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HIGHLIGHTS OF GOOD MORAL CHARACTER IN NATURALIZATION

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In order to qualify for naturalization, an applicant must demonstrate that she is or was a person of good moral character (GMC) throughout the relevant statutory period and through the time she takes the oath of allegiance. See Immigration and Nationality Act (INA) § 101(f); Title 8, Code of Federal Regulations (CFR) § 316.10. For the average person, GMC may not be an issue – the average person will have the requisite "character which measures up to the standards of average citizens of the community in which the applicant resides," USCIS Policy Manual, Volume 12, Part F (hereinafter "PM"), Ch.1A, and will not be statutorily precluded from showing GMC. GMC "does not mean moral excellence . . . ."

Matter of Sanchez-Linn, 20 I&N Dec 362, 366 (BIA 1991). GMC is "is incapable of exact definition," *Posusta v. United States,* 285 F.2d 533, 535 (2d Cir. 1961), and extremely complex. Because the statute and regulations governing the meaning of GMC cover a broad range of conduct and acts, and because officers will be exercising discretion in making a determination, an advocate must carefully review GMC with a client to ensure any potential issues are analyzed and addressed. There are statutory and regulatory bars to GMC, as well as a catchall provision which allows an adjudicator to exercise discretion and find a lack of GMC where none of the other bars apply, and it is important to keep them all in mind. Having an issue that could result in a negative determination of GMC can do more than prevent a person from obtaining U.S. citizenship – it can signal that the individual may be removable and may even be subject to mandatory detention if put in removal or if the person returns to the United States after traveling abroad. USCIS officers must assess GMC on a "case-by-

case" basis, 8 CFR § 316.10(a), examining an applicant's conduct and acts during the relevant statutory period immediately preceding the application – 5 years as a general matter, INA 316(a)(1), 3 years for those who have been residing with their U.S. citizen spouse for that period, INA 319(a), and 1 year for those who have served honorably in the U.S. military, 8 CFR § 329.2(d). However, officers are not limited to the statutory periods, and can go back in time as far as they believe necessary in assessing whether a person has experienced a "reform of character," or if the officer believes that "the earlier conduct and acts appear relevant to a determination of the applicant's present moral character." 8 CFR § 316.10(a)(2). An officer must consider "the totality of the circumstances and weigh all factors" when considering reformation of character in conjunction with GMC within the relevant period. PM Ch.2B. The PM provides officers with the following list of factors to consider in assessing an applicant's current moral character and reformation of character: family ties and background; absence or presence of other criminal history; education; employment history; other law-abiding behavior (meeting financial obligations, paying taxes, etc.); community involvement; credibility of the applicant; compliance with probation; length of time in United States. *Id*. A GMC determination therefore involves a balancing test and advocates should make a strong showing of equities where any negative factors that do not constitute a bar to establishing GMC are present, to present a strong foundation upon which an adjudicator may be swayed to find in an applicant's favor.

Absolute Bars to Showing GMC

An individual cannot show GMC if he or she has:

- Been convicted of murder at any time (8 CFR § 316.10(b)(i));
- Engaged in persecution, genocide, torture, or severe violations of religious freedom at any time (INA § 101(f)(9));
- Been convicted of an aggravated felony as defined in INA § 101(a)(43) on or after November 29, 1990 (INA § 101(f)(9), 8 CFR § 316.10(b)(ii)).

Note that an individual who was convicted of an aggravated felony *before* November 29, 1990 and does not otherwise fall into any of the permanent or conditional preclusions to showing good moral character can naturalize. They face an uphill battle and must demonstrate that they have made exemplary efforts to redeem themselves, but it can be done, if not at the USCIS level, then in federal court. For an excellent example of the showing that needs to be

made, and how advocates can prepare not only an application but also their client for the application process, see *Lawson v. USCIS,* 795 F.Supp.2d 283 (SDNY 2011), discussed at length in a previous blog post. Judge Denny Chin of the U.S. Court of Appeals for the Second Circuit, sitting by designation in district court, found that Lawson, a Vietnam War veteran honorably discharged from the Marines, had 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. Judge Chin found Lawson had 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" and continued his efforts at reform after he was released. Cases like *Lawson* demonstrate that in preparing a naturalization application for a client with a criminal history or any other GMC issue, it is important to pull out all the stops and be creative about demonstrating all of the ways in which your client is an asset to the community. Make sure they are able to communicate the many ways in which they participate in and contribute to the various communities with which they may interact.

