s conviction meets these statutory elements. First, the individual may be deported under INA § 237(a)(2)(A)(i). Second, while deportation proceedings are underway, the CIMT convictions can also trigger mandatory detention. Third, CIMT convictions make a lawful permanent resident (and other persons) inadmissible under INA §212(a)(2)(A)(i)(I). Someone with a CIMT conviction who

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\(^{112}\) *Iredia v. INS*, 981 F.2d 847 (5th Cir. 1993). In general, the BIA defines a single scheme of criminal misconduct as crimes that “were performed in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequences of a single act of criminal misconduct.” *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992). The Ninth Circuit reads “single scheme of criminal misconduct” more broadly than other circuits. See *Gonzales-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990). For an example of the more common, narrow reading, see *Pacheco v. INS*, 546 F.2d 448 (1st Cir. 1976), cert. denied, 430 U.S. 985, 52 L. Ed. 2d 380, 97 S. Ct. 1683 (1977).
does not meet one of the exceptions should not travel outside the country, as he will not be permitted to re-enter the United States.\textsuperscript{113}

Finally, a CIMT conviction (or convictions) harms the lawful permanent resident’s prospects for naturalization because it creates a bar to a finding of “good moral character.” This bar is explained in greater detail below.

C. What Is a “Conviction” for Immigration Purposes?

The INA defines “conviction” more broadly than being found guilty by a judge or jury. The definition under the INA includes:

- Formal adjudication of guilt by a court;
- Judge or jury has found the applicant guilty;
- Applicant entered a guilty plea;
- Applicant pleaded “no contest” (\textit{nolo contendere}) or “has admitted sufficient facts to warrant a finding of guilt”;
- The judge “ordered some form of punishment, penalty or restraint” on the applicant’s liberty;
- Suspended sentences.\textsuperscript{114}

If the conviction is being directly appealed, it is \textit{not} a final conviction and, thus, cannot trigger removal proceedings.\textsuperscript{115} If charges were dismissed under a diversion program that did not require a plea of guilty or \textit{nolo contendere} and the program was successfully completed, there is no conviction for immigration purposes.\textsuperscript{116}

1. Suspended Sentences

Suspended sentences are treated the same as actual sentences for immigration purposes. The relevant INA provision states that:

\textsuperscript{113} Regarding “entry,” before 1996, lawful permanent residents in the United States who left the county for “brief, casual and innocent” visits abroad were not considered to be seeking re-admission to the United States when they returned. \textit{Rosenberg v. Fleuti}, 374 U.S. 449 (1963). They were not, therefore, subject to the excludability grounds (later called “inadmissibility” grounds) in the immigration laws. However, Congress amended the law in 1996 to make a LPR subject to inadmissibility if, among other things, the LPR “has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a).” INA § 101(a)(13)(C)(v). Therefore, a LPR with a CIMT conviction will be considered seeking entry and may be inadmissible to the United States, after even a brief visit to another country.

\textsuperscript{114} INA § 101(a)(48)(A).

\textsuperscript{115} See \textit{e.g.}, \textit{Will v. INS}, 447 F.2d 529 (7th Cir. 1971) (appeal from denial of motion in arrest of judgment).

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part. (emphasis added).\textsuperscript{117}

Although some states treat suspended sentences as not counting toward terms of imprisonment, the BIA relies on federal practice, which does treat suspended sentences as counting toward the term of imprisonment. Therefore, if the immigrant received a one-year sentence with six months suspended, s/he has a one-year conviction for immigration purposes.\textsuperscript{118}

2. Juvenile Delinquency Convictions

Juvenile delinquency convictions are generally not convictions for immigration purposes.\textsuperscript{119} However, there are two exceptions to this general rule. First, if the juvenile is between 16 and 18 years old and is convicted of a felony punishable by ten years or more, it is a conviction for immigration purposes.\textsuperscript{120} Second, if the juvenile is tried and convicted as an adult, that also is a conviction for immigration purposes.\textsuperscript{121}

For foreign juvenile convictions, the immigration courts look to the Federal Juvenile Delinquency Act for guidance as to whether the foreign conviction would be considered a juvenile conviction in the United States.\textsuperscript{122}

Examples:

- Conviction for theft and sentenced to a one-year suspended sentence is a conviction for immigration purposes.

- A one-year sentence in juvenile detention is not a conviction for immigration purposes.

- Pleading guilty to a drug charge and being placed in a drug treatment program is generally a conviction for immigration purposes, except in the Ninth Circuit, where it may not be considered a conviction.

- A drug possession conviction that is being directly appealed is not a conviction for immigration purposes because it is not final.

\textsuperscript{117} INA § 101(a)(48)(B)

\textsuperscript{118} United States v. Ayala-Gomez, 255 F.3d 1314 (11th Cir. 2001), cert. denied, 122 S. Ct. 905 (2002).

\textsuperscript{119} Matter of Devison, 22 I&N Dec. 1362 (BIA 2000); Matter of Ramirez-Rivero, 18 I&N 135 (BIA 1981) (“It is settled that an act of juvenile delinquency is not a crime in the United States and that an adjudication of delinquency is not a conviction for a crime within the meaning of our immigration laws.”).

\textsuperscript{120} Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981).

\textsuperscript{121} Id.

A sentence of six months probation where, if the terms are violated, results in imprisonment without another trial is a conviction for immigration purposes.

D. Divisible Statutes

A divisible statute is one that encompasses an aggravated felony or a CIMT as well as other offenses that are not immigration violations. An immigrant is deportable only if his conviction is based on those elements of the statute that constitute a deportable offense, not if based on other parts of the statute. For example:

- An immigrant is convicted of a firearms violation in Connecticut, where the statute defines firearms crimes more broadly than the federal statute referred to in the INA. A person can be convicted in Connecticut even if he was not in possession of a firearm, but is deportable under the INA only if he was convicted for possession of a firearm. Because the state and federal laws vary, the immigration judge or BIA must look at the record of conviction to determine whether the specific offense for which the immigrant was convicted required possession of a firearm. Since it did not in this case, the immigrant is found not to be deportable.\textsuperscript{123}

- An immigrant in Colorado is convicted of child abuse. The Colorado statute encompasses actions that directly cause injury to a child (a “crime of violence” for immigration purposes) and negligent conduct that places children in situations where there is a risk of injury (not a “crime of violence” for immigration purposes). The immigration judge or BIA must “look to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted will sustain a ground of deportation.” In this case, the BIA found that the record showed only negligence and did not show that the immigrant had acted to directly injure the child. Therefore, the immigrant could not be deported on this basis.\textsuperscript{124}

To determine whether the immigrant was convicted under the part of the statute that would make him/her deportable, the court cannot look at the underlying facts. In the Connecticut example above, the court could not consider the fact that the immigrant allegedly had a firearm in his possession. The court could focus only on “the elements required to sustain the conviction.”\textsuperscript{125} Firearm possession was not required to sustain the conviction, so it was irrelevant that the immigrant was alleged to have possessed a firearm.

E. Determining Whether a Particular Conviction Is an Aggravated Felony or CIMT

- Examine the statute under which the individual was convicted.

\begin{itemize}
  \item \textsuperscript{123} \textit{In re Texeira}, 21 I&N Dec. 316 (BIA 1996). \textit{See also Matter of Short}, 20 I&N Dec. 126 (BIA 1989) (applying the same analysis as to crimes involving moral turpitude).
  \item \textsuperscript{124} \textit{In re Sweetster}, Int. Dec. 3390 (BIA 1999).
  \item \textsuperscript{125} \textit{In re Sweetster}, citing \textit{Matter of richard}, 21 I&N Dec. 330 (BIA 1996).
\end{itemize}
Compare the conviction to the crimes listed under INA § 101(a)(43) to determine whether the elements required for the conviction are described in any of those crimes. If it is described in § 101(a)(43), then it is an aggravated felony, regardless of how it is classified in state law.

Research whether this conviction could be considered a CIMT. Although some crimes are always found to be CIMTs and some are never found to be CIMTs, most are in the middle and require examination of caselaw. What is important is not the label given to a crime, but whether the elements required for a conviction necessarily include moral turpitude.

If it is a CIMT, look at whether one of the exceptions applies, i.e., juvenile offender, petty offense, or purely political offense.

II. GOOD MORAL CHARACTER REQUIREMENT FOR NATURALIZATION

As described in Chapter 1, all persons wishing to naturalize must establish that they have “good moral character.” Many criminal convictions, particularly aggravated felonies, bar a finding of good moral character. Specifically, under INA § 101(f), an applicant cannot establish good moral character if:

- S/he has an aggravated felony conviction on or after November 29, 1990.127
- S/he has a CIMT conviction or has admitted to committing a CIMT offense. The three exceptions described above (juvenile offender, petty offender, and political offense exceptions) apply to this provision.
- S/he has two or more convictions where the aggregate sentence actually imposed was five years or more. The political offense exception also applies to this provision.
- S/he has a controlled substance conviction, unless the conviction relates to possession of less than 30 grams of marijuana, or has admitted to committing such an offense.
- The CIS has reason to believe he is a drug-trafficker.128
- S/he came to the U.S. to be a prostitute or engage in “other unlawful commercialized vice,” or is someone who procures or attempts to procure prostitutes.

126 INA § 316(a)(3).
127 8 C.F.R. § 316.10(b)(1)(ii). An aggravated felony conviction before November 29, 1990 is not a statutory bar, but it may be used as evidence that the applicant does not have good moral character.
128 Nuñez-Payan v. INS, 811 F.2d 264 (5th Cir. 1987).
• S/he is a smuggler.

• S/he was previously removed or ordered removed from the United States.\textsuperscript{130}

• His/her main income is derived from illegal gambling.

• S/he has two or more gambling convictions during the “good moral character” period.

• S/he has spent a total of 180 days or more in prison during the “good moral character” period, regardless of when the offenses were committed.

There are also crime-related offenses that, although they are not statutory bars found in INA § 101(f), may nonetheless preclude a finding of good moral character. Unlike the bars described above, these offenses are discretionary; no single factor necessarily means that CIS will find that the applicant does not have the requisite good moral character. However, an applicant with any of the following offenses on his record should be prepared for questions from the CIS examiner and to explain any extenuating circumstances.\textsuperscript{131} These offenses include:

• A conviction for driving under the influence (“DUI”), which may be a factor in the overall analysis or evidence of being a “habitual drunkard.”\textsuperscript{132} Depending on the length of the sentence and the underlying elements of the conviction, a DUI may also be a CIMT, which would likely bar a finding of good moral character (subject to the exceptions noted above).

• Commission of unlawful acts other than those listed above that reflect poorly on the applicant’s moral character (unless there are extenuating circumstances).

• Being on probation, parole, or suspended sentence during the statutory period.

\begin{table}[h]
\centering
\begin{tabular}{|c|}
\hline
\textbf{Does Timing of the Conviction Matter?} \\
\hline
\textbullet\ An aggravated felony conviction \textit{any time} after November 29, 1990 is a bar to a finding of good moral character. \\
\textbullet\ A controlled substances trafficking conviction \textit{any time} after November 18, 1988 is a bar to a finding of good moral character. \\
\textbullet\ A conviction \textit{during the statutory period} precludes a finding of good moral character. \\
\textbullet\ A conviction \textit{before the statutory period} cannot on its own preclude a finding of good moral character, but it can be evidence of poor moral character.\textsuperscript{129} \\
\hline
\end{tabular}
\end{table}

\begin{footnotesize}
\textsuperscript{129} \textit{Gatcliffe v. Reno}, 23 F.Supp.2d 581, 585 (D.V.I. 1998) (holding that although the Attorney General may consider conduct and acts at any time before the statutory period, “[t]here is extensive authority… that it is \textit{impermissible to rely solely on acts outside the statutory period.”} (emphasis added).

\textsuperscript{130} Refer to INA § 212(a)(9)(A) for the grounds on which previously removed immigrants are subject to this bar.

\textsuperscript{131} For a full analysis of what applicants can do to reduce the harm of any of these factors, see ILRC, \textit{Naturalization: A Guide for Legal Practitioners and Other Community Advocates} 6-7 (2002).

\textsuperscript{132} \textit{Id.}
\end{footnotesize}
III. MANDATORY DETENTION

The INA provides for mandatory detention of LPRs and other immigrants who have been convicted of certain crimes. 133 The provision enables immigration officials to detain an immigrant as soon as s/he comes within Immigration and Customs Enforcement (ICE) custody. Following the decision in Demore v. Kim, the government is being more rigorous about enforcing mandatory detention the moment an immigrant comes into initial custody. 134 Thus, an applicant subject to § 236(c) could be detained at the naturalization interview.

A. Crimes that Trigger Mandatory Detention

As noted above, aggravated felony convictions trigger mandatory detention, as do certain CIMTs. A chart with these grounds is included as Appendix 2-A. All crimes that make an individual inadmissible under INA § 212(a)(2) also trigger mandatory detention. These are:

- One or more crimes involving moral turpitude, except for juvenile offenders and petty offenders, as described above. 135
- Multiple criminal convictions. 136
- Controlled substance trafficking, which extends to close family members who knew of the trafficking and derived any financial or other benefit from it. 137
- Prostitution and commercialized vice. 138
- Violations of religious freedom, which applies only to foreign government officials. 139
- Trafficking in persons, or benefiting from trafficking in persons. 140
- Money laundering. 141

Crimes related to terrorism, as defined in INA § 212(a)(3)(B), also trigger mandatory detention. “Terrorism” and “terrorist organizations” are specifically defined in the statute. In general, however, crimes related to terrorism include the following:

133 INA § 236(c). The Supreme Court held that this provision is constitutional as applied to LPRs in Demore v. Kim, 123 S.Ct. 1708 (2003).
135 INA § 212(a)(2)(A).
136 “Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more, is inadmissible.” INA § 212(a)(2)(B).
137 INA § 212(a)(2)(C).
138 INA § 212(a)(2)(D).
139 INA § 212(a)(2)(G).
140 INA § 212(a)(2)(H).
141 INA § 212(a)(2)(I)
Engaging in terrorist activity, including
- Hijacking;
- Seizing or detaining an individual and threatening him/her with harm in order to compel a third party to do or refrain from doing an act;
- Violent attack upon an internationally protected person;
- Assassination;
- Use of biological or chemical weapons;
- Use of explosives or arms intended to harm one or more persons or property; and
- Threat, attempt, or conspiracy to do any of the above.
- Representing a terrorist organization or membership in a terrorist organization.
- Using a position of prominence in any country to endorse or espouse terrorism.
- Offering material support to terrorists or terrorist organizations. 142

Many of the grounds that make a person deportable from the United States also trigger mandatory detention. These include:

- Multiple criminal convictions, 143
- Aggravated felony. 144
- Controlled substance convictions (there is a narrow exception for a single offense involving possession for one’s own use of 30 grams or less of marijuana). 145
- Drug abuse and addiction. 146
- Miscellaneous offenses, including
  - Firearm offenses;147
  - Espionage, treason, or sedition;148
  - Threats against the President or the President’s successors;149
  - Expedition against a friendly nation (a nation with whom the U.S. is at peace);150
  - Violation of the Military Selective Service Act; and 151

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142 Defined in INA § 212(a)(3)(B)(iii). These provisions apply equally to the spouses or children of immigrants defined in this section if the activity causing the immigrant to be found inadmissible occurred within the last 5 years, unless they did not know or should not reasonably have known about the activity or renounced the activity. INA § 212(a)(3)(B)(ii)(VII).

143 INA § 237(a)(2)(A)(ii).
144 INA § 237(a)(2)(A)(iii).
146 INA § 237(a)(2)(B)(ii).
147 INA § 237(a)(2)(C).
148 INA § 237(a)(2)(D)(i).
149 INA § 237(a)(2)(D)(ii).
150 INA § 237(a)(2)(D)(ii).
151 INA § 237(a)(2)(D)(iii).
• Smuggling and travel documentation violations, or importation of aliens for prostitution or other “immoral purpose.”\textsuperscript{152}
• Terrorism-related grounds (the same as those described above under “Inadmissibility Grounds”).\textsuperscript{153}

An LPR is subject to mandatory detention if he was convicted to a term of imprisonment of at least one year for a CIMT committed within 5 years of admission to the United States, or 10 years if the LPR gained status under INA § 245(j) (adjusting from nonimmigrant to immigrant status).\textsuperscript{154}

The remainder of this manual discusses strategies to assist naturalization applicants with criminal convictions. The following chapters include information on how to obtain criminal records, suggestions regarding forms of post-conviction relief that may eliminate the adverse consequences of convictions, and information on bond and on forms of relief from removal.

\textsuperscript{152} INA § 237(a)(2)(D)(v) (referring to violations of INA § 215 or INA § 278).
\textsuperscript{153} INA § 236(c)(1)(D).
\textsuperscript{154} INA § 237(a)(2)(A)(i)(I).
CHAPTER 4

HOW TO ACCESS CRIMINAL RECORDS

I. HOW TO ACCESS FEDERAL CRIMINAL RECORDS

The Criminal Justice Information Services (CJIS) Division of the Federal Bureau of Investigation is the central location for federal criminal records. In order to obtain federal criminal records, an applicant must:

- Make a written request to the CJIS. The request must include the applicant’s name, date of birth, and place of birth.

- Obtain a set of inked fingerprints at his/her local police station or sheriff’s office. The fingerprints should be placed on fingerprint cards or forms.

- Include a certified check or postal money order for $18.00 made payable to the Treasury of the U.S. CJIS will not process requests with payment made in any other form.

- An applicant who cannot pay the fee should include a written fee waiver request with the criminal record request and provide proof that s/he is indigent.

- Include his/her return address to ensure that s/he receives his/her records.

