NLWJC - Kagan

DPC - Box 013 - Folder 005

Disabilities - Naturalization Requirements

Disability - naturalization requirements

Diana Fortuna 03/11/97 03:07:18 PM

Record Type: Record

To: Stephen C. Warnath/OPD/EOP
cc: Elena Kagan/OPD/EOP
bcc:
Subject: Re: naturalization and individuals with disabilities

My only concern is how INS answers the following question: Why are you delaying telling people for one month? If you know they don't qualify, why don't you tell them so that they can start to plan for life after federal benefits?

The best answer is that the INS is developing additional guidance for how to do the process of denials and training staff, but I'm not sure it's totally satisfactory.

The one month will allow the INS to look at what's happening and fine tune a field office that's not doing appropriate accommodations, but I don't think they want to advertise that.

Stephen C. Warnath

Stephen C. Warnath 03/11/97 01:17:25 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Diana Fortuna/OPD/EOP
Subject: naturalization and individuals with disabilities

Elena -- I am requesting your sign-off this afternoon on the disability guidance so that INS can proceed with publishing the regulation with a release date of March 18th. My recommendation is that you approve it. As you know, the guidance states that those who do not demonstrate an understanding of the nature of the oath during the interview will be denied. However, DOJ/INS has determined that notification of denial in an individual case will not be made until Headquarters provides further guidance on the proper process for denying these sensitive cases. This guidance will be issued by mid-April. During this time INS will develop a letter for this particular circumstance explaining why INS is constrained to denying the application and probably involve some supplemental training of field officers. Part of INS' briefing to Congress and interested parties and groups will be to explain this so that any potential criticism of this approach should be minimized.

Dennis Hayashi, who leads HHS implementation, has now recommended to the Secretary that she approve this approach. As a say, this is my recommendation as well. Based upon my conversations with Diana and our understanding of why these cases will be held until April, I believe that she supports this recommendation. (Diana, correct me if I am wrong.)

So please let me know and I will pass the word on so that INS can dot its i's and cross its t's today.

Disabilities - naturalization

Diana Fortuna 02/26/97 06:10:19 PM

Record Type: Record

To: Stephen C. Warnath/OPD/EOP

cc: Elena Kagan/OPD/EOP

Subject: Re: disability and naturalization update

So I guess according to this schedule, it would be public on Wednesday or Thursday.

One concern: the current guidance tells field officers that they should hold, rather than reject, cases where the person fails because they can't take a meaningful oath. If OLC concludes this process, then I assume we would have to announce that we are rejecting these instead. I thought it was kind of appropriate to hold them for a while during the period that we make absolutely sure of what the limits are here.

(I, for one, would be reluctant to see us propose legislation on this at this time; strategically I don't think it makes sense, and I'm not sure it's the right policy to addres this problem.)

Disability - naturalization

Stephen C. Warnath	02/26/97 06:16:34 PM

Record Type: Record

To: Diana Fortuna/OPD/EOP

cc: Elena Kagan/OPD/EOP
Subject: Re: disability and naturalization update

Allen Erenbaum at INS says that they are looking at what should be said about this if OLC finalizes an opinion. They may, for example, still indicate that cases should be held temporarily rather than deny while they acquire more experience with accommodating disabilities. At any rate, we should see what they propose to do on this tomorrow when we get the new draft.

And yes, according to this schedule, the reg would be available publicly on Wednesday, if I understand the process correctly.

Disabilities - Naturalizatio-

Stephen C. Warnath 02/26/97 05:34:55 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP

cc:
Subject: Update of the update

I neglected to mention in my previous long e-mail that INS is trying to get us the latest drafts of the guidelines, Q&As and Fact Sheet tomorrow. Those drafts will try to respond to our comments (and those of HHS and SSA) to the extent that INS considered appropriate.

Thanks

Disabilities - Naturalizati-

Stephen C. Warnath 02/26/97 05:26:04 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP

cc:
Subject: disability and naturalization update

INS reports that OMB has the reg. for clearance. There weren't many modifications, so this should not be difficult to finalize.

INS hopes for the following schedule, if possible:

Monday -- The reg would be forwarded to the Fed. Register

Wednesday -- Posting

Thursday -- Publication

Also, it appears that OLC is near to deciding that it is not possible pursuant to existing law for a proxy or guardian to assent to the naturalization oath on behalf of the disabled. Because of that likely outcome, Jamie Gorelick will probably have a DOJ internal meeting on Monday to discuss various considerations/options regarding whether the Administration should offer/support legislation that would allow this. They would then brief us and we should try to be in a position to get that issue decided fairly quickly at that point. Different agencies are likely to have different views. HHS would probably urge yes. Interestingly, the Department of State would probably say no (due to concerns that a precedent allowing a proxy to renounce another's citizenship might be abused by some other countries to permit stripping of citizenship without consent of a U.S. citizen who is in their country.) INS is probably strongly divided.

