

CHAPTER 2:

Determining Your Client's Citizenship and Immigration Status

2.1 Determining Whether Your Client Is a U.S. Citizen	10
A. Generally	
B. Obstacles to Understanding Your Client's Status	
C. Who Are U.S. Citizens	
2.2 Determining Your Noncitizen Client's Particular Immigration Status	12
A. General Considerations	
B. Lawful Permanent Resident Status	
C. Refugee or Asylee Status	
D. Individuals with Temporary Lawful Status or Pending Application for Status	
E. Individuals without Immigration Status	
2.3 Additional Interview Objectives for a Noncitizen Client	16
A. Assess Your Client's Goals in the Case	
B. Gather Additional Information from Your Client	
C. Advise Your Clients of Their Rights	
2.4 Sample Questions to Help Determine Client's Immigration Status and Eligibility for Future Status	17
2.5 General Checklist For Representing and Advising a Noncitizen Client	18
Sample Images of Immigration Documents	20

When representing any new client in criminal court proceedings, a criminal defense attorney should as a preliminary matter determine whether or not the client is a U.S. citizen. If the client is not a U.S. citizen, the disposition of the criminal case may subject the client to deportation or other adverse immigration consequences.

Do not make the mistake of assuming that your client is a U.S. citizen. Many noncitizens have lived in the United States their entire lives and do not exhibit an accent. Thus, it is paramount to ask every client about his or her citizenship, not just those clients with discernible accents or who appear “foreign.” If the person was born in the U.S., the inquiry need go no further. Only if the person was not born in the U.S. will further questions be necessary. *See infra* § 2.4 (sample intake questions).

2.1

Determining Whether Your Client Is a U.S. Citizen

A. Generally

If your client is a U.S. citizen or a U.S. national, he or she is not subject to removal or other adverse immigration consequences (unless, in the case of a naturalized citizen, citizenship has been revoked because naturalization was obtained through some type of misrepresentation).

A “national” is a broader term that not only refers to any person who is a U.S. citizen, but also covers a person born in “outlying possessions of the United States.” *See* INA § 101(a)(22)(A), 8 U.S.C. § 1101(a)(22)(A); INA § 308, 8 U.S.C. § 1408. The outlying possessions of the United States are American Samoa and Swains Island. *See* INA § 101(a)(29), 8 U.S.C. § 1101(a)(29). Because “nationals” who are not U.S. citizens comprise such a small group, and because they are treated no differently than citizens for immigration purposes, this manual uses the term “citizen” to cover both U.S. citizens and noncitizen nationals.

B. Obstacles to Understanding Your Client's Status

Determining whether your client is a citizen is not always an easy task. Criminal defendant clients do not always trust appointed attorneys, especially at the first meeting. They may fear that informing you of their noncitizen status could actually trigger immigration consequences.

Practice Note: Your client may have no familiarity with the adversarial process that is part of the U.S. criminal justice system—he or she may not understand that appointed counsel is independent of the government. When interviewing a client for the first time, it is helpful to reassure the client about confidentiality and that you have no association with U.S. Immigration and Customs Enforcement (ICE).

Other times, noncitizen clients may simply be unaware that they are not U.S. citizens, particularly those who came to the U.S. at a young age. They may mistakenly assume that they are citizens because they have lived in the United States for so long. Or, some noncitizens may interpret the question, “Are you a citizen,” to be the same as “Are you here legally?” Thus, they may erroneously answer yes simply because they have a green card (*see infra* § 2.2B for a discussion of persons with green cards). It therefore may be necessary to clarify an affirmative response with follow-up questions.

Occasionally you will encounter a client who may be a citizen without realizing it, as in the case of someone who automatically derived citizenship from a family member without ever having taken any affirmative step. Therefore, some cases may require investigation beyond simply asking your client whether he or she is a citizen.

Practice Note: It is helpful to begin the citizenship inquiry by asking your client where he or she was born. If the person was not born in the U.S., then ask follow-up questions about citizenship and how, if at all, it was obtained. *See infra* § 2.4 (sample intake questions).

