

INS on Effect of Failure to Register for Selective Service on Natz Eligibility

June 18, 1999

Memorandum For Regional Directors
District Directors
Service Center Directors

From: William R. Yates
Deputy Executive Associate Commissioner
Office of Field Operations
Immigration Services Division

Subject: Effect of Failure to Register for Selective Service on Eligibility for Naturalization

This memorandum provides guidance to Immigration and Naturalization Service (INS) field offices regarding the effect of a naturalization applicant's failure to register for Selective Service on the applicant's eligibility for naturalization. This guidance is based on the attached legal opinion issued by the Office of General Counsel on April 27, 1998.

Selective Service Registration Requirements

Section 3(a) of the Military Selective Service Act [50 U.S.C. App. § 453(a)] provides that:

it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President, and by rules and regulations prescribed hereunder.

This requirement does not apply to aliens present in the United States in a lawful nonimmigrant status.

In 1980, the President directed that, except for aliens in lawful nonimmigrant status, any man born after 1959 and living in the United States must register for Selective Service when he attains his eighteenth birthday. Proc. No. 4771 of July 2, 1980 § 1-101, 94 Stat. 3775 (1980). As provided by statute, this obligation continues in force until the man either registers or attains his twenty-sixth birthday. 50 U.S.C. App. § 456(a).

Although the Military Selective Service Act provides for civil penalties for failure to register, Section 12 of the Military Selective Service Act [50 U.S.C. § 462] also provides some relief from the adverse civil effects of failure to register:

(g) A person may not be denied a right, privilege, or benefit under Federal law by reason of failure to present himself for and submit to registration under section 3 if --

(1) the requirement for the person to so register has terminated or become inapplicable to the person; and

(2) the person shows by a preponderance of the evidence that the failure of the person to register was not a knowing and willful failure to register.

Men Required to Register

Except for aliens maintaining lawful nonimmigrant status, any man born after 1959 and living in the United States must register for Selective Service. Men living in the United States are required to register at 18. Men who enter the United States as immigrants are also required to register if they are between 18 and 26.

The requirement to register with Selective Service also applied to men born before March 29, 1957 who resided in the United States, other than as lawful nonimmigrants, between their 18th and 26th birthdays. Cf. Proc. No. 4360 of March 29, 1975, 40 *Fed. Reg.* 14,567 (1975).

Men Not Required to Register

The requirement to register with Selective Service ceases when a man reaches 26 years of age. Men who did not live in the United States between 18 and 26 years of age, and men who lived in the United States between 18 and 26 years of age, but maintained lawful nonimmigrant status for the entire period were not required to register.

Men born after March 29, 1957, and before December 31, 1959, were never under an obligation to register with Selective Service. Proc. No. 4771 and Proc. No. 4360, *supra*.

Eligibility for Naturalization

Section 316(a) of the Immigration and Nationality Act (INA) requires a naturalization applicant to prove that he or she is, and has been for the requisite period, a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed toward the good order and happiness of the United States. Section 337(a)(5)(A) of the INA also requires applicants to declare under oath his or her willingness to bear arms on behalf of the United States when required by law. Therefore, it is INS policy that refusal to or knowing and willful failure to register for Selective Service during the period for which an applicant is required to prove his compliance with § 316(a)(3) supports a finding that the applicant is not eligible for naturalization, because he has failed to establish his willingness to bear arms when required and his disposition to the good order and happiness of the United States.

Effect of Failure to Register for Selective Service

Failure to register for Selective Service is not a permanent bar to naturalization. In general, INS will find an applicant ineligible for naturalization on account of failure to register for Selective Service if a male applicant refuses to or knowingly and willfully failed to register during the period for which the applicant is required to establish his disposition to the good order and happiness of the United States. This period coincides with the more familiar good moral character period. Whether it is proper for the INS to determine that an applicant refused to or knowingly and willfully failed to register for Selective Service will depend on the applicant's age at the time of filing the naturalization application and up until the time of administration of the oath of allegiance.

Applicants Under 26 Years of Age

A man under 26 years of age who refuses to register for Selective Service cannot demonstrate that he is eligible for naturalization. Every male naturalization applicant under 26 years of age must provide evidence of registration for Selective Service. The examination of a naturalization application filed by a man under 26 years of age who has not registered for Selective Service by the time of the naturalization examination must be continued to afford the applicant an opportunity to register. If the applicant refuses to register for Selective Service after being afforded a reasonable opportunity to register, the naturalization application must be denied. The decision denying the application must state specifically that the applicant has refused, after given an opportunity to do so, to register with Selective Service, and that the person, therefore, is not eligible for naturalization because he is not well disposed to the good order and happiness of the United States. The decision must cite § 316(a)(3).