U.S. Department of Justice
IMMIGRATION AND NATURALIZATION SERVICE

FACT SHEET NOT FOR DISTRIBUTION DRAFT

1/29/97

Revised 2/20/97

Final INS Rule:

Exceptions from English and Civics Testing Requirements For Disabled Naturalization Applicants

will be Revised

On February 4, 1997, the Immigration and Naturalization Service (INS) will publish a final rule in the *Federal Register* that implements Congressionally-mandated exceptions from the English and civics (U.S. history and government) requirements for naturalization for persons with disabilities. This final rule makes changes to the proposed rule published in August, 1996. The INS invites public comments for 60 days on certain new proposals contained in this final rule concerning quality control, the appeals process and training for adjudicators.

BACKGROUND

- On October 25, 1994, Congress passed the Immigration and Naturalization Technical Corrections Act of 1994. Section 108(a)(4) of this Act amended Section 312 of the Immigration and Nationality Act (INA) to provide exceptions to the English proficiency and history and government knowledge requirements for naturalization for persons with "physical or developmental disabilities" or "mental impairments."
- While the proposed rule was under development, INS provided policy guidance to its field offices with preliminary instructions for adjudication of naturalization applications based on the exceptions provided under the 1994 Technical Corrections Act. The Service also provided preliminary definitions of the terms concerning disability and mental impairment in the Act.
- The INS has consulted extensively with the Department of Health and Human Services (HHS), the Social Security Administration (SSA), and other government health agencies for guidance in developing the regulatory language contained in this final rule.
- The INS published a proposed rule to implement this legislative change on August 28, 1996. INS has carefully considered 228 comments on the proposed rule which were submitted by a wide range of immigrant assistance groups, health professionals, organizations that assist the disabled, and individuals. The final rule addresses these comments and makes substantial modifications.

THE FINAL RULE

Definitions

- The Service has modified the definitions of disabilities contained in the proposed rule in response to many public comments that the definitions were too narrow and inconsistent with existing definitions in other federal statutes.

- The rule now provides that an exception shall be granted to any person "who is unable because of a medically determinable physical or mental impairment or combination of impairments which has lasted or is expected to last at least 12 months, to demonstrate an understanding of the English language..." or who is unable for any of the same reasons "to demonstrate a knowledge and understanding of the fundamentals of the history, and of the principles and form of government of the United States."
- "The term medically determinable means an impairment that results from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques to have resulted in functioning so impaired as to render an individual unable to demonstrate an understanding of the English language, as required by [Section 312], or that renders the individual unable to fulfill the requirements for English proficiency, even with reasonable modifications to the methods of determining English proficiency..." The definition of "medically determinable" is the same with regards to the exception from the civics knowledge requirement. Loss of cognitive abilities based on the direct effect of the illegal use of drugs is not covered as a disability.
- This interpretation of the disability and mental impairment terms in the Technical Corrections Act comports more closely with existing federal policies (such as Social Security Administration definitions) and regulations for implementing nondiscriminatory disability-based programs, such as Section 504 of the Rehabilitation Act of 1973.

Procedures for Obtaining the Exceptions

- In order to base its adjudications of requests for the disability exceptions on solid medical evidence, the INS requires all persons seeking an exception to submit a new Form N-648, Medical Certification for Disability Exceptions, to be completed by a licensed medical doctor (which includes psychiatrists) or a licensed clinical psychologist. These certifying professionals must be experienced in diagnosing persons with physical disabilities or mental impairments. They must attest to the origin, nature, and extent of the medical condition as it relates to the exceptions for English and civics. A person who qualifies as disabled for other government benefit programs is not necessarily unable to learn or demonstrate English proficiency or civics knowledge for naturalization.
- The categories of health professionals who may certify an applicant's disability were expanded and clarified in response to comments that the proposed rule was too narrow in its near exclusive dependence on civil surgeons. Civil surgeons who meet the current requirements may still certify an applicant's disability.
- The medical certification form may be submitted in support of requests for both the English proficiency and civics knowledge exceptions. Form N-648 may be photocopied and submitted. Forms may be obtained from local INS district offices.
- Under penalty of perjury, both the applicant (or his or her guardian) and the medical professional must attest that all information submitted is accurate.

DRAFT

- The Service reserves the right to request an applicant to submit additional supporting evidence, or to submit a second certification from another qualified professional in cases where the Service has credible doubts about the veracity of a medical certification that has been initially presented.
- Persons with disabilities who are not seeking an exception to the English and civics requirements do not need to submit Form N-648.
- In conformance with Section 504 of the Rehabilitation Act of 1973, INS will continue to provide reasonable modifications in its testing procedures to enable naturalization applicants who have disabilities to participate in the process. Examples of such modifications may include providing sign language interpreters, wheelchair-accessible test sites, or modifications in test format or administration procedures, among others.

