



THE SELECTIVE SERVICE AND NATURALIZATION APPLICATIONS

By Nikki Marquez and Eric Cohen

I. What is Selective Service?

The Selective Service System is an independent government agency that maintains a database of people for enlistment into the military during a crisis or national emergency.¹ Since 1980, all young men between the ages of 18 and 26 have been required to register for the military with the Selective Service, including men without lawful immigration status. Non-immigrant men who maintain their valid non-immigrant status are not required to register.²

NOTE: Registering with the Selective Service is **not** the same as enlisting in the U.S. Armed Forces. The U.S. Armed Forces are an all-voluntary military. However, in the event that there was a national crisis that required a draft to supplement the U.S. military, the draft would occur through the Selective Service System. If there were a draft, the Selective Service would call men based on a random lottery number and their year of birth. Once called, the Selective Service would examine each person for mental, physical, and moral fitness, and then each person is either exempted or inducted into the U.S. Armed Forces.³

II. Selective Service and Naturalization

The Immigration and Nationality Act (INA) § 316(a) mandates that an applicant must demonstrate he possesses, and has possessed for the statutory period, good moral character; is attached to the principles of the U.S. Constitution; and is well disposed toward the good order and happiness of the United States.⁴ Moreover, INA § 337(a)(5)(A) requires applicants to declare under oath their willingness to bear arms on behalf of the United States when required by law.

Failure to register for the Selective Service is not a statutory bar nor a regulatory bar to good moral character. Importantly, the Federal Selective Act *requires* that no one be denied a federal right or benefit if he shows by a preponderance of the evidence that his failure to register for Selective Service was not knowing and willful.⁵ Nevertheless, a 1987 INS

¹ The Military Selective Service Act, 50 USC § 3801, *et seq.*

² 50 USC § 3802.; *see also* 12 USCIS-PM D.7(B)(3).

³ *Who Must Register*, Selective Service System, available at <https://www.sss.gov/Registration-Info/Who-Registration>.

⁴ Yates, Policy Memorandum No. 52, *Effect of Failure to Register for Selective Service on Naturalization Eligibility* (June 18, 1999), www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-33844.html. Adjudicators Field Manual (AFM) Chapters 71 to 76 and Appendices 71-1 to 75-7 have been superseded by USCIS Policy Manual as of January 22, 2013 and INA § 316(a), www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9898.html.

⁵ 50 USC App. § 462(g).

memorandum stated that failure to follow this law will be evaluated as evidence of bad moral character.⁶ In 1998 and 1999 opinions, the INS offered further information about the effect of failure to register on naturalization eligibility.⁷ The USCIS Policy Manual states that refusal to register, or willful failure to register, also negates the applicant's attachment to the U.S. Constitution, which is also a requirement for naturalization.⁸ In practice, this means that a male applicant will need to provide proof of registration with the Selective Service, or a statement explaining why he did not register along with a status information letter from the Selective Service as part of the N-400 application.

If a male client is applying for citizenship, and he lived in the United States between the ages of 18 and 26, you should determine if he was required to register for selective service, and if so, verify he did in fact register and gather the appropriate documentation. If he was required to register, but failed to do so, USCIS provides guidance on how to evaluate the case based on the current age of the applicant. Each of these steps is discussed in more detail below.

Nevertheless, some USCIS offices refused to accept applicants' explanations regarding why they had failed to register for Selective Service and instead had a policy of blanket denials for anyone who had not registered. These blanket denials were arguably illegal. Remember that the Federal Selective Act *requires* that no one be denied a right, privilege, or benefit under Federal law if he shows by preponderance of the evidence that his failure to register for Selective Service was not knowing and willful.⁹ Since naturalization is a federal right, privilege, or benefit, denial of naturalization based on failure to register for the Selective Service can only happen if it was and knowing and willful failure to register.

NOTE: The USCIS Policy Manual uses inconsistent language when describing the standard for failure to register, sometimes saying the applicant must show it was not "knowing **or** willful" rather than "knowing **and** willful."¹⁰ The statute requires "knowing **and** willful."¹¹ In practice, the distinction may be minimal, but it may be helpful to note the higher standard set forth in the statute when advocating for your client.

