
ARE THERE SECOND CHANCES IN US IMMIGRATION LAW? JUDGE DENNY CHIN SHOWS THE WAY IN LAWSON v. USCIS

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Second Circuit Court Judge Denny Chin's decision in [Lawson v. USCIS](#), 09 Civ. 10195 (DC) (issued July 7, 2011) provides a beacon of hope for individuals who have overcome a reprehensible past and wish to pursue U.S. citizenship, and serves as an exemplar to advocates and adjudicators not only on the legal question of good moral character but also on the way to analyze other cases such as waivers requiring a demonstration of extreme hardship. Like the issue of good moral character, which was the lynch pin in *Lawson*, extreme hardship waivers require the same care in preparation and in adjudication revealed by Judge Chin's searching legal analysis in *Lawson*. Judge Chin's scrutiny and weighing of all relevant facts and legal issues in the case provides a guide to adjudicators on how to conduct the required "case by case" legal analysis. Judge Chin expertly applies the appropriate legal standards with a keen awareness of relevant policies and priorities, and a judicious exercise of discretion that results in justice triumphing over petty posturing.

Judge Chin's decision also makes clear that applying a set of government priorities in determining whether a legal standard has been met does not mean that individuals will have an easy time of making their cases. Advocates should review the decision and the laws at issue for a sobering overview of just how high the standard is, and how much work and client preparation need be done to succeed in arguing that someone has demonstrated good moral character in the context of naturalization, or merits a favorable decision on a waiver application in the admissibility context. Adjudicators should, in turn, review the case for guidance, in the absence of guidance from DHS/USCIS, on how to apply the law within the framework of agency priorities.

Make no mistake: the road to showing someone merits a favorable finding of good moral character or a favorable exercise of discretion for a waiver, is a hard one and the bars in these case are nebulous and set quite high. Here we will explore the difficulties of establishing good moral character as a matter of law, but readers should keep in mind that the same principles for building and analyzing a case can readily apply in the waiver context as well.

Although courts have long espoused the notion that "[w]e do not require perfection in our new citizens," *Klig v. United States*, 296 F.2d 343, 346 (2d Cir. 1961), those who have committed significant crimes or have other grave negative incidents in their past face an uphill battle that can be won only if they do not fall within one of the bars to establishing good moral character and only if they have made exemplary efforts to redeem themselves.

In *Lawson*, the court concluded that Vernon Lawson, a Vietnam War veteran honorably discharged from the Marines, established good moral character and therefore was eligible to naturalize despite the fact that he was convicted of manslaughter for killing his wife in 1985 because he paid his debt to society serving 13 years in prison and while there "he overcame his drug and alcohol problems, earned three degrees (including two with honors), completed several training programs, and counseled and taught other inmates." *Lawson* at page 2.

In addition, Mr. Lawson continued his efforts at reform after he left the confines of prison:

Upon his release, he obtained gainful employment, and spent eight years as a drug abuse counselor, drawing on his own experience to help countless individuals deal with their addictions. He moved back home with his mother and took care of her as her health failed. He went to church every Sunday and regularly volunteered to help in church activities. He brought food to homeless veterans, played chess in a neighborhood chess club, and tended a neighborhood garden.

Lawson, at page 3. As described by Judge Chin, Mr. Lawson made extensive, ongoing efforts to overcome his past and though, as the court noted, he committed an “unspeakable act”, by the time of the court’s decision he had utterly reformed his life, had paid his debt to society, and therefore established that he met the legal standard for good moral character.

Judge Chin also spent considerable effort in examining Mr. Lawson’s life experiences and how these impacted him, to place Mr. Lawson’s efforts at redemption and the changes he effected in his life in context. Judge Chin closely considered Mr. Lawson’s horrific experiences in Vietnam, where he became a substance abuser as a result of the stress and suffered psychological damage. He did not get the necessary treatment until he was in prison more than 20 years after he returned from serving his country honorably.

In Mr. Lawson’s case, as in many cases, good moral character made the difference between deportation and US citizenship. That these two outcomes are alternatives in one case is astounding and underscores the importance of closely examining and mustering the positive efforts and achievements in an individual’s past and present, even where a significant obstacle to a finding of good moral character may exist. Doing so (and making the determination of whether someone should risk applying for naturalization), however, requires an understanding of the nebulous concept of good moral character as well as a firm grasp of the government’s policy goals.

