

IMMIGRATION SERVICES DIVISION,
FIELD OPERATIONS



POLICY MEMORANDUM NO. 86

SUBJECT: Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote



U.S. Department of Justice
Immigration and Naturalization Service


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Office of the Executive Associate Commissioner

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MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
SERVICE CENTER DIRECTORS
OFFICERS-IN-CHARGE

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Immigration Services Division

SUBJECT: Procedures for Handling Naturalization Applications of Aliens Who Voted
Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or
Registering to Vote

This memorandum provides guidance on handling naturalization applications of aliens who have unlawfully voted or falsely represented themselves as U.S. citizens in association with registering to vote or by voting. This guidance supplements the May 13, 1997, Office of Naturalization Operations Policy Memorandum titled, "Voter Registration and Standardized Citizenship Testing," which instructs adjudicators to ask all naturalization applicants if they have ever registered to vote or voted in a U.S. election. This memorandum should be read in conjunction with the Commissioner's November 17, 2000 memorandum titled, "Exercising Prosecutorial Discretion," which provides more general guidance on determining when or if removal proceedings should be initiated for certain naturalization applicants. This memorandum can be found on the INS Power Port under the section entitled "INS Policy and Procedural Memoranda".

What sections of the Immigration and Nationality Act (INA) address illegal voting?

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) added sections 212(a)(10)(D)(i) and 237(a)(6)(A) to the INA to address illegal voting.ⁱ Title II of the Child Citizenship Act of 2000 (CCA), Pub. L. 106-395, added sections 212(a)(10)(D)(ii) and 237(a)(6)(B) to provide exceptions to the removal grounds for lawful permanent residents who resided in the United States prior to age 16 and who have U.S. citizen parents.ⁱⁱ The CCA also

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added a clause to section 101(f)ⁱⁱⁱ to address good moral character (GMC) determinations for individuals who voted unlawfully.

Are there any criminal penalties for illegal voting?

Non-citizens who violate or who have violated these provisions may face criminal prosecution in addition to administrative removal. IIRIRA created a new section 18 U.S.C. 611,^v establishing criminal penalties for aliens who have voted in any federal election. An alien convicted of violating this provision of the law may be fined, imprisoned for up to one year, or both.

The CCA also added an exception to the criminal provision, 18 U.S.C. 611(c), for lawful permanent residents who resided in the United States prior to age 16, have U.S. citizen parents, and who reasonably believed at the time of voting in violation of the law that he or she was a citizen of the United States. The criminal provision exception only applies to convictions that became final on or after the date of enactment of the CCA – October 30, 2000.^v In such cases, because the district court has made the determination that the applicant did not fall within the terms of the exception, the Service need not re-adjudicate this issue.

Even if there is no conviction for illegal voting, officers should continue to analyze the case as provided on page 4 of this memorandum.

Is a criminal conviction for illegal voting required to support a removal charge?

No. An alien who votes illegally but who has not been convicted under 18 U.S.C. 611 is still potentially removable. Removal charges can be sustained simply by proving that the alien voted in violation of the relevant law.

What sections of the INA address false claims to U.S. citizenship?

IIRIRA added sections 212(a)(6)(C)(ii)(I) and 237(a)(3)(D)(i) to the INA to address false claims to U.S. citizenship.^{vi} The CCA added sections 212(a)(6)(C)(ii)(II) and 237(a)(3)(D)(ii) to provide exceptions to the removal grounds.^{vii} The CCA also added a clause to section 101(f)^{viii} to address GMC determinations for individuals who made a false claim to U.S. citizenship.

Are there any criminal penalties for making a false claim to U.S. citizenship?

IIRIRA added section 1015(f)^{ix} to Title 18 to establish criminal penalties for any alien who makes a false claim to U.S. citizenship in order to vote or register to vote in an election. An alien convicted of violating this provision of the law may be fined or imprisoned for not more than five years, or both.

The CCA also added an exception to the criminal provision, the last clause of 18 U.S.C. 1015(f), for lawful permanent residents who resided in the United States prior to age 16, have U.S. citizen parents, and who reasonably believed that he or she was a citizen of the United States at the time of making the false claim. Like 18 U.S.C. 611(c), this criminal provision

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exception only applies to convictions that became final on or after October 30, 2000.^x In such cases, because the district court has made the determination that the applicant did not fall within the terms of the exception, the Service need not re-adjudicate this issue.

Even if there is no conviction for making a false claim to U.S. citizenship, officers should continue to analyze the case as provided on page 4 of this memorandum.