III. Who Must Register for the Selective Service?

All male U.S. citizens and men living in the United States, between the ages of 18 and 26, must register for the Selective Service.¹² Not only do U.S. citizens and lawful permanent residents have to register, but any male refugee, asylee, parolee, or undocumented immigrant who is in the United States and is between the ages of 18 and 26 must also register.¹³ However, non-immigrant men who maintain their valid non-immigrant status are not required to register.¹⁴

Men must register within 30 days of their 18th birthday (up to 30 days prior, on their birthday, and 29 days after). Outside of this 60-day window, unregistered men are in violation of the law. However, the Selective Service accepts late registrations up until the person turns 26 years old. On the person's 26th birthday, he is no longer able to register for the Selective Service.¹⁵

⁶ INS, *Eligibility for naturalization of persons who fail to register under the Military Selective Service Act*, (July 22, 1987), reprinted in 64 *Interpreter Releases* 921 (Aug. 10, 1987) [hereafter "INS Memorandum"]; see also Letter from R. Michael Miller to Robert F. Belluscio, Esq., (Oct. 19, 1987), reprinted in 64 *Interpreter Releases* 1330 (Nov. 23, 1987), [hereafter "INS Letter"] (stating that "failure to register, as required by the Military Selective Service Act, does not constitute an automatic denial recommendation, but will alert the [INS] Naturalization examiner to closely scrutinize the applicant's good moral character, or lack thereof, and his attachment to the principles of the Constitution."); 12 USCIS-PM D.7(B)(1).

⁷ Yates, Policy Memorandum No. 52, *Effect of Failure to Register for Selective Service on Naturalization Eligibility* (June 18, 1999),

www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-33844.html; Virtue, *Failure to Register for Selective Service as a Bar to Naturalization*, (Apr. 27, 1998).

⁸ 12 USCIS-PM D.7(B)(2).

⁹ 50 USC App. § 462(g).

¹⁰ 12 USCIS-PM D.7(B)(2).

¹¹ 50 USC § 3811.

¹² 50 USC § 3802.

¹³ 50 USC § 3801, *et seq.*

¹⁴ 50 USC § 3802.; see also 12 USCIS-PM D.7(B)(3).

¹⁵ *Why Register?*, Selective Service System, available at <https://www.sss.gov/Registration/Why-Register>.

Note however, that an individual who entered the United States on a non-immigrant visa [under INA § 101(a)(15)] and who remained a non-immigrant through the age of 26 is not required to have registered.¹⁶ Also, any male who entered the United States after the age of 26 is not required to have registered.¹⁷ Finally, males born after March 29, 1957 and before December 31, 1959 are not required to have registered.¹⁸

See the following chart for registration requirements for different immigration statuses:

| Required to Register | Not Required to Register |
|--|--|
| Naturalized U.S. citizens | Lawful non-immigrants on non-immigrant visas: ¹⁹ <ul style="list-style-type: none"> • A/G – Diplomatic and International Organization Personnel; • B – Visitors for Business or Tourism; • O – Individuals of Extraordinary Ability or Achievements; • Q – Cultural Visitor; • E-1/E-2 – Treaty Traders and Treaty Investors; • H-1B/E-3 – Special Occupation Workers; • H-2 – Temporary Agricultural (H-2A) and Non-Agricultural Workers (H-2B); • H-3 – Trainees; • I – Media Representatives; • L – Intracompany Transferees; • J – Exchange Visitor; • P – Athletes and Entertainers; • R – Religious Workers; • TN – NAFTA Professional; • K/V – Nonimmigrants Intending to Adjust Status; • F/M – Student, Academic, Vocational |
| Legal permanent resident | |
| Refugee, parolee, and asylees | |
| Undocumented | |
| Dual national U.S. citizen (even if they are not living in the U.S.) ²⁰ | |

¹⁶ 50 USC § 3802; see also 12 USCIS-PM D.7(B)(3).

¹⁷ *Id.*

¹⁸ 12 USCIS-PM D.7(B)(3).

