New Members Division E-News

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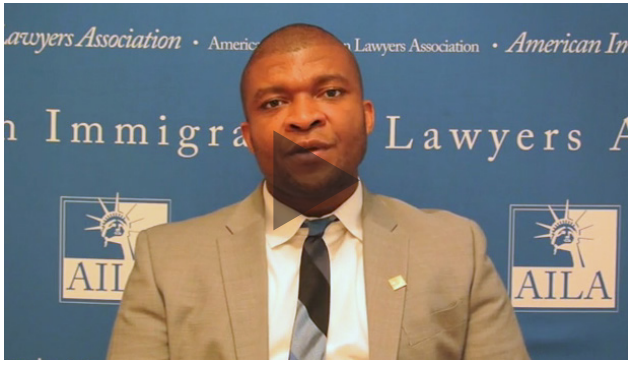
NEW MEMBER RESOURCES



Make the most of your membership! AILA Membership Associate Eric Kokuma tells you how to best utilize all the resources available to you!

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When Your Detained Client is a U.S. Citizen

by Olsa Alikaj-Cano

The Non-Detention Act provides that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress". 18 U.S.C. § 4001. Yet, as unbelievable as it may seem, we all have heard the stories of U.S. citizens being detained and even removed from the United States. If an individual who is already in custody claims to be a United States Citizen (USC), an ICE officer must immediately examine the merits of the claim and notify their local Office of Chief Counsel (OCC). Also, absent extraordinary circumstances, Detention and Removal Operations (DRO) and the Office of the Principal Legal Advisor (OPLA) must jointly prepare and submit a memorandum examining the citizenship claim, and recommending a course of action to the HQDRO Assistant Director of Operations and the HQOPLA Director of Field Operation, who then must make a decision on the recommendation within 24 hours. If there is probative evidence that the detained individual is a USC, the individual should be released from detention. See 2009 ICE Morton Memo: Superseding Guidance on Reporting and Investigating Claims to United States Citizenship (AILA InfoNet Doc. No. 10050769).

> "When dealing with clients placed in removal proceedings, we are sometimes too quick to strategize on the potential forms of relief from removal, **forgetting at times to ask questions regarding the individual's possibility of having a claim to U.S. Citizenship."**

Exploring all options regarding U.S. citizenship:

What if the detainee does not know that they are a USC and therefore does not make such a claim to ICE? When dealing with clients placed in removal proceedings, we are sometimes too quick to strategize on the potential forms of relief from removal, forgetting at times to ask questions regarding the individual's possibility of having a claim to U.S. Citizenship. It is crucial to obtain your client's full story and explore the circumstances of their birth. Whether your client was born with a "midwife" and did not have his birth registered, or has a second birth certificate filed in Mexico (as is the case with children born in the U.S. Southern border whose parents filed birth certificates so they could attend school in Mexico), the standard of proving citizenship is a preponderance

CONTINUED on pg.2 >>

DETENTION from pg.1 >>

of the evidence. *See Castelano et al v. Clinton et al*, CA M-08-057 (S.D.TX). Furthermore, the practitioner should also consider derivative citizenship and follow up with questions regarding the citizenship of the client's parents and even grandparents. (See AILA InfoNet Doc. No. 14052840). If there is any indication that your client is a USC, immediately notify the ICE agent in charge of your client's case. As mentioned earlier, ICE agents must fully investigate all claims to U.S. Citizenship within 24 hours of the claim.

Claiming citizenship during the removal proceedings:

If your client is not released after notifying ICE, but is instead placed in removal proceedings, the practitioner should bring the citizenship claim before the Immigration Judge (IJ). The IJ can either make a decision on the spot (that is why it is important to appear at the hearing with a prepared citizenship package), or the Judge may schedule an evidentiary hearing on the issue of citizenship. If a client is mandatorily detained you can always seek a "*Joseph* hearing." See *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

When pleading to the NTA, the practitioner should never admit to the allegation that the client is not a citizen of the United States, and should instead deny it. The burden then shifts to DHS to show foreign birth. Once DHS proves foreign birth, the burden shifts again to your client to prove citizenship by a preponderance of credible evidence.

If the Immigration Judge denies the citizenship claim, the practitioner should appeal the case to the Board of Immigration Appeals (BIA). If the BIA finds no genuine issue of material fact about petitioner's nationality, the Court of Appeals shall decide the nationality claim. 8 U.S.C. §1252(b)(5)(A). However, if the Court of Appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, it shall transfer the case to the District Court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim. 8 U.S.C. §1252(b)(5)(B).

Bringing your client back to the U.S. after an issuance of removal order:

Whether you have obtained a U.S. passport after a successful battle with the DOS, or have filed an N-600 application was filed where the certificate of citizenship has been issued, the most practical way to bring your client back to the U.S. is to mail the documents directly to the client. In the case of the certificate of citizenship, the practitioner should advise the client to return to the United States via any land port of entry, presenting the certificate and telling the CBP officers that he is a U.S. Citizen. The client would be paroled into the country to take the Oath of Citizenship. Your client could also apply for a passport directly with the U.S. Embassy with proof of the certificate of citizenship, and after taking the oath. If the practitioner is still litigating the case before the Federal Court (and your client remains outside the country because of the removal order), request from the DHS to parole the client into the United States in order to attend every scheduled hearing and to prove his citizenship.

The Supreme Court has called citizenship a "most precious right". *Shneiderman v. United States*, 320 U.S. 118, 166, 63 S. Ct. 1333, 1356, 87 L. Ed. 1796 (1943). We must not be passive in seeking it and safeguarding it on behalf of our clients, as it is our responsibility to ensure that no U.S. Citizen faces removal proceedings or is removed from this country.

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