C. Who Are U.S. Citizens

Generally, your client is a U.S. citizen if he or she is within one of the following categories.

Place of Birth. A person is a U.S. citizen if he or she was born in the United States or Puerto Rico, the U.S. Virgin Islands, Guam, or American Samoa and Swains Island. See INA §§ 301(a)&(b), 302, 304–307, 8 U.S.C. §§ 1401(a)&(b), 1402, 1404–1407 (citizen by birth in the U.S., Puerto Rico, U.S. Virgin Islands, or Guam); INA § 308, U.S.C. § 1408 (noncitizen national by birth in American Samoa and Swains Island).

“Acquired” Citizenship from U.S. Citizen Parent. A person is a U.S. citizen if he or she was born outside the United States but “acquired” U.S. citizenship at birth by having been born to a U.S. citizen parent or parents. The current law on “acquired” citizenship is contained in INA §§ 301(c), (d), (e), (g)&(h), 303, 8 U.S.C. §§ 1401(c), (d), (e), (g)&(h), 1403; and INA § 309, 8 U.S.C. § 1409 (child born out of wedlock).

Naturalization. A person who is born outside the United States may become a U.S. citizen by petitioning for and being granted citizenship through the “naturalization” process. This process generally involves passing a civics and English test and participating in a swearing-in ceremony. See INA § 310 *et al.*, 8 U.S.C. § 1410 *et al.*

“Derivative” Citizenship from Naturalized U.S. Parent. A person is a U.S. citizen if he or she was born outside the United States but “derived” U.S. citizenship as a minor when one or both of his or her parents became a naturalized citizen. The current law on “derivative” citizenship is contained in INA § 320, 8 U.S.C. § 1431.

Practice Note: You should ask your client whether any of his or her parents or grandparents were born in the United States or at any point obtained U.S. citizenship, which could give your client “acquired” or “derivative” citizenship even if he or she was not born in the U.S. or U.S. territories. The rules surrounding “acquired” and “derivative” citizenship are complicated, however, and depend on several factors, including an ever-changing set of laws that are not retroactive. Because this is a particularly difficult area of law, if there is any question regarding your client’s citizenship, you should contact an immigration expert for further assistance.

Documentation of U.S. Citizenship

U.S. citizens may have one of the following:

- U.S. Passport
- U.S. Birth Certificate
- U.S. Certificate of Citizenship
- U.S. Certificate of Naturalization

Sample images of some of these documents appear at the end of this chapter.

2.2

Determining Your Noncitizen Client's Particular Immigration Status

A. General Considerations

If you conclude that your client is not a citizen, you then must determine your client's particular immigration status. The immigration consequences will vary significantly depending on the client's particular immigration status. Many of your clients will know or have **documentation** indicating their immigration status. If possible, you should make arrangements to photocopy any such documents, especially in situations where your client is uncertain of his or her status.

You are also likely to encounter clients without any immigration status who are unlawfully present in the U.S. Some of these clients may be able to gain lawful status in the future. Many avenues for status would be foreclosed, however, by certain types of criminal convictions. Additionally, criminal convictions can have other serious consequences, such as mandatory detention pending removal from the U.S. and enhanced criminal sentences for illegal reentry. Consequently, the immigration consequences of conviction may matter to some of these individuals as well.

The discussion below divides noncitizens into four broad categories of immigration status:

- Lawful permanent resident status
- Refugee and asylee status
- Individuals with temporary lawful status or pending applications for status
- Individuals with no status

This list focuses on the immigration statuses you are most likely to encounter, but it is not exhaustive. The immigration consequences of a criminal conviction for each of these categories are discussed in Chapter 5 *infra*.

B. Lawful Permanent Resident Status

Definition. A lawful permanent resident (LPR) is a noncitizen who has been lawfully admitted to the United States to live and work permanently. LPRs may travel in and out of the country. An LPR may apply to be naturalized as a U.S. citizen after meeting certain requirements, including a residency requirement. For most individuals, five years of lawful permanent residence is required. *See* INA § 316(a), 8 U.S.C. § 1427(a). Regardless of numbers of years in the U.S. or U.S. citizen family relationships, an LPR can be deported or face other immigration consequences because of a criminal conviction (*see infra* § 5.1 for further discussion of impact of conviction on LPRs).