- Send his/her request to the following address:

  FBI- CJIS Division
  Attn: SCU
  Module D2
  1000 Custer Hollow Rd
  Clarksburg, WV 26306

- Allow 8 to 10 weeks for a response. If CJIS does not find a criminal record, it will send the applicant a response stating that there is no record. Applicants may call 304-625-2000 with additional questions.

II. HOW TO ACCESS STATE CRIMINAL RECORDS

A chart describing how to access criminal records in each state is provided below. Please see Appendix 3-A for sample documents from various states on requesting criminal records.
<table>
<thead>
<tr>
<th>STATE</th>
<th>ADDRESS</th>
<th>HOW TO REQUEST YOUR RECORDS</th>
</tr>
</thead>
</table>
| Alabama | Alabama Department of Public Safety  
Alabama Bureau of Investigation  
Attn: Identification Unit  
P.O. Box 1511  
Montgomery, AL 36102-1511  
Phone: 334-353-7800                                                                 | Call or write to request DA Form 7215-R and State Release Form/Alabama ABI-46. The completed state release form must be notarized. The applicant should send these forms with a request letter that includes his full name, race, sex, date of birth, and social security number.  
There is a $25 fee, which can be paid by cashier’s check or money order payable to Alabama Bureau of Investigation.                                                                                          |
| Arizona | State of Arizona Department of Public Safety  
Criminal History Records Section  
P.O. Box 18450  
Phoenix, AZ 85005  
Phone: 602-223-2222                                                                 | Arizona law does not permit the state criminal history records section to provide criminal records for immigration or visa purposes.                                                                                                                                                                                                                        |
| Arkansas | Arkansas State Police Identification Bureau  
1 State Police Plaza Drive  
Little Rock, AR 72209                                                                 | The applicant should send a written request for a record check form that includes his full name, date of birth, and social security number. The Identification Bureau will send the applicant the form with further instructions on how to obtain criminal history records.                                                                                                                   |
| California | California Dept. of Justice  
Attn: Records Review Unit  
P.O. Box 903417  
Sacramento, CA 94203-4170                                                                 | Applicants can request a “Record Review Packet” in writing or by calling 916-227-3849 or 322-2209. Select option 3, then 1, then 1 again, to leave the request for a packet. There is a $32 fee (U.S. currency only), but do not send the fee with a written request for a packet.                                                                                                  |
<table>
<thead>
<tr>
<th>State</th>
<th>Contact Information</th>
<th>Instructions</th>
</tr>
</thead>
</table>
| Colorado      | Colorado Bureau of Investigation Identification Unit  
690 Kipling Street  
Suite #3000  
Denver, CO 80215  
Phone: 303-239-4208 | Applicants can request a “Public Request for Arrest Information” form (see Appendix 3-A) by mail or obtain it at http://cbi.state.co.us/id/arrest_request_form1.htm. A $13 fee, which can be paid by money order, cashier check, Visa or Mastercard, must be included with the completed form. An applicant can also access his criminal history records through the internet at a cost of $6.85. The applicant must provide his first and last name, date of birth, social security number, sex, and race. To do an internet search, go to https://www.cbirecordscheck.com/Index.asp |
| Connecticut   | Connecticut Department of Public Safety  
Attn: SPBI  
P.O. Box 2794  
Middletown, CT 06457-9294 | To request a criminal history record, complete and mail the “Conviction History Information Request” form (Form DPS-846-C; see Appendix 3-A). The form can be obtained by mail or at http://www.state.ct.us/dps/SPBI.htm. There is a $25 fee, which can be paid by check or money order made payable to Commissioner of Public Safety. |
| District of Columbia | Metropolitan Police Headquarters  
Mail Correspondence  
300 Indiana Avenue, NW, Room 3055  
Washington, DC 20001 | An applicant can request a criminal history record in writing and should provide his full name, date and place of birth, social security number, race, and exact street address. The letter must be notarized. Include a $7 money order with the letter, made payable to DC Treasurer, and a self-addressed stamped envelope. |
| Delaware      | Delaware State Police  
State Bureau of Identification  
P.O. Box 430  
Dover, DE 19903-0430  
Phone: 302-739-5901 | Delaware criminal history records are not available to the general public. |
<table>
<thead>
<tr>
<th>State</th>
<th>Address</th>
<th>Request Process</th>
<th>Fee and Payment Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>Florida Department of Law Enforcement USB/Public Records P.O. Box 1489 Tallahassee, FL 32302 Phone: 850-410-8109.</td>
<td>Complete the “Criminal History Information Request” form (see Appendix 3-A), which can be accessed at <a href="http://www.fdle.state.fl.us/CriminalHistory/">http://www.fdle.state.fl.us/CriminalHistory/</a></td>
<td>There is a $23 fee. Make check or money order payable to Florida Department of Law Enforcement.</td>
</tr>
<tr>
<td>Georgia</td>
<td>Georgia Crime Information Center Computerized Criminal History Operations P.O. Box 370748 Decatur, Georgia 30037-0748</td>
<td>An applicant can request a criminal history record check by letter, providing his name, date of birth, sex, race, and social security number. Also include a set of fingerprints and a $15 check payable to the Georgia Bureau of Investigation.</td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>Idaho State Police Bureau of Criminal Identification P.O. Box 700 Meridian, ID 83680-0700 Phone: 208-884-7130</td>
<td>An applicant can request a Name-Based Check by completing a BCI “Non-criminal Justice Criminal History Records Check Request” form (see Appendix 3-A). This form can be requested by mail or found at <a href="http://www.isp.state.id.us/identification/crime_history/name.html">http://www.isp.state.id.us/identification/crime_history/name.html</a> under “Downloadable Forms.” There is a $10 fee, which can be paid by check made payable to Idaho State Police.</td>
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<td></td>
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<td>An applicant can request a Fingerprint-Based Check by sending a set of fingerprints with a BCI “Non-criminal Justice Criminal History Records Fingerprint Check Request” form (see Appendix 3-A). This form can be requested by mail or found at <a href="http://www.isp.state.id.us/identification/crime_history/index.html">http://www.isp.state.id.us/identification/crime_history/index.html</a> under “Downloadable Forms.” The applicant must include her name (including maiden and previous married names), current address, citizenship, date of birth, place of birth, and reason for being fingerprinted on the</td>
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<tr>
<td>State</td>
<td>Address</td>
<td>Information</td>
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<td>----------------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
<td></td>
</tr>
</tbody>
</table>
| Illinois| Illinois State Police Bureau of Identification  
260 North Chicago Street  
Joliet, Illinois 60431-1060  
Phone: 815-740-5216.  
Office hours are 8 a.m. to 4 p.m., Monday through Friday. For more information, call 815-740-5160. | An applicant can request a Non-Fingerprint Conviction Information Request Form (Form ISP6-405B) by mail or phone. The search will be based on the person’s name, sex, race, and date of birth. The fee is $12, which can be paid by check or money order made payable to the Illinois State Police.  
An applicant can also request a Fingerprint Conviction Information Request Form (Form ISP6-404B) by mail or phone. This search will be based on the person’s fingerprints. The fee is $14, which can be paid by check or money order made payable to the Illinois State Police. |
| Indiana | Indiana State Police Central Repository  
100 North Senate Avenue, Room N302  
Indianapolis, Indiana 46204-2259 | An applicant can request his criminal history at the Indiana State Police office. The applicant must bring a picture ID, social security card, or birth certificate. The fee is $10, payable in cash or money order.  
An applicant may also request his criminal history records by mail by submitting a “Request for Adult Criminal History Information” form (see Appendix 3-A). The form can also be requested by mail or obtained at [http://www.in.gov/isp/lch/](http://www.in.gov/isp/lch/) (Request Form). A complete set of fingerprints and a $10 certified check or money order payable to the State of Indiana must be included with the form. No personal checks are accepted. |
<table>
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<tr>
<th>State</th>
<th>Address</th>
<th>Instructions</th>
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</thead>
<tbody>
<tr>
<td>Iowa</td>
<td>Iowa Division of Criminal Investigation</td>
<td>An applicant can request a criminal history record check using the “State of Iowa Non-law Enforcement Record Check Request Form A” and the “Billing Form Non-Law Enforcement Record Check” (see Appendix 3-A). The forms can be requested by mail or obtained at <a href="http://www.state.ia.us/government/dps/dci/crimhist.htm">http://www.state.ia.us/government/dps/dci/crimhist.htm</a>. Applicants must submit a separate form for each last name to be checked (for example, an applicant must submit separate forms to have records checked under her married name and previous name). There is a $13 fee for each last name searched, which can be paid by cash, check, money order, Mastercard, or Visa. Applicants should include a self-addressed and stamped envelope with the request.</td>
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<tr>
<td></td>
<td>Bureau of Identification</td>
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<td></td>
<td>Wallace State Office Building</td>
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<tr>
<td></td>
<td>Des Moines, IA 50319</td>
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<tr>
<td></td>
<td>Phone: 515-281-5138</td>
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<tr>
<td>Kansas</td>
<td>Kansas Bureau of Investigation</td>
<td>An applicant can request a Name-Based Check by letter, in which the applicant should provide the purpose for his request, all names that he has been known by, date of birth, race, sex, and social security number. There is a $15 fee, which can be paid by check or money order. Do not send cash. For a Fingerprint-Based Check, an applicant should send a completed FBI Applicant Fingerprint Card with a letter explaining why he is requesting his criminal history records. There is a $30 fee, payable by check or money order. Do not send cash.</td>
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<tr>
<td></td>
<td>Attn: Adult Records</td>
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<tr>
<td></td>
<td>1620 SW Tyler</td>
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<td></td>
<td>Topeka, KS 66612-1837</td>
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<tr>
<td></td>
<td>Phone: 785-296-8200</td>
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<td>State</td>
<td>Address</td>
<td>Instructions</td>
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</tr>
</tbody>
</table>
| Kentucky | Kentucky State Police  
Division of Technical Services  
Criminal Identification and Records Branch  
Name Search Section  
919 Versailles Rd.  
Frankfort, KY 40601  
Phone: 502-227-8700 | Applicants should contact the Kentucky State Police, Division of Technical Services for information on how to apply for a background criminal check and to request a “Background Check Release Authorization” Form. There is a $10 fee. |
| Louisiana | Louisiana Bureau of Criminal Identification and Information  
P.O. Box 66614- Mail Slip 18  
Baton Rouge, LA 70896-6614  
Phone: 225-925-6095 | Louisiana criminal records are not available to the general public.                                                                                                                                               |
| Maine   | Maine State Police  
State Bureau of Identification  
State House Station #42  
Augusta, ME 04333-0042  
Phone: 207-624-7009 | An applicant can request his criminal history records by letter, in which he includes his full name, date of birth, social security number, race, and sex. There is a $25 fee, payable by check made payable to the Treasurer, State of Maine. A fingerprint-based check can be requested by including fingerprints with the request letter. The fee is also $25.  
Criminal history information can also be obtained at [http://www.informe.org/PCR/](http://www.informe.org/PCR/). The fee must be paid by credit card. |
<table>
<thead>
<tr>
<th>State</th>
<th>Location</th>
<th>Instructions</th>
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</thead>
<tbody>
<tr>
<td>Maryland</td>
<td>Maryland Department of Public Safety and Correctional Services&lt;br&gt;6776 Reisterstown Road&lt;br&gt;Suite 205 (2nd floor)&lt;br&gt;Baltimore, MD 21215&lt;br&gt;Phone: 410-585-3190</td>
<td>Applicants must go in person to the Criminal Justice Information System (CJIS) Central Repository Storefront to request their criminal history records. Office hours are Monday through Friday, 8:00 am to 8:00 pm, Saturday, 8:00 am to 4:00 pm. The fee can be paid by money order or personal check. Cash is not accepted. Bring one of the following: driver’s license, state I.D., government picture I.D., social security card, birth certificate, Green Card, or passport. An applicant who cannot request his records in person should call the number listed to the left, Customer Service at 888-795-0011 (toll free), or 410-764-4501 for instructions. An applicant can also send a written request for instructions, explaining why he cannot request his records in person.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Criminal History Systems Board&lt;br&gt;ATTN: CORI Unit&lt;br&gt;200 Arlington Street&lt;br&gt;Suite 2200&lt;br&gt;Chelsea, MA 02150</td>
<td>An applicant can request Criminal Offender Record Information (CORI) by completing a “Personal Massachusetts Criminal Record Request Form” (see Appendix 3-A), which must be signed before a notary public. Include a self-addressed stamped envelope with the form. If the applicant is detained and a notary public is not available, an official at the correctional facility may witness the applicant’s signature. The form can be requested by mail or obtained at <a href="http://www.state.ma.us/chsb/cori/cori_forms.html#pers">http://www.state.ma.us/chsb/cori/cori_forms.html#pers</a>.</td>
</tr>
<tr>
<td>State</td>
<td>Address</td>
<td>Criminal History Requirements</td>
</tr>
<tr>
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<td>-------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Michigan</td>
<td>Michigan State Police CJIC, Identification Section</td>
<td>An applicant may request a Non-Fingerprint Criminal History Check in writing. The applicant</td>
</tr>
<tr>
<td></td>
<td>7150 Harris Drive, Lansing, MI 48913 Phone: 517-322-1956</td>
<td>should provide her name, race, sex, and date of birth; a social security number, maiden name,</td>
</tr>
<tr>
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<td></td>
<td>or previous married name are also helpful. There is a $10 fee, payable by check or money order</td>
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<td>made payable to the State of Michigan. Michigan residents can request a Fingerprint Criminal</td>
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<td>History Check by first obtaining their fingerprints on a Michigan Applicant Fingerprint card</td>
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<td>(RI-8) at their local Michigan law enforcement agency. Non-Michigan residents should go to any</td>
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<td>law enforcement agency in the state where they live and ask to be printed on a FBI Applicant</td>
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<td></td>
<td>Fingerprint card (FD-258). The fingerprint card should be submitted with a letter stating the</td>
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<td>reason for the fingerprint submission. There is a $30 fee, payable by check or money order</td>
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<tr>
<td></td>
<td></td>
<td>made payable to the State of Michigan.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Minnesota Bureau of Criminal Apprehension</td>
<td>To request criminal history records, an applicant must send an informed consent letter with his</td>
</tr>
<tr>
<td></td>
<td>Criminal Justice Information Section</td>
<td>signature notarized. Include a self-addressed stamped envelope with the request. There is a</td>
</tr>
<tr>
<td></td>
<td>ATTN: Record Checks 1246 University Ave. St. Paul,</td>
<td>$15 fee, which can be paid by cash, personal check, money order, or certified check made</td>
</tr>
<tr>
<td></td>
<td>MN 55104-4197</td>
<td>payable to the BCA. See Appendix 3-A for a sample informed consent letter for guidance.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Mississippi Department of Public Safety Criminal</td>
<td>Mississippi criminal history records are available only to certain state and federal agencies</td>
</tr>
<tr>
<td></td>
<td>Information Center P.O. Box 958 Jackson, MS 39205</td>
<td>that are authorized to perform these checks, and are not available to the general public.</td>
</tr>
<tr>
<td></td>
<td>Phone: 601-933-2600</td>
<td></td>
</tr>
</tbody>
</table>
Missouri  
Missouri State Highway Patrol  
Criminal Records and Identification Division  
P.O. Box 568  
Jefferson City, MO  65102  

An applicant can request his criminal history record by completing the “Request for Criminal Record Check” form (see Appendix 3-A). The form can be requested by mail or found at http://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CRID/CrimRecChk.html under “Criminal Record Check Request.”

For a fingerprint-based search, include a set of fingerprints with the form. The fee is $14, which can be paid by check or money order made payable to the State of Missouri, Criminal Record System. No cash is accepted.

The fee for a name search is $5, which can be paid by check or money order made payable to the State of Missouri, Criminal Record System. No cash is accepted.

Montana  
Montana Department of Justice  
303 N. Roberts  
P.O. Box 201403  
Helena, MT  59620-1403  

An applicant can request his criminal history records in writing by providing his full name and any other previous names (including married names or maiden names), date of birth, and social security number. There is an $8 fee, which can be paid by check. The applicant should also include a self-addressed stamped envelope. For a Fingerprint Check, an applicant should be fingerprinted on a card available at local police offices or the Criminal Records and Identification Services Office of the Information Technology Services Division in Helena.