¹⁹ For a list of acceptable documents establishing a person’s lawful non-immigrant status, visit: <https://www.sss.gov/Portals/0/PDFs/DocumentationList.pdf>.

²⁰ According to the SSS website: <https://www.sss.gov/About/History-And-Records/Non-Citizens-and-Dual-Nationals>. There are some exceptions depending on how much time the individual has spent in the U.S. and the individual’s other country of citizenship.

If a person entered the U.S. on a non-immigrant visa, but applied for adjustment of status while he was between the ages of 18 and 26, then he will have to register for the Selective Service. USCIS assists with the registration process by transmitting the appropriate data to the Selective Service System (SSS) for male applicants between the ages of 18 and 26 who apply for adjustment of status.²¹

The Selective Service System requires registration by individuals who were born male and changed their gender to female. Individuals who were born female and changed their gender to male are not required to register. For more information, visit the Selective Service website at <https://www.sss.gov/Registration-Info/Who-Registration>.

Generally, applicants who are between the age of 18 and 26 at the time of filing for naturalization and who do not show a letter of registration with the Selective Service will be requested to do so. This means that the applicants will have to obtain status information letters from the Selective Service System before USCIS can conclude that there was a failure to register.²² The status information letter will indicate whether the applicant was required to register.²³ You can request a status information letter by calling the Selective Service at 1-847-688-6888.²⁴

For more information on who must register and who is exempt from registering, visit the Selective Service website at <https://www.sss.gov/Registration-Info/Who-Registration>.

NOTE: Conscientious objectors who oppose serving in the armed forces and/or bearing arms on the ground of moral or religious principles must still register for the Selective Service. If there is a draft and they are called to serve, they will then have an opportunity to file a claim for an exemption from military service based on their objection. For more information, visit: <https://www.sss.gov/consobj>.

A. How to Register

There are several ways to register for the Selective Service:

- Register online at www.sss.gov (requires a social security number);
- Complete a mail-back registration form at any U.S. Post Office (does not require a social security number);
- Complete a mail-back registration form received at home and mail it in (does not require a social security number);
- Check the appropriate box (“Register Me” on Box 22) of the form for federal student financial aid (FAFSA); or
- Register with a high school Selective Service Registrar (if the school has one)

B. Proof of Registration

After a person has register for the Selective Service, the agency sends an acknowledgement to the applicant. This acknowledgement serves as official proof of his Selective Service registration.

If your client does not have his acknowledgment, you can obtain confirmation of registration by calling (847) 688-6888 or online at www.sss.gov.

In addition, USCIS officers may also accept other persuasive evidence presented by an applicant as proof of registration.²⁵ However, it is unclear what evidence USCIS will consider and find persuasive.

²¹ 12 USCIS-PM D.7(B)(3).

²² 12 USCIS-PM D.7(B)(2).

²³ 12 USCIS-PM D.7(B)(2).

²⁴ For more information, visit the Selective Service website at <https://www.sss.gov/Registration/Proof-of-Registration>.

²⁵ 12 USCIS-PM D.7(B)(1).

C. Concerns about Data Security and Registering with the Selective Service System

As with other types of government services, some immigrants may be concerned with registering for the Selective Service System because it requires them to share their personal information with the government. It is important to note that the Selective Service is an independent agency, separate from the Department of Defense (DOD) as well as the Department of Homeland Security (DHS).

On the Selective Service website there is the following notice about information sharing for immigration enforcement purposes:

The Selective Service System has not now, or in the past, collected or shared any information which would indicate a man's immigration status, either documented or undocumented. Selective Service has no authority to collect such information, has no use for it, and it is irrelevant to the registration requirement. Consequently, there is no immigration data to share with anyone.²⁶

IV. Failure to Register for the Selective Service and Available Remedies

If USCIS establishes that the applicant failed to register, then USCIS must determine whether it was knowing and willful. According to USCIS, failure to register for Selective Service bars naturalization *only* if the applicant refused or knowingly and willfully failed to register. The 1999 INS memorandum provided that “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, [which] coincides with the more familiar GMC period.”²⁷ The USCIS Policy Manual similarly states that “USCIS will deny a naturalization application when the applicant refuses to register with Selective Service or has knowingly and willfully failed to register during the statutory period.”²⁸ Whether a male applicant will be denied naturalization based on his refusal to register or knowingly and willfully failing to register during the required period depends on the applicant's age at the time of the refusal or failure to register. The memoranda and USCIS Policy Manual examine three different time periods and give officers instructions on how to evaluate cases depending on the age of the applicant when he failed to register. Each age period is described below.