Documentation of Status

An LPR will generally have one of the following:

- A “green card” (no longer green in color), which is the colloquial name for INS Form I-551. The current version states “RESIDENT ALIEN” on the top of the front of the card, and states that the bearer is entitled to reside permanently and work in the U.S. Green cards now expire every ten years, and a replacement must be sought. An LPR does not lose legal status because the card expires or is misplaced. Conditional permanent residents (usually individuals who received their LPR status through a marriage less than two years old) are issued cards that are coded “CR” and that expire after two years.
- A stamp indicating “temporary evidence of lawful admission for permanent residence,” and accompanying expiration date, in either a foreign passport or on a DHS form I-94 Arrival/Departure Record. The I-94 document is issued to almost all noncitizens upon entry to the U.S. The card is stamped or handwritten with a notation that indicates the individual’s immigration status or section of law under which the person is granted admission.

Sample images of some of these documents appear at the end of this chapter.

C. Refugee or Asylee Status

Definition. A refugee or a person granted asylum is a noncitizen who has been admitted conditionally to the U.S. due to a threat of persecution in his or her country of nationality. *See generally* INA §§ 207, 208, 8 U.S.C. §§ 1157, 1158. Refugee status is granted to an individual who applied from outside the United States. Upon application, he or she is granted a visa, and then is allowed to come to the U.S. as a refugee. Asylum is granted to an individual after entry into the U.S. Thus, the person entered the U.S. in some other status or unlawfully, but then applied for and was granted asylum. Both refugees and asylees are allowed to work in the U.S. Refugees can apply to become lawful permanent residents after being present continuously for one year in the U.S., and asylees are eligible one year after being granted asylum. *See* INA §§ 209(a)(1)&(b), 8 U.S.C. §§ 1159(a)(1)&(b). However, as the process to become a lawful permanent resident can take several years, individuals may remain in this status for a long time. Both refugees and asylees can be deported or face other immigration consequences because of a criminal conviction (*see infra* §§ 5.2, 5.3 for further discussion).

Documentation of Status

Refugees and asylees will generally have one of the following:

- Refugees should have a document stating that they have been “admitted as a refugee pursuant to section 207 of the INA.” They should also have a stamp in their passport or I-94 document.
- Asylees will generally have a letter or other document from U.S. Citizenship and Immigration Services or the U.S. Department of Justice stating that the person has been granted asylum.
- Additionally, your client may have an employment authorization document indicating that he or she is in category A-3 (refugee) or A-5 (asylee). (Codes on the front of the card indicate the person’s immigration status by referring to the applicable subsection of 8 C.F.R. § 274A.12, the regulation authorizing employment.)

Sample images of some of these documents appear at the end of this chapter.

Practice Note: If your client has merely applied for asylum, as opposed to having been granted asylum, refer to the discussion *infra* § 2.2D. Like a person granted asylum, an asylum applicant may also have an employment authorization document, but his or her card will be coded C-8 rather than A-3 or A-5.

D. Individuals with Temporary Lawful Status or Pending Application for Status

The following discussion addresses persons who have temporary lawful status in the U.S. or who have a pending application for status. Temporary status authorizes a person to remain in the U.S. for a discrete period, while having a pending application for status does not give a person any permission to remain in the U.S. either temporarily or permanently. All of these individuals can be deported or face other immigration consequences because of certain criminal convictions.

Nonimmigrant Visa Holders. Nonimmigrant visa holders are admitted to the United States on a time-limited temporary visa for a specific purpose (such as tourism, study, or temporary work). They are restricted to activity consistent with their visas. The visas are issued prior to entry by a U.S. consulate or embassy. It is possible for individuals to enter the U.S. as a temporary visa holder and eventually obtain another temporary or permanent status. For example, an individual may come to the United States as a student, change to an employment-related temporary visa after graduation, and eventually obtain lawful permanent resident status based on an employment opportunity or a family relationship if he or she has the appropriate U.S. sponsor.