Other Naturalization Requirements

- The disability exceptions are not blanket exemptions from all naturalization requirements. Congress did not authorize the Service to waive any of the other naturalization requirements outlined in the INA for applicants with disabilities.
- Applicants must, for example, be able to demonstrate their good moral character, have the necessary residency as a permanent resident (five years, or three years if married to a U.S. citizen), and have the ability to take a meaningful oath of allegiance. INS will continue to make reasonable accommodations to enable persons with disabilities to demonstrate that they can meet these requirements.

Proposed additions taken from Field Guidance on Oath Section V

- Where necessary, INS' accommodation of applicants with disabilities will include modifications to procedures used to determine whether an applicant assents to the oath of allegiance. An applicant with a disability need not understand every word of the oath at the interview, but the INS officer must conclude that the applicant has a basic understanding of the nature of the oath. For example, the officer may attempt to determine whether the applicant understands that he/she is becoming a United States citizen, is giving up his/her prior citizenship, and personally and voluntarily agrees to this change of status.

- All INS offices have experience adjudicating difficult cases involving extremely ill or terminally ill applicants. The practices that officers already use to determine a conceptual understanding of the oath by these individuals will be replicated in cases involving disabled applicants.

- Each interview will be unique and each applicant's capabilities regarding the oath requirement will be assessed on a case-by-case basis. For example, INS officers can accept a wide variety of signals from an applicant with a disability that indicate he/she understands the nature of the oath, including but not limited to a simple head nod, eye blinking, or other signals specific to the individual that mean "yes" or "no".

- Reservation of the Service's right to require additional supporting evidence or to require the applicant to submit a second disability certification when the Service has credible doubts about the veracity of the initial medical certification that has been presented by an applicant.

Q. What about people with disabilities who could probably take the tests if some sort of accommodations were made for them?

A. Where a reasonable accommodation or modification to the testing procedures would enable a naturalization applicant with a disability to participate in the process, the Service will provide such accommodation as required by the Rehabilitation Act. This has been the Service's long-standing practice. There is no need for a medical certification in such a case. For example, modifications may include sign language interpreters, wheelchair-accessible interview sites, on-site interviewing and testing, or an extension of the time for the civics test to allow an applicant with a learning disability to complete the test. The disability exceptions implemented by this new regulation apply to individuals for whom a reasonable accommodation does not exist. A medical certification (Form N-648) is required before an individual may be granted an exception from the English and/or civics portions of the naturalization examination under this regulation. Disability exception eligibility determinations will be based on individual assessments by a licensed medical doctor or a licensed clinical psychologist.

Q: Is it necessary for a person with one, or a combination, of these disabilities to document the existence of the disability?

A: Yes, but only if the individual is seeking an exception to the Section 312 requirements for English and/or civics based on his or her disability. Such applicants must submit the new Form N-648 (Medical Certification for Disability Exceptions). Applicants with disabilities who can take the tests, with reasonable accommodations if necessary, do not need to submit the Form N-648.

Q. What is the new form like?

A. The Form N-648, Medical Certification for Disability Exceptions, is two pages, accompanied by two pages of instructions. It provides space for the certifying professional to indicate his or her expertise in diagnosing disabilities. It requires the certifying professional to summarize his or her assessment of the applicant's disability, and to attest that, in his or her professional opinion, the disability prevents the applicant from demonstrating the required English understanding and/or civics knowledge required for naturalization. The form must be completed by the professional under pernalty of perjury. The form also incorporates a release

of any relevant medical records which the INS may require to evaluate the certification. The release may be signed by the applicant or the applicant's legal guardian.

(previously said the medical records release could only be signed by applicant) was error.

Q. Who fills out the form?

A. In addition to the applicant, the form must be completed by a qualified licensed medical doctor or licensed clinical psychologist. The professional must have expertise in diagnosing the type of physical or mental impairment which he or she is certifying.

Q. When should the applicant submit the Form N-648, Medical Certification for Disability Exceptions?

A. The applicant should submit the medical certification form (Form N-648) as an attachment to his Form N-400, Application for Naturalization at the time of filing. Submission of the medical certification form at the time of filing the naturalization application will provide advance notice to INS of an individual's request for the English and civics exceptions, thereby enabling the Service to be better prepared to provide appropriate service and accommodations, as needed, for the applicant. (See also answer below on pending cases).

Q: May a person with disabilities obtain a certification from his or her regular doctor?

