

# SILENT PARTNER

## IMMIGRATION AND NATIONALIZATION FOR SERVICEMEMBERS AND DEPENDENTS<sup>\*</sup>

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military trial attorneys. It is an attempt to explain broad generalities about trial advocacy. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

### I. **How does one become a U.S. citizen?**

#### A. **Citizens at birth**

1. Those born in the United States, American Samoa, Guam, Puerto Rico, the U.S. Virgin Islands.
2. Those born in Panama Canal Zone if mother or father was a U.S. citizen.
3. Those born in the Republic of Panama and at least one parent worked for the Panama Railroad Company or the U.S. government.

#### B. **VIA Acquisition - Occurs at birth - child born abroad if at least one parent is a U.S. citizen.**

1. Rules for acquiring U.S. citizenship
2. Born outside of the United States to a U.S. citizen parent or parents.
3. The U.S. citizen parent(s) must have resided in the United States for a certain period of time prior to the child's birth (See chart at Appendix A.) The length of this period varies depending on when, under what circumstances the child was born (i.e. born in or out-of-wedlock and what Congressional act is applicable to that time

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period). Refer to the chart to determine what the transmission requirements were in effect at time of the child's birth.

4. Even if a child's parent(s) were not born outside the U.S., if the child's grandparents were born in the U.S. there is still the possibility that the child's parents became U.S. citizens through their parents (the child's grandparents). Then, if one of the parents did acquire U.S. citizenship, U.S. citizenship may be transmitted from the child's parent to the child.
5. To obtain proof of citizenship, child (or now adult) may file Form N-600 to obtain a certificate of citizenship or apply for a U.S. Passport or a Report of Birth Abroad of a Citizen of the United States of America (FS-240). The latter is a State Department form issued by the U.S. Consulate abroad in the country where the birth occurred.

**C. VIA Derivation - Occurs through the naturalization of citizen parent(s) who have or had custody of lawful permanent resident child.**

1. A son or daughter under 18 derives citizenship if residing in the U.S. as a Lawful Permanent Resident when the non-citizen parent naturalized provided the other parent is already a citizen INA " 320(a), 8 USC " 1431(a); or
2. A son or daughter under 18 derives citizenship if in the legal custody of the parent and permanently residing in the U.S. or is a Lawful Permanent Resident when both parent naturalizes or when the parent having legal custody of the child pursuant to legal divorce or separation INA " 321(a)(5), 8 USC " 14321(a)(5).
3. Under prior law the child had to be under 16 at time of parent's naturalization. The current law is now being applied retroactively regardless of what law was in effect when parent was naturalized.
4. Refer to chart at Appendix B for the specific act of Congress which applied at the time of the qualifying events.
5. Citizenship by derivation may be available where parent did not meet the necessary transmission requirement.
  - a) Procedures:
    - (1) File Form N-600 with local INS office. Once this is approved, the individual will be scheduled for an interview when naturalization will occur; or

- (2) Child born outside the U.S. may take an INS appointment letter to the U.S. Consul who will then issue a B-2 visa. This will permit basis for lawful admission.

**D. VIA Naturalization**

**1. Must be a lawful resident**

a) EXCEPTIONS:

- (1) served honorably in U.S. military during time of war or declared hostilities.
- (2) posthumous citizenship available to those who die in active duty during a period of military hostility provided family members petition within two years of his death. **NOTE:** No immigration benefits can be derived from person being posthumously awarded citizenship.
- (3) Applicant must **be at least 18 years of age**

b) EXCEPTION:

- (1) unless applicant's age is waived due to applicant's military involvement. See INS '329(a), 8 USC '1440(a).
- (2) Applicant must have been residing in the U.S. **for five years subsequent to receiving lawful resident status**, a.k.a. "greencard status."

c) EXCEPTIONS:

- (1) Residency period is reduced to three years for spouse of U.S. citizen who acquired lawful resident status based on marriage to U.S. citizen and who is in marital union at the time of filing the application for naturalization.
- (2) Special residency requirements exist for asylees and refugees who have acquired lawful resident status

- (3) Applicant must have **resided three months in state** where filing application for naturalization. This requirement may be waived under limited circumstances.
- (4) Applicant must have been **physically present in the U.S. for not less than half the residency period.** For those with five-year residency requirement must have been physically present in the U.S. no less than thirty months or if three-year residency requirement applies then physical presence then no less than eighteen months.
- (5) Applicant must have **continuity of residence.** This means that there has been no abandonment of residence. This is a factual determination.

