

NLWJC - Kagan

Counsel - Box 035 - Folder 010

Immigration Disability Regulation

EXECUTIVE OFFICE OF THE PRESIDENT

25-Sep-1996 05:15pm

TO: Carol H. Rasco
TO: Jeremy D. Benami

FROM: Diana M. Fortuna
Domestic Policy Council

CC: Elena Kagan
CC: Stephen C. Warnath

SUBJECT: Extension of comment period for disability naturalization re

It looks like we are about to agree to extend by 14 days the comment period on the reg that exempts certain people with disabilities from the civics/English tests for naturalization. The existing 30 day comment period expires Friday.

I was reluctant to agree to this at first, just because we don't need further delays. But it turns out that both disability and immigration advocacy groups are seeking a bit more time to comment, along with Federal agencies, and they favor a short extension. Apparently people are discovering a lot of thorny and important issues. I did push for 14 days instead of the usual, bureaucratic 30 day add-on, just to demonstrate that we need to get this out soon. Everyone seems to be OK with that.

INS is predicting a December publication date for the final reg. In the meantime, field offices are using some old guidance they have had for 2 years.

Office of Policy Development
United States Department of Justice
10th Street and Constitution Avenue, NW
Washington, D.C. 20530

FAX COVER PAGE
August 22, 1996; 11:18 am

TO: Diana Fortuna
White House/DPC Staff
FAX: 456-7028
VOICE: 456-5570

FROM: Kevin R. Jones
Deputy Assistant Attorney General
VOICE: (202) 514-4604
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Room 4256, Main Justice
Total Pages (excluding this cover): 14

Additional Message:

Attached is the INS rule waiving educational testing requirements for naturalization for persons with disabilities; this is the version that reflects the Civil Rights Division's position and was sent over to OMB previously. I have not yet seen the comments from Isabelle Pinzler today, but we will be forwarding them as soon as we get them.

Also, on the welfare bill, INS has been coordinating with the State Dept. Legal Advisor's Office regarding the provisions in the bill relating to treaty obligations:

- Section 401(c)(2)(B) authorizes federal benefits for nonimmigrants or LPR's if the U.S. is required to pay such benefits under reciprocal treaty agreements. Apparently, there are 22 bilateral investment treaties containing "national treatment" provisions for the payment of federal benefits to foreign nationals, in addition to obligations in NAFTA and GATT. National treatment means that such aliens should be eligible to receive the same federal health, retirement or disability benefits as as U.S. citizen working in a comparable capacity; it does not cover the full range of "federal public benefits" covered by the welfare bill.
- Section 402(b)(2) provides that the restriction on Title II Social Security benefits do not apply if the alien is "lawfully present" in the U.S. as determined by the AG, or if nonpayment would contravene an international agreement under § 233 of the Social Security Act, or if nonpayment would be contrary to § 202(t) of the Social Security Act regarding aliens outside the U.S.

The attached fax explains how these two provisions relate to existing treaty obligations.

BILLING CODE: 4410-10

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 312

[INS No. 1702-96]

RIN 1115-AE02

Waiver of Educational Requirements for Naturalization

for Certain Applicants

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: The Immigration and Naturalization Service (the Service) is amending its regulation relating to the educational requirements for naturalization of eligible applicants. This is necessary to implement changes to section 312 of the Immigration and Nationality Act (the Act) as amended by the Technical Corrections Act of 1994. The amendment provides an exemption from the requirements of demonstrating an understanding of the English language, including an ability to read, write, and speak words in ordinary usage, and of demonstrating a knowledge and understanding of the fundamentals of the history, and of the principles and form of government of the United States, for certain applicants who are unable to comply with both requirements because they possess a "physical or developmental disability" or a "mental impairment."

DATES: Written comments must be submitted on or before [Insert date 60 days from the date of publication in the FEDERAL REGISTER].

