



## USA V. OLIVAR: CONSPIRACY TO COMMIT CRIMINAL ACTS PRIOR TO NATURALIZATION CAN STILL RESULT IN REVOCATION OF CITIZENSHIP

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One of the advantages of becoming a US citizen is that one is no longer susceptible to being deported from the United States, especially if the person has been convicted of a crime. While being convicted of a crime results in criminal penalties, a US citizen can at least take comfort that there will be no removal, and the United States will continue to remain home for the convicted person.

Think again.

In [\*United States of America v. Olivar\*](#), the Ninth Circuit Court of Appeals on April 18, 2016 upheld the revocation of citizenship of a naturalized person who was convicted of criminal conspiracy for acts undertaken prior to applying for naturalization. Olivar, a native of the Philippines, was naturalized as a US citizen in May 2002. In the same year, according to a [Law360 story](#), Olivar began working at a law firm in the Los Angeles area in 2002. Seven years later, in early 2009, he was indicted on conspiracy charges in connection with a visa fraud scheme. Olivar and a second individual recruited people who were not authorized to work in the U.S., charging them anywhere between \$1,000 and \$7,500 to find a business that would sponsor them for an employment-based immigrant visa. They filed applications with the Labor Department and immigration authorities claiming the individuals would be working in skilled positions, like accountants or public relations specialists, according to Law360. The businesses allegedly never actually intended to employ the individuals, the prosecutors alleged. Olivar was also accused of helping the immigrants falsify their education and work experience if they didn't meet the requirements for the H-1B visa, by using false diplomas, transcripts and reference letters. Olivar

eventually pled guilty to conspiracy to commit visa fraud in April 2009 in violation of 18 USC 2, 371 and 1546 and was sentenced to just over one year in jail. Federal authorities later started efforts to revoke his citizenship, claiming he lacked good moral character in the five year period leading up to naturalization in May 2002 based on unlawful acts that adversely reflected upon his good moral character. These acts involved a conspiracy to commit visa fraud, which was a crime involving moral turpitude.

While this sounds Kafkaesque, it is possible to lose the coveted US citizenship if a person is convicted of a crime, based on conduct that occurred prior to naturalization. While a person only knows for certain about the crime being committed at the point of conviction, prior acts, or even an agreement to commit acts in the future, can potentially lead a court to conclude retroactively that acts prior to conviction adversely reflected on the person's good moral character.

The Form N-400, Application for Naturalization, asks broadly "*Have you ever committed a crime or offense for which you have never been arrested?*" In a prior blog, "[Crime Without Punishment: Have You Ever Committed A Crime For Which You Have Not Been Arrested?](#)" this author puzzled on how an immigration attorney should advise a client to answer this overbroad question. It is impossible to know whether a person has committed a crime or offense, unless it is proven beyond reasonable doubt in the criminal justice system. It may thus be problematic to advise a client to admit to a commission of a crime on the N-400 application when one does not know what provision of the law was violated, and whether the applicant met all the elements of that offense. Since this overbroad question also requires admitting non-criminal offenses, it would be difficult, and frankly ridiculous, to plumb through the memory of the client to recall every minor offense that may have been committed in this person's life, which may include such insignificant offenses as jay walking (a daily occurrence in New York City!) or driving above the speed limit.

Nevertheless, failure to disclose whether a person has committed a crime for which there was no charge or arrest can be used against the person if there is a conviction after the naturalization. In [U.S. v. Bogacki](#), for example, the defendant was convicted for conspiracy to bring in and harbor aliens, make false statements, commit mail fraud and wire fraud, and fraud by misuse of immigration documents, among others, after he had naturalized. However, the government was successful in denaturalizing him for his failure to specifically

mention the question about committing a crime for which you have not been arrested on the N-400 application.

In *USA v. Olivar*, the Ninth Circuit Court of Appeals avoided relying on this ambiguous question on the N-400 application, and instead found that he lacked good moral character during the five year period preceding his naturalization. According to the Court, "The district court made clear that the Appellant was denaturalized because he lacked good moral character during the statutory period, and did not find that Olivar should be denaturalized because he made a material misrepresentation on his naturalization form."

What is unusual about *USA v. Olivar* is that he had only agreed to commit a criminal act in the future, and the essential element of conspiracy, the overt act, only occurred after his naturalization. Was Olivar a criminal during the five year period prior to his naturalization, and thus lacking in good moral character? The following extract from the Law360 story is worth noting:

During oral arguments earlier this month, his attorney, Nimrod Haim Aviad of Crowell & Moring LLP, acknowledged that authorities alleged the conspirators began discussing the visa scheme back in 2001, several months before Olivar became a citizen.

But Aviad said no one acted on the plan until after Olivar's naturalization. So, when Olivar was sworn in as a U.S. citizen, he was not a criminal and had not committed an illegal act, Aviad argued.

"When I agree to commit an act, that does not mean that I committed it," he said. "That is the very basic principle that underlies the law of conspiracy."

Judges appeared to be skeptical of the argument.

"So somebody could decide to engage in four or five illegal conspiracies to smuggle drugs, smuggle aliens, do a whole bunch of stuff, and say 'but hold off, I'm going to become a citizen next week and then we'll start buying the guns?'" Circuit Judge Susan P. Graber asked. "And that's okay?"

As a result of his conviction in 2009, Olivar is no longer a US citizen based on an agreement prior to his naturalization to commit criminal acts in the future, and is potentially deportable. His case is especially striking since conspiracy, in addition to proving that two or more people were in agreement to commit a crime, also requires an "overt act" taken in furtherance of the crime. In *USA v. Olivar*, the applicant could not have been

accused of conspiracy during the statutory period requiring good moral character prior to naturalization as the overt act had occurred long after he had become a citizen. This appears to be a case of first impression, and the Ninth Circuit's conclusion seems to be at odds with the law of conspiracy. Even with respect to decisions involving deportation, the only relevant decision involving deportation as a result of conspiracy that this author found (with [David Isaacson's](#) assistance) is *Matter of T*-, 2 I&N Dec. 95 (1944). In *Matter of T*, the respondent was found not to be deportable for a crime involving moral turpitude committed within 5 years *after* entry as the overt act in that conspiracy occurred prior to his entry into the United States. The respondent, however, was still found deportable for having admitted to the commission of a crime involving moral turpitude prior to this entry, but it is significant that the charge of deportability for the commission of a crime after entry was not sustained as the overt act took place prior to entry. Because the Ninth Circuit's decision in *USA v. Olivar* does not appear to be crystal clear, this is not going to be the last word on whether citizenship can be revoked based on an agreement to commit a crime prior to naturalization, but where the overt act occurred after naturalization.