NOTE: According to USCIS, failure on the part of USCIS or SSS to complete the registration process on behalf of the applicant will not constitute a willful failure to register on the part of the applicant.²⁹

A. From Ages 18 to 25 Years Old

For men aged 18 to 25 years, according to INS memorandum, USCIS should deny naturalization only after providing the applicant with an opportunity to register and the applicant still refuses to register.³⁰ The decision denying the application must specify that the applicant refused to register even after being provided an opportunity to do so, and so the applicant is not eligible to naturalize because he is not well disposed to the good order and happiness of the United States.³¹

²⁶ *Who Must Register*, Selective Service System, available at <https://www.sss.gov/Registration-Info/Who-Registration>.

²⁷ *Id.*

²⁸ 12 USCIS-PM D.7(B)(2).

²⁹ 12 USCIS-PM D.7(B)(2).

³⁰ Yates, Policy Memorandum No. 52, *Effect of Failure to Register for Selective Service on Naturalization Eligibility* (June 18, 1999), www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-33844.html.

³¹ *Id.*

By contrast, the USCIS Policy Manual states that applicants in this category are “generally ineligible” for naturalization where the applicant willfully failed to register.³² The USCIS Policy Manual instructs only that an adjudicator “may request” (not *must* request) the applicant to register before concluding that he failed to register.³³ In the past, most, if not all, USCIS offices have allowed applicants between the ages of 18 to 26 the opportunity to register. If that is not the case with a particular USCIS office, advocates should use the older INS memoranda to argue that applicants in this age category be given an opportunity to register, but also be aware of this stricter guidance in the current USCIS Policy Manual.

NOTE: If your client is between the ages of 18 and 26 years old, and has not registered for the Selective Service, have him register prior to submitting his N-400 Form. The Selective Service will accept late registrations (more than 30 days after the person’s 18th birthday) up until the person’s 26th birthday.

B. From Ages 26 to 31 Years Old

If your client is between the ages of 26 and 31 years old, and the failure to register for Selective Service still occurred within the statutory period (that is, the last five years for most naturalization applicants and three years for those applying as the spouse of a U.S. citizen), USCIS can deny naturalization based on the failure to register with the Selective Service. The INS memoranda states that USCIS can presume that the failure to register was knowing *or* willful, *unless the applicant shows otherwise* by a preponderance (majority) of the evidence.³⁴ Therefore, the applicant has the burden of proof to show that either he was not required to register or that he did not knowingly and willfully fail to register.³⁵ The USCIS Policy Manual similarly states that USCIS “will allow the applicant an opportunity to show that he did not knowingly or willfully fail to register, or that he was not required to do so.”³⁶ The current N-400 directs applicants who are 26 years of age or older and did not register to attach a written statement explaining why they did not register, and a status information letter from the Selective Service.³⁷

Nevertheless, some USCIS offices refused to accept applicants’ explanations regarding why they had failed to register for Selective Service and instead had a policy of blanket denials for anyone who had not registered. These blanket denials were arguably illegal. Remember that the Federal Selective Act *requires* that no one be denied a right, privilege, or benefit under Federal law if he shows by preponderance of the evidence that his failure to register for Selective Service was not knowing and willful.³⁸ Since naturalization is a federal right, privilege, or benefit, denial of naturalization based on failure to register for the Selective Service can only happen if it was and knowing and willful failure to register.

PRACTICE TIP: It is the ILRC’s view that if the applicant’s failure to register was not willful, but was because he did not know about the requirement or sincerely believed that it did not apply to him, he should bring in evidence to prove this fact to USCIS. This could include his testimony, the testimony of others who know him, or other evidence. Many USCIS examiners will accept the applicant’s testimony as sufficient to demonstrate he did not willfully and knowingly fail to register. However, if the applicant cannot demonstrate that his failure to register was not knowing and willful, then his application must be denied for “failure to demonstrate during the requisite period before filing his application that he was well disposed to the good order and happiness of the United States.”³⁹

³² 12 USCIS-PM D.7(B)(2).

