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***636 OBTAINING CITIZENSHIP**

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"What country can this be," said one to the other, "unknown to the rest of the world and so different in every way from anything we've ever seen before? It's probably the country where everything goes well, because there must be one like that somewhere."

Voltaire, *Candide*

Citizenship affords an individual the right to vote, act as a juror, run for public office, and obtain other benefits. To many aliens, obtaining citizenship is just as important as obtaining permanent residency. Citizenship is addressed by the Fourteenth Amendment to the United States Constitution:

All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

The United States recognizes two methods of obtaining citizenship, by birth and by naturalization. Naturalization is the process whereby a person who has been a lawful, permanent resident for a required amount of time petitions a United States court for the same status as a person born in the United States. [FN1] This article will discuss how citizenship is attained by birth and naturalization, and other related issues.

CITIZENSHIP BY BIRTH

Generally, persons born in the United States automatically become citizens of the United States. However, this rule does not apply to children born of foreign diplomats while in the United States. [FN2] Persons born in the United States territories are also conferred citizenship. For example, persons born in Puerto Rico since January 13, 1941 are citizens at birth. [FN3] Persons born in the Virgin Islands since February 25, 1927 are citizens at birth, [FN4] and so are persons born in Guam since August 1, 1950. [FN5]

Persons born outside of the United States and its territories may acquire citizenship through a citizen parent, if certain conditions are met. The provisions of the Immigration and Nationality Act regarding these issues are complex and vary according to the date of the child's birth, the length of time the citizenparent resided in the United States, and whether the child was born legitimate or illegitimate.

For example, for legitimate children born abroad between December 24, 1952 and November 14, 1986, where one parent is a U.S. citizen and one parent is an alien, the child will qualify for citizenship if the citizen-parent was physically present in the United States or its possessions for a period of ten years. [FN6] Five of those ten years must have been after the citizen-parent was 14 years of age.

Currently, children born abroad on or after November 14, 1986 may become citizens if both parents are United States citizens and one of the parents resided in the United States before the child's birth. [FN7] If one parent is a United States citizen and the other is not, citizenship can be transmitted only if the citizen-parent had been physically present in the United States *638 for at least five years, two of which were after the parents' fourteenth birthday. [FN8]

The rules are slightly different and the time periods vary for children born outside of the United States who are acquiring citizenship through parents who have obtained their citizenship through naturalization. Because of the intricacies of the law, practitioners should not assume that a child born abroad of a United States citizen is automatically a U.S. citizen. Rather, the Immigration and Nationality Act, 8 USC § 1100 et seq., and regulations thereunder must be analyzed with care.

DOCUMENTING CITIZENSHIP

If it is determined that a person has received citizenship at birth, this status can be documented in different ways.

A United States passport, or a certificate of citizenship can be used to document citizenship, however, only the passport is conclusive proof of citizenship and most practitioners prefer the passport to the certificate because it is less burdensome, and generally faster, to obtain.

Application for a U.S. passport is made through the Department of State, either at a United States passport office or certain United States post offices. The applicant must bring three photographs and proof of citizenship, such as birth certificates, marriage certificates, or school records. Although the applicant must complete a questionnaire, the passport office does not conduct personal interviews. The State Department will notify the applicant in writing if the application is rejected. The process generally takes up to four months. It may take longer if the applicant is applying from another country through an American Consular office. If the passport application is rejected, administrative appeals must be exhausted before proceeding to federal court.

Applications for certificates of citizenship are made through the Immigration and Nationality Service ("INS"). Application must be made at the INS office nearest the applicant's residence. [FN9] Application may not be made from outside the United States. The applicant is required to submit evidence such as birth, adoption and marriage records to support the claim of citizenship. Unlike passport cases, applicants for certificates of citizenship are interviewed, with a few narrow exceptions. [FN10] If the application is denied, the applicant will be advised in writing of the reasons for denial and will be advised of appeal rights. [FN11] If the application is granted, a certificate of citizenship will be issued and the applicant will take an oath of allegiance.