Conditional Bars for Acts in the Statutory Period

Beyond the absolute bars to establishing GMC, the statute and regulations provide a laundry list of what USCIS refers to as "conditional bars" to establishing GMC, found in INA § 101(f) and 8 CFR 316.10:

- One or more crimes involving moral turpitude
- Convicted of two or more offenses, aggregate sentence imposed five years or more
- Controlled substance violation
- Admitting to any of the above
- Incarceration for aggregate of 180 days due to a conviction
- False testimony
- Prostitution or commercialized vice
- Smuggling of a person
- Polygamy
- Gambling
- Habitual drunkard

Here are highlights of some of the more complex conditional bars:

Crime Involving Moral Turpitude

Being convicted of a crime involving moral turpitude (CIMT) during the statutory period precludes a finding of GMC. This excludes a conviction for a purely political offense as well as an offense that falls within the petty offense exception in INA § 212(a)(2)(ii)(II) (maximum penalty possible does not exceed one year and the person was sentenced to 6 months or less imprisonment) or the youthful offender exception in INA § 212(a)(2)(ii) (committed crime when under 18, crime committed (and person released from resulting confinement) more than 5 years before application for the benefit). If the client is unclear on whether they have been convicted or what they may have been convicted of, make sure you obtain any and all records relevant to their brush with the criminal justice system. You can have them request a copy of their file from their criminal defense attorney, obtain an FBI rap sheet, have them go to the court where their case was heard and request a record or court disposition. Try to get as much documentation as possible and do not rely solely on the FBI rap sheet because it may be incomplete. Like GMC, CIMT is not defined in the INA or implementing regulations and is incredibly complex. Moral turpitude refers generally to conduct that "shocks the public conscience," conduct that "is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. . . . Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or *malum in se* so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Franklin,* 20 I&N Dec. 867, 868 (BIA 1994), aff'd, 72 F.3d 571 (8th Cir. 1995). Key to the determination of moral turpitude is "whether the act is accompanied by a vicious motive or a corrupt mind." *Id*. Each statute must be examined to determine whether it involves moral turpitude, but some common elements of CIMTs are fraud, theft (intent to permanently deprive the owner of property), crimes involving bodily harm to another with an intent to harm, and even some instances of harm resulting from criminally reckless conduct. The CIMT concept has developed over time through a multitude of court decisions, and the steps one must take in analyzing whether a crime amounts to a CIMT continues to be fought out in the courts. The determination of whether a crime is a CIMT depends on the judge, the wording of the particular statute at issue, and whether the judge applies the "categorical approach" (which requires consideration of the minimal

conduct implicated by a penal law) or "modified categorical approach" (where the categorical approach does not yield an answer because a criminal statute includes offenses that fall outside the generic criminal category, this approach allows consideration of the record of conviction for clarification), among other things. Because the topic of CIMTs can fill many volumes, an in-depth analysis of how to identify a CIMT is beyond the scope of this blog post, and the reader is referred to resources such as Mary E. Kramer, *Immigration Consequences of Criminal Activity: A Guide to Representing Foreign-Born Defendants* (5th Ed. 2012)(an AILA publication), that deal in more depth with CIMTs and other issues relating to crimes and immigration.Keep in mind that in addition to precluding a finding of GMC, one CIMT within 5 years of admission where the crime is one for which a sentence of one year or more may be imposed makes a person deportable, see INA § 237(a)(2)(A)(i), as do two or more CIMTs at any time. See INA § 237(a)(2)(A)(ii). An advocate also has to be aware of the impact of a criminal conviction on a lawful permanent resident who wants to travel outside the United States. If a lawful permanent resident with one or more CIMTs on her record travels outside the United States, upon return she may be considered an applicant for admission under INA § 101(a)(13), and may be subject to mandatory detention under INA § 236(c).