2. Factors that are considered:

- a) was employment in U.S. terminated;
- b) are there any immediate family members remaining in the U.S.;
- c) does individual maintain or have full access to residence in U.S.;
- d) has the individual obtained employment outside the U.S.;
- e) does the individual have an active U.S. bank account;
- f) has the individual filed U.S. tax returns as a resident;

E. Applicant **must not have been absent from the U.S. for more than one year** during the periods for which continuous residence is required. This would be three or five years. If absent greater than six months but less than one year there is a presumption of abandonment but that presumption may be rebutted with evidence.

1. Statutory excused absences:

- a) Military service abroad INA '328, 8 USC '1429;
- b) Employees of U.S. companies or individuals who under U.S. government contracts working abroad provided they apply for and receive approval to preserve their residence prior to their departure from the U.S. This is done on Form I-470. Only

eligible if there has been one year of physical presence in the U.S. physical presence in the U.S.

- c) Spouse of U.S. citizens working abroad can obtain expedited citizenship under limited circumstances. INA '319(b)

F. Must be a **person of good moral character** for the requisite five year residency period.

1. EXCEPTIONS:

- a) 3 years for spouse of U.S. citizen
- b) 1 year for the members of the military

2. However, the applicant's behavior prior to the residency period may be considered. The applicant's earlier history is thought to reflect on current character for the purpose of determining if the applicant has "reformed" since the wrongdoing.

G. The following circumstances/behavior will disqualify an applicant from being naturalized:

1. conviction or admitting the essential elements of a crime involving moral turpitude (other than a purely political offense).

a) EXCEPTION:

- (1) If an individual was convicted of only one offense involving moral turpitude and either a) offense occurred while person under 18 years of age; or b) the maximum jail sentence possible for the crime was less than one year and, if the person was convicted, the sentence given (regardless of time served) was 6 months or less. INA'212(a)(2)(A)(ii).
- (2) spent 180 days or more in jail as a result of one or more convictions, regardless of when the offense(s) was committed.
- (3) came to U.S. to engage in prostitution or has engaged in or profited from the business of prostitution;
- (4) engaged in or aided others to enter the U.S. illegally.

b) EXCEPTIONS:

- (1) if involved smuggling spouse, parent or child of lawful permanent resident and can show humanitarian, family unity or public interest reasons;
- (2) habitual drunkard;
- (3) giving false testimony to get or retain an immigration benefit;
- (4) two or more convictions for illegal gambling;
- (5) came to U.S. to practice polygamy.

**NOTE:** None of the above are permanent bars to naturalization. The applicant may be considered to have established "good moral character" if the conduct or conviction disqualifying the applicant occurred before the commencement of the requisite residency period.

H. The following circumstance result in being permanently disqualified for naturalization:

1. conviction of murder
2. conviction or admitting the essential elements of a drug offense (except possession of less than 30 grams of marijuana.)
3. INS has "reason to believe" that the applicant is or was a drug trafficker. Nunez-Payan v. INS, 811 F. 2d 264 (5th Cir. 1987)
4. conviction of an aggravated felony (see INA '101(a)(43).)
5. desertion from the U.S. military forces
6. draft evaders
7. deliberately failing to register with the Selective Service

I. Able to demonstrate **basic competency in written and spoken English.**

1. EXCEPTIONS:

- a) persons older than 50 who have resided in U.S. more than 20 years since becoming *as a lawful permanent resident*, or

- b) persons older than 55 who have resided in U.S. more than 15 years *after becoming a lawful permanent resident*.
- c) Able to demonstrate **fundamental knowledge of U.S. history and government**.
- d) EXCEPTIONS:
  - (1) This requirement is waived for applicants with a physical or developmental mental disability or impairment. A certificate is required from a medical professional with expertise in diagnosing the specific type of infirmity.
  - (2) Applicants over 65 with 20 years as a *lawful permanent resident* will be given special consideration. Often, this means the civic or history questions asked are selected from reduced list of questions.