CITIZENSHIP BY NATURALIZATION

Because naturalization is considered a privilege and not a right, Congress has prescribed specific conditions that an alien must meet to be eligible for citizenship by naturalization. [FN12] Citizenship is not automatically conferred by residency in the United States [FN13] or by marriage to a United States citizen. [FN14]

As a preliminary matter, applicants for naturalization must be permanent residents of the United States. [FN15] There is only one exception to this requirement. If an applicant alien served honorably in the United States armed forces during war time, the permanent residency requirement does not apply. [FN16] Deserters from the United States armed forces are not eligible for naturalization. [FN17] Further, if an alien applies for an exemption from the armed services on the ground that he is an alien, he is forever barred from becoming a citizen. [FN18]

To apply for naturalization, an applicant must be also able to show that after entering the United States as a permanent resident, the applicant has resided continuously in the United States for five years immediately before making application. [FN19] There are a number of exceptions to the five year requirement, some of which are discussed below.

Although the Immigration Act requires continuous "residence" in the United States for five years, an absence from

the United States during this time will not necessarily be fatal to the application. The Act merely requires that the applicant have been physically present in the United States for at least one-half of the five years. [FN20] However, if the applicant remained out of the country for more than six months, it is presumed that the applicant abandoned residency. [FN21] The presumption may be overcome if the applicant can establish that he or she did not intend to abandon residency in the United States. [FN22] The residency requirement is interpreted literally by INS. [FN23]

In addition to the permanent residency requirement, an applicant for naturalization must have resided in the state where the application is filed for six months immediately preceding the application. [FN24] Additionally, after the petition for naturalization has been filed, the applicant must remain in the United States until the naturalization process is complete. [FN25]

A person may not personally apply for naturalization until he or she has *639 reached the age of 18, with a few exceptions noted below. An applicant must be able to read, write and speak English. [FN26] However, this requirement does not apply if the applicant is physically unable to comply, such as where he or she is deaf or blind. The language requirement also does not apply if the applicant is over 50 years old and has lived in the United States for periods totalling at least 20 years. [FN27] Further, the applicant must have knowledge and understanding of United States history and form of government. [FN28] Finally, the applicant must be of "good moral character," and be "attached to the principles of the Constitution." [FN29]

Applicants who have committed criminal acts, [FN30] Internal Revenue violations, [FN31] perjury, [FN32] adultery, [FN33] fraud, [FN34] and prostitution [FN35] have been found to lack the requisite good moral character and have been denied citizenship. Additionally, willful misstatements on naturalization documents [FN36] and nonpayment of child support [FN37] may also serve as grounds to invalidate a petition. In the past, possession of marijuana [FN38] and homosexual activity [FN39] have been grounds for denial of citizenship. However, today these activities are generally considered not to defeat citizenship.

Acareful inquiry should be made of the applicant's background before filing the application to determine possible obstacles. Practitioners should be aware that an INS investigation of an applicant's moral character is not necessarily limited to the five-year period before the application. [FN40] Moreover, the burden of proving good moral character is on the applicant. [FN41]

In addition to good moral character, an applicant must be "attached to the principles of the Constitution." This requirement has precluded Communists [FN42] and Nazis [FN43] from obtaining citizenship. Moreover, where an applicant's religious beliefs preclude him or her from taking the oath of allegiance, he or she is not entitled to citizenship. [FN44] Additionally, those applicants who are unwilling to bear arms for the United States have been denied citizenship. [FN45] However, refusal to serve in the armed forces is not a bar to citizenship if the applicant was a conscientious objector during a war. [FN46] Also, a special pardon was given to those noncitizens who evaded military service during the Vietnam War.

