



ADVISORY FOR LAWYERS: NATURALIZATION CONSIDERATIONS FOR PEOPLE WITH PRIOR LAW ENFORCEMENT CONTACTS

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In today's national political climate, many immigrants – including those in the U.S. lawfully -- fear deportation or other negative immigration consequences. Thus, many lawful permanent residents ("green card" holders) are considering applying for U.S. citizenship now or as soon as they become eligible. **However, a lawful permanent resident with a past criminal history should proceed carefully before applying for citizenship. Why?**

- The applicant bears the **burden of disclosing** all arrest, citation, & conviction information. Failure to do so can result in denial of an application or other adverse immigration consequences.
- The applicant **might be criminally deportable & put into deportation proceedings** if s/he applies to naturalize.
- Even if not criminally deportable, criminal legal contacts during the statutory period can **bar a good moral character (GMC) finding**.
- Criminal legal contacts can result in **discretionary denial** if not handled properly.
- The federal government aggressively scrutinizes these applications, even years later. Mistakes or misrepresentations can haunt a client and may even lead the federal government to pursue **denaturalization**.

Lawyers screening and assisting clients can play a crucial role in preventing disastrous consequences and maximizing successful applications.

KEY STEPS FOR SCREENING & REPRESENTATION

1. Gather thorough, objective documentation of criminal history.
2. Determine if applicant is criminally **deportable**. [INA §§ 237(a)(2), 101(a)(43)]
3. Determine if applicant is barred from establishing **GMC**. [INA § 101(f)]
4. Assess how law enforcement contacts may impact **discretionary** decision.

STEP 1: GATHER THOROUGH, OBJECTIVE DOCUMENTATION OF CRIMINAL HISTORY.

Conduct a detailed intake. Ask questions in a neutral, non-judgmental tone to encourage your client to be truthful and complete. Do not rely solely on self-reporting and require objective documentation so you can do an accurate legal analysis and provide the necessary attachments if filing an application.

QUESTIONS TO ASK YOUR CLIENT:

Some clients may not remember or understand what happened in a criminal case. Also, even cases that were dismissed can have serious immigration consequences. It is important to identify any and all contacts – including arrests and dismissals – so you can analyze their impact on the person's immigration status. Consider the following questions that can help guide your client to the answers you need to provide analysis:

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- Have you ever been arrested?
- Have you ever been stopped by police?
- Has anyone ever called the police on you?
- Have you ever been taken to a precinct?
- Have you ever been given a ticket?
- Have you ever had to see a judge?
- Did you ever have to go to court to fight a case?
- Have you ever been put in handcuffs?

PRACTICE TIP ON DIFFERENT TYPES OF ARRESTS & INTERACTIONS W/LAW ENFORCEMENT:

Learn about your local criminal legal system to help you interview clients. For example, in New York City, the following are common but distinct ways police charge those accused of violating the law:

- **Summons** (ticket issued on the street; person not fingerprinted or booked at a precinct)
- **Desk Appearance Ticket** or “DAT” (person booked, fingerprinted & ticket issued at a precinct; released from precinct without court arraignment before a judge)
- **Regular arrest** (person booked at a precinct & fingerprinted; transported to court for central booking & arraignment before a judge; judge released or required person be held in jail)

DOCUMENTS TO REQUEST FROM YOUR CLIENT:

Clients should go to every jurisdiction where they have been arrested and obtain **ALL certificates of disposition**, including Transit Adjudication Bureau (TAB) records, **Decline to Prosecute letters** from District Attorneys and **records of any arrest**, even if the case did not result in charges or if charges were expunged, dismissed or dropped. These documents are crucial to accurate legal analysis (e.g. to see statute and subsection of conviction) and must be provided with the N-400.

CREATE A TIMELINE:

Once you have gathered documentation of your client’s criminal history, create a timeline that includes important immigration and criminal history dates, such as dates of admission to U.S., issuance of permanent resident status, commission of offense, conviction, and sentencing. This will help you analyze deportability and eligibility; in rare cases, it can also help you identify issues that put a client at risk of deportation, such as convictions not properly disclosed in the process of receiving of a green card.