Nebraska  
Nebraska State Patrol  
Criminal Identification Division  
1600 NE Hwy. #2  
Lincoln, NE  68502  
Phone:  402-471-4545  

An applicant can request his criminal history records by letter in which he includes his last name, first name, middle initial, date of birth, social security number, and any other names that he has used. Include the address where the response should be mailed. There is a $10 fee, which can be paid by cashiers check, personal check, money order, or cash.
<table>
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<tr>
<th>State</th>
<th>Address</th>
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</table>
| Nevada     | Department of Public Safety  
Nevada Highway Patrol  
Records and Identification Bureau  
808 West Nye Lane  
Carson City, NV  89703 |
|            | An applicant can obtain a copy of his criminal history record by         |
|            | completing the “Identification File Request for Nevada Records of Criminal |
|            | History” form (see Appendix 3-A). The form may be requested by mail or   |
|            | found at http://nvrepository.state.nv.us/ under “Personal Nevada Criminal |
|            | History.” A fingerprint card must be included with this form. The fee is |
|            | $21, payable by money order or certified check made payable to the Nevada |
|            | Highway Patrol.                                                        |
| New Hampshire | New Hampshire Department of Safety  
Division of State Police  
Central Repository for Criminal Records  
10 Hazen Drive  
Concord, NH  03305  
Phone: 603-271-2538 |
|            | An applicant can obtain criminal record information by applying in person |
|            | with a valid picture identification, or by completing the “Criminal Record |
|            | Release Authorization Form” (see Appendix 3-A), which can be requested by |
|            | mail or obtained at http://www.state.nh.us/safety/nhsp/cr.html#criminal.  |
|            | A self-addressed envelope and a check for $10, made payable to NHSP-Clin |
|            |riminal Records, must be included with the request.                      |
| New Jersey | Division of State Police  
Attn: CIU  
P.O. Box 7068  
West Trenton, NJ  08628-0068 |
<p>|            | An applicant must contact the police department in the municipality where |
|            | he lives and make an appointment to be fingerprinted on a State Applicant  |
|            | Fingerprint Card (SBI 19). The applicant should then submit the fingerprint |
|            | card with a cover letter stating why he is making the request and provide  |
|            | a mailing address for the reply. There is a $25 fee, which can be paid by |
|            | cashier’s check, certified check, business check, or money order made    |
|            | payable to the Division of State Police-SBI. No personal checks will be   |
|            | accepted.                                                                |
|            | If an applicant does not live in New Jersey, he should get fingerprinted |
|            | on the fingerprint card for the state where he lives, or obtain a New    |
|            | Jersey State Applicant Fingerprint Card by contacting the State Bureau of  |
|            | Investigation.                                                          |</p>
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<tr>
<th>State</th>
<th>Address</th>
<th>Contact Information</th>
<th>Instructions</th>
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<tr>
<td>New Mexico</td>
<td>New Mexico Department of Public Safety Attn: Records P.O. Box 1628</td>
<td>Phone: 505-827-9181</td>
<td>To obtain criminal history records, complete a Department of Public Safety (DPS) “Authorization for Release of Information” form (see Appendix 3-A). The form must be notarized. Applicants can request the form by mail or obtain it at <a href="http://www.dps.nm.org/faq/record_request.htm">http://www.dps.nm.org/faq/record_request.htm</a>. There is a $7 fee, which can be paid by money order or cashiers check made payable to the Department of Public Safety.</td>
</tr>
<tr>
<td>New York</td>
<td>Record Review Unit NY State Division of Criminal Justice Services 4 Tower Place Albany, NY 12203-3764</td>
<td>Phone: 518-485-7675.</td>
<td>Applicants should send a written request for a “Criminal History Information Packet.”</td>
</tr>
<tr>
<td>North Carolina</td>
<td>North Carolina Bureau of Investigation Identification Section P.O. Box 29500 Raleigh, NC 27626</td>
<td>Phone: 919-662-4500</td>
<td>North Carolina criminal history records are strictly regulated and not considered “public records.”</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Criminal Records Section North Dakota Bureau of Criminal Investigation 4205 State Street P.O. Box 1054 Bismarck, ND 58502-1054</td>
<td>Phone: 701-328-5500</td>
<td>An applicant can obtain his criminal history records by sending a written request that includes his last name, first name, middle initial, date of birth, social security number, and current address. He should include a completed “Non-Criminal Justice Request for Criminal History Record Information” form (see Appendix 3-A). This form can be requested by mail or obtained at <a href="http://www.ag.state.nd.us/BCI/CHR/CHR.htm">http://www.ag.state.nd.us/BCI/CHR/CHR.htm</a>. There is a $30 fee, which can be paid by check or money order made payable to the North Dakota Attorney General.</td>
</tr>
</tbody>
</table>
| **Ohio** | Ohio Bureau of Criminal Identification and Investigation  
1560 SR 56, SW  
P.O. Box 365  
London, Ohio 43140  
Phone: 740-845-2000 | To obtain criminal history records, an applicant must be fingerprinted at his local police department. The fingerprint form should be submitted with a letter requesting a criminal background check report that includes the applicant’s full name, social security number, date of birth, and complete address where the report should be sent. Enclose a money order for $15 payable to Treasurer, State of Ohio. Cash or personal checks are not accepted. |
| **Oklahoma** | Oklahoma State Bureau of Investigation  
Criminal History Reporting Unit  
6600 North Harvey  
Building 6, Suite 140  
Oklahoma City, Ok 73116 | An applicant can request a criminal history record in person or through the mail using the “Criminal History Information Request” Form (see Appendix 3-A), which can be obtained by mail or at [http://www.osbi.state.ok.us/PublicServices.htm](http://www.osbi.state.ok.us/PublicServices.htm). Office hours are 8:00 am until 5:00 pm, Monday through Friday.  

For a Non-Fingerprint Criminal History Check, the applicant should include a letter providing his full name, date of birth, maiden or previous married names, the purpose of the request, race, sex, and social security number. There is a $15 fee, which can be paid by cash (only if the request is made in person), money order, Visa, Mastercard, Discover, or cashier’s check made payable to OSBI.  

For a Fingerprint-based Criminal History Check, the applicant can have his fingerprints taken at his local police department or sheriff’s office. The fingerprints must be taken on an applicant fingerprint card, which should be enclosed with the “Criminal History Information Request” Form. The card must be signed and dated by the printing officer and the applicant. There is a $19 fee for a fingerprint-based search. |
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<th>State</th>
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<tr>
<td>Oregon</td>
<td>Oregon State Police Identification Services Section Unit 11 P.O. Box 4395</td>
<td>To request criminal history records, an applicant should complete the “Copy of Own Record Request” form (see Appendix 3-A), which can be requested by mail or found at <a href="http://www.osp.state.or.us/html/own_record_form.html">http://www.osp.state.or.us/html/own_record_form.html</a>. The applicant must include his fingerprints with his request, which can be taken at his local police office at a cost of about $5. There is a $12 fee for the criminal history records, which can be paid by check or money order made payable to Oregon State Police.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Pennsylvania State Police Central Repository - 164 1800 Elmerton Ave. Harrisburg, PA 17110-9758</td>
<td>An applicant can obtain his criminal history records by submitting a “Request for Criminal Record Check” Form (form SP4-164; see Appendix 3-A) with a money order or certified check for $10 payable to the Commonwealth of Pennsylvania. The form can be requested in writing or found at <a href="http://www.psp.state.pa.us/psp/cwp/view.asp?A=4&amp;Q=48275">http://www.psp.state.pa.us/psp/cwp/view.asp?A=4&amp;Q=48275</a>. After four weeks, an applicant may check on the status of his application by calling 717-783-9144.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>The Department of the Attorney General Attn: Access to Public Records Act Request 150 South Main Street Providence, RI 02903</td>
<td>To request criminal history records, an applicant should submit a letter with his full name, date of birth, social security number, and address where the records should be sent. A completed “Request for Records Under the Access to Public Records Act” form must be also be submitted. An applicant may request this form by mail (see Appendix 3-A). The cost for criminal history records is 15 cents per page.</td>
</tr>
<tr>
<td>State</td>
<td>Address</td>
<td>Criminal History Information</td>
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| South Carolina | South Carolina Law Enforcement Division  
P.O. Box 21398  
Columbia, SC  29221  
Phone:  803-737-9000 | South Carolina uses the SLED CATCH program to access criminal history record information. This program can be found at [http://www.sled.state.sc.us/default.htm](http://www.sled.state.sc.us/default.htm). There is a $25 fee, which can be paid by money order. No cash or personal checks are accepted. A criminal history record request may also be made in person at SLED’s Central Records Department, 4400 Broad River Road, Columbia, SC  29221. A fingerprint-based search can be requested at SLED’s Criminal Information Center (at the address noted above) or by calling 803-896-7005. Office hours are 8:30 am until 4:00 pm, Monday through Friday. Applicants must have a valid ID. |
| South Dakota | South Dakota Division of Criminal Investigation, Identification Section  
East Highway 34  
500 East Capitol Ave  
Pierre, SD  57501-5070  
Phone:  605-773-3331 | To request a criminal record check, an applicant should contact the Division of Criminal Investigation, which will send him/her a supply kit with instructions. The applicant should follow the instructions to have his fingerprints taken. Enclose a check or money order for $15 made payable to the Division of Criminal Investigation with the completed application. |
| Tennessee  | Tennessee Bureau of Investigation  
1144 Foster Avenue  
Nashville, TN  37210  
Phone:  615-744-4000 | Tennessee is a closed record state and does not provide criminal history information upon request. Applicants must go to their county court clerk’s office to request a criminal history background check for that county. |
| Texas      | Texas Department of Safety  
Crime Records Service | Criminal history records can be obtained only through the internet at [http://records.txdps.state.tx.us/default.cfm](http://records.txdps.state.tx.us/default.cfm). |
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<tr>
<th>State</th>
<th>Address</th>
<th>Details</th>
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| Utah   | Utah Bureau of Criminal Identification  
3888 West 5400 South  
Box 148280  
Salt Lake City, UT 84114-8280  
Phone: 801-965-4445 | Applicants with a valid ID can obtain a copy of their criminal history in person at the Bureau of Criminal Identification (BCI) office. There is a $10 fee, payable in cash, personal check, credit card, money order, or cashier’s check. Office hours are 9:00 am to 5:00 pm, Monday through Friday.  
An applicant may also request his criminal history by submitting the “Application For Criminal History Record Review” form (see Appendix 3-A). This form can be requested by mail or found at http://bci.utah.gov/Records/RecOwnRecord.html (“Right of Access Application”). The applicant must take the application to his local police department or sheriff’s office to be fingerprinted. There is a $10 fee, which can be paid by Visa/MasterCard, check, or money order made payable to the Utah Bureau of Criminal Identification. |
| Vermont| Vermont Criminal Information Center  
103 South Main Street  
Waterbury, VT 05671-2101  
Phone: 802-224-8727, ext. 5237 | An applicant can request a copy of his criminal records in person at the Vermont Criminal Information Center (VCIC) between the hours of 8:30 am and 3:00 pm. He must bring two forms of identification, at least one of which must be a picture ID.  
Records may also be requested by writing to the Director of VCIC. The applicant must provide his full name, date of birth, and the reason he needs his criminal records. The applicant must also include documentation on letterhead stationary confirming his identity from one of the following: law enforcement agency, law firm or attorney licensed to practice law where the applicant lives, or a court of law where the applicant lives. There is no fee. |
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<tr>
<th>State</th>
<th>Contact Information</th>
<th>Instructions</th>
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| Virginia  | Virginia State Police CCRE  
P.O. Box 85076  
Richmond, VA 23261-5076  
Phone: 804-674-2024 | An applicant may request his criminal history records by submitting the “Criminal History Record Name Search Request” (Form SP-167, see Appendix 3-A). The form can be requested by mail or found at http://www.vsp.state.va.us/cjis_chrc.htm under “Criminal Record Name Search.” There is a $15 fee, which can be paid by certified check or money order made payable to Virginia State Police. Personal checks are not accepted. |
| Washington| Identification and Criminal History Section Washington State Patrol  
P.O. Box 42633  
Olympia, WA 98504-2633  
Phone: 360-705-5100 | An applicant can obtain his criminal history information at the WATCH (Washington Access to Criminal History) website, https://watch.wsp.wa.gov/. The fee is $10 for each name searched, payable by credit card.  
An applicant may also submit a “Request for Conviction Criminal History Record” form (Form 3000-240-569), which can be requested in writing. There is a $10 fee, which can be paid by cashier’s check or money order made payable to the Washington State Patrol.  
For a fingerprint-based check, an applicant should submit a full set of fingerprints and a request letter. The fee is $25, which can be paid by cashier’s check or money order made payable to the Washington State Patrol. |
| West Virginia | State Police Criminal Records  
725 Jefferson Road  
South Charleston, WV 25309-1698  
Phone: 304-746-2100 or 304-746-2177 | An applicant should request a Form DPS #39A (Record Request Check) in writing. A set of fingerprints must be included with the completed form. |
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<th>State</th>
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<tr>
<td>Wisconsin</td>
<td>Crime Information Bureau Attn: Record Check Unit P.O. Box 2688 Madison, WI 53701-2688 Phone: 608-266-5764</td>
<td>An applicant must submit a completed “Wisconsin Criminal History Single Name Record Request” form (Form DJ-LE-250, see Appendix 3-A), which can be requested by mail or obtained at <a href="http://www.doj.state.wi.us/dles/cib/">http://www.doj.state.wi.us/dles/cib/</a> (under Record Check Forms, single subject requests, form DJ-LE-250). To guarantee that the correct record is sent, the applicant should get an inked fingerprint of his right index finger and place it on the bottom right hand corner of the form where it says “Right Index Fingerprint Impression.” Also send a self-addressed, postage-paid envelope with the form. There is a $13 fee, which can be paid by check or money order made payable to Wisconsin Department of Justice.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>State of Wyoming Attorney General Division of Criminal Investigation 316 West 22nd Street Cheyenne, Wyoming 82002 Phone: 307-777-7181</td>
<td>To request criminal history records, an applicant must sign a waiver and submit a fingerprint card. The waiver gives the Division of Criminal Investigation permission to do a criminal history record check and release it. Fingerprints can be taken at a local law enforcement agency or at the Wyoming Division of Criminal Investigation in Cheyenne. Office hours are 8:00 am to 3:30 pm, Monday through Friday. There is a $15 fee for the criminal history check and a $5 fee for fingerprinting.</td>
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CHAPTER 5
POST-CONVICTION RELIEF

Criminal convictions, even if they are minor or occurred many years ago, can have serious immigration consequences. Therefore, it is important to explore whether there may be ways to eliminate the adverse consequences of a conviction.

This section of the manual describes the major forms of relief: vacating a conviction (through withdrawal of guilty plea, writ of coram nobis, writ of audita querela, or a pardon), vacating or correcting a sentence, and expunging a conviction. The chapter also discusses the relevance of judicial recommendations against deportation. Vacating a conviction is an extremely effective way to eliminate the risks that convictions pose for naturalization. Vacating a sentence can also be effective, but expungement is effective in only very limited circumstances.

Because most post-conviction efforts take place within the framework of state criminal procedure laws, however, the information below is general in nature. This guide describes avenues for relief available in most states and suggests research strategies for local rules and procedures, but state laws vary and, thus, applicants should consult a post-conviction relief specialist early in the process. Further, post-conviction litigation can be expensive and may not yield the desired results. Anyone trying to overcome the adverse immigration consequences of criminal convictions should carefully weigh the costs and the chances of success.

I. VACATING A CONVICTION

Having a conviction vacated is the most effective way to prevent the conviction from interfering with naturalization. When a court vacates a conviction ab initio (meaning that it is vacated as if the conviction never occurred), the Board of Immigration Appeals will give full faith and credit to that decision,155 which eliminates the immigration consequences of the original conviction.156

155 The decision of a court to vacate a conviction cannot be collaterally attacked in immigration proceedings; in other words, the immigration authorities cannot dispute whether the decision to vacate the conviction was correct. Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378 (2000). However, the immigration authorities can attack whether the criminal court had jurisdiction. Matter of Sirhan, 13 I&N Dec. 592 (BIA 1970).

156 Matter of Sirhan, 13 I&N Dec. 592 (BIA 1970) (holding that a vacated conviction cannot be the basis for deportation). This is true notwithstanding the 1996 changes to the definition of “conviction.” Lujan-Armendariz v. INS, 222 F.3d 728, 747 (9th Cir. 2000). In Lujan-Armendariz, the court noted that “the purpose of the amendment appears to have been to establish the time at which a particular type of proceeding . . . results in a conviction for immigration purposes—not to alter the long-standing rule that a conviction entered but subsequently vacated or set aside cannot serve as the basis for a deportation order.” Id. at 745.
A vacated conviction may also have important indirect effects. As noted in Chapter 3, when a
CIMT has a maximum possible sentence of a year or more, the immigrant is deportable.
Because sentencing guidelines often mandate a longer sentence for subsequent convictions, an
immigrant convicted of a second crime may receive a sentence of a year or more. If the first
conviction is vacated, however, a longer sentence is no longer mandated, and the maximum
possible sentence for the second conviction may be less than one year. Thus, vacating one
conviction effectively removes the immigration consequences of the second conviction.157

A. Methods for Vacating a Conviction

There are several ways a sentence can be vacated, including:

- Withdrawal of a guilty plea;
- Pardon;
- Writ of coram nobis; and
- Writ of audita querela.

B. Timing for Vacating a Conviction

A lawful permanent resident should meet with a post-conviction relief specialist as quickly as
possible after being convicted of a crime, for two reasons. First, successfully vacating a
conviction will often ensure that the LPR is never brought to the attention of immigration
authorities at all. Therefore, the original conviction would not pose any problems at the time of
naturalization. Second, if removal proceedings do begin against the LPR, the post-conviction
relief efforts need to enter the administrative record as quickly as possible. Specifically, a LPR
in removal proceedings must have evidence that his conviction was vacated within 90 days of
the issuance of the BIA decision in his case.158

C. How an Applicant Can Attempt to Vacate a Conviction

If an applicant is unable to consult a post-conviction relief expert, the steps below offer a guide
to the process. The applicant should:

- Read the material below to understand the possible approaches.

157 For an analysis of INA § 237(a)(20)(A)(i)(II), see Norton Tooby, Criminal Defense of Immigrants § 8.11-12

158 8 C.F.R. 1003.2(c)(2). See also Lubowski v. INS, 279 F.3d 644 (8th Cir. 2002) (holding that a motion to
reopen would have been untimely if it was more the 90 days after the issuance of a final order of
removal). The court in Lubowski also held that the BIA could not consider new evidence that had not been
considered by the INS. This is in contrast with a recent Ninth Circuit case holding that the BIA may
consider new evidence. See Ramirez-Alejandre v. Ashcroft, 320 F.3d 858 (9th Cir. 2003).
- Obtain his immigration file by submitting a Freedom of Information Act request (see Appendix 4-D).