Because all immigrant aliens are required to register for the draft, failure to do so may disqualify the applicant for citizenship. However, current INS policy is to deny naturalization only where the applicant knowingly and willfully refused to register for the draft. [FN47]

Some classes of persons are entitled to apply for naturalization without having to wait five years as permanent residents. An applicant who is married to a United States citizen is entitled to apply for naturalization after three years, if the applicant was a permanent resident and lived with the citizen-spouse in marital union for the three-year period. [FN48] Additionally, the applicant must have been physically present in the United States with the citizen-spouse for at least one-and-a-half years of the three-year period.

Children can be included in the naturalization petition of their alien parents. To qualify under this provision the alien child must be under the age of 18 and be a permanent resident at the time of the parent's naturalization. [FN49]

Once it has been determined that the applicant meets these requirements for naturalization, the applicant must file an Application to Petition for Naturalization. The applicant must also file three photographs, a fingerprint chart and a biographic information form along with the application.

The form must be filed with the INS office closest to the applicant's residence. After the application is filed, the applicant will be notified by INS of an appointment for an interview. The interview is usually scheduled about six to nine months after the application is filed. At the interview, the applicant will be tested on the ability to speak, read and write English. The applicant will also be tested on U.S. history. The test questions are taken from the "Federal Textbooks on Citizenship." If possible, the applicant should obtain this book and study it beforehand. [FN50] If the applicant fails the test, he or she is permitted two additional opportunities to retake and pass the test. [FN51]

If the applicant passes the test, INS will recommend in favor of naturalization. INS will complete the petition for naturalization, which the applicant must file with the court. INS will instruct the applicant on where and how to file the petition.

The applicant may have to wait several months before receiving notice of a final hearing from the court. The applicant must appear on the scheduled hearing date. An INS examiner will present all petitioners to the court and recommend naturalization. The court will then enter an order approving the petitions and will administer the oath of naturalization to all petitioners present.

If INS recommends against naturalization, the applicant may still insist that the petition be filed with the court. The court almost always follows the recommendation of INS. Thus, at this stage it is vital that the applicant obtain competent legal counsel to litigate the issue of eligibility.

When INS recommends against the petition, the court will conduct an *640 investigation and will set the matter for hearing. The proceedings are similar to a trial, and the Federal Rules of Evidence are followed. The petitioner may introduce evidence and present witnesses. At the close of the case, the court will issue a decision, which is appealable to the federal circuit court of appeals.

Recently, both chambers of Congress have considered legislation which would radically change the naturalization process. If passed, court involvement in the petition would be eliminated except for the appeals process. INS would process the application, rule on the petition and administer the oath of allegiance. Under the new proposals, if the petition is denied, the applicant would be required to exhaust INS's administrative procedures before taking court action. Since both houses of Congress have passed different bills, the naturalization amendments are expected to become law in late 1990.

LOSS OF CITIZENSHIP THROUGH EXPATRIATION

Both native born and naturalized citizens can lose their citizenship under certain circumstances. This is known as "expatriation." Under the Nationality Act of 1952, citizenship could be lost simply by evading military service or by voting in a foreign election.

Recent United States Supreme Court cases and the Immigration and Nationality Act Amendments of 1986 have narrowed the circumstances under which citizenship can be lost. In two Supreme Court cases, *Afroijlm v Rusk* [FN52] and *Terrazas v Vance*, [FN53] the court made it clear that American citizens may not lose their citizenship without their consent. That is, a person must perform some specific act of expatriation, and the act must be voluntary and made with the intention of relinquishing United States citizenship. [FN54]

The most obvious way that a person can lose citizenship is by taking an oath of renunciation in another country. [FN55] Many countries require that applicants renounce their citizenship of all other countries before taking citizenship with that country. If an American citizen so renounces U.S. citizenship, it is virtually impossible to re-attain U.S. citizenship, unless it can be established that the person was insane or acting under extreme duress at the time of the renunciation.