³³ *Id.*

³⁴ See also 12 USCIS-PM D.7(B)(2) (stating that “the applicant must show by a preponderance of the evidence that his failure to register was not a knowing or willful act”).

³⁵ 12 USCIS-PM D.7(B)(2).

³⁶ *Id.*

³⁷ See USCIS, *Form N-400* (Dec. 23, 2016), Part 12, Question 44, C(2), <https://www.uscis.gov/sites/default/files/files/form/n-400instr.pdf>.

³⁸ 50 USC App. § 462(g).

³⁹ *Id.*

NOTE: It is the ILRC’s opinion that the USCIS policy on failure to register for the Selective Service has some flaws. We assert that even if the person failed to register within the statutory period (that is the previous five years for most applicants, or three years for those applying as the spouses of a U.S. citizen), e.g., if the applicant is still between the ages of 26 to 31, USCIS cannot deny naturalization based on a failure to show good moral character without first applying a balancing test and giving the applicant the opportunity to show positive equities. Even if the person admits or USCIS decides that the person did “willfully” fail to register, this should not mean an automatic denial of the application. USCIS, as in all GMC cases in which a statutory bar is not triggered, must weigh evidence of bad moral character against evidence of GMC.⁴⁰ The person must be permitted to attempt to offset the “bad act” of willful failure to register with the “good acts” of stable employment, support of family, participation in church or civic activities, and other evidence of GMC.

NOTE: If your client is between the ages of 26 and 31 years old, and the failure to register for Selective Service occurred outside of the statutory period (the last five years for most naturalization applicants and three years for those applying as the spouse of a U.S. citizen), then it is the ILRC’s opinion that these age ranges are based on the 5 year GMC time period. Therefore, it is the ILRC’s opinion that if the GMC time period is shorter, then the applicant would fall into the category outlined below. For example, it is ILRC’s position that this category would apply if your client is 30 years old and is seeking to naturalize based on his marriage to his U.S. citizen wife. While the USCIS Policy Manual does not make this distinction for individuals between the ages of 26 and 31 years old who are naturalizing based on their marriage to a U.S. citizen spouse, it is our opinion that there is a distinction since the age ranges outlined by USCIS are based on the statutory period for establishing GMC.

C. After Age 31 (or After Age 29 if Applying as a Spouse of a U.S. Citizen)

After the age of 31 (or, 29 years old if applying for naturalization as the spouse of a United States citizen⁴¹), the test changes again. The USCIS Policy Manual states clearly that if the person is in this age group, the person is eligible to naturalize, even if he failed to register and the failure was knowing and willful, because the failure to register is outside the statutory period.⁴²

In sum, the chart below shows how an applicant’s failure to register for the Selective Service will be evaluated by USCIS based on their age. For more details, please see the related sections above.

⁴⁰ See *Torres-Guzman v. INS*, 804 F.2d 531, 543 (9th Cir. 1986); *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 365 (BIA 1991); *Matter of B-*, 1 I&N Dec. 611, 612 (BIA 1943); see also discussion and footnote in Part A of this section.

⁴¹ This is the ILRC’s opinion since the age ranges outlined by USCIS in the Policy Manual (12 USCIS-PM D.7(B)(2)) are based on the statutory period for establishing GMC and the cutoff age for registering for the Selective Service.