A: Yes, if his or her doctor is qualified with expertise in diagnosing disabilities and meets the requirements as noted in the regulation and on the N-648. The doctor or clinical psychologist will have to certify the person's disability, under penalty of perjury.

Q: Why is a certification necessary at all if a person's disability is clearly visible?

A: INS Adjudication Officers are not doctors or psychologists, and should not be put in the position of making a medical determination for any type of benefit. Having the certification from a qualified professional provides the Service with the best documentation regarding the medical condition of the disabled naturalization applicant. Also, a standard form increases consistency in the adjudication of applications for the exceptions.

Q. Does a person who has an application for naturalization pending with the Service need to submit the new Form N-648, Medical Certification for Disability Exceptions?

A. If the person with a pending application has not previously submitted any medical documentation to support a request for the disability exceptions, he/she should

obtain a medical certification form (N-648), have it completed by an authorized health professional, and bring it to the interview. If, however, the applicant has provided supporting medical documentation in the past, as requested by INS, the INS officer will first consider that documentation to determine whether it is sufficient to grant the request for the exceptions based on the standards described in the final rule. If the information is not sufficient, the officer will request that the applicant submit an N-648 providing additional supporting information from an authorized medical professional. This procedure for pending cases balances the Service's desire not to burden unduly applicants who have previously submitted sufficient medical documentation, albeit not on an N-648, with the Service's responsibility to adjudicate cases fairly based on the standards set forth in the final rule.

Q. Under what circumstances will INS require more information or a second certification?

A. The Service reserves the right to require the applicant to submit additional information in support of the original certification, or to submit a second certification form from another qualified professional. By obtaining an additional doctor's or psychologist's assessment, the Service is also better able to base its ultimate decision on eligibility for the disability exception on solid medical and/or psychological evidence. Adjudicators have been instructed to use restraint in such situations, and first to follow a set of steps designed to obtain any needed information or resolve unanswered questions regarding the legitimacy or sufficiency of the original certification. Officers who have a question about a certification or the certifying professional's credentials will consult with their supervisor, and may then contact the doctor or psychologist by telephone if deemed appropriate. In order to require a second certification form, the officer must document a legitimate basis for this determination in the applicant's file, and must receive approval from the supervisor. Officers are also encouraged to consult with another relevant federal or state agency, if that agency has determined the applicant's disability for its own purposes, before requiring a second certification. When a second certification is required, the applicant should be given a new N-648. INS will not refer applicants to any specific doctor or psychologist. The Service may provide applicants with the name and telephone numbers of local medical societies and other appropriate referral sources.

Q. Who pays for the second medical certification?

A. It is the responsibility of the applicant to pay for the second certification if the INS requires such additional documentation. Taking this burden on the applicant into account, INS officers have been instructed to use extreme restraint in exercising this option, and should only exercise it when there is an unanswered question as to the disability determination rendered by the professional and when other

attempts to obtain the needed information are unsuccessful. In addition, supervisory approval is necessary before an INS officer may request the second certification.

Q. Why is INS reserving the right to require a second medical certification in instances where the Service has questions about the first certification?

A. INS officers are not doctors or psychologists and should not place themselves in the position of making medical determinations for which they are not qualified. The procedures for requiring a second medical certification for questionable cases help ensure that this does not occur.

Q. Will the INS keep an applicant's medical and mental health records confidential, if they are requested?

A. As with other agencies, INS is required to protect applicants' personal, confidential records in accordance with the Privacy Act. The Service has long-standing procedures and practices for applicant records that ensure compliance with the Privacy Act's provisions, including procedures that protect medical records already required by law for obtaining other immigration benefits. Applicants should take note of the Privacy Act Notice contained in the medical certification form which informs them that the principal use of the information submitted is to support an individual's application for naturalization. The Notice further informs the individual that submission of the information is voluntary and that it may, as a matter of routine use, be disclosed to other law enforcement entities. As with other applicant records, INS will make every effort to protect the confidentiality of the applicant's records within the requirements of the law.

Q: Are these Section 312 exceptions the same as a blanket exemption for all the requirements for naturalization for persons with disabilities?

A: No. Congress did not authorize the Service to waive any of the other naturalization requirements outlined in the Immigration and Nationality Act (INA.) Applicants must, for example, be able to demonstrate their good moral character pursuant to the requirements of Section 316 of the INA, must have the necessary residency as a permanent resident (five years, or three years if married to a U.S. citizen), and must have the ability to take a meaningful oath to support the Constitution of the United States (section 337 of the INA).

Q: How will INS protect against fraudulent efforts to get people naturalized through this disability regulation?