False Testimony

Giving false testimony with the intent of obtaining an immigration benefit precludes a finding of GMC even if the information provided in the false testimony is not material. "Testimony" must be oral and must have been made under oath. False statements in writing, such as false information provided in an application or fraudulent documents submitted with an application do not constitute "false testimony" for the purposes of this basis for denying GMC. Note however, that failure to truthfully answer the questions on the Form N-400 when combined with the fact that an applicant is usually asked to reaffirm his or her answers under oath during the naturalization interview can constitute false testimony. Providing a false *written* statements and/or fraudulent documents can result in a finding of a lack of GMC under the catchall provisions. For example, an individual provides a forged document to the government in conjunction with application for naturalization. Although the document does not meet the requirements for "false testimony," the fact of having submitted a forged document to the government could qualify as an "unlawful act" because it would be a violation of 18 USC 1503 and/or 18 USC

1519, among others. A similar outcome could result from the submission of a false affidavit or declaration made under penalty of perjury, which could qualify as an "unlawful act" as a violation of 18 USC 1623. For an in-depth and engaging discussion of how statements, both written and oral, can result in the inability to show GMC, see *Etape v. Napolitano*, 664 F.Supp.2d 498 (D. MD 2009). Be aware that not all incidents of false testimony need be fatal to a finding of GMC. Where an individual gives false testimony under oath for reasons other than obtaining an immigration benefit, such statements may not undermine a showing of GMC. False statements or misrepresentations made because of "faulty memory, misinterpretation of a question, or innocent mistake," *United States v. Hovsepian*, 422 F.3d 883, 887 (9th Cir. 2005), or as a result of "embarrassment, fear, or a desire for privacy," *Kungys v. United States*, 485 U.S. 759 (1988), should not preclude a showing of GMC. *See also, Lawson,* 795 F.Supp.2d at 294-295. False testimony raises another crucial issue for naturalization, separate from GMC. In a naturalization case, aside from showing GMC, an applicant must also demonstrate that he was lawfully admitted to the United States for permanent residence under INA 318. Any fraud, misrepresentation, or material omission in the individual's adjustment of status or immigrant visa process will not only prevent a person from naturalizing, it can also lead to recission of permanent residence under INA 246, if discovered within 5 years of admission, and to removal proceedings at any time. Even after naturalization, an individual can be subject to denaturalization and removal proceedings because of fraud, misrepresentation or material omission. Naturalization may be revoked pursuant to INA 340(a) where it was procured by concealment of a material fact or willful misrepresentation.

Prostitution

If a person has engaged in prostitution, procured or attempted to procure or to import prostitutes or receives the proceeds of prostitution, or was engaged in any other type of commercialized vice during the statutory period, he will be precluded from showing GMC. This section does not require a conviction and applies even if the prostitution occurs in a jurisdiction where it is legal. Prostitution is defined in the Department of State regulations as "promiscuous sexual intercourse for hire." 22 CFR § 40.24(b). However, one incident of prostitution does not constitute "engaging in" prostitution for the purpose of this bar to GMC. See *Matter of T*, 6 I&N Dec. 474, 477 (BIA 1955). Rather, to " 'engage in' means to carry on over a period of time a type of conduct, a pattern