⁴² 12 USCIS-PM D.7(B)(2).

| Age Range | USCIS' Evaluation |
|---|---|
| 18 years old to 25 years old | Applicant should register prior to submitting his N-400 Form. The Selective Service will accept late registrations (more than 30 days after the person's 18th birthday) up until the person's 26th birthday. |
| | It is our view that USCIS should deny naturalization only after providing the applicant with an opportunity to register and the applicant still refuses to register. |
| 26 years old to 29 years old and naturalizing through their U.S. citizen spouse (still within the statutory period) | USCIS can deny naturalization based on the failure to register with the Selective Service. The applicant has the burden of proof to show that either he was not required to register or that he did not knowingly and willfully fail to register. |
| 26 years old to 31 years old (still within the statutory period) | USCIS can deny naturalization based on the failure to register with the Selective Service. The applicant has the burden of proof to show that either he was not required to register or that he did not knowingly and willfully fail to register. |
| After Age 29 and applying as a spouse of a U.S. citizen | The person is eligible to naturalize, even if he failed to register and the failure was knowing and willful, because the failure to register is outside the statutory period. |
| After Age 31 | The person is eligible to naturalize, even if he failed to register and the failure was knowing and willful, because the failure to register is outside the statutory period. |

D. Activities Outside the Good Moral Character Statutory Period

The fact that the applicant must have GMC for five years (or three years) does not mean that USCIS is limited to looking only at the applicant's activities during that statutory period.⁴³ In fact, the Immigration and Nationality Act (INA) explicitly states that the government is not limited to the five- or three-year period immediately before the application is filed.⁴⁴ USCIS often does look beyond the statutory period to determine if the applicant has GMC. Thus, the applicant's good behavior during the past five years (or three years), while critical, is not the last word on GMC.

USCIS recognizes that when Congress created the requirement that naturalization applicants demonstrate GMC during a specified period, it intended to allow the eventual naturalization of those individuals who in the past engaged in some wrongdoing but who have now "reformed."⁴⁵ However, USCIS reasons that in order to determine if these individuals have reformed, activities prior to the statutory period will be considered. Thus, past behavior may reflect on current character.⁴⁶

However, the INS Interpretations⁴⁷ and some courts have held that the applicant's behavior before the five- or three-year period cannot be the *only* reason to deny naturalization (e.g. solely on the basis of failing to register for the Selective Service outside of the statutory period). If the applicant has shown "exemplary" conduct within the required statutory

⁴³ *Nyari v. Napolitano*, 562 F.3d 916, 920 (8th Cir. 2009).

⁴⁴ INA § 316(e); INS Interpretations 316.1(f)(2).

⁴⁵ 12 USCIS-PM F.2(B); INS Interpretations 316.1(f)(1).

⁴⁶ 12 USCIS-PM F.2(B).

⁴⁷ INS Interpretations 316.1(f)(2). See Footnote 1 for a review of controlling authority including INS Interpretations as compared to the USCIS Policy Manual.

period, the applicant must be found to have GMC.⁴⁸ In particular, if there are negative factors outside of the GMC period, like failing to register for the Selective Service, GMC should nevertheless be found if the applicant shows rehabilitation during the GMC period.⁴⁹ Check the case law in your particular jurisdiction to see if there is any supportive case precedent on this issue; even if your circuit has not addressed the issue, many district courts have strong language about not denying naturalization based only on conduct prior to the GMC period.⁵⁰ It is the applicant's burden to show GMC and thus reform within the statutory period. USCIS must evaluate each application on a case-by-case basis.⁵¹ If USCIS determines that an applicant does not have GMC, USCIS should issue a written decision that follows 8 CFR § 336.1(b) and lists the pertinent facts and legal bases upon which the denial was based.⁵² Please see the ILRC's manual, *Naturalization and Citizenship, The Essential Legal Guide* for more information on this topic (<https://www.ilrc.org/publications>).

E. Disproving Willful Failure to Register

Most applicants who failed to register with the Selective Service probably just did not know that they were required to register. USCIS offices continue to have different standards for determining whether failure to register for Selective Service was knowing and therefore "willful." For example, in some district offices USCIS adjudicators generally will accept an applicant's statement that he did not know he was supposed to register and will ask him to fill out a form affidavit to that effect.⁵³ Additionally, if there is evidence in the person's file that USCIS told him of the Selective Service requirement in his own language the officer might deny the application.

⁴⁸ *Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 (9th Cir. 1996); INS Interpretations 316.1(f)(2) (where conduct has been exemplary during the statutory period and the only adverse facts occurred outside of the period, a denial of naturalization is generally precluded).