A: The INS will use all the procedures currently in place to guard against fraud. Local

Service officers have standard methods for ensuring the integrity of the naturalization process, including investigation of suspected unauthorized signatures on medical and other forms submitted in support of applications for immigration benefits. With regard to the disability determinations, the doctor's certification on the form, made under penalty of perjury, helps ensure for the INS the accuracy of the information being submitted. If an INS officer has reason to doubt that the person signing the medical certification form is not a licensed medical professional as required by the regulation, the officer may verify the physician's status with state medical and psychological licensing boards or agencies. In addition, INS is conducting on-going outreach and education for members of the immigrant assistance and medical communities to inform them of the requirements of this new regulation.

Q. In making an assessment of an individual's disability or mental impairment, how will the medical professional know what level of English and civics knowledge the applicant will be expected to demonstrate during the naturalization interview?

A. INS fully recognizes that this will require an extensive and on-going effort to educate the many doctors and clinical psychologists who may be asked by applicants to complete medical certification forms. As part of its outreach efforts on this new regulation, INS will provide doctors and psychologists information on the naturalization requirements and process so that these professionals are better able to apply their medical knowledge of disabilities to the specific circumstances that will be faced by applicants for naturalization. The Service will continue to work with the Department of Health and Human Services, professional associations, immigrant assistance groups, and other organizations that work with people with mental and physical disabilities to develop methods of broadly disseminating this information.

Q: On August 28, 1996, INS issued a proposed rule regarding these disability-related exceptions. Since the final rule included substantial changes, is the public still able to comment?

A: INS received 228 comments on the proposed rule. After the comments were considered, it was clear that considerable changes would be made to the provisions of the proposed rule. While the rule being issued is final, the INS is seeking additional comments on areas such as appeals of a denied naturalization case and various methods to ensure quality control.

Q: If naturalization applicants with disabilities are granted an exception to the civics knowledge provisions of Section 312, isn't it a double standard to hold these applicants responsible for taking and understanding the oath of allegiance required by section 337 of the INA?

A: This issue is of particular concern to the Service. Congress only amended the section of the law (Sec. 312) relating to the English and civics requirements for naturalization. In the Technical Corrections Act of 1994, which is the statutory authority for this regulation, Congress did not address the other requirements for naturalization. Following INS' request for legal guidance, the Office of Legal Counsel, Department of Justice has determined that INS does not have the authority to waive any of the other requirements for naturalization, including the requirement to take a meaningful oath of allegiance. (See answer below for INS accommodations to assist persons to meet these requirements).

Q. Will INS provide accommodation for persons with disabilities to enable them to meet the oath and other requirements for citizenship?

A. Yes. INS has and will continue to make reasonable accommodations and modifications for persons with disabilities that will enable them to participate in the naturalization process. Where necessary, such accommodation will include modifications to procedures officers use to determine whether an applicant assents to the oath of allegiance. All INS offices have experience adjudicating difficult cases involving extremely ill or terminally ill applicants. The practices that officers already use to determine a conceptual understanding of the oath by these individuals will be replicated in cases involving disabled applicants. INS officers have been instructed that they cannot expect that interviews with many persons with disabilities will proceed or be conducted in the same way as with applicants without disabilities. Each interview will be unique and each applicant's capabilities regarding the oath requirement will be assessed on a case-by-case basis. Although an applicant with a disability need not understand every word of the oath at the interview, the adjudicating officer must conclude that the applicant has an understanding of the nature of the oath. The officer may, for example, attempt to determine whether the applicant understands that he/she is becoming a United States citizen, is giving up his/her prior citizenship, and personally and voluntarily agrees to this change of his/her status. Officers can accept a wide variety of signals from an applicant that he/she understands the nature of the oath, including but not limited to a simple head nod, eye blinking, or other signals specific to the individual that clearly mean "yes" or "no." In addition, the Service currently expedites administration of the oath under the provisions of 8 CFR 337.3 which waives the statutory requirement of participation in a public oath ceremony for certain applicants with disabilities.

Language taken directly from Field Guidance

Q: Will INS afford naturalization applicants with disabilities a special appeal procedure should their naturalization application be denied over a question of the existence of the disability?

A: The acceptance or rejection of an N-648 is not a separate adjudication, but part of the overall N-400 approval or denial process. All naturalization applicants may take advantage of the re-hearing provisions of the INA if a naturalization application is denied for any reason. (See section 336 of the INA and 8 CFR Part 336.) Independent medical evidence may be presented by the disabled applicant at the time of the re-hearing to support the claim of eligibility for a disability-based exception. The public is welcome to comment for 60 days on appeal procedures.