Is a criminal conviction for making a false claim to U.S. citizen required to support a removal charge?

No. An alien who knowingly makes a false claim to U.S. citizenship for the purpose of voting or registering to vote, but who has not been convicted under 18 U.S.C. 1015(f) is still potentially removable. Removal charges can be sustained simply by proving that the alien knowingly made the false claim for purposes of voting or registering to vote.

How is making a false claim different from illegal voting?

In the voting context, an applicant can only be found to have violated the provision if his or her conduct would be deemed unlawful under the relevant Federal, state, or local election law.

For false claims to U.S. citizenship, there is no need to focus on the underlying election law that was violated. Officers need only establish that the applicant: (1) actually falsely represented himself or herself as a U.S. citizen on or after September 30, 1996^{xi}; and (2) that such representation was made for the purpose of registering to vote or voting.

What are the exceptions to the provisions related to illegal voting and false claims to U.S. citizenship?

The CCA establishes exceptions to removal under sections 212(a) and 237(a), to GMC under 101(f) of the INA, and to criminal prosecution under 18 U.S.C. 611 and 1015(f), for any alien:

- whose natural or adoptive parents (both parents) are or were U.S. citizens
- who permanently resided in the U.S. prior to his or her 16th birthday, and
- who “reasonably believed” at the time of the violation or false representation that he or she was a US citizen.

As a matter of policy, the Service has determined that the applicant’s parents had to be U.S. citizens at the time of the illegal voting or false claim to U.S. citizenship in order to meet the first prong of this exception.

How do I adjudicate these cases?

For every naturalization case where the applicant may have unlawfully voted or may have made a false claim to U.S. citizenship while voting or registering to vote, officers should analyze the case following the six steps outlined below (see also **Attachment A** for flowchart).

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Officers should note that in most instances there will not be a conviction under 18 U.S.C. 611 or 1015(f).

1. Determine if the applicant:
 - (a) actually voted in violation of the relevant election law; or
 - (b) made a false claim to U.S. citizenship when registering to vote or voting in any Federal, State, or local election any time on or after September 30, 1996;
2. If either "a" or "b" above happened, the applicant is removable. Now determine whether the applicant is eligible for the exceptions from removal as provided under sections 212(a) and 237(a) of the INA. If the applicant is eligible for the exceptions, the applicant is no longer removable. Proceed with adjudication of the N-400 (see Step 6).
3. If the applicant does not qualify for one of the exceptions, determine whether the applicant's case merits the exercise of prosecutorial discretion.
4. If the applicant's case does not merit the exercise of prosecutorial discretion, initiate removal proceedings and **continue** the naturalization application, pending the outcome of such proceedings.
5. If the applicant's case merits prosecutorial discretion, proceed with adjudication of the N-400 (see Step 6).
6. Assess the applicant's eligibility for naturalization. The assessment should focus on whether the applicant's conduct overall (including any other potential grounds of ineligibility) precludes a finding of good moral character. The assessment should also include a determination of whether the applicant is exempted from a finding that he or she does not have good moral character based on the exception contained in 101(f).

How do I determine if applicant voted in violation of relevant election law or made a false claim to U.S. citizenship?

(a) Voting in violation of election law

Whether the alien actually violated federal, state or local law depends upon whether he or she: (1) actually voted and (2) the act of voting violated a specific election law provision. The provisions governing voting and eligibility to vote will vary by location. In addition, the penalties for voting unlawfully will vary and may include a specific intent requirement.

Information about whether an applicant actually voted can come from his or her own admission under oath or from independent sources, such as voter records. Even if the applicant actually voted, however, the act of voting, by itself, is not sufficient to establish that the applicant voted unlawfully. Officers must also determine whether the applicant's act of voting would be deemed a violation under the relevant election law.

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To make the violation decision, officers must determine in what type of election the applicant voted – Federal, State, or local – and then review the appropriate jurisdiction’s election laws. Federal election laws provide that only U.S. citizens can vote. Clearly, if an applicant is convicted under 18 U.S.C. 611, which governs federal elections, the applicant has voted in violation of the law.