of behavior, or form of activity in which sale of the body for carnal intercourse is an integral part . . . ." *Id*. Similarly, in *Matter of Gonazalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008), the BIA agreed with the respondent in that case that " 'procure' does not extend to an act of solicitation of a prostitute on one's own behalf." The PM cites to and indicates its agreement with these two cases. Keep in mind that prostitution is generally considered a CIMT, *see Matter of W,* 4 I&N Dec. 401 (Cen. Office 1951), but a single conviction for prostitution will most likey fall within the petty offense exception in INA § 212(a)(2)(A)(ii)(II), and thus will not trigger the CIMT bar to GMC. Obviously, if a client has a prostitution conviction, you should check to make sure the petty offense exception applies. More than one conviction, however, will bring the person within the CIMT bar to GMC, if during the statutory period, and will also make the person deportable under INA § 237(a)(2)(ii), inadmissible under INA § 212(a)(2)(A)(i), and subject to mandatory detention under INA § 236(c). Please note that whether simple prostitution is a CIMT is currently being contested before the Board of Immigration Appeals, and AILA has submitted an amicus brief arguing that "the BIA should hold that simple prostitution is not categorically a crime involving moral turpitude for the sex worker or client."A victim of human trafficking who had T nonimmigrant status and adjusted to LPR status, would presumably not have to be concerned about the prostitution bar to showing GMC, because his or her involvement with prostitution would likely have been over for at least 8 years, given that in order to qualify for LPR, one has to have been in T status for 3 years, and then to qualify for naturalization, one must be in LPR status for at least 5 years. However, any arrests and/or convictions must be disclosed in the naturalization process, and extenuating circumstances and equities will need to be presented to convince an officer to exercise discretion in the applicant's favor.

Habitual Drunkard

A person who is a "habitual drunkard" during the statutory period cannot show GMC. The PM directs officers to examine various documents that may reveal habitual drunkenness including "divorce decrees, employment records, an arrest records." PM Ch.5J. Other factors that officers may look to in determining whether someone is a habitual drunkard include "termination of employment, unexplained periods of unemployment, and arrests or multiple convictions for public intoxication or driving under the influence." *Id*. It is not clear how many convictions for or arrests for driving under the influence (DUI)

would trigger a finding that someone is a habitual drunkard. As a general matter, a single conviction for a simple DUI (or driving while intoxicated (DWI), without any aggravating factors, should not result in a negative determination regarding GMC. *See, e.g., Rangel v. Barrows,* No. 07 Civ. 279(RAS), 2008 WL 4441974, at *3 (E.D.Tex. Sept. 25, 2008) (" single DWI conviction is insufficient to preclude an applicant from establishing good moral character."); *Ragoonanan v. USCIS,* No. 07 Civ. 3461(PAM), 2007 WL 4465208, at *4 (D.Minn. Dec. 18, 2007) (" single DWI conviction, standing alone, does not statutorily bar a naturalization applicant from establishing good moral character when he has been candid about the conviction."). Even multiple DUI convictions have not resulted in a negative determination of GMC. *See, e.g., Yaqub v. Gonzales*, No. 05 Civ. 170(TSH), 2006 WL 1582440, *5 (S.D.Ohio June 6, 2006) (holding that two DUI convictions do not preclude finding of good moral character, especially where applicant is "forthright"); *Puciaty v. Dep't of Justice,* 125 F.Supp.2d 1035, 1039 (D.Haw.2000) (holding that two DUI arrests do not preclude finding of good moral character). Moreover, simple DUI should not constitute a CIMT or a "crime of violence" aggravated felony. A single DUI conviction without aggravating factors, for example under a statute that does not include any elements relating to intent, such as an intent to harm, would not qualify as a CIMT, nor would multiple convictions for simple DUI. *See e.g., Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (finding that multiple convictions for the same DUI offense, which individually is not a crime involving moral turpitude, do not, by themselves, aggregate into a conviction for a crime involving moral turpitude) (citing *Matter of Fualaau,* 21 I&N Dec. 475 (BIA 1996)). After the Supreme Court decision in *Leocal v. Ashcroft,* 543 U.S. 1 (2004), simple DUI convictions do not generally qualify as "crime of violence" aggravated felonies. Of course, each statute must examined to ensure the analysis in Leocal applies; in that case the key was the absence of a mental state that would give rise to a finding of moral turpitude. However, if a client does have even just one DUI conviction, you have to be prepared to support the argument that a single DUI should not preclude demonstration of GMC, especially in light of the number of cases that go to the BIA and federal courts on this issue and reports coming out of field offices.

Bars that apply absent "extenuating circumstances"

For the following three conditional bars, which include the catchall of "unlawful acts," unless the applicant can show extenuating circumstances, he will be

found to lack GMC if any of the below occurred during the statutory period. Keep in mind that with regard to these conditional bars, the applicant is effectively entitled to, and in all circumstances should, show extenuating circumstances. In general, extenuating circumstances must precede or be contemporaneous with the commission of the offense – equities that arise after the commission of the offense will not be viewed as "extenuating circumstances" by DHS. *See* PM, Ch.2E.