Additions Underlined

Q. Why did the INS take two years to issue a proposed rule implementing the Technical Corrections Act of 1994?

A. INS issued preliminary policy guidance to its field offices on disability waivers prior to the publication of the proposed rule. These guidelines included definitions of the three categories of disabilities based on the Congressional guidance provided in the House Report. These guidelines were in effect while the proposed rule was under development. In developing the proposed and final rules, INS consulted extensively with other federal agencies (notably the Social Security Administration and the Department of Health and Human Services) and other Department of Justice divisions, including the Civil Rights Division.

Q. Is this regulation being proposed now in response to the Welfare Reform Bill recently signed into law?

A. The regulation has been under development since the Technical Corrections Act was signed in 1994. Publication of the rule is in fulfillment of the Service's responsibility to implement the law. The President did reiterate his commitment to naturalization when he signed the welfare legislation. Promulgation of the final rule reinforces that commitment.

Q. Does the public have an opportunity to comment on the changes noted in the final rule?

A. The public is welcome to comment on particular points discussed in the "Discussion of Comments" portion of the final rule. In particular, the Service desires further comments on possible appeal procedures and quality control methods. Anyone may submit comments during a 60-day period. All comments should be addressed to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 5307, Washington, D.C. 20536. Comments should reference INS number 1702-96 on your correspondence.

Q: How will INS conduct quality control and assurance for these disability exception determinations?

A: INS is committed to complete quality control and assurance for the entire naturalization program. Quality control and assurance is mandatory for all local INS offices, not merely an encouragement. With regard to the disability determinations under this new regulation, the Service is implementing the action items described below that all offices must follow. These required actions are in addition to existing naturalization quality control measures substantially strengthened by the Service in recent months.

- Centralized training at INS Headquarters for officers who will be initially responsible for adjudicating disability exception requests in the field;

- Requirement that these HQ-trained officers handle all disability determinations after publication of the final rule until remaining adjudicators in their offices are trained;

- Requirements for supervisory consultation and approval before an adjudicator may seek additional documentation from an applicant, a second medical certification, and before other steps in the determination process on the request for the exception(s);

- Requirements for adjudicators to document carefully and fully in the applicant's alien file the reasons for requesting second certifications, and for the denials of any request for a disability exception.

- Review of disability exception determinations as part of the existing audit process conducted on random samplings of all naturalization cases. As stated in the Supplementary Information in the regulation, INS will soon augment this overall naturalization audit process with supplemental random samplings of cases where the applicant has requested a disability-based exception. As indicated in the supplementary section to the regulation, the Service is also investigating the possibility of entering into a contract with a private entity to perform these random samplings.

The Service also has plans to modify the adjudicator's naturalization processing checklist for each case to incorporate the disability regulation determination (where applicable). The regulation invites the public to comment for 60 days on these measures and additional quality control measures for disability cases.

TRANSMISSION RECORD

IMMIGRATION AND NATURALIZATION SERVICE
HEADQUARTERS
425 I STREET, N.W.
WASHINGTON, D.C. 20536

TO: Steve Warnath	**FROM:** Alice Smith
ORGANIZATION: DPC	**ORGANIZATION:**
TELEPHONE:	**TELEPHONE:** 616-2360 (direct)
FAX TELEPHONE: 456-7028	**DATE:** 2/20/97

NUMBER OF PAGES (including cover sheet): 17 - 1st Fax
18 - 2d Fax (~~2pts~~)

COMMENT/MESSAGE:

Steve, Please find attached the following:

1) Revised Fact Sheet (draft) on disability res. The proposed additions/changes are on last pg.

2) Revised set of Qs & As. Changes from the last version you have are checked.

3) Revised Feb. 20th INS Field Guidance. PLEASE NOTE: Sections IV and V on Accommodations and the Oath incorporate OLC and Off. of Civil Rights edits. We have also beefed up the accommodations/oath portions in accordance with your comments to Doris, Bob and me on the phone several days ago. See pgs. 12-15.

I'm going to call you shortly about all this paper.

FEB 20 1997

HQ 70/33.2-P

Section 312 Disability Naturalization Adjudications: Supplemental Policy Guidance for Field Offices

All Regional Directors
All District Directors (except foreign)
All Officers-in-Charge (except foreign)
All Service Center Directors

Office of Examinations

This memorandum and accompanying attachments provide supplemental policy guidance on section 312 exceptions for persons with disabilities to all Immigration and Naturalization Service (INS) field offices and Service Centers currently processing applications for naturalization.

A 1994 technical amendment to the Immigration and Nationality Act extended an exception to disabled applicants regarding all the section 312 requirements. The attached final rule, to be published in the Federal Register on February _?_, outlines the background history of the amendment, the efforts of INS to implement this new policy, and the new regulatory text.