Some local municipalities permit lawful permanent residents and/or nonresident aliens to vote in municipal elections. Officers should review all code provisions that define who is eligible and/or qualified to vote in such elections.^{xii}

If the election law penalizes the actual act of voting, the fact that an applicant has actually voted is sufficient to establish that he or she has voted unlawfully. If, however, the election law penalizes the act of voting only upon an additional finding that the individual acted “knowingly” or “willfully,” adjudicating officers cannot conclude that an applicant voted unlawfully until they assess the circumstances surrounding the voting, the applicant’s credibility, and the documentary evidence. In these situations, officers should determine:

- (1) how, when, and where the applicant registered to vote and/or voted;
- (2) the extent of the applicant’s knowledge of the election laws;
- (3) whether the applicant received any instructions, or was questioned verbally about his or her eligibility to vote;
- (4) who provided the applicant with information about election laws or his or her eligibility to vote;
- (5) whether the election registration form and/or voting ballot:
 - (a) contains a specific question asking if the applicant is a U.S. citizen;
 - (b) requires the applicant to declare under penalty of perjury that he or she is a U.S. citizen; or
 - (c) requires the applicant to be qualified to vote and lists specifically the requirement of U.S. citizenship elsewhere on the form.

Officers should record the applicant’s testimony regarding his or her voting in a sworn statement, and obtain any relevant evidence to support the illegal voting charge. Such evidence, for example, can include a copy of the alien’s voter registration form with instructions and his or her voter registration card, establishing that U.S. citizenship was required in order to obtain the card.

If, after weighing all the favorable and unfavorable factors, the officer determines that the applicant voted with knowledge that such voting would be a violation, the officer can conclude that the applicant voted unlawfully.

If the applicant voted unlawfully, the applicant is removable. The officer must then proceed to the next steps of determining whether the applicant meets the exceptions to removal or merits an exercise of prosecutorial discretion.

(b) Making a false claim to U.S. citizenship to vote or register to vote

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Clearly, if an applicant is convicted under 18 U.S.C. 1015(f), which governs making a false claim to U.S. citizenship in order to vote or register to vote, the applicant has violated the law. However, absent a conviction, information about whether an applicant actually falsely represented himself or herself as a U.S. citizen can come from his or her own admission under oath or from independent documentary evidence, such as voter registration forms.

The law requires that the applicant have "represented" himself or herself as a U.S. citizen on or after September 30, 1996. "Representation" is not limited to oral statements made in response to questioning by an officer; an applicant can make a false representation if he or she signed an employment application or voter registration card that specifically asked the question "Are you a U.S. citizen?" or declared under oath or penalty of perjury, in writing or orally, that he or she was a U.S. citizen. Officers should record the applicant's testimony regarding his or her misrepresentation in a sworn statement, and obtain any relevant evidence to support a false claim to US citizenship charge. Such evidence, for example, can include a copy of the alien's voter registration form with instructions and his or her voter registration card, establishing that U.S. citizenship was required in order to obtain the card.

If the officer determines that the applicant made a false claim to U.S. citizenship for the purpose of voting or registering to vote, the applicant is removable. The officer must then proceed to the next steps of determining whether the applicant meets the exceptions to removal or merits an exercise of favorable prosecutorial discretion.

How do I determine if the applicant qualifies for the exceptions to the removal grounds?

If an applicant has been convicted for violation of 18 U.S.C. 611 or 1015(f), and the conviction became final on or after October 30, 2000, the applicant is removable and not eligible for exceptions created by the CCA.^{xiii}

If the applicant has not been convicted, or if the applicant's conviction became final prior to October 30, 2000, officers must analyze whether the applicant falls under the exceptions to the illegal voting and false claim to U.S. citizenship provisions under sections 212(a) and 237(a).

The exceptions apply to any alien:

- whose natural or adoptive parents (both parents) are or were U.S. citizens,
- who permanently resided in the U.S. prior to his or her 16th birthday, and
- who "reasonably believed" at the time of the violation or false representation that he or she was a U.S. citizen.

Officers will need to obtain evidence of the applicant's parents' citizenship status if not currently available in the applicant's A-file and use normal procedures for determining qualifying lawful permanent resident status. As a matter of policy, the Service has determined that the applicant's parents had to be U.S. citizens at the time of the illegal voting or false claim to U.S. citizenship in order to meet the first prong of this exception.

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To assess whether the applicant reasonably believed that he or she was a U.S. citizen at the time of the violation, officers must consider the totality of the circumstances in the case, weighing such factors as the length of time the applicant resided in the United States and the age when the applicant entered as a lawful permanent resident. For example, suppose an applicant acknowledges voting unlawfully, but claimed he or she believed he or she was a U.S. citizen because: (1) the applicant was born overseas and adopted as an infant by a U.S. citizen couple; (2) the applicant's parents mistakenly believed that the applicant's adoption and entry into the United States conferred citizenship upon the applicant; and (3) the applicant's parents always told him or her that he or she was a U.S. citizen. In this case, it is likely the applicant has established the "reasonable belief" necessary for an exception from the removal grounds.

