Golden Nuggets Concerning U.S. Citizenship

Nancy Taylor Shivers
Shivers & Shivers
1146 S. Alamo Street
San Antonio, Texas 78210
210 226 9725
ntshivers@shiverslaw.com

Golden Nuggets

1. ***Date of Birth Discrepancies*** must be resolved *prior* to the date that the permanent resident is naturalized and issued a naturalization certificate. Once the applicant has been interviewed and sworn to the truth of her application, she cannot subsequently "correct" the date of birth by filing the I565 application to replace a naturalization certificate.

As individuals reach retirement age, they may become interested in resolving a birth discrepancy. USCIS always goes by the birth record of the applicant for naturalization purposes. The fact that the permanent resident card and related USCIS or INS records reflect a different or "correct" date of birth was accepted does not mean that USCIS will utilize that date. (Social Security will not change its date of birth for such an individual without having a USCIS record or decision reflecting such a correction.)

BEWARE the applicant who tells you that he needs to correct his date of birth for his permanent resident card because the birth record he presented to a US Consul or USCIS officer was incorrect. He may have immigrated in the 2A category when he should have immigrated (much later) in the 2B category. Trying to "correct" this date of birth via a naturalization application likely would lead to initiation of removal proceedings.

BUT if there is/was a genuine mistake on a birth record such as transposing the month and day of birth in a given year, this information along with the "corrected" birth certificate can be presented at the time of filing the naturalization application---and can result in the correct date of birth being placed on the naturalization certificate.

2. ***Issuance of NonImmigrant Visas to Persons Born in US*** As more and more individuals acquire dual nationalities (or more), there are times when a person born in the US has relinquished his citizenship formally and has a Certificate of Loss of Nationality issued by the US Department of State.

That person can be issued a nonimmigrant visa. If a person was born to a foreign mission member parent who had diplomatic immunity at the agent level (and the other parent was not a US citizen), he is considered to be a Child of Foreign Mission Member. He did not acquire citizenship at birth and thus can be issued a nonimmigrant visa. 9 FAM 301.3-3 (U).

This issue comes up with some frequency when individuals are applying for E investor or treaty trader visas. It also comes up for persons born in the US while parents are on a diplomatic assignment and who then return to the US as adults for university studies or employment.

3. **Filing the N400 for an individual who may have a claim to US citizenship or is the N600 denial the end of the line for a permanent resident?** Some permanent residents may have a claim to US citizenship through one of their parents, but they may not be able to prove it. If the individual has applied for a certificate of citizenship and been turned down, then this denial can be an exhibit to the N400 that the individual files. The USCIS officer will review the N400 noting that the applicant has indicated one or more of his parents is a US citizen and at a time that might indicate the applicant has a claim to US citizenship. But if the USCIS has already determined that he does not, he should be able to proceed with his naturalization.

4. **FALSE claims to US Citizenship.** While the I485 application asks the applicant

   Have you EVER falsely claimed to be a US citizen (in writing or in any other way)?

   the N400 application asks

   Have you EVER claimed to be a US citizen (in writing or any other way)?

An individual who believed she was a US citizen based on her US birth certificate and who learned as an adult that she was not a US citizen (her US birth certificate was invalid; her US passport application was denied etc) could answer the I485 question in the negative. But if she becomes a permanent resident who seeks to naturalize in the future, she will have to answer the N400 question in the affirmative. Clearly she would have to provide an explanation of the circumstances relating to her prior claims to being a US citizen. To the extent that she disclosed these circumstances in connection with her I485 application, she should anticipate the same disclosures. It may be prudent to obtain a FOIA of her record before proceeding with the N400 filing in order to know what the A file shows about this being discussed or documented at the in I485 interview. (Often an affidavit is presented with the I485 application on the legal entry issue that explains the reliance on a birth certificate that was subsequently revealed to be false.)

When an individual has continued to use documents establishing US citizenship to enter the US or to work in the US, knowing that they are false, then the individual could no longer answer the I485 questions in the negative. The I485 question 67 asks

Have you EVER falsely claimed to be a US citizen (in writing or in any other way)?