STEP 2: DETERMINE IF APPLICANT IS CRIMINALLY DEPORTABLE.

It is crucial to start by screening your client carefully for deportability, including a review of certificates of disposition for every single arrest or citation. Applying to naturalize brings a person in direct contact with Department of Homeland Security (DHS) officers who have conducted an extensive background check and the Trump administration has stated ICE will prioritize deporting legally removable people with prior criminal contacts. See Executive Order, dated January 25, 2017,

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available at <http://bit.ly/2jybzNG>. Moreover, for years, USCIS, has routinely denied applications from people who are deportable and referred the individuals for removal proceedings. So, **you should assume that, if a client is removable and applies to naturalize, s/he will be placed in removal proceedings** – no matter how old or minor the conviction.

DETERMINING CRIMINAL DEPORTABILITY:

To determine if your client is deportable, you must individually analyze each criminal case and conduct legal research. If you are not 100% confident about whether your client's conviction is a deportable offense, consult or refer the case to a criminal-immigration specialist.

Threshold questions to answer to analyze criminal deportability:

- **Is this a conviction for immigration purposes?**
 - o **If yes, does it fall into any of the deportability categories in INA § 237?** Note: You should look through the immigration statute to ensure you do not miss a relevant category under which the conviction may fall.
 - o **If no, does it fall into one of the categories in INA § 237 that does not require a conviction to trigger deportability?** (i.e. inadmissible at time of entry or adjustment, violators of orders of protection, etc.) Deportability can be triggered even by offenses that never resulted in a criminal conviction. Look through INA § 237 each time you are conducting analysis and consider all criminal legal contacts – not simply convictions under state law.
- **Remember to check if inadmissible at time of entry/adjustment:** Use your timeline! Watch out for arrests, charges, convictions, etc. before an adjustment and make sure the I-485 was completed accurately. Also, keep an eye out for criminal legal contacts before international travel. The contacts may have made the person criminally inadmissible and, upon return and re-entry, deportable.

NOTE OF CAUTION ABOUT THE DEFINITION OF CONVICTION:

NY "violations" are not crimes but nonetheless are treated as "convictions" under immigration law if handled in criminal court (which includes summons court). Similarly, DHS may treat convictions that are dismissed or reduced after a guilty plea and completion of rehabilitative programming as "convictions." See INA § 101(a)(48) for the immigration law definition of "conviction" and the aforementioned legal resources for information on what types of offenses are "convictions" for immigration purposes.



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OFFENSES THAT MAY TRIGGER DEPORTABILITY include, but are not limited to:

- **Drug offenses:** except single conviction for marijuana possession under 30 grams for personal use.
 - **BEWARE:** Some non-criminal offenses can make a person deportable. For example, PL § 221.05, unlawful possession of marijuana, a “violation” – not a crime – under NY law can be considered a drug conviction under the immigration law! Before submitting an application, you must do additional research to see whether the marijuana exception applies to your client *and* whether you can prove it as necessary for naturalization. See 8 CFR § 316.10(b)(2)(iii). If not, your client is likely to end up in removal proceedings.
- **Crimes involving moral turpitude (CIMTs):** typically offenses involving intent to steal or defraud; offenses where physical harm was caused or threatened; and/or sex offenses
- **Firearm offenses**
- **Crimes of domestic violence, stalking, child abuse or abandonment**
- **Violations of an order of protection** (Note: doesn’t require a conviction)
- **Aggravated Felonies** (which can be state misdemeanors):
 - Murder, rape, sexual abuse of a minor
 - Drug trafficking (includes sale or possession w/intent to distribute or sell)
 - Trafficking of firearms or explosive materials
 - Certain crimes where you received 1+ year prison sentence (even if suspended or you didn’t serve the time): crime of violence, theft or burglary, commercial bribery, forgery, counterfeiting, obstruction of justice
 - Fraud or deceit offense w/loss to victim of more than \$10,000
 - Certain “alien smuggling” offenses