Although the relevant legislative and regulatory frameworks provide an idea of what precludes a finding of good moral character, no definition exists and the term has been called “incapable of exact definition.” *Posusta v. United States*, 282 F.2d 533, 535 (2d Cir. 1961). The statutory and regulatory bars may be found in INA 101(f) and 8 CFR 316.10. These laws dictate a finding of a lack of good moral character for a person who has ever been convicted of murder, who has been convicted of an aggravated felony (defined in INA 101(a)(43)) after November 29, 1990, and who has at any time has engaged in conduct described in section 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 212(a)(2)(G) (relating to severe violations of religious freedom). Further, an applicant must be found to lack good moral character if during the relevant statutory period the applicant:

- (i) Committed one or more crimes involving moral turpitude, other than a purely political offense, for which the applicant was convicted, except as specified in section 212(a)(2)(ii)(II) of the Act;*
- (ii) Committed two or more offenses for which the applicant was convicted and the aggregate sentence actually imposed was five years or more, provided that, if the offense was committed outside the United States, it was not a purely political offense;*
- (iii) Violated any law of the United States, any State, or any foreign country relating to a controlled substance, provided that the violation was not a single offense for simple possession of 30 grams or less of marijuana;*
- (iv) Admits committing any criminal act covered by paragraphs (b)(2) (i), (ii), or (iii) of this section*

for which there was never a formal charge, indictment, arrest, or conviction, whether committed in the United States or any other country;

(v) Is or was confined to a penal institution for an aggregate of 180 days pursuant to a conviction or convictions (provided that such confinement was not outside the United States due to a conviction outside the United States for a purely political offense);

(vi) Has given false testimony to obtain any benefit from the Act, if the testimony was made under oath or affirmation and with an intent to obtain an immigration benefit; this prohibition applies regardless of whether the information provided in the false testimony was material, in the sense that if given truthfully it would have rendered ineligible for benefits either the applicant or the person on whose behalf the applicant sought the benefit;

(vii) Is or was involved in prostitution or commercialized vice as described in section 212(a)(2)(D) of the Act;

(viii) Is or was involved in the smuggling of a person or persons into the United States as described in section 212(a)(6)(E) of the Act;

(ix) Has practiced or is practicing polygamy;

(x) Committed two or more gambling offenses for which the applicant was convicted;

(xi) Earns his or her income principally from illegal gambling activities; or

(xii) Is or was a habitual drunkard.

Finally, a third set of preclusions apply, which includes a catchall. Unless the applicant establishes extenuating circumstances, the applicant shall be found to lack good moral character if, during the statutory period, the applicant:

(i) Willfully failed or refused to support dependents;

(ii) Had an extramarital affair which tended to destroy an existing marriage; or

(iii) Committed unlawful acts that adversely reflect upon the applicant's moral character, or was convicted or imprisoned for such acts, although the acts do not fall within the purview of §316.10(b) (1) or (2).

The time frame relevant to a determination of good moral character may reach well beyond the specific statutory periods relevant to particular types of petitions, for instance 5 years (individuals applying as lawful permanent residents under INA 316(a)(1)), 3 years (if LPR living for 3 years in marital union with US citizen spouse under INA 319(a)), 1 year (under regulations governing eligibility under INA 329). According to 8 CFR § 316.10(a)(2), USCIS may

take into consideration, as a basis for its determination, the applicant's conduct and acts at any time prior to [the relevant statutory] 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.

Within this framework, USCIS is directed by regulation to evaluate good moral character “on a case-by-case” basis. 8 CFR § 316.10(a)(2) There is sparse policy guidance on the question of good moral character. The Adjudicator’s Field Manual contains a lengthy section on good moral character but the section is designed to provide an overview of the statutory bars, methods of uncovering fraud, and procedures for defending challenges to a denial rather than apprising officers of how to objectively assess a person’s character within the framework of the laws and overarching agency policies. The AFM provides a baseline for analysis, specifically that “good moral character means character which measures up to the standards of average citizens of the