- Obtain his conviction record (see Chapter 4).

- Contact his original defense counsel for a copy of the case file.

- Analyze his particular situation for factors such as:
  - Whether there are strong equities in his favor, including being a long-time resident, having a citizen spouse and children who rely on him/her, special humanitarian considerations, or being an active member of the community; and
  - Whether there is anything in the conviction that raises questions of legal validity. For example, if a plea bargain was made, were the terms respected, and did he understand the immigration consequences of the plea? Were there any procedural defects? Was the right to counsel respected? Were any constitutional rights denied?

- Consult the law relevant in his jurisdiction (normally, the rules of criminal procedure that govern the court where he was convicted) and carefully examine the specific requirements for different kinds of relief. For example, many jurisdictions have codified the writs described below, and statutes of limitations for certain kinds of relief vary among jurisdictions.

- File the necessary motion or petition with the court that heard his original case, not the appeals court. State all grounds on which he seeks to have the conviction vacated in the motion or petition and set forth all facts that support the claim.

Norton Tooby offers the following advice for immigrants pursuing post-conviction relief:

The prosecution and court will often be relatively unfamiliar with the procedural vehicle or grounds presented. It is therefore important to package the request for relief in as palatable a way as possible, along the following lines:

1. The case is long over, and the client has served the time and paid the penalty for the offense;
2. The client is now threatened with extreme immigration consequences over and above the penalties that would be imposed upon a citizen in identical circumstances;
3. All the equities of the client’s spouse, family, good record and the like indicate that the immigration consequences are unduly harsh and unnecessary;
4. The client is merely seeking, e.g., to vacate the old conviction and dismiss the charge in the interests of justice or substitute a relatively harmless equivalent conviction in its place;
5. The conviction must be vacated in any event because of a legal invalidity.\footnote{Norton Tooby, \textit{Criminal Defense of Immigrants} § 8.37 (Law Offices of Norton Tooby, 2001).}

\footnote{Norton Tooby, \textit{Criminal Defense of Immigrants} § 8.37 (Law Offices of Norton Tooby, 2001).}
Five specific methods that can be employed to vacate a criminal conviction are described below.

1. **Motion to Withdraw Guilty Plea**

   **On Immigration Grounds**
   A motion to withdraw a guilty or *nolo contendere* (“no contest”) plea is especially suitable for many LPRs who accepted a plea but were unaware of the immigration consequences of the decision. An LPR can draw upon one or more of the following theories in making a motion to withdraw a guilty plea:

   - If the LPR is in a state that requires that non-citizens be advised of the immigration consequences of entering a guilty plea and the court did *not* advise him/her of the consequences.
   - The LPR’s lawyer failed to advise him/her of the immigration consequences or the “collateral consequences” of the plea.
   - The trial court or prosecutor affirmatively misadvised the LPR of the consequences.

   A federal court’s failure to advise an LPR as to the immigration consequences of a plea does not provide a basis for withdrawing a guilty plea. Under Rule 11 of the Federal Rules of Criminal Procedure (“FRCP”), courts are bound to advise defendants of the “direct” consequences of a guilty plea (i.e., the maximum and minimum sentences that a judge could impose), but not the “collateral” consequences of such a plea, such as immigration consequences.

   **On Grounds Unrelated to Immigration Consequences: Federal Court**
   Withdrawing a guilty plea may be possible where there has been a “manifest injustice.” This is a stringent standard, and allegations of injustice must be supported by substantial evidence.

---

**Notes:**

160 The information in this section applies to both guilty pleas and *nolo contendere* pleas.

161 These three theories are suggested by Kesselbrenner and Rosenberg in *Immigration Law and Crimes* at § 4.3 (last updated 2004).

162 These states are California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Maryland, Massachusetts, Minnesota, Montana, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, Texas, Washington and Wisconsin. *See generally Immigration Law and Crimes* § 4.19. *See also* Appendix 4-A for citations to relevant state statutes.

163 *Downs-Morgan v. United States*, 765 F.2d 1534, 1538 (11th Cir. 1985) (holding that a lawyer’s affirmative misrepresentation of immigration consequences may sometimes constitute ineffective assistance of counsel and invalidate the subsequent plea). *See generally Immigration Law and Crimes* at § 4.8.

164 *United States v. Sambro*, 454 F.2d 918 (D.C. Cir. 1971) (holding that deportation is a collateral consequence); *United States v. Parrino*, 212 F.2d 919 (2d Cir. 1954), cert. denied, 348 U.S. 840 (1954) (holding that Rule 11 applies only to direct consequences).
Whether a motion is granted or denied depends directly on the facts that a defendant can prove about her particular situation.\textsuperscript{165}

Manifest injustice may include technical violations of Rule 11 of the FRCP. However, the circuit courts are in disagreement as to whether a technical violation rises to the level of manifest injustice.\textsuperscript{166} In circuits where technical violations of Rule 11 are insufficient, a Rule 11 violation combined with another factor may rise to the level of manifest injustice. For example, a technical violation of Rule 11 combined with the defendant’s assertion of innocence has been found to be the type of manifest injustice that a withdrawal of plea should correct.\textsuperscript{167}

Other types of manifest injustice include:

- Involuntariness of the plea;
- Plea given through “ignorance, fear or inadvertence”;\textsuperscript{168} and
- Familial coercion to accept a plea, in conjunction with trial court’s violations of Rule 11.\textsuperscript{169}


\textbf{On Grounds Unrelated to Immigration Consequences: State Court}

The extent to which a state court will grant a motion to withdraw a guilty plea varies and must be ascertained by researching the specific state’s caselaw. Common grounds for granting a motion to withdraw a guilty plea include:

- Involuntariness of the guilty plea;\textsuperscript{170}
- Trial court’s rejection of the guilty plea;\textsuperscript{171}
- Guilty plea was not knowing and intelligent;\textsuperscript{172} and
- Serious procedural defect.\textsuperscript{173}

\textsuperscript{165} \textit{Compare} Gannon \textit{v. United States}, 208 F.2d 772 (6th Cir. 1953) (finding that defendant had not intelligently waived right to counsel and, therefore, granting motion to withdraw guilty plea) \textit{with} Brown \textit{v. United States}, 212 F.2d 589 (6th Cir. 1954) (finding that defendant failed to prove that he had not intelligently waived right to counsel and, therefore, denying the motion to withdraw guilty plea).

\textsuperscript{166} \textit{Compare} United States \textit{v. Scarf}, 551 F.2d 1124 (8th Cir. 1972) (holding that more than a technical violation of Rule 11 is required) \textit{with} United States \textit{v. Cantor}, 469 F.2d 435 (3d Cir. 1972) (holding that a violation of Rule 11 is sufficient).

\textsuperscript{167} United States \textit{v. Ford}, 993 F.2d 249 (D.C. Cir. 1993).

\textsuperscript{168} Kercheval \textit{v. United States}, 274 U.S. 220 (1927).

\textsuperscript{169} United States \textit{v. Cammisano}, 599 F.2d 851 (8th Cir. 1979).


\textsuperscript{172} Delaware \textit{v. Woolford}, 2002 Del. Super. LEXIS 391.

\textsuperscript{173} Id.
How to File a Motion to Withdraw a Guilty Plea in Federal Court

Rule 32(d) of the FRCP governs motions to withdraw guilty or nolo contendere pleas in federal court. Normally, these motions must be made before a sentence is imposed or suspended, but there is an exception for making a motion later in order to “correct manifest injustice.”

The motion to withdraw a guilty plea must be addressed to the trial court. If the motion is denied, it may be reviewed by a higher court, but the higher court can reverse the trial court’s decision only if there was an abuse of discretion.

For those in federal custody, habeas corpus petitions provide another means to withdraw guilty pleas when some aspect of the criminal process was so profoundly illegal that it rises to the level of a constitutional error (depriving an individual of due process rights).

Such errors include:

- Denial of right to counsel;
- Ineffective assistance of counsel; and
- Failure to secure voluntary, knowing, and intelligent waivers of fundamental constitutional rights, such as failure to explain the nature of the right to a jury trial.

How to File a Motion to Withdraw a Guilty Plea in State Court

Motions to withdraw a guilty plea are governed by each state’s rules of criminal procedure and court rules. The relevant citations are included in Appendix 4-A.

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174 Rule 32(d) states: “A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.” F.R.Crim.P. 32(d).

175 See, e.g., United States v. Rodriguez-DeMaya, 674 F.2d 1122 (holding that trial court did not abuse its discretion in denying a motion to withdraw a guilty plea).


177 The standard for a finding of ineffective assistance of counsel is extremely high. The “benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 692-3 (1984) (defining a two-part test for ineffectiveness: petitioner must show that “counsel’s representation fell below an objective standard of reasonableness...[and that] there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”).

178 Adams v. United States, ex rel McCann, 317 U.S. 269, 281 (holding that a determination of guilt by a court after waiver of jury trial can be set aside only where the waiver was not freely and intelligently made).
2. **Pardon**

A complete and unconditional pardon removes the adverse immigration consequences of convictions for most deportable crimes.\(^{179}\) The crimes for which a pardon can eliminate the immigration consequences are:

- Crimes involving moral turpitude, no matter how long the sentence or how recent the conviction;
- Multiple criminal convictions for crimes involving moral turpitude;
- Aggravated felonies; and
- High speed flight.

A pardon will not eliminate the immigration consequences of the following convictions:

- Controlled substances conviction;\(^{180}\)
- Firearms offense;\(^{181}\)
- Crimes of domestic violence;\(^{182}\)
- Failure to register a change of address and falsification of documents;\(^{183}\) and
- National security offenses (as described in Chapter 3).\(^{184}\)

**Who May Issue a Pardon?**

According to the plain language of the INA, a pardon should be issued by either the president of the United States or a state governor. However, in states where the highest power to issue a pardon is not held by the governor, a pardon from the highest authority within the state will be accepted as valid for purposes of erasing immigration consequences.\(^{185}\) However, legislative pardons do not have the effect of eliminating adverse immigration consequences.\(^{186}\)

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\(^{179}\) INA § 237(a)(2)(A)(V) ("Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.").

\(^{180}\) INA § 237(2)(B). This comes from an amendment to the Immigration and Nationality Act enacted by the Narcotics Control Act of 1956, 70 Stat. 5751.

\(^{181}\) INA § 237(2)(C).

\(^{182}\) INA § 237(2)(E).

\(^{183}\) INA § 237(3).

\(^{184}\) INA § 237(4).

\(^{185}\) Matter of Tajar, 15 I&N Dec. 125 (BIA 1974) (holding that it may be considered a governor's pardon where the state has a constitutional provision vesting such authority in the Board of Pardons and such Board so exercises that power).

\(^{186}\) The Immigration and Nationality Act of 1952 eliminated the use of legislative pardons to counteract deportability. See Former 8 U.S.C.A. § 1251(b)(1).
Effect of a Pardon

A pardon specifically eliminates the deportation consequences of a criminal conviction. Even though it arises under the deportability section of the INA, it has important collateral benefits:

- A pardoned conviction cannot be used as evidence against the good moral character requirement for naturalization.
- A pardoned conviction cannot be used as inadmissibility grounds when an immigrant leaves and returns to the United States after the pardon has been granted.

3. Motion to Vacate a Conviction on Constitutional Grounds

Where writs (such as habeas corpus or coram nobis) are not available, a motion to vacate a conviction on constitutional grounds may be submitted to the trial court. According to one commentator, “the argument is that even though no statute may authorize a motion, if the Constitution has been violated, the Constitution implicitly creates a remedy for the violation.”

This argument rests on the assumption that courts have “inherent power” to correct constitutional violations. For an example of a successful motion to vacate a conviction on constitutional grounds, see People v. Cardenas, 114 Cal.App.3d 643, 647-58 (1981).

4. Writ of Coram Nobis

Background: What is Coram Nobis?

Coram nobis is the term for post-conviction relief for criminal convictions based on an error that occurred because of duress, fraud, or excusable mistake.

The effect of coram nobis is like that of a vacated conviction—the conviction ceases to exist for immigration purposes. This is true even if the full sentence has already been served and the individual is no longer in custody.

Coram nobis relief has three sources:

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188 See, e.g., United States v. Brayboy, 806 F. Supp. 1576, 1583 (S.D. Fla. 1992) (suggesting that, if a court “determined that the trial lacked fundamental fairness, it would exercise its inherent power to grant a new trial.”) (emphasis added).
190 United States v. Morgan, 346 U.S. 502 (1954). The lack of a custody requirement distinguishes the writ of coram nobis from the statutory remedy provided by 28 U.S.C. § 2255. The court in Morgan held that the statutory remedy did not supercede the common law writ of coram nobis and, therefore, the writ was available to those not in custody and those who had already served their full sentences, unlike 28 U.S.C. § 2255, which can be utilized only by those presently in custody.
A state-level writ of *coram nobis*;
State statutory remedies that codify *coram nobis*; and
Federal *coram nobis*, which is almost identical to *habeas corpus* relief under 28 U.S.C. § 2255 except that, unlike *habeas corpus*, there is no custody requirement.

**When is Coram Nobis available?**
The writ of *coram nobis* is narrow and available only in extremely limited circumstances. It requires the petitioner to have exhausted all other means of relief and, thus, is not available to persons in prison, where *habeas corpus* is the appropriate means of relief.

*Coram nobis* is available when the petitioner can show four things:

- A more usual remedy is not available;
- Valid reasons exist for not attacking the conviction earlier;
- Adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and
- The error is of the most fundamental character.

Examples of errors “of the most fundamental character” include:

- Insanity of the defendant, where this issue was not before the court at the time of trial;
- Prosecutor knowingly perjured testimony;
- Prosecutor withheld material testimony;
- Guilty plea was procured fraudulently, coercively, or involuntarily;
- Improprieties in jury selection; and
- Trial was without competent and intelligent waiver of counsel.

The petitioner must also either attack the conviction promptly or provide reasons for his delay in doing so.

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191 The Supreme Court emphasizes the extremely limited availability of *coram nobis* for federal criminal convictions. “As we noted a few years after enactment of the Federal Rules of Criminal Procedure, it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate.” *Carlisle v. United States*, 517 U.S. 416, 429 (1996), quoting *United States v. Smith*, 331 U.S. at 475, n.4.

192 As Kesselbrenner and Rosenberg point out, this is true even when habeas relief is precluded by the Anti-Terrorism and Effective Death Penalty Act’s statute of limitations. *See Matus-Leva v. United States*, 287 F.3d 758 (9th Cir. 2002).

193 *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987).

194 *Robert Popper, Post-Conviction Remedies in a Nutshell* 59 (1978)

195 This list of errors is taken from *Post-Conviction Remedies in a Nutshell* 51-52.
To summarize, a petitioner may be able to benefit from the writ of coram nobis if:

- He has already served a complete sentence or is not currently in prison;
- His conviction rested upon a serious factual error that resulted from duress, fraud, or excusable mistake; and
- The error was fundamental to the outcome of his case.¹⁹⁷
- There was an error in his case, but he could have been convicted even if this error were corrected (i.e., there was sufficient other evidence and the case did not depend on this error);
- He or his attorney made a strategic decision not to raise a certain fact or issue; or
- He waived counsel after being apprised of and knowing his rights.

Must there be a showing of prejudice?

Some courts hold that coram nobis can be granted only where there is a showing of prejudice, that is, a different result would probably have been achieved if the error had been known at the time of trial.¹⁹⁸ However, the Hirabayashi court makes the following argument:

Relying on a footnote in Dellinger [657 F.2d 140, 144 n. 9], the court required a showing that “it is probable that a different result would have occurred had the error not been made.” We note here that neither the Supreme Court nor this circuit has imposed such a requirement. In Dellinger, the Seventh Circuit cited Bateman v. United States, 277 F.2d 65, 68 (8th Cir. 1960), which in turn relied on the dissent in Morgan, 346 U.S. at 516, 74 S. Ct. at 255. The majority in Morgan never required a showing of prejudice. We need not decide whether there is as high a test as the Dellinger footnote suggests because petitioner has satisfied the higher standard.¹⁹⁹

¹⁹⁶ United States v. Morgan, 346 U.S. 502, 518 (1953) (noting that a twelve-year delay was “unreasonable on its face, absent unusual circumstances which are not shown to be present here”). But see Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987) (holding that 40 years was not an unreasonable delay when the evidence only recently became available).

¹⁹⁷ For example, in 1968, a California court found Stefan Wiedersperg, a LPR, guilty of possessing a small amount of marijuana. Although he was represented by counsel, neither Wiedersperg’s attorney nor the judge knew his immigration status. After an expungement failed to remove the immigration consequences of this conviction, he filed a writ of coram nobis, arguing that he had entered his plea in ignorance of the collateral consequence of deportation. His attorney stated in a declaration that he would not have proceeded with the trial as he did had he known his client’s immigration status. The attorney also declared that he believed that “the sentencing judge would not have imposed the sentence which he did had he been aware that it would subject defendant to deportation.” This writ was eventually granted. People v. Wiedersperg, 44 Cal. App. 3d 550 (1975).

¹⁹⁸ Bateman v. United States, 277 F.2d 65, 68 (8th Cir. 1960) (relying on dissent in United States v. Morgan, 346 U.S. 502, 518 (1953)).

