

# **Defending Non-Citizens in Illinois, Indiana, and Wisconsin**

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“[T]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”

*Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

## DISCLAIMER

**This manual is NOT INTENDED to serve as legal advice on individual cases, but to give a general overview of the immigration consequences for criminal convictions to public defenders and criminal defense attorneys who are working with non-citizen clients. Due to the ever-changing nature of immigration law, almost weekly administrative immigration appellate decisions, and federal court rulings, attorneys are strongly urged to contact and collaborate closely with an immigration attorney who works on criminal immigration cases in every case involving a non-citizen defendant.**

## CHAPTER

# 1

## Defending Non-citizens in Illinois, Indiana, and Wisconsin: An Overview

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### The Importance of Understanding Immigration Law

Since 1995, Congress has enacted more than 25 major bills which have amended the Immigration and Nationality Act (INA).<sup>1</sup> In 1996, Congress overhauled the INA to greatly expand the grounds for which non-citizens could be deported for criminal offenses and created a new immigration court process called removal proceedings.<sup>2</sup> The Homeland Security Act of 2002 abolished the former Immigration and Naturalization Service (INS) in the U.S. Department of Justice and created the U.S. Department of Homeland Security (DHS), effective March 1, 2003.<sup>3</sup> The DHS is responsible for enforcing the immigration

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<sup>1</sup> See Appendix 1A, Brief History of Immigration Laws: 1996-Present.

<sup>2</sup> For general discussions about changes in immigration law, see Helen Morris, "Zero Tolerance: The Increasing Criminalization of Immigration Law," 74 *Interpreter Releases* 1317, 1317-26 (1997); Juan P. Osuna, "The 1996 Immigration Act: Criminal Aliens and Terrorists," 73 *Interpreter Releases* 1713, 1713-22 (1996).

<sup>3</sup> See Appendix 1C. The Homeland Security Act of 2002 (HSA), Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) abolished the INS and transferred its responsibilities to the new Department of Homeland Security (DHS) with its Secretary. The DHS is a Department headed by a cabinet level Secretary under the President of the United States. The Board of Immigration Appeals (BIA) and the Immigration Courts remain under the direction of the Attorney General of the Department of Justice, also a federal executive agency under the President. See I.N.A. § 103, 8 U.S.C. §1103; 8 C.F.R. §§ 1001.1, 1003, 1003.1, 1003.9. The INA also contains provisions of criminal law, for which prosecutions occur before the federal district courts. See, e.g., I.N.A. § 276, 8 U.S.C. § 1326 (illegal reentry prosecutions); I.N.A. § 274A, 8 U.S.C. § 1324a (prosecutions of U.S. employers for hiring of unauthorized workers); I.N.A. § 266, 8 U.S.C. § 1306 (failure to register changes of address), I.N.A. § 274C, 8 U.S.C. § 1324c (document fraud); I.N.A. § 274(a)(1)(A)(i), 8 U.S.C. § 1324(a)(1)(A)(i) (alien smuggling). The federal circuit courts of appeals review decisions of the district courts and, where jurisdiction is available, final orders of removal entered by the DHS or the BIA. See I.N.A. § 242, 8 U.S.C. § 1252; 28 U.S.C. § 1291; 28 U.S.C. § 2253; 28 U.S.C. § 2107(b).

laws as well as adjudicating applications for immigration benefits and U.S. citizenship.<sup>4</sup> The REAL ID Act of 2005 contains many provisions that affect the ways in which state and local governments may provide certain basic services to the public, such as the documentation required of non-citizens and U.S. citizens alike for the issuance of driver's licenses.<sup>5</sup>

The impact of the 1996 laws continues to be experienced by non-citizens and their family members throughout the U.S. More than 30,000 individuals are detained daily in DHS custody in approximately 260 facilities across the country; for Fiscal Year 2009, the DHS has a budget to detain up to 33,400 individuals per day.<sup>6</sup> This constitutes more than three times the number of detainees in 1996. Detention of individuals by the DHS can last for months and even years.<sup>7</sup> In Fiscal Year 2008, the DHS averaged 977 removals per day, for an annual total of 356,739 individuals removed from the U.S.<sup>8</sup>

For many non-citizens facing the possibility of removal (deportation) from the U.S., the statistics regarding relief from removal granted by the immigration courts are somewhat startling: of the 339,071 cases completed in Fiscal Year 2008, immigration judges ordered 17,015 proceedings terminated (7.4%), granted relief in 28,304 cases (12.3%), ordered removal in 182,646 cases (79.6%),<sup>9</sup> and entered 1,351 cases "other" dispositions.<sup>10</sup> Mexicans comprised the largest number of individuals in proceedings, being approximately

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<sup>4</sup> The Homeland Security Act of 2002 (HSA), Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) abolished the INS and transferred its responsibilities to the Department of Homeland Security (DHS) with its Secretary. The Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), and the Customs and Border Protection (CBP) are part of the DHS. See HSA, Title 4, Subtitle E, 451(b); 8 C.F.R. §§ 103.1-103.7. See Appendix 9-B, Contact information for DHS, ICE, CBP, CIS, and EOIR.

<sup>5</sup> See REAL ID Act of 2005, Title II §§ 202-208, Div. B of Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, 2005, PL 109-13, 119 Stat. 231, 310 (May 11, 2005); For more information on the REAL ID Act of 2005, see also <http://www.ncsl.org/realid/> and [www.realnighmare.org](http://www.realnighmare.org).

<sup>6</sup> See M. Roberts, "Immigrants face lengthy detention with few rights," *The Associated Press*, Mar. 10, 2009 (citing information received from a Freedom of Information Act request that showed 32,000 detainees in DHS custody on January 25, 2009 and an additional 2,700 per day are on electronic monitoring programs as an alternative to detention); See Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, at 6, Mar. 25, 2009, available at <http://www.amnestyusa.org/immigrant-detention/page.do?id=1641031>

<sup>7</sup> See Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, at 6, Mar. 25, 2009, available at <http://www.amnestyusa.org/immigrant-detention/page.do?id=1641031>.

<sup>8</sup> ICE Fiscal Year 2008 Annual Report, Executive Summary at pages iv and viii, available at [http://www.ice.gov/doclib/pi/reports/ice\\_annual\\_report/pdf/ice08ar\\_final.pdf](http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf).

<sup>9</sup> See EOIR Office of Planning, Analysis & Technology, Figure 5—IJ Decisions by Disposition, at D2, *FY 2008 Statistical Year Book*, Mar. 2009, available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>. EOIR included grants of voluntary departure under removal orders. See *id.* Voluntary departure grants constituted 26,656 of the 182,646 removal orders. See EOIR Office of Planning, Analysis & Technology, Figure 14—IJ Removal Decisions Compared to Voluntary Departure Decisions, at Q1, *FY 2008 Statistical Year Book*, Mar. 2009, available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

<sup>10</sup> See *id.*

40% of the completed cases.<sup>11</sup> In the same time period, the Board of Immigration Appeals received 32,432 cases and completed 38,369 cases, of which 48% involved detained individuals.<sup>12</sup> Thousands of other non-citizens are ordered removed from the U.S. by the DHS, without the right to a hearing before an Immigration Judge.<sup>13</sup>

Non-citizens and their attorneys must become aware of changing immigration laws and the resulting immigration consequences of criminal convictions. For non-citizens, minor criminal charges can result in mandatory detention of non-citizens, deportation or removal, and lifetime bars to returning to the United States to seek safety or be with family. This means that the role of criminal defense counsel is not only critical to the ultimate outcome of a non-citizen's criminal case, but also to that of his immigration case and future in the U.S.<sup>14</sup> This manual is intended to assist public defenders and criminal defense attorneys to become aware of the issues that may affect their non-citizen clients. The more an attorney learns about immigration consequences of criminal conduct, the better he will be able to advise his non-citizen clients and their families and to work with prosecutors and courts to prevent adverse outcomes for non-citizens under immigration law. This manual also provides resources for obtaining individual case evaluations and advice from immigration attorneys.<sup>15</sup>

## Is Your Client a United States Citizen?

As the stakes for a non-citizen with a criminal conviction are high, it is essential to identify whether your client is a United States citizen as soon as possible. U.S. citizenship should not be assumed. For example, many non-citizens entered the United States as infants or young children. They dress, speak, and appear to be U.S. citizens. It is not unusual for long-term lawful permanent residents to speak only English, have never naturalized and thus remain at risk of deportation. Neither the length of a non-citizen's residence in the United States or degree of assimilation is indicative of U.S. citizenship.

By first asking every defendant about his citizenship status and then consulting with immigration counsel regarding possible immigration consequences for the non-citizen clients, defense counsel may be able to avoid adverse immigration consequences for his non-citizen client. In addition, asking the citizenship questions may avoid motions to withdraw guilty pleas, motions to reduce sentences, motions for post-conviction relief, applications for presidential or gubernatorial pardons, and detention of non-citizens by DHS.

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<sup>11</sup> See EOIR Office of Planning, Analysis & Technology, Figure 6—FY 2008 Court Proceedings Completed by Nationality, at E1, *FY 2008 Statistical Year Book*, Mar. 2009, available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

<sup>12</sup> See EOIR Office of Planning, Analysis & Technology, Figure 25—Total BIA Cases Received and Completed, at S1, *FY 2008 Statistical Year Book*, Mar. 2009, available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

<sup>13</sup> See Final Administrative Removal Orders, *infra* at 6-3.

<sup>14</sup> See “Deportation Dilemmas, Criminal Bar Needs Immigration Info,” *Connecticut Law Tribune*, Nov. 14, 2005. The question of the role of a defense attorney regarding the immigration consequences of criminal dispositions will be decided by the U.S. Supreme Court in its 2009-2010 term. See *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), *cert. granted*, 2009 U.S. LEXIS 1453 (U.S. Feb. 23, 2009) (No. 08-651).

<sup>15</sup> See Appendix 9C, Resources.

### QUESTIONS TO ASK A CLIENT TO DETERMINE U.S. CITIZENSHIP

To begin to determine whether a criminal defendant may be a United States citizen, ask him the following questions:

1. Where were you born?
2. In what countries have you ever lived since you were born?
  - a. How long did you live in each country?
  - b. When did you first come to the U.S.?
  - c. If you have a green card (a lawful permanent resident), when did you first become a lawful permanent resident?
3. Of what country or countries do you think you are a citizen?
4. If you believe that you are a U.S. citizen, how did you become a U.S. citizen?
5. Were either of your parents U.S. citizens when you were born?
  - a. Which parent?
  - b. How do you know that your parent was a U.S. citizen at the time that you were born?
6. Where were your parents born?
7. Are either of your parents a U.S. citizen today?
  - a. How do you know that your parent is a U.S. citizen?
  - b. If your parent was not born in the U.S., when did your parent become a U.S. citizen?
  - c. If you were legally adopted, how old were you when you were adopted?
    - i. At the time that you were adopted, were your parents married to each other?
    - ii. If your parents were not married and one of your parents was a step-parent, did your step-parent adopt you?
8. Did your parents ever live in the U.S. at any time in their lives?
9. Were any of your grandparents ever U.S. citizens?
10. If one of your grandparents was a U.S. citizen, when did he or she live in the U.S.?

A criminal defendant may not know that he is a U.S. citizen. In general, a U.S. citizen is a person who was born in the United States, a person born outside the United States who gains citizenship through one or both parents, or a person who has naturalized.<sup>16</sup> Persons

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<sup>16</sup> See I.N.A. § 301, 8 U.S.C. § 1401, for the law of acquired citizenship for a person born outside of the United States who has one parent who is a U.S. citizen. It should be noted that whether an individual acquired citizenship from a U.S. citizen parent depends on such factors as: whether the mother or father was the U.S. citizen at the time of the individual's birth; whether the parents were married at the time of birth; and the date that the individual was born. In some cases, the length of time spent in the U.S. by the U.S. citizen (or in certain instances, the U.S. citizen grandparent) may also need to be reviewed. This is a highly technical field of immigration law; if one parent was a U.S.



born in Puerto Rico on or after January 13, 1941 and subject to the jurisdiction of the United States are U.S. citizens at birth.<sup>17</sup>

A child who was born to non-citizen parents may derive U.S. citizenship when his parent naturalizes to become a U.S. citizen, depending upon his age and the law in effect when his parent naturalized.<sup>18</sup> In a major amendment to the citizenship laws through the Child Citizenship Act of 2000, a child derives U.S. citizenship when he: 1. was born outside of the U.S. to a parent who is a U.S. citizen; 2. is residing in the U.S. in the legal and physical custody of his citizen parent pursuant to a lawful admission for permanent residence; and 3. is under the age of 18 years old on or after February 27, 2001.<sup>19</sup> State law may be consulted to determine whether a naturalized U.S. citizen has “legal custody” of a child.<sup>20</sup> A determination about whether there has been a judicial determination or judicial statutory grant of custody is reviewed. Where a parent has been granted custody through a judicial determination or operation of law, that parent has legal custody for purposes of immigration law.<sup>21</sup> If no such determination or judicial grant exists, then the parent who has “actual uncontested custody” is deemed to have legal custody.<sup>22</sup> A child may not derive U.S. citizenship through a step-parent who has not adopted him.<sup>23</sup> To derive U.S. citizenship, the child must have acquired lawful permanent residence in the U.S. prior to

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citizen, immigration counsel and/or immigration handbooks should be consulted to determine whether an individual is a U.S. citizen.

<sup>17</sup> See I.N.A. § 302, 8 U.S.C. § 1402; I.N.A. § 303, 8 U.S.C. § 1403 (persons born in the Canal Zone or Republic of Panama on or after February 26, 1904); I.N.A. § 304, 8 U.S.C. § 1404 (persons born in Alaska on or after March 30, 1867); I.N.A. § 305, 8 U.S.C. § 1405 (persons born in Hawaii on or after August 12, 1898); I.N.A. § 306, 8 U.S.C. § 1406 (persons living in and born in the Virgin Islands subsequent to January 17, 1917); I.N.A. § 307, 8 U.S.C. § 1407 (persons living in and born in Guam on or after April 11, 1899).