NOTE OF CAUTION ABOUT THE LIMITED MARIJUANA EXCEPTION: Be extremely careful with these cases, as an incorrect decision can land your client in removal proceedings and/or ineligible for naturalization. If you believe your client’s conviction may fit the marijuana exception to deportability under INA § 237(a)(2), do not rely on self-reporting. Request the record of conviction before submitting a naturalization application to assess:

- Would the government be able to prove my client is deportable for a “controlled substance offense?” **Note:** For deportability, the government bears the burden of proving the exception *does not* apply to your client.
- Can my client prove the single marijuana conviction was for simple possession for personal use *and* involved 30 grams or less of marijuana? (Tip: an ounce is 28.35 grams) **Note:** For naturalization, your client bears the burden of proving the exception *does* apply to him or her. See 8 CFR § 316.10(b)(2)(iii).



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COMMON NY OFFENSES THAT DO NOT MAKE A CLIENT DEPORTABLE:

Note: they can temporarily bar GMC depending on the sentence and timing of the outcome. Moreover, beware that the underlying charges can come up in adjudication of the application.

- Adjournment in Contemplation of Dismissal (ACD, ACOD) under PL 170.55/56
- Penal Law § 240.20 (disorderly conduct)
- Penal Law § 140.05 (trespass)
- Vehicle and Traffic Law §§ 511, 509 (driving with a suspended license)
- Vehicle and Traffic Law § 1192(1)

HOW USCIS DECIDES TO REFER A NATURALIZATION APPLICANT FOR REMOVAL PROCEEDINGS:

If your client is deportable, you should expect USCIS to refer him/her for removal proceedings. In June 2018 USCIS issued a policy memo that significantly expanded the grounds for USCIS to issue an NTA. It supersedes all prior policy memoranda on the topic. In effect, the new memorandum implements Executive Order 13768 to initiate proceedings “against all removable aliens.” Relevant to applications for naturalization, USCIS will now issue NTAs in all cases:

- If USCIS denies the applicant’s naturalization application on good moral character grounds based on the criminal offense, it **must** issue an NTA if the applicant is also removable.
- If the applicant is deportable under INA § 237 (i.e. pre-11/29/1990 aggravated felony, deportable offense outside of GMC period, inadmissible at time of adjustment or admission), USCIS will issue an NTA unless it exercises prosecutorial discretion through a multistep process. The adjudicating officer, a “Prosecutorial Review Panel” composed of attorneys from multiple agencies, and head of the relevant office (for example, the Field Office Director or Service Center Director) must all agree.

In practice, this will result in USCIS issuing NTAs in virtually all cases involving a removable non-citizen. For more information, see the June 28, 2018 USCIS Policy Memorandum entitled “Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs)”.

PRACTICE TIP ON WHAT TO DISCUSS IF PROSPECTIVE CLIENT IS DEPORTABLE:

When talking about the consequences of applying, consider the following:

- The fact that the client may be picked up by ICE in the community at any time (even if s/he does not file the application) and that, by applying, s/he is providing fingerprints to facilitate a criminal background check as well as their current address
- What it would mean to be in deportation proceedings, including whether the client is likely to be detained [see INA § 236(a), (c)] and for how long
- Whether the client is eligible for any relief if placed in removal proceedings
- Whether the client may benefit from post-conviction relief or a pardon

Commented [MM1]: I took out “in practice” because I think that makes this section weaker than it is after the memo.



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If your client is deportable, you may want to consider whether post-conviction relief (vacating the conviction in criminal court based on some legal error in the proceeding) or a pardon might improve his/her legal situation. See INA § 237(a)(2)(A)(vi) to determine if a pardon would ameliorate consequences. If the conviction is from New York, you can contact IDP for support at immdefense.org.