**J. SPECIAL NATURALIZATION PROGRAMS FOR:**

- 1. FILIPINO WAR VETERANS - may prove military service other than by certificate from U.S. army
- 2. PERSIAN GULF WAR VETERAN - if served honorably, in active duty between August 2, 1990 and April 11, 1991.

**II. Who can immigrate to the United States?**

- A. Under current U.S. immigration law, immigration is subject to yearly numerical limitations. Additionally, in most instances an individual requires a petitioner in order to qualify to apply to immigrate to the United States. A petitioner may be a U.S. citizen or lawful permanent resident close family relative or an employer. There are limited exceptions where an individual does not require a petitioner. These exceptions include individuals who have been recognized as political asylees or refugees by the United States, certain government employees, certain wards of U.S. juvenile courts, battered spouses of U.S. citizens or lawful permanent residents, persons of extraordinary ability, recipients of visas through special legislative programs which extend eligibility to other classes of individuals to immigrate to the United States.
- B. **Which family members can petition for relatives to immigrate to the United States?**

- a) U.S. citizen
- b) Lawful permanent resident

**C. For whom may the petition be filed?**

1. Fiance(e) of U.S. citizen - not subject to quota
2. Spouse of U.S. citizen - not subject to quota
3. Unmarried child under 21 years of age of a U.S. citizen -not subject to quota. Child includes person under the age of 21 who is the biological child, child adopted by U.S. citizen before child reached the age of 16, or stepchild of U.S. citizen. Stepchild must have been under 18 years of age when the marriage creating the step relationship occurred.
4. Parent of U.S. citizen who is 21 years of age or older. Not subject to yearly quota.
5. Unmarried son or daughter of U.S. citizen over 21 years of age - subject to quota. (includes adopted and stepchildren as defined above at #3)
6. Brother or sister of U.S. citizen. Subject to yearly quota.
7. Married son or daughter of U.S. citizen. Subject to yearly quota.
8. Spouse of lawful permanent resident. Subject to yearly quota.
9. Unmarried child of lawful permanent resident. See definition of child above at #3. Subject to yearly quota.
10. Unmarried son or daughter of lawful permanent resident who is 21 years of age or older. Subject to yearly quota.

**D. How long will this process of immigrating take?**

1. For immediate relatives of U.S. citizen the process may take up to one year at the Consulate. These are the spouse, children under 21 years of age, parents of a U.S. citizen.
2. For a family member who is subject to the annual quota the wait will vary depending on the preference classification and the backlog in the particular preference. Preference refers to the nature of the

relationship and whether the petitioner is a U.S. citizen or lawful permanent resident. See excerpt from Visa Bulletin at Appendix C.

**E. If the person for whom the petition is being filed has a child can the child immigrate with the petitioned parent (a.k.a. the beneficiary parent)?**

1. Children of beneficiaries of an immediate relative visa petition which are described at B1, B2, B3, and B4 above cannot derive from the petition filed for that immediate relative. If the requisite stepparent relationship exists then the petitioner should file a separate petition for the child. This may be filed simultaneously. However, a decision on the petition for the stepchild will probably be held until the petition for parent/spouse has been approved.
2. Children of beneficiaries of preference petitions may derive from the petitions for the preference relative. These are described supra. at B5, B6, B7, B8, B9, and B10.

**F. Are all beneficiaries of family based petitions given permanent residence?**

1. Spouse of U.S. citizen is not given permanent residence unless the marriage occurred at least two years prior to admission as a lawful resident. This spouse would receive conditional residence for a period of two years. Prior to the expiration of the two years, a petition would need to be filed with the Immigration Service to remove the conditional basis of the person's lawful residence. This is true also for any stepchildren of that relationship who received lawful residence based on the marriage between parent and U.S. citizen stepparent.
2. If marriage which is the basis of the approved petition is greater than two years in duration then no condition attaches.
3. Beneficiaries of petitions not based on marriage have no conditions attached. Described at B4, B5, B6, B7, B9, and B10. More than likely B8 would not be subject to condition either because the visa backlog would probably be greater than two years so that the period of marriage would be greater than two years by the time beneficiary is eligible to immigrate.