ADDRESSES: Please submit written comments in triplicate to the Director, Policy Directives and

Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS number 1702-96 on your correspondence. Comments are available for public inspection at the above-noted address by calling (202) 514-3048 to arrange an appointment.

FOR FURTHER INFORMATION CONTACT: Craig S. Howie, Adjudications Officer, Adjudications and Nationality Division, Immigration and Naturalization Service, 425 I Street NW., Room 3214, Washington, DC 20536, telephone (202) 514-5014.

SUPPLEMENTARY INFORMATION:

Background

Section 312 of the Act requires a person seeking naturalization as a citizen of the United States to demonstrate an understanding of the English language and a knowledge and understanding of the fundamentals of the history, and of the principles and form of government of the United States. On October 25, 1994, Congress amended section 312 of the Act, through the enactment of the Immigration and Nationality Technical Corrections Act of 1994 (Technical Corrections Act), Public Law 103-416, 108 Stat. 4309, section 108(a)(4).

Under the new subsection (b) of section 312 of the Act, certain persons are exempt from the English proficiency and history and government requirements of section 312(a) if they possess a "physical or developmental disability" or a "mental impairment."

Congress did not specifically define the phrases "physical and developmental disability" or "mental impairment" in the Technical Corrections Act. However, Congress did provide limited guidance for defining these terms in the Report of the House of Representatives Committee on the Judiciary, H.R. No. 103-387, November 20, 1993. The relevant comments, found on pages 5 and

6 of the report, read:

The bill also provides a general waiver of all testing requirements for persons of any age who, because of "physical or developmental disability or mental impairment," could not reasonably be expected to pass the test. This is not intended to include conditions that are either temporary or that have resulted from an individual's illegal use of drugs.

An individual who is developmentally disabled is one who shows delayed development of a specific cognitive area of maturation, i.e., reading, language, or speech, resulting in intellectual functioning so impaired as to render the individual unable to participate in the normal testing procedures for naturalization. This is not an acquired disability, but one whose onset occurred prior to the 18th birthday. An individual who is mentally disabled is one for whom there is a primary impairment of brain function, generally associated with an organic basis upon which diagnosis is based, resulting in an impairment of intellectual functions, including memory, orientation or judgment. This definition does not include individuals whose mental disability is not the result of a physical disorder. An individual who is physically disabled is one who has a physical impairment that substantially limits a major life activity.

It is clear that the amendment to section 312 is intended to exempt only those individuals who,

because of their disability, cannot demonstrate the requisite literacy and knowledge as required under section 312 of the Act.

On November 21, 1995, the Service provided policy guidance to its field offices with preliminary instructions for adjudication of naturalization applications based on the expanded exemptions provided under the Technical Corrections Act. The Service also provided preliminary definitions of the terms "developmental disability," "physical disability," and "mental impairment" following the language in H.R. No. 103-387. Applicants seeking disability waivers were required to submit medical evidence (e.g., a one-page certification from a designated civil surgeon) with their N-400, Application for Naturalization, supporting their claim of disability. The Service reminded field offices that the disability waiver applied only to the provisions of section 312 and that applicants must still satisfy all other requirements for naturalization, including the ability to take an oath of allegiance.

Amendment of existing regulation.

In order to implement the changes to section 312 of the Act as mandated by the Technical Corrections Act, the Service is proposing to amend 8 CFR 312.1 and 312.2 to provide definitions of the terms "developmental disability," "physical disability," and "mental impairment," and to outline procedures for individuals who seek disability waivers pursuant to section 312(b)(1) of the Act.

This proposed rule not only modifies the Service's current preliminary guidance to the field but also comports with existing Federal policies and regulations for implementing nondiscriminatory disability based programs as required under section 504 of the Rehabilitation Act of 1973, as amended by section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, and 28 CFR part 39. This proposed rule also provides that a waiver will be granted only to those individuals with disabilities who, because of the nature of their disability, cannot demonstrate

the required understanding of the English language and knowledge of American history and government.