¹⁹⁹ Hirabayashi v. United States, 828 F.2d 591, 604 n.14 (9th Cir. 1987).
State Statutory and Common Law Remedies Compared

Although the common law writ of *coram nobis* exists in almost half the states,²⁰⁰ each state has its own post-conviction relief statutes. Some state statutes simply codify the common law.²⁰¹ Others provide relief almost identical to *coram nobis*, which can make it extremely difficult to apply for the common law writ itself because some state courts have held that such comprehensive statutory remedies supcede the common law writ.²⁰²

How to Apply for Coram Nobis Relief

An application for *coram nobis* relief must be made to the court that tried the case, not to any of the courts of appeal. In federal court, the procedure is similar to that for challenging a conviction using *habeas corpus*.²⁰³ This procedure is governed by 28 U.S.C. § 2255 (see Appendix 4-B) and provides four grounds for relief:

- The sentence was imposed in violation of the Constitution or laws of the United States;
- The court was without jurisdiction to impose such sentence;
- The sentence was in excess of the maximum authorized by law; and
- The sentence is otherwise subject to collateral attack.

To take advantage of § 2255, the following conditions must exist:

- The applicant must attack the underlying conviction within one year. This statute of limitations was added in 1996 by the Anti-Terrorism and Effective Death Penalty Act (AEDPA).
- The applicant must be subject to federal custody. Custody includes imprisonment, probation, parole, and release on bail prior to the start of a sentence.²⁰⁴
- The applicant must show that s/he has exhausted all other remedies.
- The applicant must show that the issue was properly noticed at trial or, under the “cause and prejudice” exception, that there was cause for why it was not noticed and the failure to notice had actual and substantial disadvantage.²⁰⁵

²⁰⁰ *See Popper, Post-Conviction Remedies in a Nutshell.*

²⁰¹ For example, the New York Criminal Code codifies *coram nobis* within its law on motions to vacate judgment. N.Y. Criminal Law § 440.10 (2003). *See also* Tenn. Code Ann. § 40-3411.

²⁰² *See State v. Gee*, 30 Utah 2d 148 (S.Ct. Utah 1973) (holding that Utah statute supplanted common law writ of *coram nobis*).


Situations favorable to a federal coram nobis claim under §2255 include:

- A change in the law after the trial.
- An ineffective assistance of counsel claim was not raised on direct appeal because it was based on facts not apparent from the record.206
- Newly discovered evidence.

Comparing § 2255 Relief with Rule 32(d) Relief

The relief available through § 2255 overlaps with the relief available under Rule 32(d) (see Section 1.b.i above, “How to File a Motion to Withdraw a Guilty Plea in Federal Court,” but they are not identical. As one court stated,

While there may be a considerable overlap, the concept of “manifest injustice” under Rule 32(d) permits the judge a greater latitude than the requirements of constitutional “due process.” The facts disclosed in a hearing might not be sufficient for the court to conclude that the guilty plea was involuntary and violative of due process, yet the court may be of the opinion that clear injustice was done.207

5. Writ of Audita Querela

Audita querela is a rare writ that is occasionally used to vacate federal convictions. It provides a way to seek relief from the consequences of a conviction through a defense that was not previously available. Black’s Law Dictionary defines it as a “common law writ constituting the initial process in an action brought by a judgment defendant to obtain relief against the consequences of the judgment on account of some matter of defense or discharge arising since its rendition and which could not be taken advantage of otherwise.”208

Although audita querela was traditionally used by debtors “to obtain relief on the basis of a legal defense that arose after a court judgment,”209 it has recently been used to vacate convictions that would otherwise trigger adverse immigration consequences. Courts are divided on whether

207 Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963) (citations omitted).
"audita querela" can be granted simply to provide equitable relief or only where there is some defect in the underlying conviction. However, its use to prevent immigration consequences of criminal convictions is strongly disfavored by many courts.

Requirement of a Legal Invalidity in the Underlying Conviction

"Audita querela" can be used successfully to vacate a conviction independent of any underlying legal defect, although this approach has been sharply criticized by some courts.\(^{210}\) For example, the D.C. Circuit Court of Appeals stated that:

> We do not believe that the “gap filling” allowed by Morgan permits a court to redefine a common law writ in order to create relief not otherwise available in the federal post-conviction remedial scheme ... In short, because the so-called “pure equity” variant of audita querela finds no support in the historical definition of the writ, the authority of federal courts to use it as a “gap filler” under the All Writs Act is open to serious doubt.\(^{211}\)

Cases in which the court required some legal invalidity in the underlying conviction in order to grant relief are more common than those that do not.\(^{212}\) Even more importantly, the BIA considers that a conviction vacated on purely humanitarian grounds—absent any underlying legal invalidity—has not been vacated for immigration purposes.\(^{213}\) Thus, "audita querela" is not an effective remedy for immigration purposes when it is sought for strictly humanitarian purposes. Rather, it must also seek to remedy the legal invalidity of the conviction.

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\(^{210}\) In *United States v. Salgado*, a Washington court granted the writ of *audita querela* for an old conviction so that the petitioner could qualify for immigration relief. The immigrant argued that he had ineffective assistance of counsel because his lawyer did not advise him of the immigration consequences of his conviction and did not pursue potential 212(c) relief. The court examined all the equities and stated that, “the Court is left with the unmistakable impression that under the totality of the circumstances, it would be a gross injustice to allow this man, who has by all accounts been a model resident for forty-five years save for a single period of unlawful conduct, to effectively serve a life sentence, and for his family to be deprived of benefits from a fund he has paid into throughout his working life.” *United States v. Salgado*, 692 F. Supp. 1265, 1268 (E.D. Wash. 1988). A similar result was obtained in *United States v. Ghebreziabher*, 701 F. Supp. 115 (E.D. La. 1988).


\(^{213}\) *Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998).
II. VACATING A SENTENCE

In addition to vacating a conviction, vacating the original sentence may eliminate the adverse immigration consequences of a conviction, as discussed below.

A. Correction of an Illegal Sentence

- An LPR was convicted in Colorado on three counts of robbery (a CIMT) and was sentenced to eight years in prison. She moved for reconsideration of her sentence and was resentenced to three months time served and five years probation. The BIA found that the initial sentence was “void and of no consequence” and that, for immigration purposes, her sentence consisted “solely of the legally-imposed 3 months’ imprisonment and 5 years’ probation.”

- An unauthorized immigrant was convicted in New York of grand larceny. At his trial, the defendant entered a guilty plea in return for the judge’s promise to enter a recommendation against deportation. The judge failed to follow through on this promise, and the Supreme Court of New York found that, “[i]t is well settled that a sentence which fails to carry out the terms of a bargained-for plea agreement is invalid as a matter of law.” The court granted the immigrant’s motion to set aside his sentence.

B. New Trial and Sentence

- An immigrant was convicted of breaking and entering and was sentenced to imprisonment for 18 months to 15 years. One year later, the court directed that a new trial be granted. The immigrant entered a guilty plea and was sentenced to 10 months probation. The court’s action in granting a new trial vacated the prior sentence. The BIA held that only the 10-month sentence could be considered for immigration purposes.

C. Commutation

- An LPR pled guilty to the offense of obtaining property by false pretence and was sentenced to imprisonment for not less than one year and not more than ten years. Ten months after being convicted, his sentence was commuted and he was released. The BIA found that after this commutation, the first sentence lost its legal efficacy and, therefore, the LPR would not suffer the immigration consequences of having a “more than one year” sentence.

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D. Effect of Vacating a Sentence

The effect of a new, corrected, or commuted sentence holds true even if the original sentence was fully served.\footnote{Matter of Martin, 18 I&N Dec. 226 (BIA 1982).} Further, a new, corrected, or commuted sentence supplants the original sentence even when the sentence was modified specifically for the purpose of avoiding deportation or other immigration consequences.\footnote{Matter of Sirhan, 13 I&N Dec. 592 (1970).} In other words, unlike the writ of \textit{audita querela}, there is no need for an underlying legal invalidity in the original sentence.

E. How to Vacate or Correct a Sentence

Rule 35 (“Correction of Sentence”) of the Federal Rules of Criminal Procedure governs vacating or correcting a sentence in federal court. The text of Rule 35 is included as Appendix 4-C, along with a sample motion to correct sentence.

For state court convictions, the process for vacating or correcting a sentence is contained in the state Rules of Criminal Procedure. Examples of these rules include:

- California Rules of Court, Rule 4.500 (“Post-Conviction and Writs”);
- Florida Rules of Criminal Procedure 3.800 (“Correction, Reduction, and Modification of Sentence”);
- Massachusetts Rules of Criminal Procedure Rule 30 (“Post-Conviction Relief”); and

III. EXPUNGING A CONVICTION

Expungement of a conviction is a court action that helps the offender return to “his \textit{status quo ante}” — the position he was in prior to the conviction.\footnote{Kesselbrenner and Rosenberg, \textit{Immigration Law & Crimes} at § 4.21, quoting Grouh, “Expungement of Records,” Wash. U. L.Q. 147, 149 (1966).} Although there is a long history of using expungements to remove adverse immigration consequences of convictions, under current law it is rarely effective. In particular, it is not effective for showing the “good moral character” required for naturalization.\footnote{8.C.F.R. § 310(c)(3) (“record expungement”) says that, for drug offenses and crimes of moral turpitude, an applicant whose conviction has been expunged is still considered convicted:

(i) Drug offenses. Where an applicant has had his or her record expunged relating to one of the narcotics offenses under Section 212(a)(2)(A)(i)(II) and Section 241(a)(2)(B) of the Act, that applicant shall be considered as having been “convicted” within the meaning of Sec. 316.10(b)(2)(ii), or, if confined, as having been confined as a result of “conviction” for purposes of Sec. 316.10(b)(2)(iv).}
After the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") dramatically changed the definition of conviction, the BIA re-examined its position on expungements. The 1999 decision in Matter of Roldan held that, under the INA definition of conviction, “no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.”222 Since Roldan, expungements no longer prevent the immigration consequences of the underlying conviction.

A. Ninth Circuit Exception for Federal First Offenders

The only exception to this general rule on convictions vacated under state rehabilitative statutes is for cases arising in the Ninth Circuit. In Lujan-Armendariz v. INS, the Ninth Circuit overruled Roldan, holding that the new IIRIRA definition of conviction did not overrule the Federal First Offender Act, under which certain first-time offenses were not convictions and, therefore, did not trigger adverse immigration consequences.223 This holding was limited to the federal First Offender Act and did not reach expungements generally. In a 2002 case, Matter of Salazar-Regino,224 the BIA limited application of Lujan-Armendariz to the Ninth Circuit.

The federal First Offender Act exception applies to expunged state first-time convictions as long as the defendant meets the other requirements of the Act.225

B. Does Roldan Apply to Expungement of Non-Drug Convictions?

Although the BIA has not yet ruled on this principle in the context of non-drug convictions, it has stated its Roldan holding in general terms that, “[i]f a court vacates an alien's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.”226 Thus, Roldan is still valid in circuits other than the Ninth Circuit, and its principles have been reaffirmed by the BIA. Therefore, “convictions that are vacated under state rehabilitative statutes will continue to exist to trigger adverse

(ii) Moral turpitude. An applicant who has committed or admits the commission of two or more crimes involving moral turpitude during the statutory period is precluded from establishing good moral character, even though the conviction record of one such offense has been expunged.

223 Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000).
225 Cardenas-Uriarte v. INS, 227 F.3d 1132 (9th Cir. 2000).
immigration consequences except to the extent (first offense non-trafficking drug convictions) that *Lujan* and its progeny dictate otherwise.”

**IV. JUDICIAL RECOMMENDATIONS AGAINST DEPORTATION**

Until the Immigration Act of 1990, a Judicial Recommendation Against Deportation (JRAD) was available for an immigrant with a criminal conviction to fight deportation and remove any bar to a finding of good moral character. A judge in a criminal trial could convict an immigrant but ensure that s/he would not be deported as a result of the conviction by issuing a JRAD. A JRAD may also bar the use of a conviction in discretionary decisions regarding adjustment of status, but this depends on the circuit where the case arises.

As of November 29, 1990, judges could no longer issue JRADs. However, JRADs may provide some important benefits for individuals who have convictions prior to that date, including:

- An immigrant who received a JRAD cannot be deported.
- For cases in the Third Circuit, a JRAD bars the use of a conviction in proceedings other than deportation proceedings, such as adjustment of status and naturalization.
- An immigrant who was not advised by his attorney about the availability of JRADs (for convictions prior to November 29, 1990) may have his conviction set aside for ineffective assistance of counsel.

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229 The circuits are divided on this question. *Compare Giambanco v. INS*, 531 F.2d 141 (3d Cir. 1976) (holding that an applicant for Section 245 adjustment could not be denied solely on the basis of a conviction for which the judge recommended against deportation, noting that a contrary decision would harm the integrity of the judge’s decision) with *Delgado-Chavez v. INS*, 765 F.2d 868 (9th Cir. 1985) (holding that the plain language of § 1251(b)(2) limited the effect of JRADs to deportation only, and that they could not be used in voluntary departure hearings). The Seventh Circuit has followed the Ninth Circuit’s more limited view of JRADs. *See Oviawe v. INS*, 853 F.2d 1428 (7th Cir. 1988). The BIA follows *Giambanco* only in the Third Circuit. *See Matter of Gonzalez*, 16 I&N Dec. 134 (BIA 1977).

230 *United States v. Castro*, 26 F.3d 557 (5th Cir. 1994) (failure to advise of the availability of JRAD indicates ineffective assistance of counsel); *Jantvier v. United States*, 793 F.2d 449 (2d Cir. 1986) (failure to advise of the availability of JRAD indicates ineffective assistance of counsel). *But see United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985) (because immigration consequences are only collateral consequences, failure to advise of the availability of JRAD does not indicate ineffective assistance of counsel).
V. POST-CONVICTION REMEDIES THAT DO NOT REMOVE IMMIGRATION CONSEQUENCES

Not all post-conviction remedies will remove the adverse immigration consequences of a criminal conviction. Most of the remedies described above vacate convictions on the grounds that the convictions were legally invalid. However, the immigration consequences of a conviction remain when:

- The conviction is vacated solely on humanitarian grounds;
- The conviction is vacated under a state rehabilitative statute; or
- The conviction was for an offense that does not require a conviction in order to trigger immigration consequences.

A. Conviction Vacated Solely on Humanitarian Grounds

Although a writ of *audita querela* may vacate a conviction on purely humanitarian grounds, this does not remove the adverse immigration consequences. This is the limited holding of the Ninth Circuit in *Beltran-Leon v. INS*.231 As explained in a later case, the *Beltran-Leon* decision is quite narrow:

In that case we said only that a particular common law writ - the writ of *audita querela* - cannot be given effect for deportation purposes absent a defect in the underlying legal proceedings. [*Beltran-Leon*, 134 F.3d at 1380]. We relied on *Doe v. INS*, 120 F.3d 200, 203 (9th Cir. 1997), in which we held that for a writ of *audita querela* to issue, there must be a legal defect in the underlying conviction or sentence, which was absent in Beltran-Leon's case.232

Therefore, to avoid the *Beltran-Leon* situation, an applicant should seek a writ of *audita querela* not only on the basis of humanitarian reasons but also on the basis of the underlying legal invalidity of the conviction.

B. Expungement: Convictions Vacated Under a State Rehabilitative Statute

The vast majority of convictions vacated under state rehabilitative statutes still constitute convictions for immigration purposes and, therefore, retain adverse immigration consequences. As noted above, the BIA held in *Matter of Roldan* that under the INA definition of conviction, “no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of

231 134 F.3d 1379 (9th Cir. 1998).

232 *Lujan-Armendariz v. INS*, 222 F.3d 728, 747 n.31.
guilt or conviction by operation of a state rehabilitative statute.” 233 In addition, Roldan does not apply to convictions vacated under other statutes, such as statutes authorizing a judge to vacate a conviction on constitutional grounds. 234

C. Offenses That Do Not Require Convictions to Trigger Immigration Consequences

Because immigration consequences sometimes depend on the commission of an act rather than a conviction, vacating the underlying conviction will not provide any immigration relief. This applies to a person who was:

- a drug addict or abuser; 235
- found in civil court to have committed a violation of a domestic violence restraining order;
- an alien smuggler, or encouraged others to smuggle aliens; 236 or
- engaged in activities related to national security, including espionage, sabotage, compromising national security, or overthrowing the government. 237

Note: The crimes listed above render an immigrant deportable. There are additional crimes that make an immigrant inadmissible and for which no conviction is needed. Before traveling outside the United States, an applicant should consult INA § 212 for the complete list of these crimes.

VI. REOPENING REMOVAL PROCEEDINGS WHEN A CONVICTION HAS BEEN SUCCESSFULLY VACATED

A. Motion to Reopen

Ideally, post-conviction relief will be obtained prior to removal proceedings. If, however, the removal proceedings have already concluded, the immigrant can submit a motion to reopen proceedings before the BIA within 90 days after the final administrative decision is rendered. 238 There are limited exceptions to the 90-day rule, however; see 8 C.F.R. § 1003.2(c)(3) for details. The BIA also has discretion to consider motions that are not filed in a timely fashion. 239 The rules governing how to reopen removal proceedings before the BIA are found in 8 C.F.R. 1003.2 and are reprinted in Appendix 4-E. 240

234 Sandoval v. INS, 240 F.3d 577 (7th Cir. 2001).
236 INA § 237(a)(1)(E).
237 For the complete list of these activities, see INA § 237(a)(4)(A).
238 8 C.F.R. 1002.3(c)(2).
239 8 C.F.R. 1002.3(c)(3).
240 Effective February 28, 2003. These regulations were formerly at 8 C.F.R. 3.2.
Immigrants whose cases have not been appealed to the BIA must submit their motions to the immigration judge with control over the proceeding. The rules governing motions to reopen a case before an immigration judge are found in 8 C.F.R. 1003.23. The information below pertains to motions to reopen before the BIA only.