Effective upon publication in the Federal Register, offices shall immediately institute the policy outlined in the final regulation and in this document. Previously distributed drafts of this document and the previously distributed field guidance, dated November 21, 1995, which was used as a basis for adjudicating section 312 disability exception requests shall no longer be used. Offices should move forward with the adjudication of all approvable cases that are now pending. Cases where the applicant cannot meet the requirements of the oath of allegiance should not be denied, but held until further guidance is provided to all field offices.

In order to be as accommodating as possible, offices with pending requests for a disability exception received prior to the publication of the final rule, should review the submitted certification prior to scheduling interviews. If the submitted certification fulfills the disability standards and definitions outlined in the final regulation, the office should accept the certification and not require the applicant to file the new form N-648, Medical Certification for Disability Exceptions. For cases where the existing certification does not meet the disability standards, offices should mail an N-648 to the applicant with instructions to have the form completed and to bring the form to the scheduled naturalization interview. It is expected that the policy and guidelines outlined in the attachments will be followed consistently by all adjudications officers. In addition, offices should conduct community outreach and education on this regulation as discussed in the attached policy guidance.

Changes to 8 CFR §§ 312.1 and 312.2 reflect the effort to make the regulation consistent with the amended statute. In particular:

- The wording of § 312.1(b)(3) has been changed, with new language on disability-based exceptions found on page 32 of the attached final rule. Offices should note that previous wording directly referencing blindness and deafness has been removed.
- The current § 312.2(b) has been redesignated as paragraph (c) and a new paragraph has been added as paragraph (b)(1) to provide a disability-based exception to the civics requirements (page 33 of the attached rule).
- A new paragraph at 8 CFR 312.2(b)(2) has been added to explain the medical certification process for a disability exception.

The Service is committed to ensuring that the implementation of the procedures outlined in this document are followed. Since a primary mission of the INS is to provide service, applicants with a legitimate claim to the disability exception provisions should be facilitated through the adjudication process. At the same time, Service officers must also utilize credible approaches to deterring fraud and abuse that are applicable to all adjudications for benefits under the Act and must remember that what may seem like fraud may in reality be a lack of information about the naturalization process on the part of certain individuals with disabilities. Service officers must also continue to ensure that applicants who are granted section 312 exceptions continue to meet all other applicable eligibility requirements for naturalization.

Offices should note that the Service expects a sizable increase of naturalization filings with accompanying N-648s with the advent of welfare reform. The Social Security Administration is currently in the process of mailing close to one million notices to legal resident aliens who may be eligible for naturalization. These potential applicants are to be afforded the same level of compassion and professionalism as any other applicant for a benefit under the Act.

Since many disability-related cases will be emotionally charged, all INS offices and adjudication officers are directed to use compassion and sensitivity in adjudicating any request for a section 312 disability-based exception. The same level of discretion and sensitivity INS officers apply to orphan adoption cases should be replicated in all section 312 disability exception cases.

Many aspects of this regulatory revision are new and therefore we fully expect field offices to have many questions. We realize that not all questions will be answered by this document. However, we plan to distribute regular updated supplemental policy guidance memoranda for policy and procedural issues not answered by this document. As a means to help ensure consistency, Headquarters will also depend on all field offices to bring unique cases and situations to our attention in order that the experience may be shared with other offices. We are also awaiting a legal opinion from the Office of Legal Counsel (OLC) at the Department of Justice regarding the role of guardians in the naturalization process. Offices will be notified if the opinion of OLC necessitates policy or procedural changes in the administration of the naturalization process.

Questions about the policy outlined in the attachment to this memorandum and in the Federal Register final rule may be directed to Staff Officer Craig Howie, HQ Naturalization Division. Questions regarding the new form or the new training module may be directed to Staff Officer Jody

Marten, HQ Naturalization Division. Both officers may be reached on 202/514-5014. Questions regarding quality assurance and reporting compliance may be directed to Mary Beth McCarthy Elwood, HQ Field Operations. She may be reached on 202/514-0078.

Louis D. Crocetti
Associate Commissioner

Attachments

§312 DISABILITY ADJUDICATIONS: SUPPLEMENTAL FIELD POLICY GUIDANCE

I. Introduction

The Immigration and Naturalization Technical Corrections Act of 1994 amended section 312 of the Immigration and Nationality Act (the Act) to afford naturalization applicants with physical or developmental disabilities or mental impairments an exception to English language proficiency and United States history and government (civics) knowledge requirements. This amendment augmented the pre-existing exception that persons with disabilities were afforded regarding only the English proficiency requirements of section 312.