Applicants Between 26 and 31 Years of Age

A man between 26 and 31 years of age^[1] who was required to register for Selective Service and who knowingly and willfully failed to register cannot demonstrate that he is eligible for naturalization. Every male naturalization applicant between 26 and 31 years of age who failed to register for Selective Service must provide evidence that his failure to register was not knowing and willful or that he was not required to register. If a male naturalization applicant between 26 and 31 years of age failed to register with Selective Service, the naturalization examination must be continued to give the applicant an opportunity to obtain evidence that his failure to register was not knowing and willful or that he was not required to register. If the applicant is unable to demonstrate that his failure to register was not knowing and willful or that he was not required to register, his naturalization application must be denied. Again, the decision must state explicitly that the INS has found that his willful failure to register with Selective Service means he cannot show that, during the requisite period before filing his application, he was not well disposed to the good order and happiness of the United States. The decision must cite § 316(a)(3).

Applicants Over 31 Years of Age

Failure to register for Selective Service will generally not prevent a man who was over 31 years of age on the day he filed his naturalization application from demonstrating that he is eligible for naturalization. Even if the

applicant was required to register and the applicant's failure to register was knowing and willful, the failure occurred outside of the statutory period during which the applicant is required to establish his attachment to the good order and happiness of the United States. The INS may, of course, consider a person's conduct before the beginning of this period. INA § 101(f) (last sentence) and § 316(e). If the INS denies naturalization to a man who is at least 31, based on his failure to register with Selective Service, the decision must state explicitly the basis for finding that the failure to register warrants denial of naturalization. As a practical matter, a male applicant over 31 years of age who failed to register with Selective Service should, ordinarily, be found eligible for naturalization unless INS has other evidence, in addition to the past failure to register, that demonstrates that the applicant is not well disposed to the good order and happiness of the United States.

Evidence of Selective Service Registration

Men may obtain cards to register for Selective Service at their local post office. Men may also register on-line at the Selective Service System website at www.sss.gov. The Selective Service System website may also be accessed from the INS website at

www.immigration.gov. After registration, men should receive a Selective Service registration card in the mail.

Men may obtain status information letters by calling the Selective Service System at 847/688-6888 or 847/688-2576, and requesting a questionnaire. Status information letters inform men whether, based on their age and immigration status in the United States, they had a Selective Service registration requirement with which they failed to comply.

INS officers may confirm a naturalization applicant's registration status by calling the Selective Service System at 847/688-6888 or 847/688-2576. Officers will need to enter the applicant's Social Security Number and date of birth to obtain status information.

Evidence of Registration

Naturalization applicants may present Selective Service registration acknowledgement cards or status information letters as proof of registration. INS officers may also accept other persuasive evidence presented by an applicant as proof of registration.

Evidence Relating to Failure to Register

INS officers must request that naturalization applicants submit status information letters before concluding that men failed to register with Selective Service when required. Status information letters do not forgive men for failing to register, nor do they provide them with an exemption from the requirement. The letters merely inform men if they had a registration requirement with which they failed to comply. Once it is established by a status information letter that a naturalization applicant failed to register when required, the INS officer must determine, based on other evidence, whether or not an applicant's failure to register was knowing and willful. INS officers must consider all persuasive evidence presented by an applicant relating to his failure to register. At a minimum, the INS officers must take a statement under oath from an applicant in order to determine whether or not failure to register was knowing and willful.

Evidence that Registration Was Not Required

Naturalization applicants need only demonstrate that they were 26 years of age or older when they first entered the United States as immigrants to prove that they were not required to register with Selective Service. Proof of an applicant's age and immigration status should be contained in the applicant's file. This evidence is all that is necessary to prove that the applicant was not required to register.

Further Information

Further questions regarding the effect of failure to register for Selective Service on eligibility for naturalization may be directed to Cheryl Becker, Adjudications Officer, Office of Field Operations, Immigration Services Division, at 202/514-2982.

Attachments

Footnote:

[1] The 26 to 31 age range used in this memorandum must be adjusted for applicants filing under sections of the INA requiring different periods of good moral character. For example, the age range for an applicant filing under section 319(a) of the INA is between 26 to 29 years of age.

ATTACHMENTS

April 27, 1998

Memorandum For Jack Penca
Eastern Regional Counsel

From: Paul W. Virtue
General Counsel

Subject: Your February 13, 1998, Request for Legal Opinion: Failure to register for Selective Service as a bar to naturalization

I. QUESTION

In the subject memorandum, you request a legal opinion addressing the following question:

Is failure to register for Selective Service a bar to naturalization?

II. SUMMARY CONCLUSION

Failure to register for Selective Service bars naturalization only if the applicant knowingly and willfully failed to register during the period for which the applicant must establish good moral character. If the applicant knowingly and willfully failed to register, but this failure to register occurred outside the good moral character period, the failure to register is not an absolute bar to naturalization. The Service may, however, consider the failure to register in determining the applicant's naturalization eligibility.