A motion to reopen a case before the BIA must meet the following requirements:

- It must state new facts that will be proven at a new hearing;
- It must be supported by affidavits or other evidentiary materials;
- If submitting an application for relief, it must be accompanied by the appropriate application for relief and all supporting documentation;
- It must be made in English or accompanied by a certified translation;
- If the immigrant has legal representation, it must be accompanied by an EOIR-27 form; and
- It must include proof of service on the opposing party.

The BIA will not grant a motion unless “it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing.”

B. Post-Deportation Judicial Review

Even after an immigrant has been deported, s/he can petition to reopen removal proceedings on the grounds that the deportation was not legally executed because it was based upon an invalid conviction. However, the circuit courts are divided on the question of whether such a petition should be granted. The specific regulatory language is at 8 CFR § 1003.2 (formerly § 3.2), which states that, “a motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States.”

The Ninth Circuit, in *Mendez v. INS*, read this language as providing an exception for deportations that were not “legally executed,” meaning that they were based on procedural irregularities in the removal proceedings. This was affirmed in *Estrada-Rosales v. INS* for deportations based on legally invalid convictions. The First Circuit rejected the *Mendez* probably does not extend *Mendez* so far as to include deportation based on a conviction that was subsequently expunged or judicially pardoned. “The vacation of the conviction here went to the merits. It was neither a judicial pardon nor a technical expungement of record following a probationary period, which are insufficient to negate a conviction for the purposes of the deportation statutes.”

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241 8 C.F.R. 1002.3(c)(1).
242 *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981).
243 8 C.F.R. § 1003.2(d).
244 563 F.2d 956 (9th Cir. 1977).
245 645 F.2d 819 (9th Cir. 1981). *Estrada-Rosales* probably does not extend *Mendez* so far as to include deportation based on a conviction that was subsequently expunged or judicially pardoned. “The vacation of the conviction here went to the merits. It was neither a judicial pardon nor a technical expungement of record following a probationary period, which are insufficient to negate a conviction for the purposes of the deportation statutes.” Id. at 821.
exception, arguing that the decision goes against the plain language of the statute. The Second, Fifth, and Tenth Circuits have also been critical of the holding. Nonetheless, in the Ninth Circuit and other circuits that have acknowledged that a Mendez exception may exist (Third Circuit, Sixth Circuit, and Eight Circuit), judicial review may be possible after deportation.

247 Roldan v. Racette, 984 F.2d 85, 90 (2d Cir. 1993); Umanzor v. Lambert, 782 F.2d 1299 (5th Cir. 1986); Saadi v. INS, 912 F.2d 428, 428 (10th Cir. 1990).
248 Marrero v. INS, 990 F.2d 772, 777 (3d Cir. 1993).
249 Juarez v. INS, 732 F.2d 58, 59-60 (6th Cir. 1984).
250 Camacho-Bordes v. INS, 33 F.3d 26, 27-28 (8th Cir. 1994).
CHAPTER 6

REMOVAL—WHAT TO EXPECT AND HOW TO SEEK RELIEF

Although the focus of this manual is on the naturalization process, some applicants may be in removal proceedings, and others may be detained during or after their naturalization interview. This chapter offers a brief description of the removal process and examines the avenues for relief that may be available to assist naturalization applicants in removal proceedings.

I. REMOVAL

A. What Are Removal Proceedings?

When a person arrives at the United States, whether at an airport, seaport, or land border crossing, s/he must pass through immigration inspection. To be admitted to the United States, the person must convince the immigration officer that s/he is entering for a lawful purpose. If the immigration officer does not admit the person due to one of the grounds of inadmissibility, s/he may be placed in removal proceedings. Further, even if the person has been admitted into the United States, s/he may be placed in removal proceedings later based on grounds of deportability.

Removal proceedings are court hearings during which the immigration judge decides whether a person will be able to enter or remain in the United States. Before 1996, “exclusion proceedings” applied to persons who were applying for admission to the U.S. at a port of entry. “Deportation proceedings” applied to persons who had “entered” the U.S. (either legally or illegally) and whom the CIS wanted to deport. In 1996, Congress combined exclusion and deportation proceedings into one type of proceeding, called “removal proceedings.”

Removal proceedings are initiated when Immigration & Customs Enforcement (ICE) files a charging document with the immigration court. The person may be detained while in removal proceedings, awaiting release, a release on bond, or a hearing. There are two types of hearings involved in removal proceedings: a “master calendar” hearing and a “merits” hearing. The removal proceedings usually end with an order of termination, relief from removal, or removal (deportation). If the court orders the person removed, s/he has a right to appeal.

Removal proceedings are complex, and persons in removal proceedings should try to obtain assistance from an attorney experienced in representing individuals in removal proceedings. The following points apply in all removal cases:

- Removal proceedings are considered civil, not criminal, proceedings.
- When a person receives a charging document, called a “Notice to Appear” (discussed below), s/he should immediately respond by providing his mailing address to Immigration and Customs Enforcement. S/he must go to the scheduled hearing, even if he does not yet have an attorney, as s/he risks immediate removal if s/he fails to appear at the hearing.
The person should not admit at the hearing that s/he is deportable, but rather, force the ICE to prove its case. If the immigrant admits that s/he is deportable, s/he may not be eligible for some forms of relief from removal.

Immigration judges hear hundreds of cases each year and, therefore, even though the person may believe that his/her circumstances are compelling, the judge may consider it a routine case. Thus, the person needs to show, through documentation and other evidence, that his/her request for relief merits consideration.

B. Inadmissibility and Deportability Grounds for Removal

The grounds for inadmissibility and deportability are very similar. Inadmissibility grounds apply to those people who seek to enter the United States from another country, those who have entered the U.S. illegally, and those who want to become legal permanent residents in the United States. Even if a person has been in the United States for many years, s/he is subject to the inadmissibility grounds if s/he never passed through immigration and was never officially “admitted” to the country. Deportability grounds apply to those who have been legally admitted to the U.S., but have committed an illegal act that requires them to leave.

The grounds for inadmissibility contained in the INA are:

- Criminal grounds, § 212(a)(2);
- National security grounds, § 212(a)(3);
- Likelihood of becoming a public charge, § 212(a)(4);
- Immigration violations (presence without admission, smuggling, visa abuse, etc.), § 212(a)(6);
- False documentation, § 212(a)(7);
- Health (vaccines, communicable disease of public health significance, etc.), § 212(a)(1);
- Ineligibility for citizenship, § 212(a)(8); and
- Previously removed, § 212(a)(9).

The grounds for deportability contained in the INA are:

- Criminal grounds, § 237(a)(2);
- National security grounds, § 237(a)(4);
- Public charge, § 237(a)(5);
- Removable immigrants (inadmissible at time of entry, present in violation of INA, violation of nonimmigrant status, smuggling, etc.), § 237(a)(1); and
- Falsification of documents, § 237(a)(3).
C. Initiating Removal Proceedings: the Notice to Appear (NTA)\textsuperscript{251}

ICE initiates removal proceedings by issuing a “Notice to Appear” (NTA, formerly known as an “Order to Show Cause”) to the immigrant and filing it with the local immigration court.\textsuperscript{252} The NTA will state the charges against the immigrant, the type of proceedings, and the legal basis for the proceedings. The NTA will also provide the address of the immigration court and information on the time and place of the hearing, if one has been scheduled.

As stated on the NTA, the immigrant must immediately provide his/her address and phone number to ICE so that s/he can be contacted regarding the proceedings. The NTA will state the penalties for failure to provide this information and, if the immigrant does not provide his/her address, the immigration court is not obligated to send notices to him/her of scheduled hearings. ICE will also inform the immigrant that s/he may obtain legal assistance, at his/her own expense, and will provide a list of pro bono attorneys or organizations that can assist him/her in obtaining an attorney. Finally, if the immigrant is age fourteen or older, s/he must be fingerprinted as well.

1. Right to an Attorney

An immigrant may have legal representation in removal proceedings, but the government will not pay for this representation. The immigrant must be informed of his/her right to an attorney in the NTA, and ICE or the immigration court should provide a list of pro bono attorneys. In addition, an immigrant may ask to contact an attorney at any time during questioning by ICE. ICE must allow the immigrant to use a telephone to contact an attorney, although the immigrant must pay for long distance calls. Once an attorney is reached, the ICE must stop questioning the immigrant.

2. Removal Hearings

Immigrants in removal proceedings have the right to a hearing before an immigration judge. After a removal case is assigned to a judge for a hearing, an ICE attorney will prosecute the case.

The immigrant will first appear at a “master calendar” hearing, where an immigration judge explains the immigrant’s rights and the immigrant will admit or deny each of the factual allegations in the NTA.\textsuperscript{253} The immigrant should also respond to the charges of inadmissibility or deportability against him/her. If the immigrant does not speak English, s/he has the right to an interpreter.

\textsuperscript{251} For a sample Notice to Appear, see Appendix 6-H.

\textsuperscript{252} CIS can cancel a NTA before it is filed with the immigration court if, for example, it was not properly issued or the circumstances of the case have changed and the government decides not to proceed with the case.

\textsuperscript{253} The master calendar hearing may be conducted by telephone, especially if the immigrant is detained.
Before the hearing, the immigrant and his/her advocate should review all the forms of relief that might be available and request such relief during the master calendar hearing. In addition, the immigrant may designate the country to which s/he wants to be removed if an order of removal is issued. Most immigrants choose to be returned to their country of citizenship. However, an immigrant applying for asylum or withholding of removal should not designate his/her country of citizenship, as it may be interpreted as an admission that s/he can return to that country without fear of persecution.

If the immigration judge determines that the immigrant is eligible for relief from removal, s/he will schedule a “merits,” or individual, hearing, at which an ICE attorney will prosecute the case and the immigrant will be able to present evidence in his/her defense.\(^{254}\) The INA requires that the immigrant be given “a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government.”\(^{255}\) If the immigrant contests his removal, ICE must prove that the immigrant is removable before the immigration judge will enter an order of removal. Either side can submit documents as evidence at this hearing that, along with the immigrant’s testimony, will be included in the record upon which the immigration judge will base his/her decision.

### 3. Judge’s Decision and Right to Appeal

The immigrant has the right to appeal the immigration judge’s decision. When the judge announces his/her decision, s/he will ask the immigrant and the ICE attorney whether either wants to reserve appeal (i.e., retain the right to appeal) or waive appeal. If both sides waive appeal, the immigration judge’s decision becomes final. If one side reserves appeal, s/he must file a “Notice of Appeal” (Form EOIR-26) with the Board of Immigration Appeals (BIA) within 30 days and simultaneously send a copy to the other party. The appellant must enclose the required fee with the Notice of Appeal, but if s/he cannot pay it, he should file an “Appeal Fee Waiver Request” (Form EOIR-26A) with the Notice. Samples of both forms are attached in Appendix 6-A.

The BIA is the appellate body within the U.S. Department of Justice’s Executive Office for Immigration Review (EOIR). If there is an appeal of the immigration judge’s decision, the BIA will examine the documents submitted to the immigration court and the transcript of the hearing in order to reach its decision. In most cases, the BIA will not reverse the decision of the lower court unless the immigration judge made a mistake in applying the law to the facts of the immigrant’s case.

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\(^{254}\) The individual hearing may be conducted by videoconference, which is more likely if the immigrant is detained.

\(^{255}\) INA § 240(b)(4)(B).
If the immigrant is detained during the appeals process, it will probably take between six and nine months for the BIA to make its decision. If the immigrant is not in ICE custody, the process may take much longer. There is no deadline for the decision, however, so these times are only estimates.

4. Failure to Appear at a Hearing

If the immigration court properly sends a notice of removal hearing to the immigrant but s/he fails to appear at the hearing, the immigration judge will enter an immediate removal order. This is called an in absentia removal. In order for the immigrant to be removable, ICE must prove only that it sent the written notice properly, or that it was not required to do so because the immigrant did not provide an address. An immigrant who fails to appear at his/her hearing will not be eligible for relief from removal for ten years. ICE may also give the immigrant verbal notice, in a language the immigrant understands, of the time and place of the hearing, as well as explain the consequences of not appearing. An immigrant who was given verbal notice but does not appear at the hearing (other than for exceptional circumstances) will not be eligible for relief from removal for at least five years after the removal order.

The immigrant can appeal an in absentia removal order, however, by filing a request with the immigration court within 180 days of the date of issuance of the order, to reopen the proceedings and withdraw the order. To succeed, the immigrant must show that her/his failure to appear at the hearing was due to “exceptional circumstances.” Exceptional circumstances include the “serious illness of the immigrant or serious illness or death of the spouse, child, or parent of the immigrant, but not including less compelling circumstances, beyond the control of the immigrant.” If an immigrant has a medical or other valid problem that prevents her/him from appearing, s/he should contact the court administrator as early as possible before the hearing. The immigrant can then file a motion to reopen her case and provide a complete explanation of the difficulty that prevented her from appearing at the hearing. The immigrant should include medical records, affidavits, and other evidence with the motion to support her/his claim.

Alternatively, the immigrant can make a request to reopen the proceedings at any time if s/he did not receive the notice of the hearing or did not appear because s/he was in custody and could not appear. In addition, if the immigration judge denies the immigrant’s request to withdraw the order, the immigrant can appeal to the Board of Immigration Appeals.

II. RELIEF FROM REMOVAL

Lawful permanent residents who wish to naturalize but have a criminal record may not be able to seek post-conviction relief, such as a pardon or vacating the conviction, because of the expense, the nature of the crime, or the lack of underlying legal invalidity. In such cases, the immigrant should carefully investigate whether relief from removal is available. Although it

256 INA § 240(e).
has become increasingly difficult in recent years for even LPRs to gain relief from removal, certain narrowly-drawn forms of relief are still available, as discussed below.

Persons with aggravated felony convictions, however, are precluded from relief, except under extremely limited circumstances, and are subject to mandatory detention. In addition, good moral character is a requirement for many types of relief from removal. Acts that show a lack of good moral character include being a habitual drunk, being convicted of crimes, illegal gambling, lying to obtain immigration benefits, smuggling, and prostitution.

A. Process for Seeking Relief

To prevent being removed from the United States, the immigrant should request relief at the master calendar hearing. The immigration court will establish deadlines for filing an application and evidence to support the claim for relief before the merits hearing. The immigrant has the burden of proving that s/he is entitled to relief from removal and should, therefore, submit as much supporting documents and testimony as possible.

For all discretionary relief, such as cancellation of removal, the immigration judge will first decide whether the immigrant is eligible for the requested relief. As stated above, the immigrant has the burden of proving that s/he meets the requirements for the particular relief. Second, if the immigrant has established that s/he is eligible, the immigration judge has discretion to decide whether to grant the requested relief.

For mandatory forms of relief, such as withholding of removal or relief under the Convention Against Torture, if the judge finds that the immigrant is eligible, s/he must grant the relief. The different forms of relief are discussed below.

1. Cancellation of Removal

Cancellation of removal does not remove a conviction from the immigrant’s record and, therefore, may continue to be a bar to naturalization, but it prevents the immigrant from being removed. It is available to a maximum of 4,000 people each year.

Cancellation of removal is available to LPRs if they meet three conditions:

257 See “Deferral of Removal” below.

258 See INA § 101(f).

259 See INA § 240A(a). For a full discussion of how to apply for cancellation of removal, see How to Apply for Cancellation of Removal for Certain Legal Permanent Residents, published by the Florence Immigrant and Refugee Rights Project. The pamphlet is available on the web at http://www.firrp.org/kyrindex.asp.

260 INA § 240A(e).
• The immigrant has been an LPR for not less than five years;
• The immigrant has resided in the United States continuously for seven years after being admitted in any status; and
• The immigrant has not been convicted of an aggravated felony.261

Further, cancellation of removal is discretionary relief – even if an LPR meets all three criteria, the immigration judge may not grant her/him cancellation of removal. Rather, “the applicant needs to convince the judge that the positive factors for allowing her/him to remain in the U.S. outweigh the reasons for ordering removal. The rehabilitation of the applicant is usually one of the key issues in these cases.”262

Positive factors that may persuade a judge to grant cancellation of removal include:

• Family connections;
• Involvement in the community;
• Service in the U.S. military;
• Good employer recommendations;
• Rehabilitation; and
• Length of time that the individual has lived in the United States.263

Five years as an LPR

The date an immigrant acquired LPR status is not always the same date the immigrant first came to the United States, as people may come on non-immigrant visas and later adjust to LPR status. For example:

• A woman has a U.S. citizen brother who filed an immigrant visa petition for her in 1990. She received the visa on May 3, 1995 and arrived in the United States on June 12, 1995. She has satisfied the “five years as LPR” requirement on June 12, 2000 – five years after she was admitted to the United States as a permanent resident, not five years after she received the visa.

• A man came to the U.S. on a student visa on November 22, 1988. He married a U.S. citizen on December 15, 1990 and became a LPR on June 1, 1991. He satisfied the “five years as LPR” requirement on June 1, 1996.

Seven Years Continuous Residence

An individual has met the continuous residence requirement if s/he has lived in the United States for seven years, with only short visits outside the country.264

261 The criteria for those who are not permanent residents are different. See INA § 240A(b).
263 See Florence Project, How to Apply for Cancellation of Removal for Certain Legal Permanent Residents 20 (1999).
What constitutes a break in residence?