The section 312(b) disability-waiver is not a blanket exemption from the testing requirements to be granted based solely on evidence of a disability. To interpret section 312(b) as a blanket exemption not only would have the tacit effect of perpetuating the negative stereotype that people with disabilities are unable to participate fully in mainstream activities, but also would be contrary to the requirements of section 504 of the Rehabilitation Act.

All waiver-eligibility determinations will be based on evidence of a cognitive impairment, resulting in an inability to learn the required language and history and government material. Therefore, the disabled applicant must show that his or her disability actually interferes with the ability to learn the required language and knowledge skills. Those individuals with disabilities who cannot demonstrate a cognitive impairment will not receive waivers but will be provided with any reasonable modification in the test administration process necessary to comply with section 504 of the Rehabilitation Act.

It will be the responsibility of the disabled person applying for naturalization to provide the documentation necessary to substantiate the claim for a disability-based exception. The Service has no desire for applicants with disabilities to submit extensive medical reports or medical background information regarding their condition. Since Service officers are not physicians and should not be placed in the position of making a medical determination, the Service will use designated civil surgeons to confirm the existence of a particular disability. The civil surgeons will review the necessary background medical reports, submitted by the applicant or the applicant's medical specialist. Civil surgeons not experienced in diagnosing developmental disabilities or other cognitive

impairments shall be required to consult with professionals who are experienced in diagnosing cognitive impairments prior to making an eligibility determination. If the surgeon is in agreement with the background information and has consulted with the necessary specialist, he or she will issue a one-page certification, verifying the existence of a disability as defined under 8 CFR 312.1(b)(3) and 312.2(b)(1), and attesting to the applicant's inability to participate in the normal testing procedures required under section 312 of the Act. The Service fully intends to work with the civil surgeons in developing guidance and procedures for the preparation of the certification needed by an applicant with a disability for this particular exception.

Request for comments

The Service is seeking public comments regarding this proposed rule. It should also be noted that the Service is engaged in a complete revision of 8 CFR part 312. The complete 8 CFR part 312 revision will be issued as a proposed rule, also with a request for public comments. The provisions noted within this proposed rule will be incorporated into the overall 8 CFR part 312 revision. In addition, any comments made in response to this proposed rule will be incorporated with other comments received on the overall 8 CFR part 312 revision.

Paperwork Reduction Act

The information collection requirement contained in this proposed rule at 8 CFR 312.2 has been submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act. Comments on this information collection requirement should be sent directly to the following two addresses:

Office of Information and Regulatory Affairs (OMB)
725 17th Street, NW
Washington, DC 20503

Attn: DOJ/INS Desk Officer
Room 10235

Immigration and Naturalization Service
Policy Directives and Instructions Branch
425 I Street, NW
Washington, DC 20536
Attn: INS No. 1702-96
Room 5307

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605 (b)), has reviewed this regulation and, by approving it, certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule has been drafted in a way to minimize the economic impact that it has on small business while meeting its intended objectives.

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Under Executive Order 12866, section 6(a)(3)(B)-(D), this proposed rule has been submitted to the Office of Management and Budget for review. This rule is mandated by the 1994 Technical Corrections Act in order to afford certain disabled naturalization applicants an exemption from the educational requirements outlined in section 312 of the Immigration and Nationality Act.

Executive Order 12612

The regulation will not have substantial direct effects on the States; on the relationship

between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 8 CFR Part 312

Citizenship and naturalization, Education.

Accordingly, part 312 of chapter I of title 8 of the Code of Federal Regulations is proposed

to be amended as follows:

PART 312—EDUCATIONAL REQUIREMENTS FOR NATURALIZATION

1. The authority citation for part 312 continues to read as follows:

Authority: 8 U.S.C. 1103, 1423, 1443, 1447, 1448.