<sup>18</sup> See I.N.A. §§ 320, 301A, 302-307, 309, 8 U.S.C. §§ 1431, 1401a, 1402-1407, 1409; *see also*, Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), sections 101-104, amending I.N.A. §§ 320, 322, 8 U.S.C. §§ 1431, 1433 (effective 120 days after the date of enactment; amending the I.N.A. to provide for acquisition of U.S. citizenship by a child who is under 18 years of age, a lawful permanent resident, and residing permanently in the U.S. in the legal and physical custody of the U.S. parent). For an individual who became a lawful permanent resident and turned age 18 before February 27, 2001, both parents had to naturalize before he turned age 18 or if the individual was born out of wedlock, he was not legitimated at the time that his parent with custody of him became a naturalized U.S. citizen. See I.N.A. § 321(a)(3) (2000), 8 U.S.C. § 1432(a)(3); *In re Hines*, 24 I&N Dec. 544 (BIA Jun. 4, 2008); *In re Baires*, 24 I&N Dec. 467 (Mar. 10, 2008) (custody by naturalized parent must have occurred before child turned age 18).

<sup>19</sup> See Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), sections 101-104, amending I.N.A. §§ 320, 322, 8 U.S.C. §§ 1431, 1433; *Ali v. Ashcroft*, 395 F.3d 722, 726 (7<sup>th</sup> Cir. Jan. 11, 2005) (holding that the Child Citizenship Act (CCA) is not retroactive and finding that although the first two conditions under the CCA had been met, the non-citizen had not derived U.S. citizenship from his mother because he was over the age of 18 on February 27, 2001); *Gomez-Diaz v. Ashcroft*, 324 F.3d 913, 916 (7<sup>th</sup> Cir. Apr. 7, 2003); *In re Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA Jul. 24, 2001).

<sup>20</sup> See *Wedderburn v. I.N.S.*, 215 F.3d 795, 799 (7<sup>th</sup> Cir. Jun. 1, 2000) (holding that the terms legal custody and legal separation of the parents take their meaning from federal law but that federal law may point to state or foreign law as a rule of decision).

<sup>21</sup> See *In re M-*, 3 I&N Dec. 850 (BIA Jan. 24, 1950).

<sup>22</sup> See *id.*; *Wedderburn v. I.N.S.*, 215 F.3d 795, 797 (7<sup>th</sup> Cir. Jun. 1, 2000) (citing with approval *In re M-*, 3 I&N Dec. 850 (BIA Jan. 24, 1950)).

<sup>23</sup> See *In re Guzman-Gomez*, 24 I&N Dec. 824 (BIA May 8, 2009).



turning 18 years old.<sup>24</sup> Where the citizen parent has died within the preceding five years, a citizen grandparent or citizen guardian may apply for naturalization of a child born outside of the U.S. where the other requirements under the Child Citizenship Act are met.<sup>25</sup>

United States nationality is acquired by birth or by naturalization.<sup>26</sup> A national of the United States is person who is a citizen of the United States or who, though not a citizen of the United States, owes permanent allegiance to the United States.<sup>27</sup> Persons born in outlying United States possessions are U.S. nationals but not U.S. citizens at birth.<sup>28</sup>

A non-citizen can apply to naturalize to become a United States citizen if she is a U.S. national or a non-citizen who meets the requirements for naturalization. In general, a non-citizen must be a lawful permanent resident for five years (or three years if she has been married to a U.S. citizen for three years since becoming a lawful permanent resident), have good moral character, speak, read, and write English, pass an examination on United States government and civics (waivers available for elderly and disabled), be willing to take an oath of allegiance, pass a criminal investigation, and pay the application and fingerprint fee to the DHS Citizenship and Immigration Services (CIS).<sup>29</sup> A non-citizen who has applied for naturalization and passed the interview is not a U.S. citizen until she takes the oath of citizenship before a CIS officer or a federal district court, typically at an oath ceremony.<sup>30</sup>

Persons who served in the U.S. Armed Forces for three years or who served in active-duty status in World War I, World War II, the Korean hostilities, Vietnam hostilities, or other periods of military hostilities and who were honorably discharged may be eligible for naturalization under slightly different requirements.<sup>31</sup> In addition, non-citizens who hold non-immigrant visas, Temporary Protected Status (TPS), refugee status, or asylee status may be able to apply directly for citizenship without becoming lawful permanent residents through enlisting in a new military pilot program to serve as a health care professional or with certain strategic language skills.<sup>32</sup> A person who voluntarily renounces his U.S.

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<sup>24</sup> See *In re Nwozuzu*, 24 I&N Dec. 609 (BIA Sept. 10, 2008).

<sup>25</sup> See I.N.A. § 322(a), 8 U.S.C. § 1433(a).

<sup>26</sup> See I.N.A. § 101(a)(22), 8 U.S.C. § 1101(a)(22); *In re Navas-Acosta*, 23 I&N Dec. 586 (BIA Apr. 29, 2003) (holding that a non-citizen who takes an oath of allegiance during an interview for naturalization does not acquire U.S. nationality; where a person is born abroad and does not acquire United States nationality by birth, naturalization, or congressional action, he is not a U.S. national).

<sup>27</sup> See I.N.A. § 101(a)(22), 8 U.S.C. § 1101(a)(22).

<sup>28</sup> See I.N.A. § 308, 8 U.S.C. § 1408.

<sup>29</sup> See generally I.N.A. §§ 310-344, 8 U.S.C. §§ 1421-1455.

<sup>30</sup> See I.N.A. § 337, 8 U.S.C. § 1448.

<sup>31</sup> See Appendix 6B, Forms of Immigration Relief Chart; I.N.A. §§ 328, 329, 8 U.S.C. §§ 1439, 1440.

<sup>32</sup> See under I.N.A. § 329, 8 U.S.C. § 1440. For more information about the Military Accessions Vital to the National Interest (MAVNI) program and the requirements, see 74 Fed. Reg. 7993 (Feb. 23, 2009); M. Stock, "Ten Things that Immigration Attorneys Should Know About the Army's New Non-citizen Recruiting Program," available at *Bender's Immigration Bulletin*, Feb. 2009, <http://drop.io/hf4xwak/asset/stock-mavni-2-22-09-pdf>; J. Preston, "U.S. Military Will Offer Path to Citizenship," *The New York Times*, Feb. 14, 2009, available at [http://www.nytimes.com/2009/02/15/us/15immig.html?\\_r=1&scp=3&sq=immigrants&st=cse](http://www.nytimes.com/2009/02/15/us/15immig.html?_r=1&scp=3&sq=immigrants&st=cse).

citizenship is no longer a U.S. citizen.<sup>33</sup>

### **Who is a Non-citizen?** <sup>34</sup>

A non-citizen is a person who is not a U.S. citizen. He can fall under any one of the following categories:

- Lawful permanent resident (“green card” holder)
- Refugee
- Asylee
- Asylum Applicant
- Parolee
- Visitor with a B-1 or B-2 visa
- Visitor who was admitted under the Visa Waiver Program
- Visitor who was admitted with a border crossing card
- Foreign student with a F-1, M-1, or J-1 visa
- Dependent of individual with a foreign student visa, including holders of F-2, M-2, or J-2 visas
- Undocumented individual who entered the U.S. without inspection by a U.S. official (entered illegally) or who entered legally but overstayed or violated his status
- Individual with a non-immigrant employment visa, including A, E, H, I, L, O, P, Q, and R visas
- Dependents of non-immigrant employment visa holders, including holders of A-2, E-2, H-4, L-2, R-2 visas
- Individual with another type of non-immigrant visa, such as a diplomat and crewman
- Individual with Temporary Protected Status (TPS)
- Individual with a temporary visa based on being the victim of a crime or human trafficking and/or assisting in the prosecution or investigation of a crime: T, U, and S visas
- Individual born in the U.S. to a parent with a diplomatic visa
- Individual with deferred action status
- Amnesty/Family Unity Applicant

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<sup>33</sup> See *Bensky v. Powell*, 391 F.3d 894 (7<sup>th</sup> Cir. Dec. 13, 2004) (discussing renunciation of citizenship and nationality under the procedures for expatriation under 8 U.S.C. § 1501).

<sup>34</sup> The Immigration and Nationality Act uses the term “alien” to refer to persons who are not U.S. citizens. See I.N.A. § 101(a)(3), 8 U.S.C. § 1101(a)(3). For purposes of this manual, the term non-citizen will be used.

## Non-citizen Populations in Illinois, Indiana, and Wisconsin

Illinois is home to 1,773,600 immigrants, an estimated 14 percent of the entire state's population, which numbers 12,831,971.<sup>35</sup> Illinois has the fifth largest foreign born population<sup>36</sup> in the U.S.<sup>37</sup> Six percent of the foreign born population are naturalized U.S. citizens and eight percent are not U.S. citizens.<sup>38</sup> Of these non-citizens in Illinois, approximately 550,000 are undocumented.<sup>39</sup> Almost half of those born outside of the U.S. come from Latin America, and the top three countries from which foreign born arrive are Mexico, Poland, and India.<sup>40</sup>

With foreign born residents comprising four percent of its population of 6,313,520, Indiana does not have near the number of foreign born residents as Illinois.<sup>41</sup> It has, however, seen a tremendous increase in its foreign born population in recent years due to the availability of jobs in the service and production/manufacturing industries.<sup>42</sup> Indiana has witnessed the tenth largest immigrant migration with a 40 percent increase in the foreign born population from 2000 to 2006.<sup>43</sup> Specifically among non-citizens there was a 30 percent increase, bringing the percentage of non-citizens to four percent of the entire state population.<sup>44</sup> An estimated 55,000-85,000 of non-citizens in Indiana are undocumented.<sup>45</sup> Similar to Illinois, almost half of the foreign born come from Latin America.<sup>46</sup> The leading countries from which foreign born arrive in Indiana are Mexico, India, and China.<sup>47</sup>

Wisconsin has also seen growth in its foreign born population in recent years. From 2000 to 2006, the foreign born population increased by 27 percent, and more specifically,

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<sup>35</sup> See "States Ranked by Number of Foreign Born: 1990, 2000, and 2006," *Migration Information Source: 2006 Population Estimates*, U.S. Census Bureau.

<sup>36</sup> Foreign born refers to all people born outside of the U.S. This term includes naturalized U.S. citizens and non-citizens. Non-citizens include legal immigrants, legal non-immigrants (i.e. temporarily working or studying in the U.S.), and undocumented persons.

<sup>37</sup> See "States Ranked by Number of Foreign Born: 1990, 2000, and 2005," *Migration Information Source: 2005 Population Estimates*, U.S. Census Bureau.

<sup>38</sup> See *2005 Population Estimates*, U.S. Census Bureau.

<sup>39</sup> See *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006*, DHS Office of Immigration Statistics, <http://www.dhs.gov/ximgtn/statistics/>, Aug. 2007, p. 4. An estimated 400,000 reside in the Chicago area. See Karina Fortuny, Randy Capps & Jeffrey Passel, *The Characteristics of Unauthorized Immigrants in California, Los Angeles County, and the United States*, The Urban Institute, Mar. 2007, p. 6;

<sup>40</sup> See *Census 2000*, U.S. Census Bureau; *2006 Population Estimates*, U.S. Census Bureau.

<sup>41</sup> See *id.*; "States Ranked by Number of Foreign Born: 1990, 2000, and 2006," *Migration Information Source: 2006 Population Estimates*, U.S. Census Bureau.

<sup>42</sup> See *InContext*, Indiana Bureau Research Center.

<sup>43</sup> See "States Ranked by Number of Foreign Born: 1990, 2000, and 2006," *Migration Information Source: 2006 Population Estimates*, U.S. Census Bureau.

<sup>44</sup> See "Persons Naturalized by State of Residence: Fiscal Years 1997 to 2006," *2006 Yearbook of Immigration Statistics*, DHS Office of Immigration Statistics, Sept. 2007; "States Ranked by Percent Change in the Foreign-Born Population: 1990, 2000, and 2006," *Migration Information Source: 2006 Population Estimates*, U.S. Census Bureau.

<sup>45</sup> See Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, Pew Hispanic Center, [www.pewhispanic.org](http://www.pewhispanic.org), Mar. 21, 2005.

<sup>46</sup> See *2006 Population Estimates*, U.S. Census Bureau.

<sup>47</sup> See *2006 Population Estimates*, U.S. Census Bureau.

the non-citizen population increased by 18 percent.<sup>48</sup> Overall, foreign born residents represent approximately four percent of the Wisconsin population of 5,556,506.<sup>49</sup> Approximately 43 percent are U.S. citizens and 57 percent are non-citizens.<sup>50</sup> Of the non-citizens, it is estimated that 100,000 to 150,000 are undocumented.<sup>51</sup> Thirty-nine percent of the foreign born population is Latin American and, due to the resettlement of many Hmong refugees from Laos in the 1980s and early 1990s, thirty-one percent of the foreign born population is of Asian origin. Wisconsin has the third largest Hmong population in the U.S., with the largest population in the metropolitan areas of Milwaukee and Racine. The other two leading countries from which foreign born arrive in Wisconsin are Mexico and Germany.<sup>52</sup>

ILLINOIS		INDIANA		WISCONSIN	
Foreign Born Country of Birth (2006)		Foreign Born Country of Birth (2006)		Foreign Born Country of Birth (2006)	
Mexico	40.9%	Mexico	39.0%	Mexico	32.9%
Poland	8.8%	India	5.3%	Laos	7.7%
India	6.5%	China	4.3%	Germany	5.5%
Philippines	4.8%	Germany	2.8%	India	5.2%
China	2.9%	Canada	2.3%	Thailand	3.5%
Korea	2.4%	Korea	2.7%	China	3.3%
Germany	1.7%	Philippines	2.6%	Canada	3.1%
Guatemala	1.3%	United Kingdom	2.59%	Philippines	2.6%
Pakistan	1.2%	El Salvador	2.2%	Korea	2.4%

Foreign Born Population in Comparison with Total Population												
	Illinois				Indiana				Wisconsin			
	2000		2006		2000		2006		2000		2006	
	#	%	#	%	#	%	#	%	#	%	#	%
Total State Population	12,419,293	100	12,831,970	100	6,080,485	100	6,313,520	100	5,363,675	100	5,556,506	100
Foreign Born	1,529,058	12	1,773,600	13.8	186,534	3	263,607	4.2	193,751	3.6	245,006	4.4
Naturalized U.S. Citizens	603,521	4.8	780,039	6	70,983	1.1	92,773	1.5	76,223	1.4	104,451	1.9
Non-U.S. Citizens	925,537	7.4	993,561	7.7	115,551	2	170,834	2.7	117,528	2.2	140,591	2.5

<sup>48</sup> See “States Ranked by Number of Foreign Born: 1990, 2000, and 2006,” *Migration Information Source*; 2006 *Population Estimates*, U.S. Census Bureau; 2006 *Population Estimates*, U.S. Census Bureau.