An applicant who qualifies for the exceptions to removal is no longer removable. Officers should then determine whether the applicant is eligible for naturalization. If the applicant does not qualify for the exceptions to removal, officers should proceed to the next step and determine if the applicant's case merits a favorable exercise of prosecutorial discretion.

How do I determine whether the applicant's case merits prosecutorial discretion?

Officers should determine whether to initiate or decline to initiate removal proceedings on a case-by-case basis, following the procedures outlined in the Commissioner's November 17, 2000 memorandum titled "Exercising Prosecutorial Discretion."

If the applicant's case does not merit prosecutorial discretion, what do I do with the N-400?

If the adjudicating officer determines that initiation of removal proceedings is appropriate, the officer should follow local procedures for issuing a Notice to Appear (NTA).^{xiv} In addition to initiating removal proceedings, the adjudicating officer should continue the naturalization application pending the outcome of the removal proceedings. The applicant's naturalization application should not be denied under INA § 318 either prior to placing him or her into proceedings or after proceedings are initiated. The applicant is not considered to be in removal proceedings until the NTA has been served on the Immigration Court. Once an applicant is in proceedings, his or her application may not be denied because § 318 prohibits the Attorney General from taking any action on the case (including naturalization adjudication) while removal proceedings are pending.

If the applicant's case merits prosecutorial discretion, what should I do with the N-400?

If the Service decides that the applicant's case merits a favorable exercise of prosecutorial discretion, the officer should proceed with adjudication of the N-400. Note that the alien is not ineligible to naturalize simply because he or she is still susceptible to a removal charge.^{xv} The facts surrounding an alien's susceptibility to a removal charge, however, should be considered when assessing whether he or she is of good moral character for the purpose of naturalization.

How do I assess an applicant's good moral character?

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Officers should decide whether the unlawful voting or false claim to U.S. citizenship affects the applicant's eligibility to naturalize. Officers should analyze the case focusing on:

- (1) whether the applicant is precluded from establishing good moral character pursuant to section 101(f)(1) through (8),
- (2) whether the unlawful conduct warrants a discretionary denial based on lack of good moral character, after balancing the equities, and
- (3) whether the applicant qualifies for an exception to 101(f).

Per se Bars to Establishing Good Moral Character

If the applicant has been convicted of a violation of 18 U.S.C. 611 or 1015(f),^{xvi} the officer must determine whether or not the conviction precludes the applicant from establishing good moral character (GMC). Of particular importance are the bars to GMC that involve applicants who have been convicted of certain classes of crime, specifically INA 101(f)(3) and (f)(7).^{xvii}

Sections 101(f)(3) and 212(a)(2)(A)(i)(I) provide that individuals convicted of certain crimes involving moral turpitude (CIMT) are precluded from establishing GMC. Because it is unlikely that a conviction under 18 U.S.C. 611 is a CIMT, such conviction will not preclude the applicant from establishing GMC under these provisions. However, the Service has determined that section 18 U.S.C. 1015(f) is a CIMT. Because it is a felony, such conviction will preclude a finding of GMC, under 101(f)(3) and 212(a)(1)(A)(i), if the offense was committed within the statutory period, unless the officer determines that the applicant qualifies for the 101(f) exception for lawful permanent residents who resided in the United States prior to age 16 and have U.S. citizen parents.

Sections 101(f)(3) and 212(a)(2)(B) preclude individuals who have been convicted of multiple crimes for which the aggregate sentence imposed is greater than five years, regardless of whether the offenses involve moral turpitude, from establishing good moral character. In addition, section 101(f)(7) precludes an applicant from establishing GMC if he or she has been confined in a penal institution for 180 days or more, regardless of whether the offense for which he or she was convicted was committed in or outside the statutory period. Officers should determine whether an applicant who has been convicted under 18 U.S.C. 611 or 1015(f) was confined for 180 days or more or has multiple convictions with an aggregate sentence of more than five years during the statutory period. If, after a careful analysis, the officer concludes that the applicant's convictions fall under 101(f)(3) and 212(a)(2)(B), or 101(f)(7), then the officer must determine whether the applicant qualifies for the 101(f) exception for lawful permanent residents who resided in the United States prior to age 16 and have U.S. citizen parents.

