CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

THE INAPPROPRIATENESS OF FINDING ABANDONMENT OF LAWFUL PERMANENT RESIDENCY DURING NATURALIZATION

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On November 18, 2020, U.S. Citizenship and Immigration Services (USCIS) updated policy guidance to clarify the circumstances when the agency would find applicants ineligible for naturalization because they were not lawfully admitted for permanent residence. "Applicants are ineligible for naturalization if they obtained lawful permanent residence (LPR) status in error, by fraud or otherwise not in compliance with the law," USCIS said.

The update also clarifies that USCIS reviews whether an applicant has abandoned LPR status when it adjudicates a naturalization application. If an applicant does not meet the burden of establishing maintenance of LPR status, USCIS said it generally denies the naturalization application and places the applicant in removal proceedings by issuing a Notice to Appear (NTA). The update also provides that USCIS generally denies a naturalization application "filed on or after the effective date if the applicant is in removal proceedings pursuant to a warrant of arrest."

The updated policy guidance does not break new ground. USCIS has always rendered applicants ineligible for naturalization after it finds that they were not lawfully admitted for permanent residence. One example is if the applicant made a misrepresentation while applying for a tourist visa many years ago and failed to disclose this fact when filing the I-485 application for adjustment of status along with the submission of a waiver to overcome this ground of inadmissibility under INA 212(a)(6)(C)(1).

What is more troubling about this new guidance is that it incentivizes USCIS to find that lawful permanent residents may have abandoned that status

previously even though Customs and Border Protection (CBP) may have admitted them into the United States. A naturalization applicant may have at some point in the past been outside the US for more than 180 days, and then admitted by CBP into the US. Even if the LPR remained outside the US for over a year, as a result of inability to return to the US due to Covid-19, the LPR may still be admitted into the US. The new guidance now encourages naturalization officers to investigate whether the applicant may have abandoned LPR status regardless of the length of prior trips abroad, even if the trips abroad were for less than 180 days. Indeed, the guidance encourages naturalization examiners to overrule a determination that CBP made at the time of the LPRs admission into the US. At that point in time, the government had a very heavy burden to establish that the LPR had abandoned permanent residence.

Under INA 101(a)(13)(C), LPRs shall not be regarded as seeking admission into the United States unless, inter alia, they have abandoned or relinquished that status or have been absent from the US for a continuous period in excess of 180 days.

It has historically been the case that when an applicant for admission has a colorable claim to lawful permanent resident status, the burden is on the government to show that they are not entitled to that status by clear, unequivocal and convincing evidence. This standard was established by the Supreme Court in *Woodby v. INS*, which held that the burden was on the government to prove by "clear, unequivocal, and convincing evidence" that the LPR should be deported from the United States. Subsequent to *Woodby*, in *Landon v. Plasencia*, the Supreme Court held that a returning resident be accorded due process in exclusion proceedings and that the *Woodby* standard be applied equally to a permanent resident in exclusion proceedings.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") introduced the notion of "admission" in INA §101(a)(13)(C). "Admission" replaced the pre-IIRIRA "entry" doctrine as enunciated in *Rosenberg v. Fleuti*, which held that a permanent resident was not considered making an entry into the US if his or her departure was "brief, innocent or casual." Under §101(a)(13)(C), an LPR shall not be regarded as seeking admission "unless" he or she meets six specific criteria, which include the permanent abandoning or relinquishing of that status or having been absent for a continuous period in excess of 180 days. *Fleuti* has been partially restored in *Vartelas v. Holder* with respect to grounds of inadmissibility that got triggered prior to the enactment

of IIRIRA. Moreover, the returning permanent resident who returns from a trip abroad that was more than 180 days would be treated as an applicant for admission under INA 101(a)(13)(C)(ii), and thus vulnerable to being considered inadmissible. INA 240(c)(2), also enacted by IIRIRA, requires an applicant for admission to demonstrate by "clear and convincing evidence" that he or she is "lawfully present in the US pursuant to a prior admission." INA 240(c)(2) places the burden on an applicant for admission to prove "clearly and beyond doubt" that he or she is not inadmissible. On the other hand, with respect to non-citizens being placed in removal proceedings, INA 240(c)(3), also enacted by IIRIRA, keeps the burden on the government to establish deportability by "clear and convincing" evidence.