<sup>49</sup> See “States Ranked by Number of Foreign Born: 1990, 2000, and 2006,” *Migration Information Source*; 2006 *Population Estimates*, U.S. Census Bureau.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

Non-citizens come to these three Midwestern states for a variety of reasons. Foreign exchange students come from many countries to learn about life in the U.S. and to obtain high school and advanced degrees. Mexican farm workers have settled in these states since the early 1920s seeking better lives for themselves and their children. U.S. companies legally hire foreign workers in the areas of business, scientific and medical research, and industry where there are not enough U.S. citizens or other authorized workers, such as in the computer technology industry and the nursing field.

Non-citizens also come to the U.S. to join their family members already here. Some non-citizens initially settle in other parts of the U.S. and later move to the Midwest to reunite with family members, to find better employment, and to live in safe communities. Many families are comprised of persons with different types of immigration status, such as lawful permanent residents, U.S. citizens, and undocumented non-citizens. Non-citizens have become a part of communities in schools, churches, neighborhoods and workplaces throughout Illinois, Indiana, and Wisconsin.

Non-citizens also come to the U.S. to seek relief from persecution, terrorism, war, extreme poverty, famines, or natural disasters. Those who flee persecution may be granted refugee status by the DHS or a U.S. Embassy or Consulate in their home country and allowed to enter the U.S. as a refugee. Although refugees come from all over the world, the majority have come from Africa in recent years. In 2006, forty-four percent of the 41,150 refugees admitted to the U.S. were from countries throughout the African continent, with the largest number being from Somalia.<sup>53</sup>

Non-citizens seeking relief from past or future persecution in their home country may apply for asylum once they arrive in the U.S. In 2006, the DHS and Immigration Courts granted asylum to 26,113 individuals with the majority having come from Asia and Latin America and primarily representing the countries of Haiti, Colombia, and China.<sup>54</sup>

Illinois is home to a large number of refugees, asylees, and asylum applicants from around the world. In the 1980s and early 1990s, Central Americans arrived after escaping the civil wars and conflicts in their home countries of El Salvador, Guatemala, Nicaragua and Honduras. Since the late 1980s and early 1990s, refugees from Africa and the former Yugoslavia have resettled in the Chicago area. Jewish refugees from the former Soviet Union and Eastern Bloc countries have also resettled in the metro Chicago area. In 2006, 1,227 refugees were resettled throughout Illinois. The top countries from which refugees came were the former U.S.S.R., Somalia, Iran, Liberia, Ethiopia, and Cuba.<sup>55</sup>

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<sup>53</sup> See "Refugee Arrivals by Region and Country of Origin: Fiscal Years 1996-2006," *2006 Yearbook of Immigration Statistics*, DHS Office of Immigration Statistics, Sept. 2007, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/Table14D.xls>.

<sup>54</sup> See "Individuals Granted Asylum Affirmatively By Region and Country of Origin: Fiscal Years 1990-2006," *2006 Yearbook of Immigration Statistics*, DHS Office of Immigration Statistics, Sept. 2007, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/Table17D.xls>; "Individuals Granted Asylum Defensively By Region and Country of Origin: Fiscal Years 1990-2006", *2006 Yearbook of Immigration Statistics*, DHS Office of Immigration Statistics, Sept. 2007, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/Table19D.xls>.

<sup>55</sup> See "Fiscal Year 2006 Refugee Arrivals: By Country of Origin and State of Initial Resettlement for FY 2006," Office of Refugee Resettlement, Administration for Children and Families, U.S.

Due to the growing Hmong population in Wisconsin, the state resettled 397 refugees in 2006. Notably, almost half of the refugee population is from Laos.<sup>56</sup> Other leading countries from which refugees came were Somalia, the former U.S.S.R., and Burma.<sup>57</sup>

Indiana has a relatively small refugee population, comparable to Wisconsin. In 2006, 367 refugees were resettled in Indiana. The leading countries from which they came were Burma, Somalia, Liberia, Thailand, and the former U.S.S.R.<sup>58</sup>

## **Determining a Course of Action for Non-Citizen Client's Defense**

Once it has been determined that a client is a non-citizen, counsel should find out his immigration status by asking to see his immigration documents and passport, if he has one. There are three main categories of non-citizens: 1. lawful permanent residents; 2. non-immigrants who have temporary visas or other lawful status; and 3. undocumented non-citizens, who have either overstayed the time permitted or who entered the U.S. illegally.

Common immigration documents which a client may have include: a permanent resident alien card, also known as a "green card" (I-551 or I-151) or I-551 stamp in a foreign passport, temporary resident card (I-688), I-94 Arrival/Departure Record, an employment authorization document or work permit (I-688B), Mexican border crossing identification card (now called a laser visa), or parole authorization (I-512).<sup>59</sup> If a non-citizen claims to be a lawful permanent resident or a conditional resident but cannot find his actual resident alien card, ask him or his family for copies of application receipt notices or any other notices from the former INS or the CIS as these documents can be helpful to immigration counsel in determining his immigration status.<sup>60</sup>

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Department of Health and Human Services,  
<http://www.acf.hhs.gov/programs/orr/data/fy2006RA.htm>.

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> *See* Appendix 9D, Sample Immigration Documents and How to Read a Green Card.

<sup>60</sup> *See* Appendix 1G, Form I-797, Notice of Action (CIS application receipt notice). With the receipt number, a non-citizen can check the status of an immigration application on the CIS website, [www.uscis.gov](http://www.uscis.gov); Appendix 1G, CIS online case status printout.



### Weighing the Options

After determining a non-citizen client's immigration status, several questions must be considered:

1. Is your non-citizen client currently deportable or inadmissible based on a past criminal history and/or current immigration status?
2. Will a proposed disposition of your non-citizen client's case render her deportable or inadmissible?
  - If yes, are there other options that will not render him deportable or inadmissible?
  - How do the risks of the outcome of a trial compare with the immigration consequences of a guilty plea?
3. If your non-citizen client is deportable or inadmissible, is he eligible for relief from deportation or removal?
4. For final convictions, would post-conviction relief or a full and unconditional pardon affect deportability or inadmissibility and possible relief from deportation or removal?

Where possible, a non-citizen's case should be discussed by defense counsel with an immigration attorney who works on criminal immigration issues before a plea is entered.<sup>61</sup> Plea bargains and admissions of facts under different sections of the Illinois, Indiana or Wisconsin statutes will have distinct consequences for immigration purposes. For example, a conviction for domestic battery entered on or after September 30, 1996 may render a non-citizen deportable whereas a conviction for disorderly conduct may not. Creative strategies may ultimately protect your non-citizen client's future (as well as that of his family) in the United States.

### Other Factors to Consider When Working with Non-Citizen Clients

A non-citizen's immigration status may become a factor during a criminal trial. Where a non-citizen witness has overstayed his visa or does not have current immigration status in the U.S., his unlawful presence in the U.S. may be used to argue bias on the part

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<sup>61</sup> A list of agencies and attorneys who focus on criminal immigration issues in Illinois, Indiana, and Wisconsin is contained in Appendix 9C. In addition, numerous published resources and information are available on the Internet to begin research about the immigration consequences of criminal convictions. See Appendix 9C, Resources.



of the witness.<sup>62</sup> The Seventh Circuit Court of Appeals has held that a state court's refusal to allow questions about the immigration status during a trial was harmless error.<sup>63</sup>

There are additional challenges to working with non-citizens in the state criminal justice systems. Many non-citizens have a different frame of reference with respect to judicial systems and the world around them.<sup>64</sup> For example, certain foreign judicial systems do not have a jury system and non-citizens from such countries may not understand the term "jury." Often non-citizens have come from countries where the justice system exists or existed in the form of a brutal police or military force. For example, the Khmer Rouge regime in Cambodia systematically killed attorneys and judges after taking over the country in the 1970s and interned thousands of people in "re-education" camps. The police in Vietnam were in charge of registering births and deaths as well as issuing certificates for marriage and divorce. Bribery was a way of life in dealing with the Vietnamese police to get certificates issued or to report crimes. In Mexico, the police often work with drug traffickers; consequently they do not protect the general population from harm by the drug cartels. As a result, criminal defense attorneys in Illinois, Indiana, and Wisconsin may be seen by non-citizen clients as working for or with the police and against their interests.

In addition, many non-citizens were previously arrested in their home countries, imprisoned, and tortured for political reasons by government officials or non-governmental forces. They may have been denied the right to a trial in front of a judge and held incommunicado in detention for weeks, months, or even years. As a result, they may suffer from post-traumatic stress disorder, depression, and/or other mental illness.<sup>65</sup>

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<sup>62</sup> See *People v. Calmuextle*, 255 Ill. App. 3d 504, 626 N.E.2d 741 (Ill. App. 3d Jan. 6, 1994); *People v. Turcios*, 228 Ill. App. 3d 583, 593 N.E.2d 907 (Ill. App. 3d May 3, 1992); *People v. Austin*, 123 Ill. App. 3d 788, 463 N.E.2d 444 (Ill App. 3d Apr. 24, 1984).

<sup>63</sup> See *Toliver v. Hulick*, 470 F.3d 1204 (7<sup>th</sup> Cir. Dec. 4, 2006) (also commenting on the different possibilities for a person not to have immigration status, including being a U.S. citizen and the lack of recordkeeping by the former INS).

<sup>64</sup> For a discussion regarding differences in perception and understanding about the judicial system and cultural considerations for motion to suppress confessions given by non-citizens, see "Guarding *Miranda* and Waivers *Rancheros*: Cultural Considerations in Suppressing Confessions," Francisco "Frank" Morales, Assistant Federal Defender, Western District of Texas, available at [http://www.fd.org/pdf\\_lib/CulturalIssues\\_FMorales.pdf](http://www.fd.org/pdf_lib/CulturalIssues_FMorales.pdf); see also, March-April 2009 issue of *Judicature*, (Journal of American Judicature Society), which has articles addressing cross-cultural considerations in criminal cases, including immigrants and their understanding of the U.S. judicial system.

<sup>65</sup> See Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, Mar. 25, 2009, available at <http://www.amnestyusa.org/immigrant-detention/page.do?id=1641031>; Appendix 1I, Materials from Kovler Center; Appendix 1H, Materials from Center for Victims of Torture; L. Piwowarczyk, "Seeking Asylum: A Mental Health Perspective," 16 *Geo. Immigr. L.J.* 155 (Fall 2001); Michelle R. Piston & John J. Hoeffner, "Rules are Made to be Broken: How the Process of Removal Fails Asylum Seekers," 20 *Geo. Immigr. L.J.* 167, 177 (Winter 2006). Mental health courts may be an option for non-citizen clients. See, e.g., Brandon Coutre, "Mental-health Court Launches," *Northwest Herald*, Apr. 13, 2007 (discussing the initiation of a mental health court in McHenry County, Illinois in which a defendant is selected for an 18 to 24 month program to work with specialists to address mental health issues and if successfully completed, the pending criminal charges are dropped).

Non-citizen youth may also face numerous challenges in the juvenile justice or adult criminal system due to the lack of stability in their lives. Many have fled civil war or chaos with their families or traveled alone from one country to another in search of safety. Some have grown up in refugee camps. Others were forcibly recruited to fight with rebel forces in civil wars from which they later deserted. Post-traumatic stress disorder is common among non-citizen youth who have come to the United States seeking refuge.<sup>66</sup>

As defense counsel, you may need to assist non-citizen clients in overcoming obstacles that could impede effective representation. Non-citizens may inform their defense counsel that they will take any deal that will get them out of jail or prison as quickly as possible or will keep them out of jail, without knowing or understanding what the immigration consequences will be for a particular criminal plea.<sup>67</sup> Thus, non-citizens who lack an understanding of U.S. law and the legal system may not be fully cognizant of the rights that they are waiving or how their immigration status may be affected. Although states may have mandatory advisals to non-citizens, the advisals may be meaningless if a non-citizen defendant and defense counsel are not aware, knowledgeable, or informed about the actual immigration consequences for a conviction.<sup>68</sup>

In working with non-citizens from other countries, you need to explain to your clients exactly what your role is and how the criminal justice system works in the particular state or federal court. Non-citizens need to understand the basics of the criminal justice system, including their responsibility to go to court, what will happen at each court appearance, what rights they will give up in exchange for a plea of guilty or nolo contendere, the right to go to trial, how plea bargaining works, the right to a jury trial, the right to appeal a decision or verdict, and the range of sentencing possibilities. You should be aware that others related or associated with the accused non-citizen may be as important in resolving the charges as the non-citizen. For example, a non-citizen client may not ask many questions based on his past experiences with other justice systems in which she could not ask questions out of fear for her life; instead, friends or family members may act on his behalf to ask the questions and obtain the information for him.

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<sup>66</sup> See Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, Mar. 25, 2009, available at <http://www.amnestyusa.org/immigrant-detention/page.do?id=1641031>; L. Lamberg, "Children of Immigrants May Face Stresses, Challenges That Affect Mental Health," 300 *JAMA* 780-81 (2008); *United States of America: Unaccompanied Children in Immigration Detention*, Amnesty International Publications, Jun. 18, 2003, pp. 7, 60-72 (discussing the trauma that non-citizen children may have experienced and the Immigration Court experience for unaccompanied minor non-citizens), available at [http://www.amnestyusa.org/refugee/pdfs/children\\_detention.pdf](http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf).