Discretionary Good Moral Character

If the applicant's conviction does not preclude a finding of GMC under 101(f)(3) or (f)(7) or the applicant has not been convicted for violations of 18 U.S.C. 611 and 1015(f), the officer must still determine whether the applicant lacks GMC as a matter of discretion.

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When a discretionary denial is considered, officers must consider the totality of the circumstances in the case and weigh all factors, favorable and unfavorable, in determining whether naturalization should be denied as a matter of discretion. Officers must balance the facts regarding the applicant's unlawful voting or false representation as a U.S. citizen against other factors such as:

- (1) family ties and background
- (2) the absence or presence of other criminal history
- (3) education and school records
- (4) employment history
- (5) other law-abiding behavior, e.g. meeting financial obligations, paying taxes, etc.
- (6) community involvement
- (7) credibility of the applicant
- (8) length of time in United States.

For example, an officer might find that an applicant who: (1) unlawfully registered to vote in a federal election fifteen years ago; (2) signed the voter registration card without understanding that he or she was claiming to be a U.S. citizen by doing so; (3) was specifically told by a community organization that he or she was entitled to vote; (4) has been a law-abiding citizen in all other respects; and (5) has no other criminal history, can establish good moral character in spite of making a false claim to U.S. citizenship. Alternatively, an officer might find that an applicant who: (1) voted unlawfully but was not convicted; (2) has failed to pay taxes in the past 15 years; (3) has 50 unpaid traffic tickets; and (4) owes \$20,000 in back child support, cannot establish good moral character even if the officer determines that the applicant is eligible for the CCA exceptions to 101(f) for long-term residents because the applicant's other bad acts cumulatively reflect that he or she lacks good moral character as a matter of discretion. Further, where an officer finds that the applicant's testimony is not credible and that he or she has no or few favorable factors to support a finding of good moral character, the officer can deny the application as a matter of discretion. In every instance, officers should clearly document in the file which factors were considered and, if the case is denied, cite those factors in the denial so that a person reviewing the file can clearly understand how the officer concluded that the applicant did not merit a finding of good moral character.

If, after a careful analysis, the officer concludes that the applicant's case warrants denial as a matter of discretion, then the officer must determine whether the applicant qualifies for the 101(f) exception for lawful permanent residents who resided in the United States prior to age 16 and have U.S. citizen parents.

Exception to Section 101(f) for Long-Time Residents

If an applicant has been convicted for violation of 18 U.S.C. 611 or 1015(f), and the conviction became final on or after October 30, 2000, the applicant does not fall within the 101(f) exception.^{xviii}

If the applicant's conviction became final prior to October 30, 2000, or if the applicant has not been convicted, officers must analyze whether the applicant falls under the 101(f) exception. Because the 101(f) exception determination is identical to the exception for removal,

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the officer's determination should be consistent with the prior determination. Thus, if the officer determined that the applicant was not removable for illegal voting or making a false claim to U.S. citizenship, the applicant should also fall within the 101(f) exception. If, however, the officer determined that the applicant was removable, but proceedings were not initiated as a matter of prosecutorial discretion, the applicant should not be eligible for the 101(f) exception.

* * * * *

Officers should consult with their local district counsel to receive updated information related to the election laws. Requests for additional information regarding this policy guidance should be directed to Lyle Boelens, Immigrations Services Division, (202) 514-8273.

¹Sections 212(a)(10)(D)(i) and 237(a)(6)(A) provide that "[a]ny alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation" is inadmissible and deportable.

²Sections 212(a)(10)(D)(ii) and 237(a)(6)(B) provide that "[i]n the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction on voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be inadmissible [deportable] under any provision of this subsection based on such violation."

³The last clause of section 101(f) provides: "[i]n the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it."

⁴Under 18 U.S.C. § 611, it is unlawful for an alien to vote in any election held "for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Residential Commissioner...."

⁵See section 201(d)(3) of Pub. L. 106-395.

⁶Sections 212(a)(6)(C)(i)(I) and 237(a)(3)(D)(i) provide that "[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law" is inadmissible and deportable.

⁷Sections 212(a)(6)(C)(ii)(II) and 237(a)(3)(D)(ii) provide that "[i]n the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation he or she was a citizen, the alien shall not be considered to be inadmissible [deportable], under any provision of this subsection based on such representation."

⁸See endnote 3.