Once the individual knows she is not a US citizen, she must cease to use or rely on documents she knows to be false.

5. **How many times should the attorney review the N400 questions with his or her client?** If the attorney is going to sign the N400 application as the preparer, she certifies under penalty of perjury the following:
   a. I prepared the application at the request of the client
   b. The applicant reviewed the completed application and informed me that he understands all information contained

in and submitted with his application AND that all of this information is complete, true and correct

c. *I completed this application based only on information that the applicant provided to me or authorized me to obtain or use.*

The last sentence does not say "provided to my legal assistant." It does say "based only on information that the applicant… authorized me to obtain or use."

While an attorney may choose to have an applicant meet with a legal assistant for "intake" it is critical that the attorney at some point prior to filing the application review each and every question on the application. Thanks to the significant amount of publicity about Operation Janus, far more applicants are spending time going over their applications very carefully. The attorney should review the N400 application question by question with the applicant for several reasons. First, the attorney can guage whether the applicant has sufficient fluency in English to go forward with the filing. Second, the attorney can red flag questions that are of concern to the applicant---or to the attorney!! There is nothing worse than to have an applicant say during a USCIS interview, "But I told your legal assistant about this."

Once the application has been prepared in final, some attorneys have the applicant return to the office and review it there before signing the application for filing. Certainly the applicant should be provided with a copy of the application as filed along with a letter stating that any errors should be brought to your attention for correction at the interview. A sample of the letter our firm uses is enclosed as Exhibit A.

Review AGAIN after the interview notice comes. At a minimum the attorney should review the application again at least one week prior to the interview. If documents are missing or addendum corrections are required, get on it. Some attorneys meet with the applicant prior to the interview; others exchange emails or phone discussions about the application. Most applicants have one or more concerns and want to be reassured about those.

6. **The USCIS Interview & Does the Attorney Need to Go?**
Generally this is determined by the attorney and the applicant when the attorney is retained. If I cannot appear with an applicant, and the applicant and I have agreed that he/she wants to go forward without my presence, I generally meet with the applicant and review the application. We discuss any issues of concern and I advise about additional documents to take to the interview. I provide the client with a letter to hand to the USCIS officer asking that my appearance that day be waived but conveying that I will remain as the applicant's attorney and want to receive any N14 etc. A sample of such a letter is enclosed as Exhibit B.

In today's world, most applicants who have retained an attorney want the attorney to be at the interview. For the applicant this means there is someone who is witnessing what happens during the interview. The attorney can:

Prepare and present addenda dealing with travel or revisions in answers
Prepare and present legal arguments if necessary (eg—a criminal record with a SHORT memo re Petty Offenses; a memorandum with IRS reg about dependents, married filing jointly etc)
Monitor which N400 questions are asked and which are not
Note answers provided by applicant (and seek clarification)
Provide moral support to applicant (as in Good Job after he passes the civics test)

Examples:
**Officer asks: *Have you ever given any US government official any information that was false, fraudulent or misleading? Have you ever lied to any US government officials to gain entry or admission into the United States or to gain immigration benefits while in the United States?*

As attorney you have gone over this question with the applicant and reminded him about his waiver application in

the past or that his first N400 (with a different attorney) was denied re prior misrepresentation. SO when he answers NO, I would do something that allows the question to be asked again and for him to answer YES.

When you are present at the interview, you can develop some sense of how much review will be required—how big is the A file etc. And you will hear exactly what the officer says at the conclusion of the interview---not what the applicant thought or hoped he heard.

7. Should you appeal a Denial versus file a new N400?

The lawyer answer is "It Depends" on the basis for the denial. If you are the attorney for the N400 and were present at the interview and conclude that the denial leaves out important facts or misstates facts and evidence in the record, then the appeal which is not really an appeal makes sense. If the denial is for failure to file tax returns or be current on tax payments or child support, then it probably makes more sense to file a new N400 when these problems have been taken care of so that evidence of same is available.