Generally, the act of becoming a naturalized citizen of another country is considered a voluntary, consensual act of renouncing U.S. citizenship. [FN56] However, this is not true where citizenship is automatic by law. The Immigration and Nationality Act specifically provides that expatriation of women does not occur where they automatically become citizens of another country by virtue of marriage to a citizen of that country. [FN57]

Service in a foreign military branch will result in expatriation only if the armed forces of that country were engaged in hostilities against the United States or where the person serves as a commissioned or non-commissioned officer. [FN58] Additionally, employment by a foreign government, if done with the intent of relinquishing citizenship, can result in expatriation. [FN59] An act of treason, or attempting to overthrow the United States government, may result in loss of citizenship. [FN60] However, generally, persons under the age of 18 will not lose their citizenship for committing any of these acts. [FN61]

The government bears the burden of proving by a preponderance of the evidence [FN62] that an act of expatriation was committed. [FN63] Expatriation proceedings usually arise in the context of deportation proceedings, where the person being deported raises citizenship as a defense.

LOSS OF CITIZENSHIP THROUGH DENATURALIZATION

In some instances the government may institute denaturalization proceedings to revoke the naturalization petition. This occurs particularly where willful misrepresentations were made in naturalization documents. In *Schneiderman v U.S.* [FN64] the Supreme Court held that loss of citizenship through denaturalization could be accomplished only where there was the clearest and most convincing evidence of impropriety. Clerical mistakes and minor omissions in naturalization papers will not serve as a basis for denaturalization.

Denaturalization suits are generally brought in U.S. district court, with the U.S. government as the plaintiff. If the case goes to trial, *641 the government must prove its case by clear and convincing evidence. [FN66]

If a person is denaturalized, he or she is classified as an alien and is subject to deportation. The denaturalization of children, if they were part of the original naturalization petition, may also occur if the parent is denaturalized due to concealment or misrepresentation. [FN67]

CONCLUSION

Advice on naturalization issues will be an important aspect of any international law practice. Statutes, regulations and case law, as well as statutory changes likely to be passed by Congress must be carefully studied. In this way, practitioners can assist their client in becoming citizens of the country where everything goes well--indeed the best of all possible worlds.

[FN1]. In re Stasinopoulos, 21 F. 2d 71 (E.D. Mich. 1927); U.S. v Schwimmer, 49 S. Ct. 448, 279 U.S. 644, 73 L.Ed 889 (1929).

[FN2]. In re Thenault, 47 F. Supp. 952. (D.C.D.C., 1942).

[FN3]. 8 USC § 1402.

[FN4]. 8 USC § 1406.

[FN5]. 8 USC § 1407.

[FN6]. 8 USC § 1401(7) of Act of June 27, 1952.

[FN7]. 8 USC § 1401(c).

[FN8]. 8 USC § 1401(g).

[FN9]. 8 CFR § 341.2.

[FN10]. See 8 CFR § 341.2.

[FN11]. 8 CFR § 341.6.

[FN12]. Ralich v U.S., 185 F. 2d 784 (8th Cir. 1950).

[FN13]. Reynolds v Haskins, 8 F. 2d 473 (8th Cir. 1925).

[FN14]. Gordon and Gordon, "Immigration Law and Procedure," Matthew Bender (1990) § 22.03.

[FN15]. 8 USC § 1427(a)(1).

[FN16]. 8 USC § 1427(g).

[FN17]. 8 USC § 1425.

[FN18]. 8 USC § 1426.

[FN19]. 8 USC § 1427(a)(1).

[FN20]. 8 USC § 1427(a).

[FN21]. 8 USC § 1427(b).

[FN22]. 8 USC § 1427(b).

[FN23]. In re Naturalization of Vafaei-Makhssoos, 597 F. Supp 499 (D. Minn. 1984).

[FN24]. 8 USC § 1427(a).

[FN25]. 8 USC § 1427(a).