2. In § 312.1, paragraph (b)(3) is revised to read as follows:

§ 312.1 Literacy requirements.

* * * * *

(b) * * *

(3) The requirements of paragraph (a) of this section shall not apply to any person who is unable because of physical or developmental disability or mental impairment to demonstrate an understanding of the English language, as noted in paragraph (a) of this section. Physical disability, developmental disability, and mental impairment do not include conditions that are temporary or that have resulted from an individual's illegal drug use. For the purposes of this paragraph, the term:

Developmental disability means an impairment, the onset of which precedes an individual's 18th birthday, that causes an individual to show delayed development of a specific cognitive area of

maturation, i.e., reading, language or speech, resulting in intellectual functioning so impaired as to cause an individual to be unable to demonstrate an understanding of the English language as required by this section.

Mental impairment means a primary impairment of brain function, generally associated with an organic basis upon which the diagnosis is based, resulting in an impairment of intellectual functions such as memory, orientation, or judgement that causes an individual to be unable to demonstrate an understanding of the English language required by this section. This definition does not include a mental impairment that is not the result of a physical disorder.

Physical disability means a physical impairment that substantially limits an individual's major life activities in a way that causes that individual to be unable to demonstrate an understanding of the English language required by this section.

* * * * *

3. Section 312.2 is amended by:

- a. Revising the last sentence of paragraph (a);
- b. Redesignating paragraph (b) as paragraph (c) and by
- c. Adding a new paragraph (b), to read as follows:

§ 312.2 Knowledge of history and government of the United States.

(a) * * * A person who is exempt from the literacy requirement under § 312.1(b)(1) and (2) must still satisfy this requirement.

(b) Exceptions. (1) The requirements of paragraph (a) of this section shall not apply to any person who is unable because of physical or developmental disability or mental impairment to demonstrate a knowledge and understanding of the fundamentals of the history, and of the principles

and form of government of the United States. Physical disability, developmental disability, and mental impairment do not include conditions that are temporary, or that have resulted from an individual's illegal drug use. For the purposes of this paragraph, the term:

Developmental disability means an impairment, the onset of which precedes an individual's 18th birthday, that causes an individual to show delayed development of a specific cognitive area of maturation, i.e., reading, language or speech, resulting in intellectual functioning so impaired as to cause an individual to be unable to demonstrate the knowledge required by this section.

Mental impairment means a primary impairment of brain function, generally associated with an organic basis upon which the diagnosis is based, resulting in an impairment of intellectual functions such as memory, orientation, or judgement that causes an individual to be unable to demonstrate the knowledge required by this section. This definition does not include a mental impairment that is not the result of a physical disorder.

Physical disability means a physical impairment that substantially limits an individual's major life activities in a way that causes that individual to be unable to demonstrate the knowledge required by this section.

(2) Medical certification All persons applying for naturalization and seeking an exemption from the requirements of § 312.1(a) and paragraph (a) of this section based on one of the enumerated disability exceptions must submit a certification from a designated civil surgeon (as defined in 42 CFR 34.2), attesting to the origin, nature, and extent of the person's medical condition as it relates to the disability exceptions noted under § 312.1(b)(3) and paragraph (b)(1) of this section. The certification shall be a letter-sized one-page document, signed and dated by the civil surgeon. The civil surgeon, in particular those not experts in diagnosing developmental disabilities or other cognitive impairments,

shall consult with other qualified physicians and psychologists prior to providing a certification, and may require the person seeking a disability-based exception to furnish evidence from a medical specialist or psychologist to support the person's claim of a qualifying disability. Any additional medical evidence required by a civil surgeon to assist in the evaluation shall only be for the use of the civil surgeon. The additional evidence shall not be attached to the civil surgeon's certification or filed with the applicant's application for naturalization as background or supporting documentation. An affidavit or attestation by the person, his or her relatives, or guardian on his or her medical condition is not a sufficient medical attestation for purposes of satisfying this requirement.