Different adjudicators have different styles and ways of looking at the same evidence. If the case is approvable in the attorney's mind, and the applicant is willing, filing an appeal may make sense as the waiting time for a decision if shorter than filing a new application.

8. Most common problem areas for naturalization.

A. Names: What is my legal name? What do I want my name to be on my US passport? What names have I used in my whole life? What do I have to do if I change my name?
These seem like simple questions but they are REALLY important to many applicants. USCIS adjudicators get to spend significant time dealing with these questions. Ideally attorneys get these issues resolved before the interview but often a name change crops up or a decision not to change the name requires revision of the N400.

NOTE: If the applicant wants a legal name change, she must wait for a federal judge to swear her in. If she does not want a name change, then she can be sworn in at an administrative hearing at the USCIS office.
The Texas Department of Public Safety wants to see the Naturalization Certificate and Name Change annotation before it will change the name on the driver license.
The Social Security Administration wants to see the Naturalization Certificate and Name Change annotation before it will change the name on its records.

B. **Addresses** This is interesting for students: should they use their parents' home address or their school address? This determines where their interview will be scheduled and where they will be sworn in. For undergraduates there rarely is any question by USCIS if they use their parents' address. Once they are in grad or professional school, there often is a preference and or insistence that they use their address where they are in school.
Swearing in location is determined by where the applicant lives and which federal district court jurisdiction matches. A sample of a the letter our firm uses for Swearing in notices is enclosed as Exhibit C.

C. **Employment** Place of employment should have some nexus with where the applicant lives. Unemployed for substantial periods of the 5 years preceding filing often triggers inquiries about how the applicant is being supported.

D. **Time Outside the United States** The regulations are very clear about how much time an applicant is expected to have been physically present in the United States in the five years (or three) preceding the filing of the application. For individuals living in border towns and communities, there is less physical evidence or maybe none of how much time is spent in the US and how much across the border. Such applicants are generally asked for evidence that they really live in the United States—utility bills, rent, phone bills, etc.
Note: the questions all ask

How many total days or trips of 24 hours or longer did you spend outside the United States during the last five years?

Travel across into Canada or Mexico for a day to shop or visit relatives is not counted unless the applicant has been out more than 24 hours.
PRACTICE TIP: When you congratulate your client on becoming a permanent resident, suggest that she keep a journal or other record of EVERY trip she makes out of the US from the date she became a permanent resident.

E. Children

They want to know about ALL children—biological, adopted, stepchildren, including ones born outside the US even if you have not mentioned them before. IF the applicant failed to disclose a child born outside the US on his I485 application, this may be a PROBLEM if he immigrated on the basis of a marriage to a US citizen. If the applicant tells you about the child but tells you he does not want to list the child now, ***tell the client Audios and that he would be lying on the application.*** If he wants to disclose the child now, study the facts very carefully and determine if there is any logical, plausible way to explain why the child was not mentioned previously. (Never knew about the child until a year ago when its mother contacted my family etc) And let the potential applicant know that this could lead to many complications. *Sometimes the best advice is to remain as a permanent resident.*

F. Taxes: failing to file, failing to pay taxes. If someone has not filed a tax return during the past five years, the attorney must inquire about the situation. An elderly parent living with an adult child probably OK. A woman who gets rent income from properties in Mexico, probably not OK and needs to go talk to a CPA. Always ask for the tax returns. Always have them ready to submit at the interview unless you submit with the N400 application. Always look at the front page of the return concerning dependents and concerning amount of reported income. Multiple dependents aka nieces, aunts are RED FLAGS. Head of household returns can be problematic. Best to get these cleaned up before filing any N400.

G. Organizations. This is of greater interest than ever before. What organizations did the former asylum applicant list?

Remind applicants that USCIS is going back to the beginning of their relationship with America and needs to know about Boy Scouts and coming forward with other organizations. If you do not have the applicant's I485 application or asylum application, a FOIA may be prudent.

H. **Public Benefits** Applicants who have received or are receiving public benefits may find themselves being questioned about this in connection with the N400 application. Attorneys must ask questions about this in meetings with applicants.