⁴⁹ See *Nyari v. Napolitano*, 562 F.3d 916, 920 (8th Cir. 2009); *U.S. v. Hovespian*, 422 F.3d 883, 886–87 (9th Cir. 2005); *Ikenokwalu-White v. INS*, 316 F.3d 798, 805 (8th Cir. 2003); *Santamaria-Ames v. INS*, 104 F.3d 1127, 1131–32 (9th Cir. 1996); *Pignatello v. Attorney Gen. of U. S.*, 350 F.2d 719 (2d Cir. 1965); *Marcantonio v. United States*, 185 F.2d 934, 937 (4th Cir. 1950); *Petition of Zele*, 140 F.2d 773 (2d Cir. 1944); *Matter of Carbajal*, 17 I&N Dec. 272 (RC 1978).

⁵⁰ *Gatcliffe v. Reno*, 23 F. Supp. 2d 581, 585 (D.V.I. 1998); *Tan v. INS*, 931 F. Supp. 725, 731–32 (D. Haw. 1996); see also *Adegoke v. Fitzgerald*, 784 F. Supp. 2d 538, n.2 (E.D. Pa. 2011); *Fuks v. Devine*, 2006 WL 2051321, at *5 (N.D. Ill. July 20, 2006); *Meraz v. Comfort*, 2006 WL 861859 (N.D. Ill. Mar. 9, 2006); *In re Pruna*, 286 F. Supp. 861, 862 (D.P.R. 1968); *Gordon v. Chertoff*, 2005 WL 2989706 (E.D. Va. Nov. 4, 2005); *Asamoah v. U.S. I.N.S.*, 2004 WL 736911 (S.D.N.Y. Apr. 5, 2004); *Gizzo v. I.N.S.*, 2003 WL 22110278 (S.D.N.Y. Sept. 10, 2003); *Petition of Orphanidis*, 178 F. Supp. 872 (N.D.W. Va. 1959).

⁵¹ 8 CFR § 316.10(a)(2).

⁵² See Settlement in Class Action Challenging Naturalization Denials; USCIS Agrees to Pay Attorneys' Fees and Cost, 82 Interpreter Releases 1932 (Dec. 5, 2005).

⁵³ ILRC has heard that some offices might also require that applicants submit a registration even if no longer eligible to register.

Extenuating Circumstances. Under 8 CFR § 316.10, a person who falls into the non-statutory, regulatory bases to deny good moral character (GMC) is entitled and required to establish “extenuating circumstances” to explain their conduct and avoid an adverse moral character determination.⁵⁴ USCIS has provided guidance in a memorandum⁵⁵ as well as in the USCIS Policy Manual⁵⁶ as to what is required of a naturalization applicant to prove extenuating circumstances for acts that might indicate a lack of GMC.

Extenuating circumstances must directly relate to the applicant’s commission of the act at issue, i.e., failure to register for the Selective Service. To be directly related, the extenuating circumstance must take place before or during the same time as the commission of the act. Also, evidence of the extenuating circumstance must relate to the reasons for lacking GMC. For example, an extenuating circumstance could be that a person did not register for the Selective Service because he did not have adequate notice that he was supposed to. Nothing that occurs after the act is committed, such as the consequences of the act, will be considered an extenuating circumstance. This means that reformation, rehabilitation, and other effects such as hardship resulting in ineligibility for citizenship⁵⁷ will not be considered extenuating circumstances. Finally, it is important to note that extenuating circumstances will be given further credence if many positive equities exist in the case because of the necessity of USCIS to employ a balance test before determining whether the applicant has GMC.

In a federal district court case in California⁵⁸ the court found that an applicant who has failed to register has the burden to prove by a preponderance of the evidence that: (1) he possessed neither actual or constructive⁵⁹ knowledge of the Selective Service registration requirement; and (2) he did not have the intent to fail to register by producing evidence negating this intent such as evidence that he made a good faith attempt to comply with the Selective Service requirement before the age of 26 if it was possible in the case.⁶⁰ This is a high burden for many clients to meet. Although USCIS does not have to follow this case because it is not a federal circuit court case, it could provide guidance for USCIS in some offices in the future. You should check legal standards in your jurisdiction.