- Any single visit outside the United States that lasts more than 90 days is a break in continuous residence.\(^{265}\)

- Two or more visits outside the United States totaling more than 180 days is a break in continuous residence.\(^{266}\)

- Service of a Notice to Appear (NTA) stops the accrual of continuous residence.\(^{267}\)

- A conviction for a crime referenced in INA § 212(a)(2) stops the accrual of continuous residence as of the date the offense was committed, not as of the date of conviction.\(^{268}\) These crimes include:
  - A crime involving moral turpitude, except for juvenile offenders, petty offenders, and purely political offenses. A conviction is not necessary to constitute a break in residence if the individual has admitted committing the crime;
  - Multiple criminal convictions;
  - Controlled substance trafficking, extending to close family members who knew of the trafficking and derived financial or other benefit from it;
  - Prostitution and commercialized vice;
  - Violations of religious freedom (applies only to foreign government officials);
  - Trafficking in persons or benefiting from trafficking in persons; and
  - Money laundering.

For example:

- A Senegalese woman came to the United States on a L-1 visa on January 3, 1991. She married a U.S. citizen and adjusted to LPR status on March 12, 1994. She visited Senegal for two weeks each year, and made one additional trip for 30 days in 1996. As her visits to Senegal do not total more than 180 days, she has had no break in continuous residence. Thus, she has seven years continuous residence on January 3, 1998.

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\(^{264}\) Residence is a person’s “actual dwelling place in fact, without regard to intent.” INA § 101(a)(33).

\(^{265}\) INA § 240A(d)(2).

\(^{266}\) INA § 240A(d)(2).

\(^{267}\) INA § 240A(d)(1)(A).

\(^{268}\) INA § 240A(d)(1)(B). This provision also refers to crimes that make an individual removable under § 237. However, the BIA has held that “convictions that trigger removal, but not inadmissibility, under INA § 212(a) do not stop the accrual of time for meeting the continuous residence or physical presence for purposes of qualifying for cancellation of removal.” Kesselbrenner and Rosenberg, *Immigration Law and Crimes* § 9:13, citing *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).
An Australian man arrived in the United States and became a LPR on July 3, 1993. On June 18, 1994 he was convicted of writing a bad check, a CIMT with a maximum possible sentence of 180 days. On February 4, 2000, he was convicted of larceny and sentenced to six months out of a possible two years maximum sentence. Unlike the bad check conviction, where the petty offender exception applied, this second conviction stops his “continuous residence” before he has accrued seven years continuous residence.

A Mexican woman arrived in the United States on October 4, 1995. She committed a theft offense on August 19, 2001 and was convicted on October 22, 2002. She had not accrued seven years continuous residence at the time of her conviction because the date that the crime was committed stopped the continuous residence clock, not the date of the conviction.269

Finally, the continuity exception is not required for individuals who have served in the United States military for 24 months or longer or who were honorably discharged before serving 24 months.270

Aggravated Felony and Other Criminal Conduct

As noted previously, an aggravated felony conviction bars relief from removal. This underscores the importance of an immigrant and his/her attorney avoiding an aggravated felony conviction by working with the prosecutor to charge the immigrant with a lesser crime or, after an aggravated felony conviction, attempting to vacate the conviction or reduce the sentence.

Immigrants who engage in terrorist activities or pose a threat to the national security of the United States are also ineligible for cancellation of removal.271 In addition, an immigrant who has participated in the persecution of another person is ineligible for cancellation of removal.272

Prior Cancellation of Removal or Other Waivers

*If the applicant has previously been granted cancellation of removal or received any other type of waiver, s/he is ineligible for a subsequent cancellation of removal.*273

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270 INA § 240A(d)(3).
271 INA § 240A(c)(4), citing INA § 212(a)(3) and § 237(a)(4).
272 INA § 240A(c)(5).
273 INA § 240A(c)(6).
Applying for Cancellation of Removal

To apply for cancellation of removal, the applicant must complete and submit Form EOIR-42A, “Application for Cancellation of Removal for Certain Permanent Residents.” This form and instructions are attached in Appendix 6-B. Form EOIR-42A instructs the applicant to attach supporting documents that prove eligibility for cancellation of removal. The original is submitted to the immigration court and a copy must be served on the ICE District Counsel.

The applicant must also complete and submit Form G-325A (“Biographic Information Form,” attached in Appendix 6-C), and the fingerprint fee (see Appendix 6-C). Unlike Form EOIR 42-A, the original Form G-325A is submitted to the ICE District Counsel and a copy is served on the immigration court. The applicant must also include the filing fee or submit a request for waiver of the fee. The fee (or the waiver request) must be sent to the immigration court with the other materials.

2. 212(h) Relief

For immigrants with certain criminal convictions, relief from removal may be available under INA § 212(h) which, although it provides for a waiver for inadmissibility, has been held to apply to removal proceedings as well.\(^{274}\) The waiver may be available for immigrants with the following convictions:

- CIMT (conviction, or admission of conduct constituting a CIMT);
- Possession of less than 30g of marijuana;
- Multiple criminal convictions;
- Prostitution and commercialized vice; and
- Serious criminal offense where immunity from prosecution was exercised.\(^{275}\)

There are two forms of § 212(h) relief. Under the first form, the immigrant must show that:

- Either the conviction was for prostitution or commercialized vice and the conviction was at least 15 years ago, or the immigrant has been rehabilitated and his admission to the United States would “not be contrary to the national welfare, safety, or security of the United States”;\(^{276}\)
- He has not been convicted of an aggravated felony;
- He has not been convicted of or admitted to committing murder or torture; and
- He has resided lawfully in the United States for at least seven years before removal proceedings were initiated.

To be eligible under the second form, the immigrant must show that:

\(^{274}\) Yeung v. INS, 76 F.3d 337 (11th Cir. 1995), reconsideration denied Yeung v. INS, 21 I&N Dec. 610 (BIA 1996).

\(^{275}\) INA § 212(h).

\(^{276}\) INA § 212(h).
- S/he is the spouse, parent, son, or daughter of a U.S. citizen or LPR;
- Denial of admission would result in extreme hardship to the U.S. citizen or LPR spouse, parent, son, or daughter;
- S/he has not been convicted of an aggravated felony;
- S/she has not been convicted of or admitted to committing murder or torture; and
- S/he has resided lawfully in the United States for at least seven years before removal proceedings were initiated.

The waiver is discretionary and the immigrant must show why discretionary relief is merited. S/he should provide evidence of all factors in her favor, such as steady employment, family ties to U.S. citizens or legal immigrants, property ownership, and involvement with the community such as a church or volunteer work.

What is "Extreme Hardship"?

Proving “extreme hardship” to an immediate family member (parent, spouse, or child) is vital for the second form of § 212(h) relief. First, the statutory language makes clear that extreme hardship to the immigrant herself does not constitute a basis for relief. Rather, extreme hardship “includes the emotional difficulties of family separation, financial dependence, serious illness and other forms of hardship [and] includes present and foreseeable future hardship,”277 determined on a case-by-case basis.278 Factors that can contribute to a showing of extreme hardship include:

- Presence of LPR or U.S. citizen family ties to the United States;
- Qualifying relative’s family ties outside the United States;
- Conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties to such countries;
- Financial impact of departure from this country;
- Significant conditions of health, particularly when tied to the unavailability of suitable medical care in the country to which the qualifying relative would relocate.279

Applying for a § 212(h) Waiver

To apply for a 212(h) waiver, the immigrant must complete and submit Form I-601, “Application for Waiver of Ground of Excludability” to the local office having jurisdiction over the case. The Form I-601 (with filing instructions) is attached as Appendix 6-D. Immigrants are strongly advised to seek legal assistance before submitting this form.

279 Matter of Cervantes, 22 I&N Dec. 560 (BIA 1999). Although this is a case involving inadmissibility due to fraud (INA § 212(i)), the Board noted that the interpretation of “extreme hardship” can be comparable across forms of relief.
3. Withholding of Removal

Withholding of removal is an alternative form of relief for a person who fears persecution in his/her country of origin but, because s/he has a criminal conviction, would likely not be granted asylum. Unlike asylum, withholding of removal is mandatory relief and, thus, if the immigration judge finds that the person meets the statutory requirements, the judge must grant withholding.280

Requirements for Withholding of Removal

The immigrant must prove three elements to be granted withholding of removal:

- The immigrant must show that s/he fears returning to his home country and that it is more likely than not that s/he will be persecuted if sent back. A possibility of persecution is not sufficient. If the immigrant can demonstrate past persecution, this will help show that it is likely that he will be persecuted again if sent back to his/her home country and that his/her fear is reasonable.

- The immigrant must show that s/he will face persecution or loss of his/her life or freedom. “Persecution” includes being threatened, hurt, kidnapped, beaten, detained, jailed, tortured, sexually abused, or killed. In addition, if the immigrant would not be able to get a job or go to school, or would face harassment, these factors combined may constitute persecution.

- The persecution is based on the immigrant’s race, religion, nationality, political opinion, or membership in a particular social group. “Political opinion” includes both the immigrant’s actual political opinion281 or a political opinion that may be imputed to him/her by others.282 A “social group” can be a tribe, clan, ethnic group, members of the same family, or other identifiable group, including a group based on sexual preference or women who...

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280 For information on asylum eligibility and application requirements, consult the Florence Project’s How to Apply for Asylum and Withholding of Removal (electronic version available at http://www.firrp.org/kyrindex.asp.

281 In Re S—–P—–, 21 I. & N. Dec. 486 (BIA 1996) (persecution found where applicant was detained and abused by the Sri Lankan Government because of assumption that applicant’s views were hostile to government and where abuse included being tied up, beaten, and threatened). See also Vongsakdy v. INS, 171 F.3d 1203 (9th Cir. 1999) (claim of persecution valid where applicant was forcibly detained by Communist government in labor camp, beaten and tortured, and forced to attend meetings on “new politics”).

282 INS v. Elias- Zacarias, 502 U.S. 478, 481-84 (1992) (no persecution based on political opinion found where there was evidence of a guerrilla organization attempting to recruit the immigrant into its military forces).
are subject to female genital mutilation or other forms gender based violence.283 “Race” encompasses persecution because of skin color, origin, or background.284 “Religion” includes persecution for holding particular religious beliefs, or for not adhering to a preferred or state religion.285 Finally, “nationality” refers to the immigrant’s country of origin or citizenship.286

An individual is ineligible for withholding of removal if:287

- S/he has been convicted of a particularly serious crime;288
- S/he has persecuted others;
- S/he is or has been a terrorist or danger to U.S. security; or
- S/he has committed a serious non-political crime outside the U.S. Conviction is not required for this particular bar from relief.

If an individual is granted withholding of removal, s/he may be released from ICE custody and will be granted authorization to work. However, the relief may be temporary. Unlike a person who is granted asylum, a person who is granted withholding of removal cannot apply for lawful permanent residence and may be returned to his country of origin if there is a change of country conditions such that the persecution or torture is no longer “more likely than not.” Also, a person who has been granted withholding of removal cannot apply to have family members join him/her in the United States.

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283 Matter of H, 21 I. & N. Dec. 337 (BIA 1996) (persecution found where clan rivalry led to asylum applicant being rounded up and detained, and while in detention was badly beaten on head, back, and arm with a rifle.).
284 Duarte de Guinac v. INS, 179 F.3d 1156 (9th Cir. 1999) (persecution found where applicant, a member of the Guatemalan military, was repeatedly beaten and verbally assaulted by other members of the military because he was “Indian,” called an “Indian pig,” and threatened with death if he complained of his treatment).
285 In re S-A-, 22 I. & N. Dec. 1328 (BIA 2000) (persecution found where woman with liberal Muslim beliefs was physically and emotionally abused by her father, an orthodox Muslim, and the abuse consisted of the father beating the woman with his hands, feet, or a belt).
286 In re O-Z- & I-Z-, 22 I. & N. Dec. 23 (BIA 1998) (persecution found where Jewish Ukrainian suffered repeated beatings and received handwritten anti-Semitic threats, his apartment was vandalized by anti-Semitic nationalists, and his son was intimidated because of his Jewish nationality).
287 INA § 241(b)(3)(B).
288 An aggravated felony conviction with a minimum five-year sentence is considered per se a particularly serious crime. In deciding whether the crime is particularly serious, the judge will look at the facts of the crime, if the sentence was heavy or light, whether the crime was against property or against a person, and whether the crime makes the immigrant a danger to society.
Applying for Withholding of Removal

An applicant for withholding of removal must submit Form I-589 (attached as Appendix 6-E) to the immigration court once he/she is in removal proceedings. Applicants are strongly advised to seek assistance from a lawyer experienced in asylum and withholding of removal cases, as such cases can be complex. Also, because documentary evidence is frequently difficult to obtain, it is particularly important to develop a strong and credible claim.289

4. Relief under the Convention Against Torture (CAT)

An immigrant may also be granted withholding of removal under the Convention Against Torture (CAT). CAT protection is available to a person who can show that it is more likely than not that s/he would be tortured by, at the instigation of, or with the consent or acquiescence of a government official or other person acting in an official capacity.290 Torture is defined as the intentional infliction of severe pain or suffering, either physical or mental, which does not arise from, or incidental to, “lawful sanctions.” The torture can be for any reason and, thus, there is no requirement for it to occur on account of political, racial, ethnic, religious, or social group reasons, as with asylum and withholding of removal. Relief under CAT is mandatory.

As with withholding of removal, an individual is ineligible for CAT relief if:

- S/he has been convicted of a particularly serious crime;291
- S/he has persecuted others;
- S/he is a terrorist or danger to U.S. security; or
- S/he committed a serious non-political crime outside the U.S., for which a conviction is not required.292

Individuals who are ineligible for withholding of removal under CAT for any of these reasons may nonetheless be granted deferral of removal, which permits them to remain in the United States. However, the Department of Homeland Security can still detain an individual who has been granted deferral of removal, either because s/he is subject to mandatory detention under INA § 236(c) or because s/he poses a danger to the community.

The process for seeking CAT relief is similar to the process for seeking withholding of removal, using Form I-589 and including documentation to support the claim. The immigrant may obtain a helpful packet of information from the U.S. office of the United Nations High

289 An important element of establishing the reliability of a claim is research on country conditions indicating that persecution and/or torture exists in the particular country. A list of websites with information on human rights and country conditions is included as Appendix 6-F.


291 An aggravated felony conviction with a minimum five-year sentence is considered per se a particularly serious crime.

292 INA § 241(b)(3)(B).
Commissioner for Refugees, which may also provide an advisory opinion after reviewing the preliminary application package. The address is 1775 K Street, N.W., Suite 300, Washington, D.C., 20006, 202-296-5191. For more information on how to prove a CAT claim, the immigrant may write to the World Organization Against Torture USA, 1015 18th Street N.W., Suite 400, Washington, D.C., 20036.

5. Prosecutorial Discretion

Prosecutorial discretion is the authority a law enforcement agency has to decide whether to enforce the law in a particular case. For example, Eduardo, Renee, and Marta are all present in the U.S. illegally. ICE comes into contact with them and has probable cause to believe that all three are in the U.S. illegally. However, ICE arrests only Renee. ICE has prosecutorial discretion not to arrest Eduardo and Marta, and Renee cannot argue that her arrest was illegal because she was singled out. Further, although ICE has prosecutorial discretion to begin removal proceedings against an individual, it does not have prosecutorial discretion to admit an inadmissible immigrant into the United States.

As discussed above, the ICE District Director initiates removal proceedings against an immigrant by issuing a Notice to Appear. ICE has the discretion to both issue the NTA and cancel it before it is filed with the immigration court, as well as request that the court dismiss the proceedings after the NTA has been filed with the court. Once ICE decides whether to proceed or not with removal proceedings, however, the immigration court cannot review this decision. ICE can also exercise discretion by giving the immigrant a date by which s/he must leave the U.S., known as “voluntary departure,” and thereby avoid removal proceedings.

There are certain factors that the CIS may take into account when evaluating the “totality of the circumstances” of the immigrant and deciding whether to exercise favorable discretion, including:

- Immigration status: LPRs will be more likely to be given favorable prosecutorial discretion.
- Length of residence in the U.S.: The longer an immigrant has lived in the U.S., the more likely ICE will take favorable action.
- Criminal history: ICE will look at “the nature and severity of any criminal conduct,” how long ago the crime occurred, if the immigrant has been rehabilitated, the sentence or fine imposed (which may indicate the seriousness of the crime as decided by the court), how old the immigrant was when the crime was committed, and whether or not the immigrant is a repeat offender.

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293 8 CFR § 239.2(a).
294 8 CFR § 239.2(c).
295 INA § 242(g).
- Humanitarian concerns: These concerns include the immigrant’s family ties in the U.S., any medical conditions the immigrant or his family have, whether the immigrant came to the U.S. at an extremely young age, conditions in the immigrant’s home country, and the ties the immigrant has to his home country (for instance, whether the immigrant speaks his home country’s language or has relatives there).

- Immigration history: Immigrants who have not previously violated immigration laws are more likely to receive favorable treatment from ICE. Here, ICE is particularly concerned with violations such as re-entering the U.S. after removal, not appearing at a hearing, or resisting arrest, which show a disregard for the law.

- Likelihood of ultimately removing the immigrant: If it appears likely that the immigrant will be found removable by the immigration judge, ICE is less likely to exercise favorable discretion.

- Likelihood of achieving enforcement goal by other means: If the immigrant can leave the U.S. by other means, such as voluntary departure or withdrawal of her/his application for admission, ICE is less likely to proceed with removal.

- Whether the immigrant is eligible or is likely to become eligible for other relief: ICE will examine whether there are other ways for the immigrant to legalize his/her status.

- Effect of action on future admissibility: ICE may take into consideration whether the immigrant’s removal will be time-limited or indefinite.

- Current or past cooperation with law enforcement authorities: If the immigrant has ever cooperated with other law enforcement agencies, ICE is more likely to treat the immigrant favorably.

- Honorable U.S. military service: ICE is more likely to exercise favorable discretion if the immigrant has served in the U.S. Armed Forces and been honorably discharged.

