

## IMMIGRATION ADVISOR

### The Risk of Deportation

A 2010 US Supreme Court decision requires criminal defense counsel to inform a non-citizen client whether his plea of guilty or *nolo contendere* carries a risk of deportation. In ***Padilla v. Kentucky***, the US Supreme Court determined that the Sixth Amendment's right to counsel mandates that non-citizens receive such information in criminal cases.

**Sufficient pleading.** The Court ruled that "[b]ecause counsel must inform a client whether his plea carries a risk of deportation, Padilla has *sufficiently alleged* that his counsel, who failed to do so, was constitutionally deficient. Whether he is entitled to relief depends on whether he has been *prejudiced*."

#### **Vacation of conviction.**

Accordingly, if counsel fails to provide such advice, and a tendered guilty plea later results in deportation proceedings, the non-citizen may file a post-hearing motion to *vacate* the conviction based upon the constitutional claim of ineffective assistance of counsel.

If the alien's conviction *is* vacated due to such constitutional deficiency, the deportation charge which relies upon the conviction is no longer viable in removal proceedings which thereby must be dismissed, unless some other ground of deportability or inadmissibility exists.

**Loss of citizenship.** A criminal defendant may lose citizenship either by revocation of naturalization or by voluntarily relinquishing it while performing one of the expatriation acts listed in section 349 of the Immigration and Nationality Act (Act). The government must show the defendant had a specific intent to relinquish citizenship.

Thus, if such loss of U.S. citizenship previously occurred, or is pending, a criminal defendant client could be exposed to deportation. A person's naturalization may be revoked based upon mistake or misrepresentation in

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Given the increasing popularity of annuities, estate planners must know what consequences these investments will have for their clients. Unfortunately, little is written on the topic of estate planning with annuities. Joseph Cipparone spent 3 years writing ***ANNUITIES IN CONNECTICUT ESTATE PLANNING : An Essential Guide for Attorneys and Financial Advisors*** (LawFirst Publishing, a division of the Connecticut Bar Association; ISBN 9780984583423; © 2011; purchase price \$39.95; Paperback) to fill this gap for Connecticut attorneys and financial advisors. For more about the book and to purchase a copy, go to [www.eldersolutionscenter.com](http://www.eldersolutionscenter.com). Congratulations, Joe!

the procurement.

**Evidence of citizenship.** For a person born outside the United States, his or her U.S. citizenship status may be proven by 1) a *Certificate of Naturalization* issued by the U.S. Citizenship and Immigration Services (CIS); 2) a *Certificate of Citizenship* issued by CIS pursuant to 8 CFR Sec. 341.7 ("Issuance of certificate"); 3) a valid unexpired U.S. Passport; or 4) a *Consular Report of Birth Abroad* (FS-240).

**Certificate of citizenship - application process.** Once US citizenship automatically vests in a child born abroad, the child (or the parents) may thereafter apply *at any time* for a certificate of U.S. citizenship on Form N-600 for the child. Citizenship automatically vests in a child born abroad if his or her parent was a U.S. citizen or, *subsequent* to birth abroad, a parent became naturalized ("derivative citizenship").

This means that, once automatically vested, citizenship starts immediately, and continues, even if there is a delay in filing an application for a certificate; and even if there is *no* such application ever filed.

If an application is filed, the CIS typically will notify the applicant to report before a USCIS officer for an in-person examination under oath. The officer will review the applicant's "A-file," which contains the application, supporting documents, prior immigration documents, and any other admissible evidence. 8 CFR 103.2.

**Precious right of citizenship.** The CIS will issue a certificate of

citizenship or of naturalization, as the case may be, upon successful conclusion of the administrative proceeding. While a Certificate of Citizenship and a Certificate of Naturalization have slightly different wording, they both establish that the bearer has the status of citizen of the United States. The bearer is conferred with the same rights and responsibilities as a native born citizen, including protection from deportation. There is no second class citizenship in America. Courts recognize that this "precious right" may not be lightly taken away. However, revocation of naturalization proceedings may be initiated in the case of procurement by concealment of material facts or by willful misrepresentation. See Section 340 of the Act (revocation of naturalization).

**Conclusion.** Because criminal defense counsel must now inform a non-citizen client whether his plea of guilty or *nolo contendere* carries a risk of deportation, such counsel may wish to consult with an immigration attorney prior to entering such a plea

*Robert Kim Bingham, Sr., Esq., focuses his practice on immigration law and wrote the article in this edition. No person can avoid deportation based on the advice given in this newsletter. This information is for general purposes only and does not constitute legal advice. For specific immigration questions related to your situation, you should consult a qualified attorney.*

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