8/19/96
 Dated:

Doris Meissner

Doris Meissner,

Commissioner,

Immigration and Naturalization Service.

HR 3734 - Personal Responsibility and Work Opportunity Reconciliation Act of 1996

Section 401(c)(2)(B):

Section 401(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 precludes payment of federal benefits to aliens in the United States who are not "qualified aliens." Section 431 defines "qualified aliens" to include legal permanent resident aliens, asylees, refugees, parolees, and aliens granted withholding of deportation or conditional entry. Aliens admitted to the United States as nonimmigrants under the Immigration and Nationality Act, 8 U.S.C. 1101, et seq. are not, however, "qualified aliens," within the meaning of Section 431.

Section 401(c)(2)(B) authorizes the payment of federal benefits to aliens permitted to enter the United States as nonimmigrants or legal permanent residents if the United States is required to pay such benefits under reciprocal Treaty agreements as determined by the Attorney General, after consultation with the Secretary of State. The United States has committed to provide national treatment, on a reciprocal basis, in trade, investment, and other commercial activities to foreign nationals of our treaty partners under numerous international agreements. Specifically, the United States is a party to twenty-two bilateral investment treaties and many more treaties of Friendship, Commerce and Navigation containing specific "national treatment" provisions that obligate the United States to pay federal benefits to nationals of these forty-five countries living in the United States as nonimmigrants on the same basis as U.S. citizens. The United States is also required to accord national treatment under the North American Free Trade Agreement and the General Agreement on Trade in Services.

(FYI: Under a typical bilateral investment treaty, the United States is obligated to accord national treatment to aliens living in the United States as nonimmigrants (e.g., E-2 visa beneficiaries). National treatment means that such aliens should be eligible to receive the same federal health, retirement, or disability benefits as a United States citizen working in a comparable capacity. Although section 401(c)(2)(A) does cover many of the obligations imposed by national treatment provisions contained in bilateral investment treaties, it does not do the whole job, because it does not address the full range of federal benefits.)

NAFTA
GATT

Egypt
Panama
Senegal
Zaire
Morocco
Turkey

Cameroon
Bangladesh
Guatemala
Congo
Poland

Tunisia
Sri Lanka
Czech Republic
Slovakia
Argentina
Kazakhstan

Romania
Armenia
Bulgaria
Kyrgyzstan
Moldova

WELFARE REFORM BILL--SOCIAL SECURITY PAYMENTS TO ALIENS

The welfare reform bill the President is expected to sign tomorrow includes a provision that restricts the payment of Social Security and other Federal public benefits to aliens.

Under section 401(a) of the bill, an alien who is not a "qualified alien," as defined in section 431 of the bill, would not be eligible for any "Federal public benefit." A Federal public benefit is defined in the bill to include "any retirement, welfare, health, disability...benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States." The term "qualified alien" is defined in section 431(b) of the bill to include an alien lawfully admitted to the United States for permanent residence, an asylee, a refugee or an alien who has been paroled into the United States for more than 1 year or whose deportation is being withheld or who was granted conditional entry prior to April 1, 1980.

Under section 401(b)(2) of the bill, the new benefit restriction would not apply to any benefit payable under title II of the Social Security Act (i.e., the Social Security retirement, survivors and disability insurance program) if the benefit is based on an application filed in or before the month of enactment, if it is payable to an alien who is lawfully present in the United States as determined by the Attorney General, or if nonpayment would contravene an international Social Security agreement concluded pursuant to section 233 of the Social Security Act. Finally, the restriction would not apply if nonpayment would be contrary to section 202(t) of the Social Security Act (which establishes the conditions under which Social Security benefits may be paid to aliens who are outside the United States).