<sup>67</sup> For example, a non-citizen may be more concerned initially about her ability to return to her parents, spouse, or children than to consider the long-term immigration consequences of a criminal disposition. However, the long-term consequences may be detrimental to U.S. citizen children who may be forced to move to a foreign country that does not have the same educational or employment opportunities or to remain in the U.S. without their parent(s). See L. Lamberg, "Children of Immigrants May Face Stresses, Challenges That Affect Mental Health," 300 *JAMA* 780-81 (2008); Dorsey & Whitney LLC, "Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement," © 2009, available at [http://www.dorsey.com/severing\\_a\\_lifeline/](http://www.dorsey.com/severing_a_lifeline/).

<sup>68</sup> See Chapter 8, Pre-Plea Advisals About Immigration Consequences, Motions to Withdraw Guilty Pleas, and Post-Conviction Relief, *infra* at 8-1, et. seq.

Communication with non-citizen clients may pose challenges for defense counsel. Non-citizen clients may tell their attorneys “yes” to avoid possible confrontation or conflict even when they want to say “no”. In addition, some words in English may not exist in an indigenous language. For example, the word “attorney” does not exist in the Hmong language. The inability of an attorney to communicate with his non-citizen client may render his assistance constitutionally ineffective.<sup>69</sup>

In addition, gender roles and differences may influence what information a non-citizen reveals to her defense counsel. For example, a man from Afghanistan may not directly answer the questions from a female defense attorney based on his perception that she could not be qualified to represent him as women there generally do not have the same opportunities to receive an education as women in the United States.<sup>70</sup> Similarly, an indigenous Guatemalan woman who was raped in a Guatemalan police station in retaliation for her political activities may not want to discuss her fear of continued detention in an Illinois county jail with a male defense attorney.<sup>71</sup>

Resources are available to assist non-citizens who suffer from post-traumatic stress disorder and other mental illnesses and their attorneys. There are two main centers serving the non-citizen population that resides in Illinois, Indiana, and Wisconsin. In Chicago, the Marjorie Kovler Center for the Treatment of Survivors of Torture works with persons who have suffered torture.<sup>72</sup> The licensed Kovler psychiatrists, psychologists, and social workers work with non-citizens to help them rebuild their lives. The staff can also provide evaluations that can be used in court proceedings and on-going treatment. These evaluations can be instrumental in plea bargaining, trial and sentencing issues. The Center also provides referrals to similar treatment providers in other areas of Illinois and the United States. The Kovler Center can be contacted at:

1331 West Albion Avenue  
Chicago IL 60626  
Phone: (773) 381-4070 (for general information)  
(773) 751-4035 or 4036 (for appointments)  
Fax: (773) 381-4073  
Email: [kovler@heartlandalliance.org](mailto:kovler@heartlandalliance.org)  
[www.heartlandalliance.org](http://www.heartlandalliance.org)

In Minneapolis, Minnesota, the Center for Victims of Torture offers services to persons living in Minnesota and western Wisconsin who have suffered torture. The CVT can be contacted at one of two locations:

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<sup>69</sup> See *Granada v. U.S.*, 51 F.3d 82, 85 (7<sup>th</sup> Cir. Mar. 23, 1995).

<sup>70</sup> See *Afghanistan: Country Reports on Human Rights Practices 2006*, U.S. Department of State, <http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm>, Mar. 6, 2007, p. 16.

<sup>71</sup> See *Guatemala: Country Reports on Human Rights Practices 2006*, U.S. Department of State, <http://www.state.gov/g/drl/rls/hrrpt/2006/78893.htm>, Mar. 6, 2007, pp. 9-10.

<sup>72</sup> See Appendix 1I, Representing Non-Citizens Who Have Suffered Torture or Trauma.

Minneapolis Healing Center  
717 East River Parkway  
Minneapolis, MN 55455  
Tel. 612.436.4800  
Fax 612.436.2600

St. Paul Healing Center  
649 Dayton Avenue  
St. Paul, MN 55104  
Tel. 612.436.4800  
Fax 612.436.2604

Toll-free: 1-877-265-8775  
[www.cvt.org](http://www.cvt.org)

Juveniles with disabilities include youth with conduct disorders, depression, post-traumatic stress disorder, attention deficit/hyperactivity disorder, oppositional defiant disorder, learning and developmental disabilities, and mental retardation.<sup>73</sup> Five centers in Illinois provide consultation services about special education law for attorneys representing youth with disabilities.<sup>74</sup> There are also organizations and services in Indiana and Wisconsin that work with such youth.<sup>75</sup> Under the Individuals with Disabilities Education Act,<sup>76</sup> it may be possible for a public defender to move for dismissal of a juvenile court petition where the non-citizen youth's behavior in an educational setting is based on a disability.

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<sup>73</sup> The Pacer Center, Inc., a non-profit parent training center in Minneapolis, Minnesota has a special project entitled the Juvenile Justice Project which works with juveniles with disabilities in the juvenile justice system. The staff can provide training and assistance to public defenders as well as coordinate with other agencies. The Juvenile Justice Project has published a useful resource entitled *Unique Challenges, Hopeful Responses: A Handbook for Professionals Working with Youth with Disabilities in the Juvenile Justice System*, 1999, 2nd edition, updated 2003. The Pacer Center, Inc. is located at 8161 Normandale Blvd., Minneapolis, MN 55437, (952) 838-9000. To contact the Juvenile Justice Project, call (952) 838-9000 or visit <http://www.pacer.org/jj/index.asp>.

<sup>74</sup> The Family Resource Center on Disabilities is located at 20 E. Jackson Boulevard, Suite 300, Chicago, IL 60604. For a consultation, call (800) 952-4199. Designs for Change is located at 814 S. Western, Chicago, IL 60612, (312) 236-7252. Equip for Equality is located at 20 N. Michigan, Suite 300, Chicago, IL (312) 341-0022. The National Center for Latinos with Disabilities is located at 1921 S. Blue Island Avenue, Chicago, IL 60608, (312) 666-3393. The Family Ties Network is located at 830 S. Spring Street, Springfield, IL 62704, (800) 865-7842.

<sup>75</sup> The Indiana Institute on Disability and Community is located at 2853 E. 10<sup>th</sup> St., Bloomington, IN 47408, (812) 855-6508. The Wisconsin Coalition for Advocacy has three locations: 1) 131 W. Wilson St., Suite 700, Madison, WI 53703, (608) 267-0214; 2) Summit Place, 6737 W. Washington St., #3230, Milwaukee, WI 53214, (414) 773-4646; and 3) 217 W. Knapp Street, Rice Lake, WI 54868, (715) 736-1232.

<sup>76</sup> See 20 U.S.C. § 1400 et seq. (1997).

## Notary and Immigration Consultant Fraud

Thousands of non-citizens prematurely file applications for adjustment of status with the assistance of notary publics or other persons, such as travel agents and “immigration consultants.” Many of these persons act in unscrupulous manners to defraud non-citizens and their families. For example, they have promised to help non-citizens obtain employment authorization documents from the legacy INS and the DHS, knowing that these non-citizens did not meet the minimum legal requirements for such benefits. The DHS has taken action to place non-citizens in removal proceedings upon learning of their illegal presence in the United States from their application. The DHS has issued thousands of Notices to Appear or charging documents and placed some of these non-citizens in removal proceedings before the Immigration Court while it has reinstated prior orders of deportation or removal against other non-citizens.

On February 20, 2003, a class action lawsuit was filed in the U.S. District Court for the Northern District of Illinois.<sup>77</sup> The lawsuit alleged that the INS Chicago District Office instituted a project specifically targeting individuals who filed applications for adjustment of status based on the unqualified and unscrupulous advice of individuals not entitled to practice law, improperly accepting the applications and using the information to open investigations against them, and eventually instituting removal proceedings against them.<sup>78</sup> The District Court denied the DHS’ Motion to Dismiss on September 29, 2003.<sup>79</sup> A settlement agreement was approved by the District Court on August 11, 2005.<sup>80</sup> In the settlement agreement, the DHS, among other things: (1) stipulated to the certification of the classes; (2) agreed to review the files of all class members who had not received any notification of a deportation hearing against them; (3) agreed to conduct a review of the class members cases where removal proceedings had already been initiated and determine whether prosecutorial discretion can be used to terminate proceedings against the class members; and (4) agreed to consider class membership for class members who have already been deported and are applying for a waiver of inadmissibility in their applications to return to the United States through approved visa petitions.<sup>81</sup>

Notary fraud continues to be a major concern as Congress debates proposed immigration legislation.<sup>82</sup> Unfortunately, many non-citizens are unable to easily distinguish between proposed and enacted legislation, thus making themselves vulnerable to fraud. Illinois, Indiana, and Wisconsin prohibit notary publics, who are not attorneys or accredited representatives under federal immigration regulations, from holding themselves out as attorneys, from giving advice about immigration law, and from accepting fees for

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<sup>77</sup> See *Ramos v. Ashcroft*, 2003 U.S. Dist. LEXIS 17426 (N.D.IL Sept. 29, 2003).

<sup>78</sup> See *id.*

<sup>79</sup> See *Ramos v. Ashcroft*, 2003 U.S. Dist. LEXIS 17426 (N.D.IL Sept. 29, 2003).

<sup>80</sup> See *Ramos v. Ashcroft*, Case No. 02-8266, Settlement Agreement at 46-47 (N.D.IL. Aug. 11, 2005).

<sup>81</sup> See *id.* at 31-32.

<sup>82</sup> In Indiana, the Attorney General posted a press release warning non-citizens of notary fraud. See “Indiana Attorney General Warns Immigrants about Scam Artists,” *Office of Attorney General Steve Carter*, <http://www.in.gov/attorneygeneral/>, Jun.1, 2006. Notary fraud in any state can be reported to the appropriate state Office of the Attorney General. In Chicago, it may also be reported to the City of Chicago’s Department of Consumer Services by calling 311 or contacting the office at 50 West Washington, Room 208, Chicago, IL 60602, (312) 744-4006.

legal advice.<sup>83</sup> Efforts continue to be made to combat notary fraud, particularly as the current presidential administration considers possible legislation for immigration benefits for non-citizens without status in the U.S.

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<sup>83</sup> See 5 ILCS 312/3-103; IC 33-42-2-10; Wis. Stat. § 137.01(1)(i).

## Brief History of Immigration Laws: 1996-Present

Enacted laws relating to criminal immigration issues and benefits for noncitizens in removal proceedings are noted below:

### 1996

- Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), P.L. 104-132, 110 Stat. 1214 (4/24/1996).
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), P.L. 104-193, 110 Stat. 2105 (8/22/1996).
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, P.L. 104-208, 110 Stat. 3009 (9/30/1996).

### 1997

- INA § 245(i)/245(k) Legislation: Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, P.L. 105-119, 111 Stat. 2440, Sec. 11 (11/26/1997).
- Nicaraguan and Cuban Adjustment and Central American Relief Act (NACARA), P.L. 105-100, 111 Stat. 2160, Tit. II, Div. A (11/19/1997).

### 1998

- Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), P.L. 105-277, Div. A, §101(h), Title IX, 112 Stat. 2681 (10/21/1998).
- American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Div. C, title IV (10/21/1998).
- International Religious Freedom Act of 1998, P.L. 105-292, 112 Stat. 27871 (10/27/1998).

### 2000

- Victims of Trafficking and Violence Protection Act of 2000, P.L. 106-386, 114 Stat. 1464 (10/28/2000).
- Child Citizenship Act of 2000 P.L. 106-395, 114 Stat. 1631 (10/30/2000).
- Legal Immigration Family Equity Act (LIFE Act), P.L. 106-553, 114 Stat. 2762, Title XI (12/21/2000).

### 2001

- USA PATRIOT Act of 2001 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001) P.L. 107-56, 115 Stat. 272 (10/26/2001).



## **2002**

- Enhanced Border Security and Visa Entry Reform Act of 2002, P.L. 107-173, 116 Stat. 543 (5/14/2002).
- Child Status Protection Act (CSPA), P.L. 107-208, 116 Stat. 927 (8/6/2002).
- Homeland Security Act of 2002, P.L. 107-296, Title IV, Subtitles C-F, 116 Stat. 2135 (11/25/2002).

## **2003**

- National Defense Authorization Act for Fiscal Year 2004 (Naturalization and Other Immigration Benefits for Military Personnel and Families, P.L. 108-136, title XVII, 117 Stat. 1392, 1691-96 (11/22/2003).
- Trafficking Victims Protection Reauthorization Act of 2003, P.L. 108-193, 117 Stat. 2875 (12/19/2003).

## **2004**

- Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, 118 Stat. 3638, 3732-42 (12/17/2004)

## **2005**

- REAL ID Act of 2005, Div. B of Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, 2005 P.L. 109-13, 119 Stat. 231, 310 (5/11/2005).

## **2006**

- Violence against Women and Department of Justice Reauthorization Act of 2005, P.L. 109-162, 119 Stat. 2960 (1/5/2006).
- National Defense Authorization Act for FY 2006, P.L. 109-163, 119 Stat. 3136 (1/6/2006).
- Immigration Law Reforms to Prevent Sex Offenders from Abusing Children (Adam Walsh Child Protection and Safety Act of 2006, P.L. 109-248, title IV; 120 Stat. 587, 622-23 (7/27/2006).
- Military Commission Act of 2006, P.L. 109-366, 120 Stat. 2600 (10/17/2006).
- Secure Fence Act of 2006, P.L. 109-367, 120 Stat. 2638 (10/26/2006).

## **2007**

- Consolidated Appropriations Act of 2008, P.L. 110-161, Div. J, Sec. 691, 121 Stat. 1844, 2364-65 (12/26/2007).

## 2008

- National Defense Authorization Act for FY 2008, P.L. 110-181, 122 Stat. 3 (1/28/2008).
- Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act, P.L. 110-293 (7/30/2008).
- Child Soldiers Accountability Act of 2008, P.L. 110-340 (10/3/2008).
- William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), P.L. 110-457, 122 Stat. 5044 (12/23/2008).