Documentation of Status

- Evidence of nonimmigrant status is documented on an I-94 document or I-797 notice from U.S. Citizenship and Immigration Services. The expiration date on an I-94 document supersedes the visa expiration date. For example, an individual may have a tourist visa valid for ten years, but periods of stay in the U.S. are usually granted for no more than six months at a time (as indicated on the I-94 document).

Sample images of some of these documents appear at the end of this chapter

Temporary Protected Status. Temporary Protected Status (TPS) establishes a safe haven for and is conferred on an entire nationality based on dire situations such as civil wars, natural disasters, or other extraordinary conditions in their home country. *See* INA § 244, 8 U.S.C. § 1254a. Countries that are currently designated for TPS include Burundi, El Salvador, Honduras, Liberia, Nicaragua, Somalia, and Sudan. *See* www.uscis.gov for the most current listing of countries. TPS country designations are for a limited period, but may be renewed by the U.S. Department of Justice. In order to acquire TPS status, an individual must have resided in the U.S. continuously since the date of TPS country designation and must have properly registered within the period provided by the U.S. Attorney General. *See* INA § 244(c), 8 U.S.C. § 1254a(c). Individuals with TPS are allowed to work in the U.S.

Individuals with Pending Applications for Status. This category includes individuals with pending applications for status, such as an asylum petition or an application for adjustment of status to a lawful permanent resident. It is important to note that a pending application does not constitute permission to remain in the U.S. Individuals with a pending application may, however, have a temporary employment authorization document and, as a result, erroneously assume that they have lawful status. While a pending application does not confer status, ICE may have more lenient policies with respect to deporting such persons.

E. Individuals without Immigration Status

These individuals have no government authorization to be present in the United States. This category includes undocumented persons who entered the U.S. without inspection (crossed the border illegally), as well as individuals who entered the U.S. on a valid visa but remained past their authorized period of stay (as evidenced by the expiration date on the I-94 document). If your client is here unlawfully, he or she may be deported immediately on that basis alone. The immigration consequences of conviction may still matter to some of these individuals because they may be eligible now or in the future to obtain lawful resident status, asylum, or other protection from removal. For example, Congress may pass a large-scale worker bill in the future, providing an opportunity for lawful status for many undocumented persons. Certain convictions could foreclose the possibility of the individual obtaining lawful status in the future.

2.3

Additional Interview Objectives for a Noncitizen Client

A. Assess Your Client's Goals in the Case

After obtaining information to determine your client's immigration status, you should discuss with your client the relative importance of any immigration consequences of conviction. It may be that the traditional criminal defense goals of minimizing the severity of the conviction and sentence will conflict with the immigration-related goal of minimizing adverse immigration consequences. For example, in certain situations, your client may be able to plead guilty to a non-deportable offense in exchange for a longer sentence. Thus, it is necessary to gauge the immigration goals of the case, as it will inform your ultimate strategy in the criminal proceeding.

B. Gather Additional Information from Your Client

In addition to obtaining information to determine your client's immigration status, you should use the initial and later interviews to gather information on his or her equities (ties to the U.S.), prior criminal history, length of residence in the U.S., and potential fear of returning to his or her country of nationality. This information will be necessary to determine the immigration consequences of any potential conviction and whether your client will be eligible for any form of relief from deportation (*see infra* §3.2B for further discussion of relief from removal).

C. Advise Your Clients of Their Rights

U.S. Immigration and Customs Enforcement (ICE) has prioritized the removal of noncitizens in jails and prisons. ICE and cooperating law enforcement agents are increasingly identifying, questioning, and detaining individuals who may be subject to removal based on criminal grounds or lack of immigration status. Admissions by noncitizen defendants may be used as evidence against them in deportation or criminal proceedings.