Agreements concluded pursuant to section 233 generally guarantee that each country party to the agreement will pay its Social Security benefits to residents of the other country. The United States has concluded such agreements with 17 countries:

- | | | |
|---------|-------------|----------------|
| Austria | Greece | Norway |
| Belgium | Ireland | Portugal |
| Canada | Italy | Spain |
| Finland | Luxembourg | Sweden |
| France | Netherlands | Switzerland |
| Germany | | United Kingdom |

Section 202(t)(1) of the Social Security Act provides that benefits may not be paid to an alien who has been outside the

August 21, 1996

United States for more than 6 months unless the alien meets one of several exceptions listed in the subsequent paragraphs of section 202(t). Section 202(t)(2), for example, provides that benefits may be paid to an alien outside the United States without any time limitation if the alien is a citizen of a country that has a social insurance or pension system of general application under which qualified U.S. citizens can receive benefits without restriction while they are outside the foreign country. About 66 countries have been determined to have such systems. Section 202(t)(3) provides that the alien nonpayment provision will not apply if nonpayment would be contrary to a U.S. treaty obligation in effect on August 1, 1956. The United States has treaties with 7 countries that require the United States to pay its Social Security benefits to citizens of the other country while outside the United States. These countries are:

Ireland
Germany

Israel
Greece
Netherlands
(survivors
benefits only)

Italy
Japan

Section 202(t) includes other exceptions to the alien nonpayment provision that may apply to citizens of additional countries.

As a result of the exception in section 401(b)(2) of the welfare reform bill, it appears that the benefit restriction in section 401(a) will only apply to Social Security benefits when those benefits are payable to an alien who is in the United States but not lawfully present in the United States. It does not appear that any treaty or international agreement would require the United States to pay benefits to an alien who is in the United States but not lawfully present.

Section 401(c)(2) of the Welfare Reform bill excludes from the definition of a Federal public benefit subject to the restriction in section 401(a) "benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Attorney General, after consultation with the Secretary of State."

It does not appear that section 401(c)(2) has any impact on Social Security benefits, since section 401(b)(2) of the bill already includes specific exceptions for international Social Security agreements (under section 233 of the Social Security Act) and for treaties dealing with Social Security (by virtue of the reference to section 202(t) of the Social Security Act).

EXECUTIVE OFFICE OF THE PRESIDENT

23-Aug-1996 08:42am

TO: Michelle Crisci for Rahm E
TO: Barry Toiv

FROM: Jeremy D. Benami
Domestic Policy Council

CC: Carol H. Rasco
CC: Diana M. Fortuna
CC: Elena Kagan

SUBJECT: additional immigration actions

Rahm/Barry/etc

There are two additional steps beyond the Naturalization directive and the food stamps action that the administration is taking/can take to mitigate the immigrant provisions:

(1) The INS will be publishing a proposed reg (required by a 1994 law) authorizing the exemption of people with certain disabilities from the testing requirements for naturalization.

Legal immigrants whose disability may make them unable to take or pass these tests will not be denied the opportunity to become citizens. These are obviously some of the people most at risk re the SSI cuts -- SEE WASHINGTON POST THIS MORNING.

The reg is nearly done and should be published next week. The President could order the AG or INS to publish it immediately and finalize it as soon as possible.

(2) The welfare bill gives the AG authority to designate certain programs, services and assistance from which immigrants cannot be barred. The designation will ensure that certain services necessary to protect the life and safety of immigrants will not be adversely affected by the bill. Examples of the type of services that the AG will exempt include soup kitchens, crisis counseling, and short-term shelter.

While the AG is required by the bill to make such a determination - its issuance does demonstrate that the legislation provides the administration some authority to limit potential harm.

The Attorney General's memorandum will, I believe, be issued today. At this point Elena Kagan is in final discussions with DOJ and has told them she will signal them on when to issue it.

These are two more actions to add to the two you have as part of an overall package to demonstrate Presidential/administration commitment to act to mitigate the harm to legal immigrants.

Please let me and/or Elena know how you wish to proceed or if you need any further information.