Notwithstanding the introduction of INA 101(a)(13)(C), as well as INA 240(c)(2) and INA 240(c)(3), the *Woodby* standard still prevails and nothing in 101(a)(13)(C) overrules it, and the burden of proof is still on the government through clear, convincing and unequivocal evidence that LPR has lost that status. See *Matadin v. Mukasey*. This was further established in 2011 by the Board of Immigration Appeals in *Matter of Rivens*, which held:

> *Given this historical practice and the absence of any evidence that Congress intended a different allocation of standard of proof to apply in removal cases arising under current section 101(a)(13)(C) of the Act, we hold that the respondent – whose lawful permanent resident status is uncontested – cannot be found removable under the section 212(a) grounds of inadmissibility unless the DHS first proves by clear and convincing evidence that he is to be regarded as an applicant for admission in this case by having "committed an offense identified in section 212(a)(2).*

Although in *Matter of Rivens*, the BIA acknowledged that the language in INA 240(c)(3) indicated "clear and convincing" evidence rather than "clear, convincing and unequivocal" evidence as in *Woodby,* the BIA has not had occasion to determine that the deletion of one word "unequivocal" has effected a substantial change to the standard.

Additionally, in cases involving the abandonment of permanent residence, it is not the length of the absence that is determinative but whether it was a "temporary visit abroad" pursuant to INA 101(a)(27)(A). The term "temporary

visit abroad" has been subject to interpretation by the Circuit Courts that requires a searching inquiry of the purpose of the trip, thus making it harder for the government to find that the LPR abandoned that status even if the trip abroad was for an extended period of time in addition to the high burden of proof that the government is required to meet under *Woodby*. The Ninth Circuit's interpretation of "temporary visit abroad" in *Singh v. Reno* is generally followed:

> *A trip is a "temporary visit abroad" if (a) it is for a relatively short period, fixed by some early event; or (b) the trip will terminate upon the occurrence of an event that has a reasonable possibility of occurring within a relatively short period of time. If as in (b) the length of the visit is contingent upon the occurrence of an event and is not fixed in time and if the event does not occur within a relatively short period of time, the visit will be considered a "temporary visit abroad" only if the alien has a continuous, uninterrupted intention to return to the United States during the visit.*

The Second Circuit in *Ahmed v.Ashcroft*, with respect to the second prong, has further clarified that when the visit "relies upon an event with a reasonable possibility of occurring within a short period to time…the intention of the visitor must still be to return within a period relatively short, fixed by some early event." The Sixth Circuit in *Hana v. Gonzales* held that LPR status was not abandoned where LPR was compelled to return to Iraq to resume her job and be with her family while they were waiting for immigrant visas to materialize.

Although the USCIS guidance to naturalization examiners cites these and other cases regarding abandonment of LPR status, this determination was already made by the CBP at the time of the applicant's admission when the burden was on the government to establish through clear and convincing evidence that the LPR had abandoned that status. Since presumably the government did not meet this burden then, the LPR was admitted into the US. It is inappropriate to empower the USCIS through new policy guidance to once again meet this burden after the fact in a naturalization interview. It is one thing to investigate whether an applicant was ineligible for LPR status at the time of receiving it based on a ground of inadmissibility (e.g. fraud or misrepresentation) that was not overcome, but it is quite another to waste government resources to require

USCIS to meet its heavy burden again regarding abandonment of LPR status during naturalization. If the USCIS wants to retain guidance regarding finding abandonment in a naturalization interview, it can be narrowed, which the Biden administration may wish to consider, in circumstances where naturalization may be denied when it is readily obvious that the applicant is no longer a permanent resident. This may apply to one who was once an LPR as the unsuccessful plaintiff in *Biglar v. Attorney General*, departed the US over a period of several years and then was subsequently admitted in B-2 visitor status, after which the applicant applies for naturalization. The Eleventh Circuit held that Biglar had abandoned his LPR status even though he sought to renew his green card after he was admitted into the US in B-2 status. Except for these unusual facts, the USCIS should not be investigating abandonment based on any and every absence especially when the CBP admitted the applicant as an LPR after being aware of the length of that absence from the US.

While the government will argue that the burden is on the applicant for naturalization to establish his or her eligibility, see *Berenyi v. INS*, the guidance also instructs the USCIS to initiate removal proceedings against LPRs who have been deemed to abandon their status. While in removal proceedings, applicants must insist that the government continue to meet its heavy burden through clear and convincing evidence to demonstrate that they abandoned LPR status, and this burden becomes doubly difficult when USICS is required to second guess a CBP officer's determination regarding an LPRs admission several years later in a naturalization interview.

The new guidance has been introduced by the Trump administration to create a chilling effect on potential applicants on naturalization based on past travel abroad. The Biden administration should immediately revise the guidance on January 20 or shortly thereafter.