community in which the applicant resides. Any conduct or acts which offend the accepted moral character standards of the community in which the applicant resides should be considered, without regard to whether the applicant has been arrested or convicted.” AFM 73.6(a). The AFM also provides some helpful guidance with regard to what kind of misstatements may be excused or insignificant because they do not demonstrate the requisite intent to deceive for an immigration benefit. (“[M]isrepresentations that results [sic] from poor memory or because the applicant did not understand the question are not false testimony.”) However, in the next paragraph, the AFM goes on to note that individuals use the failure to understand the question as a “very common defense” and refers readers to another section “regarding interviewing techniques and proper documentation to file in order to eliminate this line of defense.” Perhaps more helpful to adjudicators would be direction on how to figure out whether someone is using a “line of defense” or sincerely has not understood. Such direction is once again found in Judge Chin’s decision.

In Mr. Lawson’s case, the government finally based its effort to deport Mr. Lawson on its claim that he committed perjury (at the deposition taken as part of the action in district court regarding his application for naturalization) for the purpose of obtaining an immigration benefit (in violation of 8 CFR § 316.10(b)(2)(vi)). The government argued that Mr. Lawson did not truthfully answer a question about whether he continued to drink alcohol. Closely examining the questions asked and answers given, Judge Chin found that Mr. Lawson had not understood the question at the deposition. Judge Chin recognized that Mr. Lawson had interpreted the words “drinking” and “drinks” [and “alcohol”] to mean “hard liquor” and reasonably interpreted the question as inquiring whether he continued to engage in abusive drinking. The court concluded that Mr. Lawson could therefore not be found to have committed perjury for not mentioning that he occasionally had wine or beer at family gatherings. The court noted that “[i]n light of the case law and all of the compelling circumstances, the Government’s latest position seems nothing but petty.”

After Mr. Lawson’s many years of hard work to redeem his character, it is daunting to think that a misinterpretation of question could have made all the difference in his case. What saved Mr. Lawson was not only that the court found that he had not answered the question “falsely” but also that case law recognizes other possible motives for false statements besides that of seeking to obtain an immigration benefit or naturalization exist and requires these alternatives to be considered. Judge Chin reviewed case law recognizing that fear, embarrassment or a desire for privacy could be alternative reasons, see *Kungys v. United States*, 485 U.S. 759, 782 (1988) as could misinterpretation of a question. See *United States v. Hovsepian*, 422 F.3d 883 (9th Cir. 2005).

Hovsepian involved two individuals who had been convicted in the past of serious crimes, but who, like Mr. Lawson, had completely reformed their lives, both earning advanced degrees and becoming community and youth role models, devoting a great deal of their lives to community leadership. The government argued that in the course of their quest for naturalization, each made false statements on the Form N-400 and regarding other issues (one regarding the nature of a youth group to which he belonged; the other regarding other names by which he had been known). Ultimately, the court found no error in the lower court’s conclusion that the individuals had not given intentionally false testimony for the purpose of obtaining an immigration benefit. Interestingly, the court noted that the question on the form at issue -- “Have you at any time, anywhere, ever ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion?” -- was rife with potential for misinterpretation or different reasonable interpretations given the extensive case law regarding the concept of

“persecution.”

Individuals and their advocates must parse the question of good moral character very carefully and prepare to answer questions carefully, asking for clarification where they do not understand in order to avoid running afoul of the legal standards by mistake. What might appear to be a lost cause may not be if the individual can demonstrate that he has changed for the better because the laws are not meant to punish “but to admit as citizens those who are law-abiding and useful.” *Posusta*, 285 F.2d at 535-36. Circuit Judge Chin’s decision serves as an excellent reference for understanding what good moral character is and how it can be demonstrated. It also presents guidance for individuals who seek to reform themselves after having committed an act that stands as an obstacle (though not falling within the statutory bars) to naturalization. These individuals must demonstrate sincere and significant efforts to become upstanding and engaged contributors to their communities and to the nation in order to merit a favorable finding on their behalf. Finally, the decision serves, in the absence of guidance from DHS/USCIS on the adjudication of good moral character and similarly the exercise of discretion in waiver cases, as an exacting guide of the type of searching legal and factual inquiry adjudicators should make in these cases, not simply to uncover suspected fraud, but to analyze a person in light of their experiences, their mistakes, and their efforts to remake themselves into law-abiding and useful members of their local and national communities.