- Willful Failure to Support Dependents
- Extramarital Affairs which tended to destroy a marriage
- Unlawful Act

The "unlawful acts" bar provides a broad spectrum of issues. A person is precluded from showing GMC if, during the statutory period and in the absence of extenuating circumstances, he has 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 Sec.316.10(b)(1) or (2)." According to the PM, an " 'unlawful act' includes any act that is against the law, illegal or against moral or ethical standards of the community. The fact that an act is a crime makes any commission thereof an unlawful act." PM Ch.5E. The PM goes over the examples of unlawful voting, false claim to U.S. citizenship for voting, and failure to pay taxes. Here we review common issues including traffic tickets, domestic disputes, and pending cases. In 2006, USCIS confirmed through AILA liaison that a "single traffic ticket that does not result in a disqualifying arrest or conviction under the INA or a non-criminal moving violation, standing alone, will not be the sole basis for a denial of naturalization for lack of the requisite moral character." You should review traffic tickets with your client and if they have a series of tickets, ask them to explain, because if they have a large number of tickets, this may lead to a question of whether an adjudicator will see your client as failing to live up to community standards in having a repeated series of unlawful acts. Some clients may come to you with a history of domestic disputes. Be sure to analyze carefully any contact your client may have had with the criminal justice system or family court, relating to any domestic altercations. Determine whether the client has had arrests, convictions, or protective orders relating to a domestic incident. Domestic violence can result in convictions that count as CIMTs and/or aggravated felonies, and can trigger deportability under INA 237(a)(2)(E). Where a client has been arrested but no charges resulted from the arrest, the arrest must still

be disclosed on the Form N-400, because failure to disclose an arrest can constitute false testimony in the context of a naturalization interview. The arrest itself will likely trigger an inquiry into the "unlawful act" that led to the arrest, thus the client must be prepared to explain briefly what happened with the arrest in a way that will not lead to an admission that meets the definition of a "conviction" pursuant to INA § 101(a)(48) *(Matter of K-*, 7 I&N Dec. 594 (BIA 1957) mandates the specific procedure that a government official must follow in order to elicit an admission that may qualify as a conviction). If a client has a pending case, even for something minor like a disorderly conduct or a simple DUI with no aggravating factors, it would be best to wait for the case to be resolved before applying for naturalization, or try to get the case resolved before the interview. (Of course, even minor charges require analysis of the statute at issue to ensure what might at first appear minor is something more complex.) If it is not possible to reach resolution before an interview, when facing a charge that you have determined does not trigger any issues, such as a simple DUI (and there are no other problematic cases in your client's history), you should be prepared to argue that even if a conviction were to result, your client can still meet his or her burden of establishing good moral character, especially in light of the fact that "we do not require perfection in our new citizens." *Klig v. United States,* 296 F.2d 343, 346 (2d Cir. 1961).

Catchall Provision

Finally, even if an individual does not fall within one of the permanent or conditional bars to establishing GMC, INA § 101(f) provides that this does not "preclude a finding that for other reasons such person is or was not of good moral character." This is where an adjudicator can exercise discretion in assessing GMC. As noted above, adjudicators are required to consider the totality of the circumstances and engage in a balancing of factors in making a determination of GMC. Thus it is our job as advocates to present as complete a picture of a client as possible where GMC is likely to be an issue. A careful exploration of a client's past and present will yield much useful information that can be used to present extenuating circumstances, reformation of character, and to demonstrate that the client has GMC sufficient to merit a grant of citizenship. Keep in mind that GMC issues overlap with other issues and that if you get a red flag while going over GMC issues, your client might have much more significant problems and face risks including removal and mandatory detention. Analysis of GMC will help you determine whether the client should

or should not risk applying for naturalization, and in managing a client's expectation as to how much of a fight will be necessary to show GMC, and in what venues (USCIS, AAO, federal court) that fight might need to take place.