The client's Fifth Amendment privilege against self-incrimination covers immigration status if that information could lead to a criminal prosecution (certain immigration violations, including entering the U.S. without inspection, may carry criminal penalties). You should, therefore, advise all noncitizen clients not to discuss their immigration status, birthplace, or manner of entry into the U.S. with federal immigration agents or other law enforcement officers, except with the advice of counsel. You should also advise your noncitizen clients not to sign any documents while in custody, which could contain a stipulation that they are deportable, except with the advice of counsel. If questioned by an immigration agent, your client may remain silent or ask for an attorney.

You should also advise your noncitizen clients not to lie or misrepresent their status, as they can be criminally prosecuted for making a false statement. *See* 18 U.S.C. § 1001 (false statements), § 911 (false claim to citizenship).

In addition, immigration agents may ask your clients to waive the opportunity for a removal hearing before an immigration judge. You should advise your clients not to waive their rights to a hearing ("stipulation of removal") until all of their options are fully evaluated.

2.4

Sample Questions to Help Determine Client's Immigration Status and Eligibility for Future Status

Be sure to request copies of immigration documents to verify the information your client provides you.

1. Where were you born? (if answer is U.S. or other U.S. territory such as Puerto Rico, end of inquiry; otherwise, continue)
2. Are you a United States citizen?
 - a. If yes, how and when did you become a citizen? Do you have a U.S. passport? (to clarify whether the individual is in fact a citizen)
 - b. If no, continue to #3
3. Were your parents or grandparents born in the United States? If not, did they ever become U.S. citizens?
 - a. If your parents naturalized, were you under the age of 18 when they did? (If your client's parents or grandparents were born in the U.S. or your client's parents naturalized, you may have an acquired or derivative citizenship issue and should consult an immigration expert for further assistance in the case.)
4. Do you have any immigration documents (papers)?
 - a. Green card? On what date issued?
 - b. Valid work authorization card?
 - c. Temporary visa?
 - d. I-94 card?
 - e. Stamps in your passport?
5. Do you currently have any pending immigration applications or petitions, or has any documentation ever been filed on your behalf by a family member or employer? Have you ever appeared before an immigration judge? When, for what reason?
6. When and at what age did you come to the United States for the first time?
7. What was your immigration status when you arrived?
8. How long have you resided in the United States?
9. Have you ever traveled outside of the U.S. since your first arrival?

10. Have you been previously deported or ordered deported?¹ Were you stopped by U.S. officers at the border and questioned or refused admission? Were you ever “turned around” at the border? Have you ever been fingerprinted by U.S. immigration officers?
11. Do you have family here? Who? What is their citizenship or immigration status?
12. Are you married? What is the immigration status of your spouse?
13. Do you have children? Where were they born? What are their ages?
14. Do you have a prior criminal history? (It is important to obtain the client’s rap sheet; clients are not always aware of their entire criminal record.)
15. Do you fear returning to your country? Why?

2.5

General Checklist For Representing and Advising a Noncitizen Client

Because some of the terminology in this list may be unfamiliar, you may consider reviewing this list after examining the other chapters in this manual.

- Determine whether client is noncitizen
- If your client is a noncitizen, advise client not to make any admissions without advice of counsel to an immigration agent or other law enforcement officer
- Determine client’s particular immigration status
- Based on status and past criminal record, evaluate possible consequences
- Determine the relative importance of immigration consequences to your client
- Determine possible ways to mitigate adverse immigration consequences
- Explain the possible immigration consequences of the charged offenses, potential sentence, and possible plea options to client
- Even if immigration consequences cannot be avoided and client may be subject to removal or other adverse consequences, advise client of possible consequences:
 - advise client that he or she may be taken into federal immigration custody upon completion of his or her state sentence

1. If your client thinks that he or she may have been previously removed or is currently in removal proceedings but is not sure, you can call the U.S. Department of Justice Executive Office for Immigration Review (EOIR) automated information system (1.800.898.7180) to verify whether removal proceedings have commenced against your client or whether there is an outstanding removal order against your client. You will need your client’s Alien Registration Number (also known as an “A Number,” beginning with the letter A and followed by an 8 or 9 digit number). The Alien Registration Number may be found in your client’s passport or other immigration documents. It will be printed on all Department of Homeland Security (DHS) and EOIR correspondence.