## APPENDIX B

### NATURALIZATION CHARTS

#### AUTOMATIC ACQUISITION OF CITIZENSHIP UNDER THE CHILD CITIZENSHIP ACT OF 2000

Effective Date of Act*	Eligibility Requirements**	Age Limit	Date of Automatic Acquisition	Law Applicable
2/27/01	At least one parent is U.S. citizen by birth or naturalization. Child residing in U.S. in the legal and physical custody of citizen parent pursuant to a lawful admission for permanent residence.	Under 18	Date last condition fulfilled	INA §320, as amended by P.L. 106-395

\* Law is not retroactive, i.e., acquisition can only occur on or after 2/27/01 and only for children under 18 after 2/27/01.

\*\* Applies to adopted child if child has met requirements applicable to adopted children under INA §101(b)(1)(E) or (F).

#### EXPEDITED NATURALIZATION OF CHILDREN

Effective Date of Act*	Eligibility Requirements	Age Limit	Date of Acquisition	Law Applicable
2/27/01	At least one parent is U.S. citizen by birth or naturalization at time of filing N-600K. If citizen parent deceased during preceding 5 years, citizen grandparent or citizen legal guardian may file N-600K.  Prior to filing, citizen parent has been physically present in U.S. for at least 5 years, at least 2 after age 14, or citizen parent has a citizen parent who has been physically present in U.S. for 5 years, at least 2 after age 14.  Child is currently residing outside U.S. in legal and physical custody of citizen parent, or if citizen parent deceased, an individual who does not object to the application.  Child is temporarily present in U.S. pursuant to a lawful admission and maintaining lawful status.	Under 18	Date of Issuance of Certificate	INA §322, as amended by P.L. 106-395 & by P. L. 107-273

\* Applies to adopted children under 18 if child has met requirements applicable to adopted children under INA §101(b)(1)(E) or (F)

These charts and tables are intended for use only as a helpful generalized reference guide, and not to make determinations or to be cited in any case. Information current as of May 2006.

*Courtesy of Mr. Carmen DiPlacido, of Arlington, Virginia*

**AUTOMATIC ACQUISITION OF CITIZENSHIP  
THROUGH NATURALIZATION OF PARENT(S)**

Date Parent(s) Naturalized	Who Naturalized	Age Limit*	Date of Automatic Acquisition		Law Applicable
			If Residing in U.S.	If Residing Abroad	
Prior to 3/2/07	Either parent	Under 21	Date of naturalization of parent	Date child lawfully admitted U.S. for permanent residence	§2172, R.S. (Act 4/14/1802)
3/2/07 to noon EST, 5/24/34	Either parent	Under 21	Date of naturalization of parent	Date child lawfully admitted U.S. for permanent residence	§2172, R.S. Sec. 5, Act 3/2/07
noon EST, 5/24/34, to 1/13/41	One parent, other remaining alien	Under 21 when admitted U.S.	Upon completion 5 yrs. residence in U.S. including residence completed after age 21 and after 1/13/41		§5, Act 3/2/07, as amended by Sec. 2 Act 5/24/34
	Alien parent (other being citizen); surviving parent; or parent having custody in divorce	Under 21	Date of naturalization of parent	Date child lawfully admitted U.S. for permanent residence	§2172, R.S.
1/13/41 to 12/24/52	Alien parent other being citizen from child's birth	Under 18	Date of naturalization of parent	Date child lawfully admitted U.S. for permanent residence	§313, 1940 Act
	Both parents; surviving parent; or parent having custody in legal separation	Under 18	Date of naturalization of parent	Date child lawfully admitted U.S. for permanent residence	§314, 1940 Act
Subsequent to 12/24/52 but before 2/27/01	**Alien parent, other being citizen from child's birth	Under 18	Date last condition fulfilled	Date child lawfully admitted U.S. for permanent residence	INA §320, as amended by P.L. 95-417. Repealed by P.L. 106-395
	**Both parents; surviving parent; parent having custody in legal separation; or mother of child out of wedlock	Under 18	Date last condition fulfilled	Date child lawfully admitted U.S. for permanent residence	INA §321, as amended by P.L. 95-417. Repealed by P.L. 106-395

\* The date of the parent(s) naturalization and the date of the lawful admittance of the child must occur before the age shown in the age limit column.

\*\* Applies to an adopted child if the child is residing in the U.S. at the time of naturalization of such adopted parent or parents, in the custody of his adoptive parent or parents, pursuant to a lawful admission for permanent residence.

**ADJUDICATING CITIZENSHIP BASED ON  
BIRTH OUT OF WEDLOCK TO A U.S. FATHER**

**Determining Whether to Use "New" or "Old" INA §309(a)**

Date of Birth	Applicable Statute	Age Before Which "Legitimation" Must Occur*	Date Before Which "Legitimation" Must Occur*	Statement of Support Required?
<i>Before Nov. 14, 1968</i>	Old Section 309(a)	21	11/14/89	No
<i>On or after Nov. 14, 1968 but before Nov. 14, 1971</i>	Old Section 309(a)	21	11/14/92	No
	New Section 309(a)	18	11/14/89	Yes
<i>On or after Nov. 14, 1971 but before Nov. 14, 1986</i>	Old Section 309(a)	15	11/14/86	No
	New Section 309(a)	18	11/14/04	Yes
<i>On or after Nov. 14, 1986</i>	New Section 309(a)	18	None	Yes

\* Note that under New Section 309(a), the citizen father can, in lieu of legitimation, acknowledge paternity in writing and under oath, or paternity of the child can be established by adjudication of a competent court. Any one of the three methods of establishing paternity must occur before the child's 18th birthday.

## Tables of Transmission Requirements Over Time for Citizenship for Certain Individuals Born Abroad

**Note—Governing Statute:** Acquisition of U.S. citizenship at birth abroad to a U.S. citizen parent(s) is governed by federal statute. The governing law in the case of a person born abroad who claims U.S. citizenship through a U.S. citizen parent(s) is the law in effect on the date of the claimant's birth, unless a subsequent law specifically by its language in the statute applies retroactively to persons who had not already become citizens by the provisions of the prior law. At times, a new law will merely renumber an old law without changing the requirements or provisions. As such, it will read, e.g., “§301(a)(7), now §301(g) INA.”

When pertinent law requires specific conditions on the part of the U.S. citizen parent(s), the conditions must be met prior to the child's birth unless otherwise stated in the statute.

Residence or physical presence transmission requirements can be met while the transmitting parent is not a citizen.

Birth Abroad to U.S. Citizen Parent and Alien Parent

Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
<i>Before</i> May 24, 1934 (noon EST)*	Either U.S. citizen father or mother could transmit. U.S. citizen parent resided in U.S. before child's birth.	§1993, Revised Statutes (RS); 7 FAM 1135; §301(h) INA; P.L. 103-416.	None	§324(g)(1) Immigration and Nationality Act of 1952 (INA); §101 P.L. 103-416; 7 FAM 1133.5-15.
<i>On or after</i> May 24, 1934 (noon EST),* <i>but before</i> Jan. 13, 1941	Either U.S. citizen father or mother could transmit. U.S. citizen parent resided in U.S. before child's birth.	§1993, RS as amended in 1934; 7 FAM 1135.1, 1135.2.	Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance. (1) 5 years residence between the ages 13-21 if begun before 12/24/52; or (2) 2 years continuous physical presence between ages 14-28; <sup>1</sup> or (3) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72; <sup>2</sup> (4) None if parent employed certain occupation; <sup>3</sup> (5) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.	(1) §201(g) and (h) Nationality Act of 1940 (NA); 54 Stat. 1137; 7 FAM 1134.6-3 (2) Former §301(b), (c) INA; 7 FAM 1133.5-7, 5-8 (3) Former §301(b), (4) INA; 7 FAM 1133.5-2, 1133.5-9 (4) §201(g) INA; 7 FAM 1134.6-2 (5) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11

\* *Sic.* The statute refers to “Eastern Standard Time”; however, Daylight Savings Time was in effect on May 24, 1934.

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.

<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.

<sup>3</sup> U.S. Government, American education, scientific, philanthropic, religious, commercial, or financial organization or an International Agency in which the U.S. takes part. Note: residence or physical presence of parent must take place *before* child's birth.

Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
On or after Jan. 13, 1941, but before Dec. 24, 1952	Citizen parent resided in U.S. or possession 10 years prior to child's birth, five of which after the age of 16.	§201(g) NA; 7 FAM 1134.2, 1134.3	Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance. (1) 2 years continuous physical presence between ages 14-28; <sup>1</sup> or (2) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72; <sup>2</sup> (3) None if parent employed in certain occupation; <sup>3</sup> (4) None if child born on or after 10/10/52; (5) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.	§324(d)(1) INA, §101 P.L. 103-416; 7 FAM 1133.5-15 (1) Former §301(b), (c) INA; 7 FAM 1133.5-7, 5-8 (2) Former §301(b), (d) INA; 7 FAM 1133.5-2, 1133.5-9 (3) §201(g) NA; 7 FAM 1134.6-2 (4) P.L. 95-432; 7 FAM 1133.5-13 (5) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11
	Citizen parent in U.S. military 12/7/41 to 12/31/46 and resided in U.S. or possession 10 years prior to child's birth, five of which after age 12.	§201(i) NA; 7 FAM 1134.2, 1134.4	Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance. (1) 2 years continuous physical presence between ages 14-28; <sup>1</sup> or (2) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72; <sup>2</sup> (3) None if child born on or after 10/10/52; (4) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.	§324(d)(1) INA, §101 P.L. 103-416; 7 FAM 1133.5-15 (1) Former §301(b) INA; 7 FAM 1134.4e, 1133.5-2 (2) Former §301(b), (d) INA; 7 FAM 1133.5-2, 1133.5-9 (3) P.L. 95-432; 7 FAM 1133.5-15 (4) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.

<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.

<sup>3</sup> U.S. Government, American education, scientific, philanthropic, religious, commercial, or financial organization or an International Agency in which the U.S. takes part. Note: residence or physical presence of parent must take place *before* child's birth.



Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
<i>(on or after Jan. 13, 1941, but before Dec. 24, 1952— cont'd)</i>	Citizen parent in U.S. military 1/1/47 to 12/24/52 and physically present in U.S. or possession 10 years prior to child's birth, five of which after age 14, and who did not qualify under either provision above.	§301(a)(7), now §301(g) INA; 7 FAM 1134.4f	Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance. (1) 2 years continuous physical presence between ages 14-28; <sup>1</sup> or (2) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72; <sup>2</sup> (3) None if child born on or after 10/10/52. (4) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.	§324(d)(1) INA; P.L. 103-416; 7 FAM 1133.5-15 (1) Former §301(b) INA; 7 FAM 1133.5-7, 5-8 (2) Former §301(b), (d) INA; 7 FAM 1133.5-2, 1133.5-9 (3) P.L. 95-432; 7 FAM 1133.5-13 (4) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11
<i>On or after Dec. 24, 1952, but before Nov. 14, 1986</i>	Citizen parent physically present in U.S. or possession 10 years prior to child's birth, five of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment, may be included.	§301(a)(7), now §301(g) INA; 7 FAM 1133.2-2, 1133.3-3	None	
<i>On or after Nov. 14, 1986</i>	Citizen parent physically present in U.S. or possession 5 years prior to child's birth, two of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment, may be included.	§301(g) INA; P.L. 99-653, P.L. 100-525; 7 FAM 1133.2-1	None	

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.<sup>3</sup> U.S. Government, American education, scientific, philanthropic, religious, commercial, or financial organization or an International Agency in which the U.S. takes part. Note: residence or physical presence of parent must take place *before* child's birth.

## Birth Abroad to Two U.S. Citizen Parents

Date of Birth	Transmission Requirements (Parents' Residence)	Applicable Laws	Reference
<i>Before May 24, 1934</i> (noon, EST)*	One parent resided in the U.S.	\$1993, Revised Statutes (RS); §301(h) INA; §101 P.L. 103-416	7 FAM 1135.1
<i>On or after May 24, 1934</i> (noon, EST)* <i>but before Jan. 13, 1941</i>	One parent resided in the U.S.	\$1993, RS as amended by Act of 5/24/34	7 FAM 1135.6-1
<i>On or after Jan. 13, 1941,</i> <i>but before Dec. 24, 1952</i>	One parent resided in the U.S. or possession.	§201(c) NA	7 FAM 1134.2, 1134.3-1, 1134.3-2
<i>On or after Dec. 24, 1952</i>	One parent resided in the U.S. or possession.	§301(a)(3), now §301(c) INA	7 FAM 1133.2-1a, 1133.3-1a

Notes: (1) In all cases, residence must take place prior to the child's birth; (2) the law does not define how long residence must be; and  
(3) children born to two U.S. citizen parents never had retention requirements.

## Child Born Out of Wedlock to U.S. Citizen Mother

Date of Birth	Transmission Requirements (Parents' Residence)	Applicable Laws	Reference
<i>Before May 24, 1934</i> (noon, EST)*	Mother resided in the U.S. or possession prior to child's birth; child not legitimated by alien father before 1/13/41.	§205, paragraph 2, NA	7 FAM 1135.3-2
<i>On or after May 24, 1934</i> (noon, EST)* <i>but before Jan. 13, 1941</i>	Mother resided in U.S. or possession prior to child's birth.	\$1993, RS as amended by Act of 5/24/34; §205, paragraph 2, NA	7 FAM 1135.7-2
<i>On or after Jan. 13, 1941,</i> <i>but before Dec. 24, 1952</i>	Mother resided in U.S. or possession prior to child's birth.	§205, paragraph 2, NA	7 FAM 1134.5-4
<i>On or after Dec. 24, 1952</i>	Mother physically present in U.S. or possession continuously 12 months prior to child's birth.	§309(c), INA	7 FAM 1133.4-3

Note: Children born out of wedlock to a U.S. citizen mother never had retention requirements.