Therefore, the immigrant should provide as much evidence as possible to illustrate favorable factors, as ICE will weigh both positive and negative factors when deciding whether a favorable exercise of discretion is warranted. The following evidence may be helpful:

- Evidence of the immigrant’s relationship to persons in the U.S., including birth, marriage, divorce, and death records. If the immigrant’s relatives are U.S. citizens, s/he should attach copies of their passports, naturalization certificates, and any other relevant evidence.

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297 In Re Javier Sotelo-Sotelo, 23 I. & N. Dec. 201 (BIA 2001) (favorable factors did not outweigh negative factors in immigrant’s request for cancellation of removal where immigrant had multiple criminal convictions, used fraudulent documents, and smuggled immigrants from Mexico into the U.S.).

- Live testimony of a credible witness who will speak in favor of the immigrant.

- Testimony or affidavits of doctors, psychologists, or social workers discussing any hardships the immigrant may be experiencing or his rehabilitation, if applicable.

There are also factors that may not be considered when deciding whether to exercise favorable discretion, including the immigrant’s race, religion, sex, national origin, or political association, activities, or beliefs; the officer’s personal feelings regarding the immigrant; or the possible effect that the decision may have on the officer’s own professional or personal circumstances.\(^{299}\)

Thus, although ICE has the authority to cancel removal proceedings, courts have reviewed such decisions “upon contentions that there was selective prosecution in violation of equal protection or due process, such as improper reliance on political considerations, on racial, religious, or nationality discrimination, on arbitrary or unconstitutional criteria, or on other grounds constituting abuse of discretion.”\(^{300}\)

ICE will notify the immigrant of its decision in writing. If the decision is favorable, the letter will state the basis for the decision, as well as make clear “that exercising prosecutorial discretion does not confer any immigration status, ability to travel to the United States..., immunity from future removal proceedings, or any enforceable right or benefit upon the immigrant.”\(^{301}\)

ICE can also recommend “deferred action,” i.e., decide not to initiate removal proceedings, end removal proceedings, or not follow through with a final order of deportation to prevent a “harsh and unjust outcome.”\(^{302}\) Although ICE’s deferred action guidelines were deleted from its internal guidelines in 1997, “there is no indication that the INS [ICE] has ceased making this sort of determination on a case-by-case basis.”\(^{303}\) ICE may consider the following factors when recommending a case for deferred action:\(^{304}\)

- The likelihood of ultimately removing the immigrant, including:
  
  - the likelihood that the immigrant will depart without formal proceedings;
  - age or physical condition affecting ability to travel;
  - the likelihood that another country will accept the immigrant; and
  - the likelihood that the immigrant will qualify for some form of relief.

- The presence of sympathetic factors that could unfavorably affect future cases.

\(^{299}\) Meissner, Exercising Prosecutorial Discretion at 995.


\(^{301}\) Doris Meissner, Exercising Prosecutorial Discretion at 995.


\(^{303}\) Id.

\(^{304}\) INS Operating Instructions § 242.1(a)(22). Although this section was removed in 1997, ICE appears to continue to take these factors into consideration.
Whether the immigrant belongs to a class of violators whose cases have been given a high enforcement priority.

Whether local, state or federal law enforcement authorities want the person to remain in the U.S. for an ongoing civil or criminal investigation or prosecution.

6. Termination of Removal Proceedings In Order to Naturalize

Another form of relief is termination of removal proceedings, which is particularly advantageous for LPRs who are seeking to naturalize. An immigration judge can terminate removal proceedings for an LPR when:

- The immigrant has established *prima facie* eligibility for naturalization; and
- There are exceptionally appealing or humanitarian factors involved.\(^{305}\)

A sample motion to terminate proceedings is attached as Appendix 6-G.

7. Registry

Registry is a form of relief from removal available to immigrants who entered the United States before January 1, 1972. Registry creates a record of lawful admission for permanent residence when a record is not otherwise available, usually because the immigrant did not enter the U.S. legally. In addition to showing that s/he entered the U.S. before January 1, 1972, the immigrant must show that s/he has been a continuous resident of the U.S. since his/her entry, that s/he is a person of good moral character, and that s/he is not otherwise ineligible for citizenship. When a registry application is granted, ICE treats the immigrant as though s/he has been granted adjustment of status to permanent residence, and removal proceedings are terminated.

III. WHEN RELIEF IS NOT AVAILABLE: VOLUNTARY DEPARTURE

A. Eligibility and Requirements

Many immigrants seek voluntary departure as a form of relief from removal, especially if the immigrant has agreed that s/he is removable.\(^{306}\) If an immigrant is eligible for voluntary departure, he can choose which country he will go to and, more importantly, avoid the ten-year bar on re-entry, which is a consequence of a removal order. However, “it is almost always better not to ask for removal or voluntary departure unless you have no defense to removal such as asylum, withholding, NACARA, cancellation of removal, or a pending family petition.”\(^{307}\)

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\(^{305}\) 8 C.F.R. § 1239.2(f).

\(^{306}\) Voluntary departure is governed by INA § 240B.

The immigrant should carefully weigh whether to request voluntary departure early in the removal proceedings, because it becomes less likely that voluntary departure will be granted as the proceedings progress. In addition, once the NTA has been filed with the immigration court, authority shifts to the immigration judge to decide whether to grant voluntary departure, and s/he may do so only if the immigrant admits that s/he is removable. However, certain immigrants are not eligible for voluntary departure under any circumstances, including those who have been found removable for an aggravated felony or on terrorism grounds, and those who were previously permitted voluntary departure after being found inadmissible.

In order to be eligible for voluntary departure before or during removal proceedings, the immigrant must prove that s/he can pay his own departure expenses and that s/he is not removable under aggravated felony or terrorism grounds.308

In order to be eligible for voluntary departure at the end of removal proceedings, the immigrant must prove the following:

- S/he was in the U.S. for at least one year immediately before the date the NTA was served;
- S/he had good moral character for the five years immediately before the application for voluntary departure;
- S/he is not removable under aggravated felony or national security (including terrorism) grounds; and
- S/he clearly has the means to leave the U.S., and intends to leave the U.S.

An immigrant who is given permission to voluntarily depart before or during removal proceedings must leave the U.S. within 120 days. The immigration judge may set a bond, and the immigrant will have to show that s/he has, at a minimum, attempted to obtain travel documents within 60 days (which CIS can extend to up to 120 days). If an immigrant is given permission to voluntarily depart at the end of removal proceedings, s/he must leave the U.S. within 60 days and must post a bond.

Finally, if an immigrant is granted voluntary departure but does not leave the U.S. by the scheduled date, s/he will become immediately deportable under another Order of Removal and will not receive a hearing. Even if s/he leaves voluntarily after the second Order of Removal is issued, his/her departure will be considered based on the removal order, and s/he will not be allowed to re-enter the U.S. for a minimum of ten years. Further, s/he will not be eligible for any relief from removal for at least ten years and will face a penalty of $1,000 to $5,000.

B. Effect of Accepting Voluntary Departure

Although voluntary departure has fewer consequences than being removed, applicants should be aware of the following:

308 The government will pay departure expenses if it determines that the immigrant’s removal is in the best interest of the United States.
• If an individual has accumulated more than 180 days of unlawful presence, s/he is prohibited (or “barred”) from seeking re-entry to the United States for three years. If s/he has accumulated more than 365 days of unlawful presence, s/he is subject to a ten-year bar on re-entry.

• It is a crime for an individual who is subject to either the three-year or ten-year bar to try to re-enter the United States without “advance consent” before the time period has expired.\textsuperscript{309} This crime makes the individual inadmissible under INA § 212(a)(9)(B).

For more information on voluntary departure, please consult the Florence Project’s pamphlet, \textit{How to Apply for Voluntary Departure} (March 2003). Copies are available at \texttt{www.firrp.org/kyrindex.asp}.

\textsuperscript{309} Although advance consent is granted only under exceptional circumstances, an individual may apply to return before the three-year or ten-year period has expired. S/he must have a legal means to return (such as a Green Card), and request permission to re-enter by submitting a Form I-212 to his/her local U.S. consulate.
CHAPTER 7

DETENTION AND RELEASE ON BOND

IN THE EVENT THAT AN APPLICANT FOR NATURALIZATION IS DETAINED OR WISHES TO BE PREPARED FOR THE POSSIBILITY OF EVENTUAL DETENTION, THIS SECTION BRIEFLY DISCUSSES DETENTION AND RELEASE FROM DETENTION ON BOND.

I. Detention

The number of immigration detainees has increased dramatically in recent years. In the wake of the 1996 immigration laws mandating the detention of asylum seekers and other immigrants (including those with criminal offenses), detention has grown by 100 percent to a daily count of more than 21,000 people. ICE headquarters expects the number of detainees to expand to over 35,000 in the next few years, and legislative proposals in the aftermath of the terrorist attacks of September 11, 2001 signify even further expansion in the number of non-citizens in detention.

Detainees are held at ICE facilities across the country and at regional and county jails with which ICE has contracts (Intergovernmental Service Agreement, or “IGSA,” facilities). National standards governing how detainees should be treated in both ICE and IGSA facilities are available at http://www.ice.gov/graphics/dro/opsmanual/index.htm.

For more detailed information on the legal issues facing detainees and the conditions of their confinement, please consult the following ABA publications:

- A Legal Guide for Immigration Detainees: Petitioning for Release from Indefinite Detention
- A Legal Guide for Immigration Detainees: How to Complain Effectively Step By Step
- A Legal Guide for Immigration Detainees: Actions Brought Against DHS or Other Law Enforcement Officials for Personal Injury or Property Damage or Loss

These publications are available from the American Bar Association Commission on Immigration, 740 15th Street N.W., Washington, D.C., 20005.

A number of other publications are available on the ABA website at http://www.abanet.org/immigration/publications.html:

- Fact Sheet on Complaint Processes within INS Office of Internal Audit (OIA)
- Fact Sheet on Complaint Processes within USDOJ Office of Inspector General (OIG)
- Fact Sheet on Division of Immigration Health Services (DIHS)
- Fact Sheet on Immigration Detainee Telephone Access
- Immigration Detainee Grievance Procedures - A Summary (English and Spanish)
- INS Memo and Notice re: Preprogrammed Telephone Access for INS Detainees
- Preprogrammed Telephone Access for Immigration Detainees
- Pro Se Federal Appeals Packet
Summary of Selected ICE Detention Standards

The Florence Immigrant and Refugee Rights Project offers a number of publications that assist detainees with a variety of legal issues and are available in both English and Spanish at http://www.firrp.org/kyrindex.asp. The publications include:

- All About Bonds (Todo Sobre Fianzas)
- How to Apply to DHS for Release from Custody (Cómo Solicitar al Departamento de Homeland Security la Puesta en Libertad)
- Asylum, Withholding of Removal, and Convention Against Torture Protection (Cómo Solicitar el Asilo y la Retención de Expulsión)
- Are you a United States Citizen? (Es Usted Ciudadano de Estados Unidos?)
- Cancellation of Removal for Legal Permanent Residents (Cómo Solicitar le Cancelación de Expulsión de Ciertos Residentes Legales Permanentes)

II. RELEASE FROM DETENTION: BOND ELIGIBILITY

Bond is a mechanism that permits an immigrant to obtain temporary release from ICE custody by paying a specified sum of money as a guarantee that, if s/he is released, s/he will not flee and will appear at all of his immigration proceedings. Bond is usually set at between $1,500 and $5,000, but sometimes at $10,000 or more. If the immigrant does not appear at all immigration proceedings, including deportation, if that is the final decision, the bond is forfeited. However, if the immigrant does appear at all proceedings, ICE will return the bond. This section describes the general criteria for bond eligibility and the process for obtaining release on bond.

A. Bond Eligibility

Bond eligibility is governed by 8 C.F.R. § 236.1, which provides that bond may be given if the immigrant poses no danger to the community and is not a flight risk. Even if an immigrant is not statutorily ineligible for bond, however, a judge can exercise her/his discretion to deny a motion for bond.

An immigrant who is arrested by an ICE officer and is issued a “Warrant of Arrest” (Form I-205) and a “Notice of Custody Conditions” (Form I-286) may be eligible for bond. However, the following persons are ineligible for bond:

- A person who received a negative determination from the immigration court and did not appeal to the BIA;

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\[310\] 8 C.F.R. § 236.1(c)(3) (“A]n alien must first demonstrate, by clear and convincing evidence, that release would not pose a danger to the safety of other persons or of property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding (including any appearance required by the Service or EOIR) in order to be considered for release in the exercise of discretion.”).
• A person who received a negative determination from the BIA;
• A person subject to mandatory detention (see Chapter 3 above for full discussion). The grounds for mandatory detention include, but are not limited, to:
  • One or more crimes involving moral turpitude (except for juvenile offenders and petty offenders);
  • Aggravated felony;
  • Multiple criminal convictions;
  • Controlled substance convictions (except for a single offense involving possession for one’s own use of 30g or less of marijuana);
  • Controlled substance trafficking (extends to close family members who knew of the trafficking and derived financial or other benefit from it);
  • Prostitution and commercialized vice;
  • Trafficking in persons, or benefiting from trafficking in persons;
  • Money laundering;
  • Crimes related to terrorism (including hijacking, violent attack upon an internationally protected person, assassination, use of biological or chemical weapon, etc);
  • Drug abuse and addiction; and
  • Firearm offenses.

The immigrant is subject to mandatory detention on one of these grounds if s/he was charged with the crime(s) on either the Notice to Appear, the Order to Show Cause, or Notice to Applicant Detained for Admission (Form I-122).311

B. The Bond Hearing: Setting or Lowering Bond

An immigrant may request a bond hearing (which is separate from the removal hearing312) if s/he believes s/he is eligible for bond and his/her bond has not been set,313 or if s/he wishes to lower the amount of the bond.314 However, an immigrant in exclusion or removal proceedings is not eligible for bond redetermination.315

1. Requesting a Bond Hearing

An immigrant can request a bond hearing either when s/he appears before the immigration judge (for example, at a master calendar hearing), or by submitting a form requesting a bond

311 Florence Project, All About Bonds (March 2002).
312 8 C.F.R. § 1003.19(d).
313 Some immigrants receive notice of the amount of their bond at the same time that they receive a Notice to Appear, arrest warrant, or other charging documents from ICE.
314 8 C.F.R. § 1003.19(a).
315 8 C.F.R. § 1003.19(h)(2).
hearing. The immigrant can obtain this form from the ICE officer in charge of the facility where the immigrant is detained.

2. What Happens at the Bond Hearing

The bond hearing is the immigrant’s opportunity to show good reason why the judge should lower the bond or release the immigrant on her/his own recognizance. In other words, the immigrant does not pay a bond, but is released based on her/his promise to return for required hearings. However, release on one’s own recognizance is extremely rare.

When granting or lowering bond, the judge will look at the equities (positive factors) in favor of releasing the immigrant, especially those that indicate a strong connection to the community, such as steady employment, family ties to U.S. citizens or legal immigrants, property ownership, and involvement with local institutions (church, volunteer work, etc). In addition, the judge will examine whether the immigrant has any possible relief from removal. The judge will also weigh negative factors, such as a criminal record, relatives who are unauthorized immigrants, irregular employment, lack of connection to community institutions, or ineligibility for relief from removal.

The immigrant can present evidence to justify her/his request for bond or reduced bond, including:

- Letters from family members or community figures, such as clergy or members of a community or volunteer group to which the volunteer belongs, testifying to her/his character and ties to the community;
- Letters from employer(s);
- Letter from the person the immigrant will live with if released, confirming the arrangement;
- Letter from probation officer (if applicable); and
- Grounds on which s/he believes s/he qualifies for relief from removal (if applicable).

An immigrant will have only one bond hearing (unless something material changes in the immigrant’s situation316), so it is vital to present all of the arguments and evidence in favor of bond at the hearing. The immigrant may ask the judge to postpone the hearing until s/he has gathered the evidence to support her/his request. Further, an immigrant may appeal the bond determination to the BIA within 30 days of the judge’s decision.317

For an in-depth discussion on how to prepare for the bond hearing, please see All About Bonds, published by the Florence Immigrant and Refugee Rights Project.

316 8 C.F.R. § 1003.19(e).
317 8 C.F.R. § 1003.19(f); 8 C.F.R. § 1003.38.
3. How to Pay Bond

Once the bond has been set, it must be paid before the immigrant can be released from detention. The instructions issued by ICE for paying bond are included as Appendix 7-A. The instructions refer to two kinds of bonds: delivery bonds and voluntary departure bonds. The discussion in this chapter has concerned delivery bonds. Voluntary departure bonds are for immigrants who have been granted voluntary departure from the United States in lieu of deportation.318

Bond can be paid in one of three ways:

- By the immigrant herself/himself at the detention center.
- By a friend or family member at an immigration office, which does not need to be the office closest to the detention facility. Most offices have facilities to accept payment of bond.
- By a bond company, which is company through which a person can arrange for payment of an immigration or criminal bond.

318 For more information on voluntary departure, see the Florence Project’s manual cited above.
CONCLUSION

This publication was intended to provide an overview of the naturalization process and some of the challenges you, or those you are assisting, may encounter along the path to citizenship. If you are considering applying for citizenship, you are urged to consult an attorney before proceeding, particularly if you may face one of the obstacles mentioned above. US citizenship confers many rights, privileges, and responsibilities, and we hope you have found this publication to be a helpful resource as you navigate the naturalization process.

If you have any questions about the contents of this guide, or if you would like additional information about the ABA Commission on Immigration, please feel free to contact the Commission at 202-662-1005 or immcenter@abanet.org. We are located at 740 25th Street, NW, Washington, DC 20005 and our website is www.abanet.org/immigration.
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