III. ANALYSIS

An applicant for naturalization must be "a person of good moral character, attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States." INA § 316(a)(3), 8 U.S.C. § 1427(a)(3). The period during which the applicant must meet this requirement begins five years before the applicant files the naturalization application, and continues through the date that the applicant is admitted to citizenship. *Id.* (The applicant must show that the applicant "has been and still is" of good moral character). Moreover, an applicant must be willing "to bear arms on behalf of the United States when required by the law." *Id.* § 337(a)(5)(A), 8 U.S.C. § 1448(a)(5)(A).

Except aliens maintaining lawful nonimmigrant status, any man born after 1959 and living in the United States must register for Selective Service when he attains his eighteenth birthday. 50 U.S.C. App. § 453(a); Proc. No. 4771 of July 2, 1980, § 1-101, 94 Stat. 3775, 3775 (1980). This obligation continues until the man's twenty-sixth birthday. *Id.* The INA does not make compliance with this requirement a condition for naturalization. The Service would be fully justified, nevertheless, in finding that a man who refuses to comply with this requirement is not willing to bear arms when the law requires. INA § 337(a)(5)(A), 8 U.S.C. § 1448(a)(5)(A). This finding would support the further inference that the applicant is not disposed to the good order and happiness of the United States. *Id.*

§ 316(a)(3), 8 U.S.C. § 1427(a)(3). Any naturalization application should be denied on this basis, if the applicant is a man who has not yet turned twenty-six, and who refuses to register for Selective Service.

The posture of the case changes once the applicant has turned twenty-six. In that case, there was, but no longer is, a duty to register. 50 U.S.C. App. § 453(a). The Service can still find that the applicant is ineligible to naturalization, based on the failure to have registered, unless the applicant establishes that his failure to file was not knowing and willful. 50 U.S.C. App. § 462(g). Note that this statute clearly places the burden of proof on the applicant. *Id.* Therefore, the Service may presume the failure to register to have been knowing and willful, unless the applicant proves the contrary "by a preponderance of the evidence." *Id.*

The posture of the case changes, again, the day after the applicant's thirty-first birthday. If the applicant files on that date, or later, then more than five years will have elapsed since the failure to register. That is, the event

that reflects adversely on the applicant's eligibility will have occurred outside the period during which the applicant must show that he is of good moral character and disposed to the good order and happiness of the United States. INA § 316(a)(3), 8 U.S.C. § 1427(a)(3). The Service should first consider whether the failure to register was knowing and willful. 50 U.S.C. § 462(g). If not then the Service should find the applicant to have satisfied § 316(a)(3), unless other adverse factors are present. Even if the applicant *did* knowingly and willfully fail to register, that fact would not be an absolute bar to eligibility. INA § 316(a)(3), 8 U.S.C. § 1427(a)(3). The Service could grant naturalization, so long as the Service were satisfied that the applicant satisfies § 316(a)(3) now, even if he may not have been able to do so in the past.

But the Service need not automatically disregard the failure to register, once the applicant is at least thirty-one years old. The Service is entitled to consider improper conduct that occurred outside the statutory period, in determining whether the applicant can satisfy § 316(a)(3). *Id.* §§ 101 (f) (last sentence) and 316(e), 8 U.S.C. §§ 1101(f) and 1427(e); 8 C.F.R. § 316.10(a)(2). For this reason, the Service could properly consider a willful failure to register for Selective Service, together with other evidence concerning the applicant's compliance with § 316(a)(3), even if the willful failure to register is outside the good moral character period. For the sake of further review, it would be necessary for the Service to explain in its decision why an event outside the statutory period is taken to prove the applicant to be ineligible under § 316(a)(3). It would not be correct simply to say that a knowing and willful failure to register is a permanent bar to naturalization. There is also an important factor to keep in mind, when the failure to register is outside the good moral character period. An applicant may seek judicial review of a final decision denying naturalization. *Id.* § 310(c), 8 U.S.C. § 1421(c). In reviewing the case, the district court would have legal authority to decide the issue *de novo*, making its own judgment on the effect of the failure to register on the applicant's eligibility. *Id.*

We are aware of the argument that, drawing an analogy from INA §§ 314 and 315, 8 U.S.C. §§ 1425 and 1426, an alien who knowingly and willfully fails to register should be permanently barred from naturalization. Letter from Russell A. Ezolt to Toni B. Florence (December 16, 1997). We agree with Mr. Ezolt that this analogy cannot be sustained. Congress has specifically enacted that convicted deserters, those convicted of departing to avoid the draft, and those who obtain an alienage exemption from induction or further service, are permanently barred from naturalization. INA §§ 314 and 315, 8 U.S.C. §§ 1425 and 1426. But Congress has not enacted a similar provision for those who fail to register for the draft. We do not consider it proper to extend these bars to naturalization to persons Congress did not choose to include within the scope of the bars. It is only under § 316(a)(3), if at all, that failure to register for Selective Service can warrant denial of naturalization in any given case.