Child Born Out of Wedlock to U.S. Citizen Father and Alien Mother

Date of Birth	Transmission and Legal Relationship Requirements	Reference	Retention Requirements	Reference
<i>Before May 24, 1934</i> (noon, EST)*	Legitimated under law of father's U.S. or foreign domicile. Father resided in U.S. before child's birth.	\$1993, RS; 7 FAM 1135.3-1	None	
<i>On or after May 24, 1934</i> (noon EST),* <i>but before Jan. 13, 1941</i>	Legitimated under law of father's U.S. or foreign domicile. Father resided in U.S. before child's birth.	\$1993, RS as amended in 1934; 7 FAM 1135.7-1	Persons failing to fulfill below requirements may have citizenship restored upon taking oath of allegiance. (1) 5 years residence between ages 13-21 if begun before 12/24/52, or (2) 2 years continuous physical presence between ages 14-28; <sup>1</sup> or (3) 5 years continuous physical presence between ages 14-28 if begun before 10/27/72. <sup>2</sup> (4) None if parent employed certain occupation. <sup>3</sup> (5) None if alien parent naturalized and child began to reside permanently in U.S. while under age 18.	\$324(d)(1) INA; §101 P.L. 103-416 1133.5-15 (1) §201(g) and (h) INA; 7 FAM 1133.6-3 (2) Former §301(b), (c) INA; 7 FAM 1133.5-7, 1133.5-8 (3) Former §301(b), (d) INA; 7 FAM 1133.5-2, 1133.5-9 (4) §201(g) NA; 7 FAM 1134.6-2 (5) Former §301(b) INA; 7 FAM 1133.5-7, 1133.5-11

\* Sic: The statute refers to "Eastern Standard Time"; however, Daylight Savings Time was in effect on May 24, 1934.

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.

<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.

<sup>3</sup> U.S. government, American educational, scientific, philanthropic, religious, commercial, or financial organization or an international agency in which the U.S. takes part.

Note: Residence or physical presences of parent must take place before child's birth. Section 301(h) of INA took effect Oct. 25, 1994, and is retroactive to 1790. Section 324(d) of INA took effect March 1, 1995, and is applicable to anyone who failed to retain citizenship regardless of date citizenship ceased.



Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
After Nov. 14, 1968. through Nov. 14, 1971	<p>(1) Father physically present in U.S. or possession 10 years prior to child's birth, five of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment may be included; and</p> <p>(2a) Blood relationship established between father and child, father a U.S. citizen at time of child's birth, father (unless deceased) agrees in writing to support child until 18 years, and while child is under 18 years: (i) child is legitimated, (ii) father acknowledges paternity, or (iii) paternity established by court adjudication, or</p> <p>(2b) Paternity is established under age 21 by the legitimation law of father's or child's residence/domicile.</p>	<p>§301(a)(7) INA</p> <p>§309(a) INA as amended 11/14/86, 102 Stat 2619; 7 FAM 1133.4-2</p> <p>§309(a) INA, as originally enacted</p>	None	

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.

<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.

<sup>3</sup> U.S. government, American educational, scientific, philanthropic, religious, commercial, or financial organization or an international agency in which the U.S. takes part. Note: Residence or physical presences of parent must take place before child's birth. Section 301(h) of INA took effect Oct. 25, 1994, and is retroactive to 1790. Section 324(d) of INA took effect March 1, 1995, and is applicable to anyone who failed to retain citizenship regardless of date citizenship ceased.

Date of Birth	Transmission Requirements	Reference	Retention Requirements	Reference
<i>After</i> Nov. 11, 1971, <i>but before</i> Nov. 11, 1986	(1) Father physically present in U.S. or possession 10 years prior to child's birth, five of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment, may be included; and (2) Blood relationship established between father and child, father a U.S. citizen at time of child's birth, father (unless deceased) agrees in writing to support child until 18 years, and while child is under 18 years (i) child is legitimated, (ii) father acknowledges paternity, or (iii) paternity established by court adjudication.	\$301(a)(7) INA  \$309(a) INA, as amended 11/14/86; 102 Stat. 2619; 7 FAM 1133.4-2	None	
<i>On or after</i> Nov. 11, 1986	(1) Father physically present in U.S. or possession five years prior to child's birth, two of which after age 14. Honorable U.S. military service, employment with U.S. government or intergovernmental international organization, or as dependent unmarried son or daughter and member of the household of a parent in such service or employment, may be included; and (2) Blood relationship established between father and child, father a U.S. citizen at time of child's birth, father (unless deceased) agrees in writing to support child until 18 years, and while child is under 18 years: (i) child is legitimated, (ii) father acknowledges paternity, or (iii) paternity established by court adjudication.	\$301(c) INA; 7 FAM 1133.3-3  \$309(a) INA as amended 11/14/86; 102 Stat. 2619; 7 FAM 1133.4-2		

<sup>1</sup> Absences of less than 60 days in aggregate during 2 year period do not break continuity.

<sup>2</sup> Absences of less than one year in aggregate during 5 year period do not break continuity.

<sup>3</sup> U.S. government, American educational, scientific, philanthropic, religious, commercial, or financial organization or an international agency in which the U.S. takes part.

Note: Residence or physical presences of parent must take place before child's birth. Section 301(h) of INA took effect Oct. 25, 1994, and is retroactive to 1790. Section 324(d) of INA took effect March 1, 1995, and is applicable to anyone who failed to retain citizenship regardless of date citizenship ceased.

# **FEDERAL IMMIGRATION SYSTEM BEFORE THE HOMELAND SECURITY ACT OF 2002**

Department of Justice		
Executive Office for Immigration Review (EOIR) Administrative court system for immigration cases.	Immigration and Naturalization Service (INS)	<p><b>Administrative Appeals Office (AAO)</b></p> <p>Reviewed appeals from District Director decisions</p>
	<p><b>Inspections and Border Protection</b></p> <p>Investigations</p> <p>Intelligence</p> <p>Detention and Removal.</p>	<p><b>District Director</b></p> <p>Adjudicated applications for immigration benefits, including adjustment of status, waivers, asylum, and naturalization.</p>
<p><b>Board of Immigration Appeals (BIA)</b></p> <p>Appellate court which reviewed decisions of the Immigration Court.</p>		
<p><b>Immigration Court</b></p> <p>Court system in which judges were appointed by the Attorney General to review deportation and exclusion cases. Also reviewed initial custody decisions of the INS.</p>		

# **CURRENT FEDERAL IMMIGRATION SYSTEM POST-HOMELAND SECURITY ACT OF 2002**

After September 11, 2001, Congress abolished the INS. The Department of Homeland Security (DHS) was created as a separate entity from the Department of Justice and assumed the responsibilities of the former INS on March 1, 2003.

Department of Homeland Security (DHS)		
Customs and Border Protection (CBP)	Immigration and Customs Enforcement (ICE)	Citizenship and Immigration Services (CIS)
Border protection and customs for inspection of goods and persons at air, land, and sea ports of entry. Refers cases for removal processing to ICE.	Issues warrants, Notices to Appear before the Immigration Court, and final removal orders for persons with certain criminal convictions and/or immigration violations. Initially decides custody of non-citizens. Removes non-citizens from the U.S. to other countries. Conducts investigations and carries out enforcement activities. Office of Chief Counsel represents DHS before the Immigration Court and Board of Immigration Appeals.	Adjudicates applications for immigration benefits, including adjustment of status, waivers, asylum, and naturalization. Refers cases for removal proceedings to ICE.
Department of Justice		
Executive Office for Immigration Review (EOIR) Administrative law court system for immigration cases under the U.S. Attorney General.		
<p><b>Board of Immigration Appeals (BIA)</b></p> <p>Appellate court which reviews decisions of the Immigration Court.</p>		
<p><b>Immigration Court</b></p> <p>Court system in which judges appointed by the Attorney General decide removal cases and review initial custody decisions made by ICE.</p>		

## RED FLAGS FOR NON-CITIZEN CLIENTS

- ☐ Entered U.S. without inspection by an immigration officer and does not have a "green card"
- ☐ Obtained green card less than 5 years ago and has resided in the U.S. for less than 7 continuous years
- ☐ Has been arrested and/or deported by the former Immigration and Naturalization Service or the Department of Homeland Security
- ☐ Has prior misdemeanor arrests, charges, and/or convictions for crimes involving moral turpitude (shoplifting, theft, forgery, burglary, fraud, etc.)
- ☐ Has prior criminal sexual conduct arrests, charges, and/or convictions
- ☐ Has prior DUI related arrests, charges, and/or convictions
- ☐ Has prior controlled substance offense or drug paraphernalia arrests, charges, and/or convictions
- ☐ Has prior domestic assault arrests, charges, and/or convictions or has violated any order of protection or no-contact order
- ☐ Has prior felony arrests, charges, and/or convictions for any other type of offense
- ☐ Is charged with or faces potential charges for:
  - ☐ Controlled substance violation(s)
  - ☐ Crime involving moral turpitude
  - ☐ Criminal sexual conduct
  - ☐ Assault, battery, or a crime of violence
  - ☐ Domestic assault or battery, stalking, child abuse, child neglect, child abandonment, or violation of a protection order
  - ☐ Prostitution or soliciting a prostitute
  - ☐ DUI or related offense(s)
  - ☐ Firearms offense
- ☐ Is a juvenile charged with a controlled substance violation, prostitution, or a crime of violence in delinquency or EJJ proceedings
- ☐ Is a juvenile facing prosecution as an adult for any of the offenses listed above



## QUESTIONNAIRE FOR NON-CITIZENS IN CRIMINAL PROCEEDINGS

Fill out this questionnaire before consulting with an immigration attorney to determine your non-citizen client's current immigration status and possible immigration consequences of any criminal convictions. If possible, you should also photocopy any immigration documentation for your client. Add pages as needed.

### DEFENSE ATTORNEY'S CONTACT INFORMATION

Name: \_\_\_\_\_ Phone number: \_\_\_\_\_  
Email: \_\_\_\_\_

### DEFENDANT'S IMMIGRATION INFORMATION

Name: \_\_\_\_\_  
Country of Citizenship: \_\_\_\_\_ Country of Birth: \_\_\_\_\_  
Date of Birth: \_\_\_\_\_

#### Immigration Status:

Lawful Permanent Resident	Refugee	Visa Overstay
Adjustment of Status Applicant	Temporary Protected Status (TPS)	H1-B, L-1, O-1, R-1 (or a dependent)
Asylee (asylum granted)	Undocumented	Amnesty/Family Unity
Asylum Applicant	Visitor (B-1 or B-2)	Other: _____
Naturalization Applicant	J-1/F-1/M-1 Student (or a dependent)	

Date of first entry into U.S.: \_\_\_\_\_ Date of last entry into U.S.: \_\_\_\_\_  
Place of first entry into U.S.: \_\_\_\_\_ Place of last entry into U.S.: \_\_\_\_\_  
Manner of entries (Inspected or NOT inspected by U.S. officials; visa type, etc.): \_\_\_\_\_

Prior deportations or appearances before an Immigration Judge (circumstances and date(s)): \_\_\_\_\_

Relatives (spouse, parent(s), child(ren), sibling(s)) with U.S. citizenship immigration status:

Name:	Relationship:	Status:
_____	_____	_____
_____	_____	_____

### CRIMINAL INFORMATION

Date of most recent arrest: \_\_\_\_\_

Pending charges:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Prior arrests, charges, and outcomes (including juvenile history) and corresponding sentences:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_

## THE CRIMINAL DEFENDER'S QUICK OVERVIEW FOR REPRESENTATION OF A NON-CITIZEN

Is your client a U.S. citizen?

YES

Go forward advising client.

Non-profit attorneys available for consultation regarding immigration consequences for pleas and convictions.

- \* **National Immigrant Justice Center**  
312-660-1370  
[defenders@heartlandalliance.org](mailto:defenders@heartlandalliance.org)
- \* **Legal Assistance Foundation**  
312-941-9617

NO



Fill out Red Flags list and Questionnaire and call an immigration attorney BEFORE advising your non-citizen client about pleas.

Is an immigration attorney available?

YES



NO



Get advice regarding plea bargains, trial, and possible defenses from removal/deportation:

- Will the proposed disposition of the case render your non-citizen client deportable or inadmissible to the U.S.?
- If the proposed disposition of an immigration case will render your client deportable, will she be eligible for any relief under immigration law to avoid and/or minimize immigration consequences?

Get a CONTINUANCE and call an immigration attorney later.

Is your client eligible for relief?

NO



The best option may be to GO TO TRIAL.

YES



Advise your client of the immigration consequences and refer them to an immigration attorney for immigration case assistance.



Receipt Number:  MSC 1234567		Case Type:  I-485 - Application to Register Permanent Residence or Adjust Status
Received Date: January 31, 2007	Priority Date:	Applicant: A99 999 999 Name
Notice Date: February 02, 2007	Page 1 OF 1	ASC Code: 3

Attorney Name Address	Notice Type: Receipt Notice  Amount Received: \$395.00
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The above application has been received. Please notify us immediately if any of the above information is incorrect. If you find it necessary to contact this office in writing, you must include a copy of this receipt notice with your inquiry.

#### BIOMETRICS-

The next step is to have your biometrics taken, if required, at a US Citizenship and Immigration Services (USCIS) Application Support Center (ASC).

#### PLEASE NOTE-

USCIS WILL SCHEDULE YOUR BIOMETRICS APPOINTMENT. You will be receiving an appointment notice with a specific time, date and place where you will have your fingerprints and/or photos taken.

#### WHAT TO BRING TO Your appointment -

Please bring this letter and your photo identification to your appointment. Acceptable kinds of photo identification are:

- a passport or national photo identification issued by your country,
- a driver's license,
- a military photo identification, or
- a state-issued photo identification card.

If you do not bring this letter and photo identification, we cannot process you.

Please bring a copy of all receipt notices received from USCIS in relation to your current application for benefits.

#### CASE STATUS -

Information about your local office processing times may be obtained by calling the NCSC at 1-800-375-5283.

If you have Internet access, you can visit the United States Citizenship and Immigration Services website at [www.USCIS.gov](http://www.USCIS.gov) where you can find valuable information about forms, filing instructions, and immigration services and benefits.

U. S. Citizenship and Immigration Services  
P.O. Box 648005  
Lee's Summit, MO 64064  
National Customer Service Center: 1-800-375-5283

Appendix I-G



[Services & Benefits](#)[Immigration Forms](#)[Laws & Regulations](#)[About USCIS](#)[Education & Resources](#)[Press Room](#)[Change Of Address](#)[Services While Your Case is Pending](#)[Civil Surgeons](#)[Processing Times](#)[Case Status Online](#)[Case Status Search](#)[Register](#)[Login](#)

Receipt Number: msc0712412926

Application Type: I485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR TO ADJUST STATUS

Current Status: Fingerprint fee accepted; receipt notice mailed and case pending.