RESOURCES that can help you start deportability analysis:

- IDP Immigration Consequences of Crimes Summary Checklist at bit.ly/2oTubNr
- IDP NY Quick Reference Chart, updated July 2016, at bit.ly/2oTsX4C
- *Kurzban's Immigration Law Sourcebook*, by Ira J. Kurzban
- *Immigration Law & Crimes*, by Dan Kesselbrenner (Author), Lory D. Rosenberg (Author), Maria Baldini-Potermin (Editor)
- Visit our website – immdefense.org – for more resources for immigration lawyers.

STEP 3: DETERMINE IF APPLICANT IS BARRED FROM ESTABLISHING GMC.

To be eligible for naturalization, a person must:

- Be a lawful permanent resident for five years (three years if married to a U.S. citizen);
- Be a person of good moral character now and during the required residence period; and
- Pass certain tests, like literacy and civics.

Under INA § 101(f) and 8 CFR § 316.10, certain criminal contacts can bar an applicant from being able to establish good moral character (GMC). Some convictions permanently bar a finding of GMC and make a person permanently ineligible for naturalization. Other convictions are only temporary bars, which means the application will be denied and the client should wait until the conviction is no longer a bar to reassess whether to apply.

CONVICTIONS THAT PERMANENTLY BAR GMC:

- Aggravated felony conviction on or after November 29, 1990
- Murder conviction at any time

For temporary bars, a person cannot establish GMC during the statutory period, which is the 5 years (or 3 years if married to a U.S. citizen) prior to submitting the application.

CONVICTIONS OR ADMISSIONS THAT BAR GMC DURING THE STATUTORY PERIOD include but are not limited to:

- Controlled substance offense (except single offense of simple possession of 30g or less of marijuana – **note:** for naturalization, burden is on applicant to show this exception applies)
- Crime involving moral turpitude (except if the offense is not subject to a potential jail sentence in excess of one year, the actual sentence received does not exceed six months in jail, **and** the applicant has no prior crime involving moral turpitude)

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- Two or more offenses of any type and committed at any time for which you received a total (aggregate) sentence of 5 years or more

ADDITIONAL CRIMINAL ISSUES THAT BAR GMC during the statutory period include but are not limited to:

- Confinement to jail for 180 days or more
- Has given false testimony for an immigration benefit
- Two or more gambling convictions or primary income from illegal gambling
- Is or was involved in prostitution as described in INA § 212(a)(2)(D)
- Is or was involved in “alien smuggling” as described in INA § 212(a)(2)(E)
- Polygamy (past or current)
- Is or was habitual drunkard

NOTE OF CAUTION ABOUT UNRESOLVED SENTENCES:

Per 8 CFR § 316.10, an application **will not be approved until completion of any probation, parole or suspended sentence**. USCIS has interpreted this to include unresolved sentences – for example:

- The period before which a case is dismissed (such as the period after a NY Adjournment in Contemplation of Dismissal disposition but before a dismissal)
- The time during which the applicant is under the jurisdiction of the court, even without specific obligations (such as the period of a NY “conditional discharge”)
- Any sentence where the applicant still has obligations to court, such as fines to pay or community service

It is important that, with each case, you review the full statute and regulation on GMC to see if any categories apply. For law enforcement contacts that do not bar GMC, you should also consider the discretionary impact – especially if the contact was within the statutory period.

If your client is barred from establishing GMC, you may want to consider whether post-conviction relief (vacating the conviction in criminal court based on some legal error in the proceeding) or a pardon might improve his/her legal situation. Also, note that 8 CFR § 316.10 contains some language regarding the impact of “full and unconditional” executive pardons and expungements. If the conviction is from New York, you can contact IDP for support at immdefense.org.

STEP 4: ASSESS HOW LAW ENFORCEMENT CONTACTS MAY IMPACT DISCRETIONARY DECISION.

Even if the client is not barred from establishing GMC, law enforcement contacts can impact the adjudication of a naturalization application. The client is likely to receive questions about criminal

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contacts at the naturalization interview and may endure requests for evidence (RFEs) about criminal cases. USCIS may consider criminal legal contacts and find *in its discretion* that an applicant lacks the GMC necessary to gain citizenship. Moreover, applications for an individual who has prior law enforcement contacts undergo additional scrutiny and often take longer to adjudicate because of the many levels of review. Nonetheless, as an advocate, you can play a role in minimizing the negative impact of criminal legal contacts and maximizing the chances of success.