Many USCIS offices assert that permanent residents are warned, in a manner that they can understand, of the requirement at the time they gain permanent residency. For example, special rules applied to some persons applying under the “amnesty” programs of the 1980’s.⁶¹ Some USCIS examiners argue that therefore all failures to register by permanent residents who were warned in some manner are knowing and willful. These officers may insist that even if the person did not understand such a warning, the person should have understood and should be penalized.

⁵⁴ *Ragoonanan v. USCIS*, No. 07-3461, 2007 U.S. Dist. LEXIS 92922, *11–12 (D. Minn. Dec. 18, 2007) (unpublished) (holding that when USCIS examines an applicant’s criminal behavior under the catch-all category he is entitled to establish extenuating circumstances); *Angel v. Chertoff*, No. 07-cv-168, 2007 U.S. Dist. LEXIS 78084, *15–16 (S.D. Ill. Oct. 22, 2007) (“Angel must still satisfactorily explain away his unlawful actions by showing extenuating circumstances”).

⁵⁵ See USCIS, Memorandum on Amendment to AFM 73.6(d)(3)(B) regarding Application of the “Unlawful Acts” Regulation in Naturalization Determinations, (Sept. 19, 2005).

⁵⁶ 12 USCIS-PM F.2(G).

⁵⁷ *Jean-Baptiste v. United States*, 395 F.3d 1190 (11th Cir. 2005); 12 USCIS-PM F.2(G).

⁵⁸ *Patel v. Still*, No. C04-0138, 2005 WL 1910926 (N.D. Cal. Aug. 10, 2005) (unpublished).

⁵⁹ “[K]nowledge can be inferred if the evidence shows that the person had information that would lead a reasonably prudent person to inquire as to the facts, despite a lack of evidence that the person had actually inquired and learned the facts ... [and] by circumstantial evidence relating to a party’s conduct or activities.” *Id.* at 4–5.

⁶⁰ The burden was not met in *Patel* because the applicant had actual knowledge of the requirement. He signed a notice of duty to register at a visa interview abroad and orally acknowledged that he understood the requirement. At the time of applying for naturalization, he had the opportunity to inquire about the requirement mentioned in the application and to review the requirement in the INS booklet in preparation for the test. He also received and read a notice from the INS stating that he must bring evidence of Selective Service registration to his interview. Further, he waited over five years to register despite numerous reminders.

⁶¹ People who became permanent residents under the amnesty or legalization program because they lived here since before 1982 were required to register for Selective Service to qualify for amnesty and the question appeared on the amnesty form. Persons who gained amnesty through the SAW program because they were farmworkers were not required to register as a condition of getting amnesty, and the question did not appear on their application forms.

The question, however, should be whether *the individual person actually understood the requirement*. A person's statement that he did not understand the requirements should contain details about the applicant's own experience and feelings and not just be a "boilerplate" statement. In all cases the applicant should be prepared to explain in detail why he did not believe he had to register. For example, if the applicant attended high school in the United States and heard of the requirement but thought that it did not apply to undocumented or permanent resident aliens, he should be ready to discuss that. If his immigration record states that he was informed of the requirement when he immigrated, but he does not remember this or did not understand it, he should be ready to discuss any limitations in terms of understanding English or of literacy he had at that time. We suggest that naturalization applicants who may be affected by this (males between 26 and 31 who did not register) and who live in an USCIS jurisdiction that is strict about accepting the applicant's statement as to why he failed to register for the Selective Service, should file a Freedom of Information Act (FOIA) request with USCIS to review the person's USCIS file. If there is some written record of a warning in the applicant's native language, this will give the applicant time to think about the warning and remember if in fact he understood the warning, and if not, why not. ILRC has a step-by-step guide for completing FOIA requests with DHS, available here: <https://www.ilrc.org/step-step-guide-completing-foia-requests-dhs>.

The denial notice in cases where willful failure to register is established may also show that in addition to failing to register, the applicant is not well disposed to the good order and happiness of the United States.⁶²

⁶² 12 USCIS-PM F.4(A)(1).



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.