[FN26]. 8 USC § 1423(1).

[FN27]. 8 USC § 1423(1).

[FN28]. 8 USC § 1423(2).

[FN29]. 8 USC § 1427.

[FN30]. In re Caroni, 13 F. 2d 954 (N.D. Cal. 1926) (manslaughter); Petition of Liknes, 151 F. Supp. 862 (S.D. N.Y. 1957) (petty larceny).

[FN31]. Gambino v Pomeroy, 562 F. Supp. 974 (D.C. N.J. 1982).

[FN32]. Petition of de la Cruz, 565 F. Supp. 998 (S.D. N.Y. 1983).

[FN33]. In re Zunker, 283 F. Supp. 793 (S.D. N.Y. 1968).

[FN34]. In re Yao Quinn Lee, 480 F. 2d 673 (2nd Cir. 1973).

[FN35]. Ralich v U.S., 185 F. 2d 784 (8th Cir. 1950).

[FN36]. U.S. v Koziy, 728 F. 2d 1314 (11th Cir. 1984) cert. denied 469 U.S. 835 (1984).

[FN37]. Petition of Dobric, 189 F. Supp. 638 (D. Minn. 1960).

[FN38]. 8 USC § 1182(a).

[FN39]. In re Schmidt, 289 N.Y.S. 2d 89 (N.Y. 1968); Petition of Longstaff, 538 F. Supp. 589 (N.D. Tex. 1982).

[FN40]. U.S. v Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978) rev'd on other grounds 597 F. 2d 946 (5th Cir. 1979).

[FN41]. Nemetz v INS, 647 F. 2d 432 (4th Cir. 1981); In re Kovacs, 476 F. 2d 843 (2nd Cir. 1973).

[FN42]. Allan v U.S., 115 F. 2d 804 (9th Cir. 1940).

[FN43]. Petition of Sittler, 197 F. Supp. 278 (S.D. N.Y. 1961) aff'd 316 F. 2d 312 (2nd Cir. 1963).

[FN44]. Petition of Williams, 474 F. Supp. 384 (D. Ariz. 1979); In re Matz 296 F. Supp. 927 (E.D. Cal. 1969).

[FN45]. Petition of Williams, 474 F. Supp. 384 (D. Ariz. 1979).

[FN46]. 8 CFR § 337.1(b).

[FN47]. 64 Interpreter Releases 921 (August 10, 1987).

[FN48]. 8 USC § 1430(a).

[FN49]. 8 USC § 1433(a).

[FN50]. The book may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402, or any government bookstore.

[FN51]. 8 USC § 1423(3).

[FN52]. 387 U.S. 253, 87 S. Ct. 1160, 18 L.Ed. 2d 757 (1967).

[FN53]. 444 U.S. 252, 100 S. Ct. 540, 62 L.Ed. 2d 461, rehig denied (1980).

[FN54]. 8 USC § 1481(a).

[FN55]. Richards v Secretary of State, Dept. of State, 752 F. 2d 1413 (9th Cir. 1985).

[FN56]. 8 USC § 1481(1).

[FN57]. 8 USC § 1489.

[FN58]. 8 USC § 1481(3).

[FN59]. 8 USC § 1481(4).

[FN60]. 8 USC § 1481(7).

[FN61]. 8 USC § 1483.

[FN62]. Terrazas v Murskie, 494 F. Supp. 1017 (N.D. Ill. 1980); aff'd 653 F. 2d 285 (7th Cir. 1981).

[FN63]. Lim v Mitchell, 431 F. 2d 197 (9th Cir. 1970).

[FN64]. 320 U.S. 118, 63 S. Ct. 1333, 87 L.Ed. 1796, rehig denied (1943).

[FN65]. 8 USC § 1451(d).

[FN66]. U.S. v Linnas, 527 F. Supp. 426 (E.D. N.Y. 1981).

[FN67]. 8 USC § 1451(e).

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