REGULATORY AUTHORITY TO CONSIDER CRIMINAL HISTORY IN DISCRETION:

Under 8 CFR § 316.10(a)(2), USCIS “is not limited to reviewing the applicant's conduct during the five years immediately preceding the filing of the application, but may take into consideration, as a basis for its determination, the applicant's conduct and acts at any time prior to that period, if the conduct of the applicant during the statutory period does not reflect that there has been reform of character from an earlier period or if the earlier conduct and acts appear relevant to a determination of the applicant's present moral character.” Also, USCIS will consider the fact that an applicant was on probation, parole or suspended sentence during the statutory period – even if not barred from establishing GMC. See 8 CFR § 316.10(c)(1).

BEWARE OF CRIMINAL CASES – EVEN THOSE OUTSIDE OF THE STATUTORY PERIOD:

Beware that USCIS might ask about and/or consider criminal cases from outside of the statutory period, especially if the applicant has any contacts within the statutory period. This is not limited to convictions, but may include mere arrests as well. This is particularly of concern if the cases were for similar offenses (e.g. 2 DUIs). While there is no guarantee of success, as an advocate, you can try to limit questioning about contacts outside of the statutory period at the naturalization interview or in Requests for Evidence, asserting that they are not relevant to present GMC, citing lack of new criminal legal contacts, disconnect between types of offenses, and/or strong proof of reform, if applicable. See 8 CFR § 316.10 for language about relevance of contacts outside of the statutory period.

From screening for representation through the oath of citizenship, to maximize success, you should: (1) properly disclose all criminal legal contacts; (2) minimize extraneous information about criminal cases to decrease chances of negative interpretation or admissions; (3) prepare your client to answer questions at the interview; (4) attend the interview and intervene if necessary to avoid problematic admissions; and (5) submit positive evidence of GMC.

PRACTICE TIPS ON FILLING OUT THE N-400:

It is important to consider how you discuss criminal legal contacts on the N-400. USCIS may probe beyond convictions to solicit negative information and admissions. Your work can help minimize the chances of that. Below are suggestions on completing some of the criminal questions on the form:



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Part 12, #29 - Why were you arrested, cited, detained or charged? Enter only the Penal Law (PL) code/subsection listed in the arraignment charges section of Certificate of Disposition (COD). A narrative description is not necessary or required.

Part 12, #29 - Outcome or disposition of the arrest, citation, detention or charge (use last outcome on COD)

- Enter one of the following **for outcome**: Declined prosecution (usually need Decline to Prosecute letter); Charges dismissed; Pled guilty to [statute number]; Found guilty of PL #.
- Enter one of the following **for sentence**: # years probation + indicate it was completed; # days/years jail or “Time served” + calculation of time; Length of conditional discharge + conditions (e.g. community service).

Tricky Question, Part 12, #22 - Commission of offense for which you were not arrested

Be cognizant because USCIS might bring this up when applicant has demonstrated record of a certain type of arrest charges (e.g. prostitution).

Tricky Question, Part 12, #30 - Have you ever...?

USCIS might argue some of the following grounds apply based on documentary evidence of arrests/convictions provided. For example:

- Habitual drunkard (multiple DUIs)
- Prostitute (past prostitution arraignment charges)
- Sale of drugs
- Gambling
- Misrepresentation to obtain public benefits (welfare fraud charges)

PREPARE TO AVOID PROBLEMATIC ADMISSIONS AT THE NATURALIZATION INTERVIEW:

Your client should be ready to answer questions about all criminal legal contacts, including those dismissed or expunged. Admissions at the interview can impact discretionary decisions and statutory eligibility; they may also create future bars or delays to naturalization and barriers to foreign travel. So, it is important to counsel him or her to keep answers simple, and it is important for you to attend the interview.