On February 2, 2007, your fingerprint fee was accepted and we have mailed you a notice describing how we will process your case. Your case is now pending. Please follow any instructions on this notice. You will be notified by mail when a decision is made, or if the office needs something from you. If you move while this case is pending, call customer service. We process each kind of case in the order we receive them. You can use our processing dates to estimate when this case will be done. This case is at our MISSOURI SERVICE CENTER location. Follow the link below for current processing dates. You can also receive automatic e-mail updates as we process your case. Just follow the link below to register.

You can choose to receive automatic case status updates, which will be sent via email. Please click here to create an account online.

If you would like to see our current Processing Dates for Applications and Petitions, click here.

Note: Case Status is available for Applications and Petitions which were filed at USCIS Service Centers. If you filed at a USCIS Local Office, your case status may not be reviewable online but for processing times on forms filed at that Office please, click here.

If you have a question about case status information provided via this site, or if you have not received a decision from USCIS within the current processing time listed, please contact Customer Service at (800) 375 – 5283 or 1-800-767-1833 (TTY).

[New Search](#)[Printer Friendly Case Status](#)

02-07-2007 12:11 PM EST

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U.S. Department of Homeland Security

Appendix 1-G

Providing Legal Services to Survivors of Torture, Persecution and War Violence:  
Considerations for Public Defenders and Criminal Defense Attorneys<sup>1</sup>

By Michele Garnett McKenzie<sup>2</sup>

Attorneys encounter survivors of torture, persecution and war trauma with a variety of legal needs, including the need for criminal defense. For those attorneys representing clients from countries in which the use of torture is widespread, it may be expected that some clients will be victims of such atrocities.

Most survivors of torture are newcomers to the United States. They share with other newcomers the challenges of unfamiliarity with the United States' legal system and lack of fluency in the English language. Survivors of torture may face specific trauma-related challenges—depression, post-traumatic stress disorder, anxiety, and fear of authority, including lawyers and the judicial system. These issues may interfere substantially with the client's ability to effectively participate in their representation.

*Identifying Torture*

The United Nations Convention Against Torture defines torture as

“...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>3</sup>

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<sup>1</sup> This article is adapted from Chapter 7: Legal Services, by Michele Garnett McKenzie and Mary Ellison, which appeared in *Healing the Hurt: A Guide to Developing Services for Torture Survivors*, published by the Center for Victims of Torture, 2005.

<sup>2</sup> Michele Garnett McKenzie is the director of Minnesota Advocates for Human Rights' Refugee & Immigrant Program, where she manages the *pro bono* asylum project, detained and clinical client services, and advocacy on legal issues affecting refugees and immigrants. She received her J.D. from the University of Minnesota Law School, and her B.A. from Macalester College in Saint Paul. Prior to her work at Minnesota Advocates, Ms. McKenzie practiced general immigration law in Saint Paul, Minnesota, and served as a Judicial Law Clerk for the Executive Office for Immigration Review in Arizona and Nevada. She has served as an adjunct faculty member of William Mitchell College of Law and currently serves as an adjunct clinical professor at the University of Minnesota Law School Immigration Clinic. She is admitted to practice in the State of Minnesota and the U.S. District Court for the District of Minnesota.

<sup>3</sup> Art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 [hereinafter CAT].

Torture may be physical or psychological. The methods of torture are limited only by the imagination,<sup>4</sup> including:

- Beatings
- Mutilations
- Asphyxiation and submersion
- Mock executions
- Electric shock
- Over- or under-sensory stimulation
- Rape
- Humiliation
- Witnessing the torture or murder of others
- Denial of food, medical care, and sanitary surroundings<sup>5</sup>

The use of torture is widespread, with Amnesty International documenting the use of torture in more than 100 countries around the world.<sup>6</sup> The Center for Victims of Torture in Minneapolis estimates that between 400,000 and 500,000 survivors of torture live in the United States.<sup>7</sup> The prevalence of torture in selected samples of refugees varies from 5 - 70% depending on the composition of the sample in relation to nationality, sex, age, and point in time.<sup>8</sup> According to Amnesty International, police officers are the agents of the state most likely to use torture. Torture or ill-treatment by police officers has been reported in more than 140 countries since 1997.<sup>9</sup>

### ***Impact of Torture, Persecution and War Violence***

The purpose of torture is to terrorize entire communities into silence and submission by making examples of individuals and their families.<sup>10</sup> Repressive societies have a profound impact upon everyone living within them, shaping the worldview of those who escaped torture as well as the direct victims. Persons living in the midst of armed conflict suffer both targeted and random violence. Many of these conflicts witnessed levels of

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<sup>4</sup> For a useful, although not exhaustive, glossary of methods of torture, see Ken Pope, "Torture," *Encyclopedia of Women and Gender: Sex Similarities and Differences and the Impact of Society on Gender* ed. Judith Worell, Academic Press, October, 2001, available at <http://kspope.com/torvic/torture-abst.php#copy>.

<sup>5</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 7.

<sup>6</sup> See Berliner P., Nikkelsen E.M., Bovbjerg, A., Wiking, M. (2004). *Psychotherapy treatment of torture survivors*, International Journal of Psychosocial Rehabilitation. 8, 85-96. See also Survivors of Torture, International at [http://www.notorture.org/torture\\_defined.html](http://www.notorture.org/torture_defined.html).

<sup>7</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 7.

<sup>8</sup> Lavik, N.J., Haiff, E., Skrondal, A., Solberg, O. (1996). *Mental Disorder Among Refugees and the Impact of Persecution and Exile: Some findings from an outpatient population*, British Journal of Psychiatry, 169:726-732.

<sup>9</sup> Amnesty International, *Campaign Against Torture*, at [http://web.amnesty.org/apro/stoptortureinchina.nsf/torture\\_context\\_page\\_eng](http://web.amnesty.org/apro/stoptortureinchina.nsf/torture_context_page_eng)

<sup>10</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 10.

aggression, targeting of civilian populations, and unmitigated brutality on a massive scale. While not every victim of torture, persecution or war violence suffers from mental health problems, prevalence rates of depression, Post-Traumatic Stress Disorder (PTSD), and physical symptoms are elevated in populations of survivors.<sup>11</sup>

The psychological and physical disorders prevalent among survivors of torture, persecution and war trauma may interfere with the client's ability to participate in the case. For example, people suffering from PTSD may experience flashbacks when reminded of the torture. Depression may affect the person's ability to concentrate and to make decisions. Physical complaints may make it difficult for the client to keep appointments.<sup>12</sup> Identifying these problems and working with the client and their therapist, social worker or psychologist, if they have one, will help to alleviate miscommunication and stress between the attorney and client.

*A young woman seeking asylum retained an attorney to prepare for the asylum interview. At each meeting with the attorney, however, the client spent the first hour complaining about various unrelated issues – poor housing, lack of a good job, pain and illness – leaving little time to prepare for the upcoming interview. The client was avoiding confronting the horrors she had undergone as a bush wife to rebels in Sierra Leone while a young girl.*

The experience of those who have fled torture, persecution and war violence is often encapsulated in a description known as the Triple Trauma Paradigm.<sup>13</sup> This paradigm helps service providers understand the stages of the life of many refugees – pre-flight, flight, and post-flight – and the attendant issues of each stage. Pre-flight experiences may include the torture, harassment, chaos, hiding, and fear that drove the person from their country. While in flight from the persecution, experiences of detention, loss, violence, and uncertainty pervade. Upon arrival in the country of refuge, in the post-flight stage, people may experience low social and economic status, racial discrimination, inadequate housing, challenges posed by language barriers, and unrealistic expectations from home.<sup>14</sup> All of these experiences are brought to bear upon the attorney/client relationship.

### *Avoiding assumptions*

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<sup>11</sup> Berliner P., Nikkelsen E.M., Bovbjerg, A., Wiking, M. (2004). *Psychotherapy treatment of torture survivors*, International Journal of Psychosocial Rehabilitation. 8, 85-96.

<sup>12</sup> This list of symptoms is taken from the "Handout for Survivors and Their Families: Common Effects of Torture," found in the Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 25.

<sup>13</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 23.

<sup>14</sup> See Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 23. See also Berliner P., Nikkelsen E.M., Bovbjerg, A., Wiking, M. (2004). *Psychotherapy treatment of torture survivors*, International Journal of Psychosocial Rehabilitation. 8, 85-96.

The lawyer cannot assume a torture survivor is familiar with basic United States' legal concepts—often learned by those who grow up in this country through high school civics classes and television courtroom dramas. While the lawyer must clarify the client/attorney relationship with all clients, it is especially important in representing torture survivors that the attorney foregoes assumptions and takes time to begin at the beginning.

Clients may be unfamiliar with the most basic concepts of the United States' legal system. Their understanding of the legal system necessarily will be informed by their own experience in their home country. Notions such as the adversarial process and the independence of the judiciary may be unfamiliar. Confidentiality of communications and the client/attorney privilege—the foundation of the client/attorney relationship—must be carefully explained.

While some clients may not know the United States' legal system, it is a mistake to assume clients are unfamiliar with legal concepts or lack of sophistication or education. Clients come from all backgrounds and may be attorneys, judges, physicians, government officials, scientists, professors, journalists, or business owners. In short, it is critical that the attorney take time to ask questions about the client's background, explain basic concepts, and remain open to questions by the client.

#### *The torture survivor's response to the legal system*

In some cases, members of the home country's legal system may have been involved in the repression and torture. Fear of authority figures, including the client's own attorney, immigration officials, police, prosecutors, and judges may interfere with the client/attorney relationship or with the client's ability to go forward with their legal case.

*A uniformed police officer passed by a client and attorney in the law office's building. The attorney's response was one of mild curiosity about where the officer was going. The torture survivor, on the other hand, froze, became silent, and began sweating. His assumption, based on his experience, was that someone—perhaps he—would be taken away by the police without charge or explanation.<sup>15</sup>*

The client's fears may be exacerbated by incarceration or the threat of incarceration. Police stations, jails and prisons are often the site of torture. Often conditions of detention mirror those which the torture survivor fled.

*When sought as a witness in a criminal investigation, an asylum seeker and her attorney met with the criminal defense attorney. The defense attorney carefully laid out the client's options: to talk to the police without assurances the conversation would be used against them in later criminal charges; to seek assurances the conversation would not be used*

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<sup>15</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 79.



*against them later; or to refuse to talk to the police. When the client asked what would happen if she refused to speak to the police, the attorney replied "the government might try to make things difficult." The client, a survivor of torture, went pale, believing the attorney meant she would face the same torture – prolonged incommunicado detention, electric shock, and severe beatings resulting in loss of teeth – she had suffered in her home country. The immigration attorney, aware of the torture, explained she would absolutely not be tortured or otherwise physically harmed by the police for exercising her constitutional right against self-incrimination. The defense attorney then detailed what sort of pressure the police might bring against her in that situation. Had the miscommunication not been caught, the client would have been unable to make an informed decision because she would have based her decision on a critical misunderstanding.<sup>16</sup>*

Symptoms suffered by survivors—depression, anxiety, and post-traumatic stress disorder—and side effects of medication for these disorders may interfere with the client's ability to participate in their case. Clients may have difficulty remembering details of events. Their emotional reactions when recounting traumatic events may seem inappropriate. They may avoid discussion of the torture or other traumatic events.

Traditional indicators of credibility in U.S. courts—demeanor, eye contact, consistent recall of events—may be inaccurate. Both attorneys and adjudicators may jump to the conclusion that a torture survivor is lying. Counsel must understand the sequelae of symptoms that result from torture. The attorney also must develop evidence to present to the adjudicator that offsets a negative credibility finding.

There is no substitute for the work of a care team trained in working with torture survivors to help meet the client's medical, psychological, and social needs. Where such expertise is not available, attorneys may need to research providers who have sufficient training to assist their clients.

As Professor Angela McCaffrey discusses in her article, "Don't Get Lost in Translation: Teaching Students to Work With Interpreters," taking time to learn the basics of the home country's legal system and the social and political background of the client helps avoid misunderstandings, saves time and frustration, and more accurately conveys the client's story.<sup>17</sup>

Ensure that you and your client are using the same definition of a term. For example, a client maintained he had been arrested three times, but in the course of discussion with the attorney preparing his asylum application, he mentioned many other times when he

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<sup>16</sup> Center for Victims of Torture, *Healing the Hurt: A Guide for Developing Services for Torture Survivors*, at 82.

<sup>17</sup> Angela McCaffrey, "Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters," 6 *Clinical Law Review* 347, Spring 2000.

was held by the police. Eventually the client explained that when the attorney asked about “arrests,” he thought only of the three times he was held in prison for extended periods of time. The dozens of other times he was stopped by the police and detained for a few hours or days he regarded as “routine” and not worthy of mention.

### *Practice Tips for Representing Torture Survivors*

- Be prepared to hear your client’s story. Do background research about the country. Learn about the types of torture, repressive tactics, and persecution employed there.
- Build trust. Torture systematically destroys the ability to form trusting relationships.
- Do not judge the client. Shame and humiliation are hallmarks of torture. Be supportive. Own your emotions to your client if you react with disbelief or horror.
- Remain alert for signs of distress –PTSD, flashbacks, dissociation – and be ready to refer clients to supportive or emergency services.
- Understand that many symptoms of PTSD, depression, or physical complaints arising out of torture may interfere with the work of preparing the legal case. If possible, work with the client’s therapist, social worker, or psychologist to help the client cope with the necessary work.
- Remain alert for signs of secondary (vicarious) trauma to yourself. Understand that some emotional impact is a normal part of exposure to stories of trauma. Know when to limit exposure to stories of torture.

### *Summary*

Legal work on behalf of torture survivors provides both enormous professional satisfaction and great challenge. The basic tenets of professional responsibility go far toward building a successful working relationship with clients who have survived torture. In addition, by tailoring legal representation programs for torture survivors, structural barriers can be reduced to provide survivors with the greatest access to legal services. For those attorneys providing even occasional services to torture survivors, careful consideration of the particular needs of the survivor can enhance client-attorney communication, strengthen the record, and ultimately contribute to the success of the case.