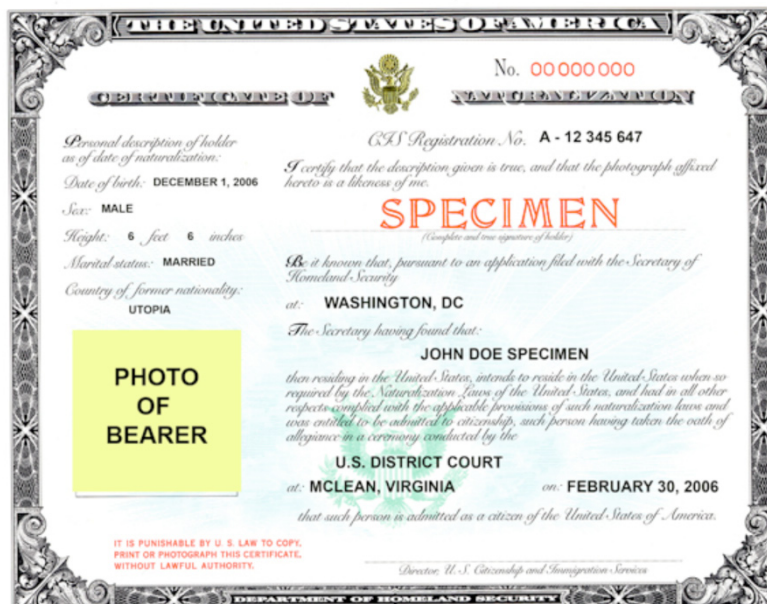
- advise client that reentering the country illegally after removal could lead to federal criminal charges and significant jail time
- advise client to consult with an immigration attorney before filing for any immigration benefit, including naturalization, adjustment of status, asylum, and work permits
- possibly set the client up with an immigration lawyer before or after criminal case is over
- If client is an LPR and criminal disposition does not make the client deportable, but may make him or her inadmissible in the future, advise the client to consult with an immigration attorney before traveling abroad or applying for naturalization
- If appropriate discuss effect of direct appeal or post-conviction relief

Sample Images of Immigration Documents

Form N-560 or N-561 – Certificate of United States Citizenship



Form N-550 or N-570 – Certificate of Naturalization





Foreign Passport with Temporary “Processed for I-551” Stamp (indicating “temporary evidence of lawful admission for permanent residence” and accompanying expiration date)



Form I-766 – Employment Authorization Document



Form I-94 – Arrival/Departure Record (this particular sample is for a nonimmigrant visa holder – note expiration date of April 23, 2009)

Departure Number		OMB No. 1651-0111	
b2b633123 12			
I-94 Departure Record			
14. Family Name SAMPLE			
15. First (Given) Name JANE		16. Birth Date (Day/Mo/Yr) 23 03 68	
17. Country of Citizenship NEW ZEALAND			
See Other Side		CBP Form I-94 (10/04) STAPLE HERE	
<p>Warning - A nonimmigrant who accepts unauthorized employment is subject to deportation.</p> <p>Important - Retain this permit in your possession; <i>you must surrender it when you leave the U.S.</i> Failure to do so may delay your entry into the U.S. in the future. You are authorized to stay in the U.S. only until the date written on this form. To remain past this date, without permission from Department of Homeland Security authorities, is a violation of the law.</p> <p>Surrender this permit when you leave the U.S.:</p> <ul style="list-style-type: none"> - By sea or air, to the transportation line; - Across the Canadian border, to a Canadian Official; - Across the Mexican border, to a U.S. Official. <p>Students planning to reenter the U.S. within 30 days to return to the same school, see "Arrival-Departure" on page 2 of Form I-20 prior to surrendering this permit.</p> <p>Record of Changes</p>			