- **Tips for the client:** Warn them about any red flags you see for possible admissions. Practice numerous times so s/he is comfortable presenting an authentic explanation but without giving extensive details to minimize the potential for problematic admissions. Alert them to the fact that you may intervene during the interview.
- **Tips for advocates:** You should not send your client with prior law enforcement contacts to attend the interview alone. Be prepared to politely intervene in questioning, if necessary, and remind the naturalization officer or supervisor that you have submitted CODs with information on the case and why that is sufficient. If USCIS tries to ask about contacts outside of the statutory period, be prepared to explain how the case does not bar GMC and why it is not relevant to current GMC. Bring with you as much evidence of positive GMC as possible, including any new documentation you have gathered since



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submitting the application. This may also help you argue that, with clear evidence of reform, past criminal history should not be used to deny in discretion.

TIPS ON DELAYS IN ADJUDICATION OR REQUESTS FOR EVIDENCE (RFEs):

It is not uncommon for applicants with virtually any criminal history – including contacts outside of the statutory period – to receive RFEs or experience unusually long processing times for their applications. The Benjamin N. Cardozo Law School Immigration Justice clinic has produced a useful practice advisory on handling these cases. See *Handling a Complex or Delayed Naturalization Application: Administrative Inquiries and 8 USC § 1447(b) Relief*, available at <http://bit.ly/2qcJlCq>. The advisory also includes sample cover letters and a response to an RFE.

WARNING CLIENTS ABOUT NEW LAW ENFORCEMENT CONTACTS WITH APPLICATION PENDING:

When you file the application, ask your client to tell you if they have any law enforcement contacts while the application is pending and at any time before the oath, as this may create issues. See 8 CFR § 316.10(a)(1) (“An applicant for naturalization bears the burden of demonstrating that, during the statutorily prescribed period, he or she has been and continues to be a person of good moral character. **This includes the period between the examination and the administration of the oath of allegiance.**”). Your client will be required to fill out a questionnaire, Form N-445, prior to the oath ceremony. The questions are broader than the N-400 and include *any* arrests post-interview, and falsehood can provide a basis for criminal conviction for unlawful procurement of naturalization as well as denaturalization.

FOR MORE INFORMATION, CONNECT WITH IDP



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Lawyers' Naturalization Checklist for Criminal History Issues

Note: This is for criminal issues only. You must separately analyze other eligibility requirements.

STEPS	CHECK IF COMPLETE
Conduct thorough intake to understand full criminal history, including arrests and dismissals. Encourage client to be honest and complete.	
Collect certificates of disposition from client for every arrest. Request Decline to Prosecute letters if charges dropped by District Attorney. If client does not have documents, explain how to obtain them.	
Create a timeline of client's immigration and criminal history.	
Conduct individual legal research to determine if client is criminally deportable . [INA §§ 237, 101(a)(43)] <ul style="list-style-type: none"> - If deportable: counsel client as to consequences of application, including likelihood of detention and removal proceedings. - If not deportable, move to next step. 	
Assess whether client is barred from establishing good moral character (GMC) . [8 CFR § 316.10] <ul style="list-style-type: none"> - If not deportable but barred from proving GMC: explain that USCIS will deny the application. Counsel client as to when conviction(s) will be outside of GMC period and encourage him/her to reassess the possibilities with a lawyer at that time. - If not deportable and not barred, move to next step. 	
Assess how criminal legal contacts may impact discretionary decision . <ul style="list-style-type: none"> - Encourage client to gather positive evidence of good moral character, especially if criminal legal contact(s) within the GMC period. Counsel client as to likelihood of success at this time, with consideration for issues like cost. 	
Fill out N-400 . Disclose all prior arrests, citations and convictions. Include only basic information about the law enforcement contacts and attach certificates of disposition.	
Warn client to report any new law enforcement contacts to you while application is pending and until s/he is sworn in.	
Prepare your client for the naturalization interview , keeping answers simple and avoiding problematic admissions. Attend naturalization interview with your client.	
Troubleshoot issues carefully. Respond to Requests for Evidence. Be prepared to contact USCIS if adjudication of application delayed because of criminal convictions.	