### *Resources*

#### *Services for Survivors of Torture and War Trauma*

To locate services for victims of torture and war trauma, contact the National Consortium of Torture Treatment Programs at <http://ncttp.westside.com/default.view>; The National Consortium of Torture Treatment Programs website provides links to mental health services for torture victims in the United States.

The Center for Victims of Torture provides comprehensive services to residents of the Twin Cities Metro area in Minnesota. The Center serves approximately 250 clients each year. For intake information, clients should contact the Center directly at 612-436-4800 for intake or referral. For more information go to [www.cvt.org](http://www.cvt.org).

### *Additional Resources*

Healing the Hurt: A Guide for Developing Services for Torture Survivors, is available online at [www.cvt.org](http://www.cvt.org). This article was adapted from Chapter 7: Legal Services, which addressed particular concerns when developing legal services for torture survivors seeking asylum.

The Lutheran Immigrant and Refugee Service's Detained Torture Survivor Legal Support Network is a nationwide network of legal service hubs for torture survivors held in immigration detention. They have produced a series of booklets, *Pocket Knowledge*, a 40-page booklet with practical information for individuals released from immigration detention. Available on-line in French, English, Spanish, and Arabic. [www.lirs.org/What/programs/torturesurvivor.htm](http://www.lirs.org/What/programs/torturesurvivor.htm).

[www.state.gov/g/drl/rls/hrrpt/](http://www.state.gov/g/drl/rls/hrrpt/): The U.S. Department of State issues annual reports on human rights practices around the world.

[www.amnesty.org](http://www.amnesty.org). Amnesty International documents human rights abuses, including the use of torture, in most countries.

[www.asylumlaw.org](http://www.asylumlaw.org): Free website run by an international consortium of agencies that help asylum seekers in Australia, Canada, the United States, and several countries in Europe. Provides links to legal and human rights resources, experts, and other information valuable for asylum seekers.

[www.law.northwestern.edu/cfjc/catresources/](http://www.law.northwestern.edu/cfjc/catresources/) Northwestern University School of Law, Bluhm Legal Clinic, Children and Family Justice Center, Convention Against Torture Resources. This site contains specific information about the effects of torture on children, child soldiers, children involved in gangs, and street children.

## **REPRESENTING NON-CITIZENS WHO HAVE SUFFERED TORTURE OR TRAUMA**

### **Introduction**

At some point in their careers, public defenders stand a good chance of working with immigrants who have suffered torture, severe human rights abuses, or war trauma prior to arriving in the United States. Such experiences can have profound implications for a client's interaction with law enforcement and the courts. In some circumstances, traumatized immigrants may be at greater risk of arrest, and experiences with law enforcement can exacerbate mental health problems related to traumatic stress. Unfortunately these problems often remain hidden, as many clients never talk about their past, and many legal professionals never ask.

The prevalence of traumatic stress from torture or severe human rights abuses is far more frequent than one might imagine. A survey of immigrant patients conducted at a public hospital in New York demonstrated that 5% of all foreign-born patients suffered from long-term medical or mental health problems related to torture or war. Immigrants in other major US cities are likely to be similarly affected. Chicago is home to many immigrants who fled wars and civil instability; our city hosts the largest Bosnian community outside of Europe, a very large Central American community, and a rapidly growing African immigrant population. In total, more than 200,000 Chicagoans fled wars or immigrated from countries with widespread human rights abuses, and there are probably at least 5,000 torture survivors in Chicago.

### **Recognizing victims of torture or severe human rights abuses**

People rarely volunteer information about torture, detention or war trauma. Many World War II veterans are only now talking about their experiences; it is far less likely that a recently arrived immigrant will discuss traumatic experiences with a public defender. During interactions with a client, public defenders should pay attention to the client's pre-immigration history and note psychological signs that may indicate a past history of trauma. Once trust is established, a client may talk about his or her personal history, or may talk about medical or mental health problems indicating a history of politically-motivated violence. The following signs and symptoms are warning signs that the client may have a traumatic past that is affecting current health or social functioning.

#### Personal history

- ☞ Immigrated from a country or region with a history of civil strife / human rights abuses. (Central America; the Balkans; Southeast Asia; West or Central Africa; Ethiopia, Sudan and Somalia; Turkey, Iran or Afghanistan, etc.)
- ☞ Exhibits reluctance to divulge experiences or personal history prior to arrival to the United States.
- ☞ Experienced imprisonment or detention, or cannot account for a period of time while living in a country with a poor human rights record.

- ☞ Was politically active or previously employed as a teacher, civil official, attorney, union organizer, or other high-profile position in society (although not all victims of abuses are prominent citizens).
- ☞ Lost family members, friends or neighbors due to conflict or political repression.

### Medical signs & symptoms

- ☞ Scarring to the head and/or extremities, small circular scars from cigarette burns, or limited range of motion from unhealed injuries. Occasionally scarring is a product of traditional practices and is not evidence of abuse.
- ☞ Persistent headaches; may complain of head injuries
- ☞ Neurological problems - numbness, weakness on one side or in a limb, damage to facial nerves.

### Psychological signs and symptoms

- ☞ Sleep disorders: Many clients find it especially difficult to sleep due to nightmares, or because they spontaneously wake up from stress.
- ☞ Depression: The client may complain of feeling “numb”, be socially isolated, and be unable to experience pleasure or visualize a more positive future. Clients may be tearful but more often present with a “flat affect” - monotone speech, lack of normal eye contact, lack of expression or expressiveness. This is usually accentuated when the client talks about traumatic events or the past.
- ☞ Anxiety: Clients often become noticeably anxious in response to one or more of a number of different stimuli - being in confined spaces, walking alone, seeing uniformed police, etc. Clients often complain of difficulty concentrating, and sometimes also exhibit an exaggerated startle response to loud noises or other unexpected events.
- ☞ Re-experiencing the event: Clients often experience flashbacks or intrusive memories of the abuse they endured. This may occur spontaneously but is also frequently triggered by having to talk about the past. Clients may become suddenly tearful, frightened or even mute, unable to explain what is wrong.
- ☞ Memory problems: Traumatic memories are overwhelmingly vivid and immediate; some clients fear these memories so much that they consciously or unconsciously block out parts of their past and will simply not talk about certain events or periods of time.

### **Implications for legal defense**

Torture and other severe human rights abuses can place an immigrant at greater risk of arrest, and can severely complicate the immigrant’s ability to act on his or her own behalf or cooperate with a defense attorney.

Post-traumatic stress disorder (PTSD) is the psychiatric diagnosis that most accurately encompasses the range of symptoms experienced by survivors of torture, human rights violations and war trauma. Although a diagnosis of PTSD has useful applications for defense attorneys, each person’s response to trauma and process of recovery is unique. PTSD should be understood

as a general diagnostic construct encompassing a very wide range of symptoms, not a well-defined mental illness like bipolar disorder or major depression.

The five key diagnostic criteria of PTSD are:

- ☞ depression
- ☞ anxiety
- ☞ avoidance of stimuli related to the traumatic event
- ☞ persistent psychological arousal (such as nightmares or exaggerated startle response)
- ☞ persistent re-experiencing of the traumatic event (such as intrusive memories or flashbacks)

Interaction with law enforcement can prompt several symptoms of PTSD. Torture survivors and war trauma survivors nearly always experience anxiety and try to avoid policemen, military personnel, or security officers. If confronted by law enforcement, even during a routine traffic stop, some may experience extreme anxiety or even a full-scale flashback. There is a risk that such an interaction could provoke “fight or flight” behavior, resulting in the client’s injury or arrest - regardless of guilt or innocence in a crime.

Memories may be distorted by trauma and clients may have difficulty describing a chronological sequence of events. A person may have a vivid memory of one specific event, but the details surrounding the event may change from interview to interview, undermining credibility. Clients may experience memory problems when recounting traumas that occurred prior to immigration, as well as subsequent traumas or flashbacks that occurred here in the United States.

Mental health problems related to trauma clearly affect a person’s ability to function in society and may be mitigating or explanatory factors that need to be taken into account during legal proceedings. Clients may fail to fulfill basic legal obligations due to depression or fear of the legal system. In particular, a past history of trauma is relevant in cases where an immigrant fails to appear in court. Trauma survivors sometimes have difficulty managing anger, or may be impulsive and take unnecessary risks. Although a history of trauma does not necessarily cause alcohol or drug abuse, survivors of torture or war trauma often have more severe substance abuse problems than non-affected immigrants.

Public defenders should anticipate difficulties establishing trust with traumatized clients, above and beyond the cultural difficulties inherent in working with immigrants. It will take time and good communication skills to effectively represent a traumatized immigrant, especially if the client is in detention.

- ☞ Victims of torture and other severe human rights abuses left countries in which there was either no judicial system at all, or a judiciary that failed to provide them with the most basic legal protections. They may not recognize any separation between defense and prosecution, not fully believe attorney-client privilege, and assume that the public defender will act on the state’s behalf rather than their own.

- ☞ In particular, torture survivors have especially great difficulty trusting others. Torture is used to silence and intimidate more often than to obtain information, so torture survivors find themselves isolated from their family, community and friends. Shame is also a central component of torture. People become ashamed of having lost control of themselves due to fear or pain, no matter how understandable their reaction may seem to an observer. If interrogation was part of the torture, the client may be ashamed of having provided information under duress about friends, relatives or co-workers to authorities. Torture very often involves rape and other sexual abuse - of men as well as women - which is always accompanied by some degree of shame. As a result, torture survivors are often very reluctant to discuss their experiences even after trust is established.

### **Interviewing victims of torture or human rights violations**

It is always stressful for the client to talk about experiences of torture or other violent events. The stress of recounting the experience is called “re-traumatization”, and an interview can provoke reactions ranging from discomfort to depression to full-scale flashbacks or suicidal behavior. It is important to pay attention to the reactions of the person you are interviewing and to know when to take a break and stop asking questions. Listening to accounts of torture or human rights violations can be stressful for the interviewer as well.

- ☞ Public defenders should be prepared to extend proceedings or ask for delays if it appears that the client is severely traumatized.
- ☞ Carefully explain attorney-client privilege and reinforce confidentiality frequently.
- ☞ Avoid using relatives as interpreters. If the client arrives with relatives and wishes them to be present during the interview, try to meet at least briefly with the client to check if he or she has anything to talk about without family members present.
- ☞ Interviews usually require privacy - but sometimes clients are more comfortable talking in a public place such as a coffee shop.
- ☞ The objective is not to interrogate the client, but help the client talk freely. Avoid situations that demonstrate an inequality of power - i.e. sitting behind a big desk, or using any sort of intimidating body language or speech. Try to sit in chairs facing each other, and take into consideration client's preference for having the door open or closed, or adjusting other variables in the physical environment. Ask if he or she is comfortable.
- ☞ You may face legal deadlines and need information quickly. Even if you think it is in the client's interest, or if you are frustrated, don't try to force the client to talk or raise your voice. Better to explain why you need information and try to delay proceedings until you have established sufficient trust.
- ☞ Be aware that some clients may suspect others in the same immigrant group and the client may not be comfortable with the interpreter. Try to discuss this with the interpreter and the client separately.
- ☞ Try not to keep the client waiting as this often provokes anxiety and additional discomfort. Survivors of torture frequently report being forced to wait long periods of time during their detention and abuse.

### **For more help**

The effects of torture and other human rights abuses can be overwhelming, and the defense attorney may feel unable to effectively address the clients legal, emotional or emergency needs. Helping a client access services can improve the partnership between a defense attorney and the client. There are several mental health and social support providers in Chicago that specialize in services for immigrants and refugees:

#### **The Marjorie Kovler Center for the Treatment of Survivors of Torture**

1331 West Albion Avenue

Chicago, IL 60626

Phone: (773) 381-4070 (for general information)  
(773) 751-4035 or 4036 (for appointments)

Fax: (773) 381-4073

Email: [kovler@heartlandalliance.org](mailto:kovler@heartlandalliance.org)

Mission: Mental health, medical and case management services for torture survivors

#### **Appropriate referrals:**

- ☞ Persons who experienced torture or other exceptionally cruel punishment carried out by foreign governments, rebel movements or others acting in an official capacity, because of their political opinion, ethnicity, nationality, religious belief or membership in a social group.
- ☞ Immediate family members of torture survivors
- ☞ Immigration status is no bar to services

#### **Inappropriate referrals:**

- ☞ Survivors of torture inflicted by police or other officials in the US
- ☞ Clients with schizophrenia or other serious mental illnesses
- ☞ Perpetrators of torture or war crimes

#### **Refugee Mental Health Program**

4750 North Sheridan, Suite 300

Chicago, IL

773 271 1073 x 238 (to schedule an intake)

773 271 0601 (fax)

Contact: Buni Cocar

Mission: Mental health and case management services for refugees

#### **Appropriate referrals:**

- ☞ Refugees who have been in the United States less than 5 years who are suffering from war-related trauma, depression, or adjustment difficulties.
- ☞ Refugees with mental illnesses
- ☞ Age 18 and older



**Inappropriate referrals:**

- ☞ Undocumented or non-refugee immigrants
- ☞ US citizens

**FACES**

4750 North Sheridan, Suite 300

Chicago, IL

773 271 1073 x 235 (to schedule an intake)

773 271 0601 (fax)

Contact: Joan Liautaud or Nela Krasnjar

Mission: Mental health services for refugee and asylee children

**Appropriate referrals:**

- ☞ Children and teenagers who are refugees, asylees or political asylum applicants and are experiencing mental health problems or adjustment difficulties due to traumatic stress
- ☞ Minor children of refugee parents
- ☞ Children who meet the other criteria and have mental illnesses are eligible

**Inappropriate referrals:**

- ☞ Immigrant children or children of immigrant parents who have no history of war trauma, torture or other human rights abuses committed outside the United States.

**Community Counseling Centers of Chicago (C-4)**

4740 N. Clark St.

Chicago, IL

773 769 0205

Mission: Mental health services for Chicago residents

**Appropriate referrals:**

- ☞ Persons suffering from mental illness, traumatic stress or other mental health problems that do not fit in other listed programs

**Inappropriate referrals:**

- ☞ None