**G. If family member is already in the U.S. does that person have to leave the U.S. to apply for immigrant visa at U.S. consulate abroad?**

1. This depends on the specific facts and circumstances of the case. For example, was the family member seeking to immigrate inspected

at last entry to the U.S.; was the person in violation of a non-immigrant status and the petitioner is not a U.S. citizen; has the person worked without authorization and the petitioner is not a U.S. citizen.

2. If beneficiary has had any non-immigrant violations or entered unlawfully then look to see if beneficiary is entitled to file a waiver application to overcome the lapse in non-immigrant status. See '245(i) of the INA's grandfathering provisions.

**H. When must a beneficiary process for his/her immigrant visa overseas?**

1. Applicant/beneficiary is in the United States and not in lawful non-immigrant status and is not an immediate relative.
2. Entered the United States without inspection.
3. If not covered by the grandfathering provision of '245(i) of the INA. To be covered by grandfathering provisions, a petition must have been filed on or before January 14, 1998.
4. Applicant/beneficiary is currently outside U.S. and not eligible for non-immigrant visa.

**I. What would prevent someone from immigrating to the U.S, if otherwise meets the qualifying family relationship?**

1. Unlawful presence bars to admissibility
  - a) Beginning 4/1/97 an applicant for immigrant or non-immigrant visa who was previously in the United States in unlawful presence for more than 180 days and departs the U.S. voluntarily before the commencement of proceedings will be ineligible for a visa three years. '212(a)(9)(B)(i)
  - b) Beginning 4/1/97 an applicant for immigrant or non-immigrant visa who was previously in the United States unlawfully for more than one year will be ineligible for a visa for ten years.'212(a)(9)(B)9(ii)
  - c) A hardship waiver is available for spouses and sons or daughters of U.S. citizens or lawful permanent residence.

**J. Convicted of certain serious criminal offenses. INA '212(a)(2), 8 USC '212(a)(2)**

- a) Involving moral turpitude
  - b) sex crimes
  - c) crimes against the government
  - d) drug offenses
  - e) weapons offenses
- K. Afflicted with certain serious diseases. INA '212(a)(1), 8 USC '1182(a)(1)
- L. Misrepresentation or fraud in an effort to gain immigration benefit. INS '212(a)(6)(C), 8 USC '1182(a)(6)(C)
- M. Being or likely to become a public charge. INA '212(a)(4), 8 USC '212(a)(4)
- 1. Form I-864, Affidavit of Support needed for all family based applications to overcome public charge ground.
  - 2. Form I-134, Affidavit of Support needed for most non-family applications to overcome public charge ground.
- N. Physical or mental disorder. INA '212(a)(1)(A)(ii), 8 USC '1182(a)(1)(A)(ii) False claims to U.S. citizenship. INA '212(a)(6)(C)(ii), 8 USC '1182(a)(6)(C)(ii)
- O. Voting in a national or state election. INA '212(a)(10)(D), 8 USC '1182(a)(10)(D)
- P. **Are exceptions made for any of the above violations?**

There are waivers available in limited circumstances for several of the grounds of inadmissibility listed above. However, many result in permanent bars to admission. The above list is not exhaustive. These are the most commonly occurring violations. Refer to INA '212(a), 8 USC '1182(a) for the remainder of these grounds of inadmissibility.

- Q. **If an individual successfully immigrates or is lawfully admitted to the United States for what reasons might his immigrant status, i.e. greencard status be in jeopardy?**

Refer to INA '237, 8 USC '11 for grounds of removability. The latter will result in an individual who has been admitted to the U.S. being subject to removal if in violation of one of these grounds. These grounds mirror the grounds of inadmissibility listed

above. However, there are some variations. Please consult that statute and a qualified attorney with experience in this area.

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