On November 21, 1995, the INS issued preliminary guidance to all naturalization adjudicating offices on the section 312 disability exceptions. On August 28, 1996, a proposed rule was published in the Federal Register, proposing to amend the Service regulations at part 312 to accommodate these new disability exceptions. During the Fall of 1996, the Service reviewed and digested the 228 comments that were submitted by the public pursuant to the proposed rule. The resulting final rule, scheduled to be published in the Federal Register on February ___, 1997, contains substantial changes to the provisions of the proposed rule and the preliminary guidance. In particular:

- Direct reference to the three disability categories in the regulatory language of 8 CFR 312 has been replaced with language complementing the disability terminology used by the Social Security Administration (SSA) in their regulations (i.e., "medically determinable physical or mental impairment or combination of impairments").
- Creation of a new public use form, N-648, Medical Certification for Disability Exceptions, to be used by any applicant requesting an exception to the section 312 requirements based on a disability. A copy of the form is included with this document. Offices are advised to accept legible photocopies of the N-648.
- The elimination of the proposed exclusive use of civil surgeons to make the disability determinations. In the place of using only the civil surgeons, the INS will allow only medical doctors or clinical psychologists licensed to practice in the United States to complete the N-648.

As noted in the accompanying documentation, these exceptions for persons with disabilities are not blanket exemptions from the requirements mandated by section 312. With accommodations or modifications, certain applicants with disabilities will be able to meet the section 312 requirements, just as they are accommodated today in many instances. Offices should note that an exception means that the applicant is not required to meet the section 312 requirements. An accommodation or modification means that the applicant is able to demonstrate to the adjudicator that he or she can meet the requirement of section 312, but with a particular change to the standard interview procedure that allows such a demonstration. To institute a policy of blanket exemptions would play into the stereotypical concept that persons with disabilities are not able to participate in mainstream activities. Such a policy would be contrary to the provisions of section 504 of the Rehabilitation Act of 1973

with which all federal government agencies must comply. It would be discriminatory to formulate policy which states that everyone with a particular disability is exempted from the section 312 requirements when some individuals with a disability could well take part in the testing requirements required by section 312 with reasonable accommodations or modifications. Therefore, all adjudications of a section 312 exception based on a disability will be made on a case-by-case basis.

All offices must note that the provisions contained within the documents in this package are effective immediately upon publication of the final rule in the Federal Register and must be followed without exception. Due to the substantial changes the Service has made to the provisions of the proposed rule, the public is being allowed a 60 day comment period on the final rule. This will not affect the authority or responsibility of all local offices to proceed with these adjudications immediately and without delay. Any changes that may result from further public comments will be issued in writing to all field offices.

Service offices processing naturalization applications should make note of the changes to the regulatory language of 8 CFR part 312. Of particular concern to officers should be these changes:

- The wording of § 312.1(b)(3) has been changed, with new language on disability-based exceptions found on pages 33-34 of the attached final rule. Offices should note that previous wording directly referencing blindness and deafness has been removed. Blind or deaf applicants desiring either a complete exception to the section 312 requirements, or only an exception to the English or civics portion of the requirement, must file an N-648 in the same manner as any other applicant with a disability.
- The current § 312.2(b) has been redesignated as paragraph (c) and a new paragraph has been added as paragraph (b)(1) to provide a disability-based exception to the civics requirements (page 33 of the attached rule).
- A new paragraph at 8 CFR 312.2(b)(2) has been added to explain the medical certification process for a disability exception and an explanation of the new form, N-648, Medical Certification for Disability Exceptions.

Adjudication officers receiving the special two-day training at HQ during the week of January 27, 1997, will be the officers charged with the responsibility for ensuring the complete dissemination of the information and policies contained in this document to additional adjudications officers within each naturalization adjudicating office and shall ensure that these officers are familiar with these policies prior to the processing of disability-related exception cases. These trained officers should also work closely with the district director or officer-in-charge to ensure that full information about this regulation is provided to information officers, congressional and public affairs officers, and others within their office who will be answering questions from the public.

Each office is responsible for conducting local community outreach to inform and educate organizations that assist immigrants, persons with disabilities, the elderly, and others to whom this regulation may apply. Representatives of medical and psychological organizations and government agencies such as SSA and Health and Human Services (HHS) should be included in this outreach.

Each office should endeavor to educate members of the medical and immigrant assistance communities about the naturalization process and the requirements of this regulation as soon as possible following publication in the Federal Register. Such information dissemination will improve the ability of the assistance groups and medical professionals to accurately apply the disability-based exceptions in appropriate cases and will help deter abuse of the process. Service HQ will provide materials for public use in community briefings including fact sheets and questions & answers. HQ will also conduct similar educational briefings in Washington, DC for representatives of national medical, disability, and immigrant organizations.

All offices are reminded of the intense public scrutiny the INS will be placed under as this program moves forward. Officers must therefore remember to always use compassion and sensitivity in making adjudications involving persons with disabilities. The same level of compassion and consistency that has in the past been applied to cases involving orphan adoptions is to be applied to any section 312 disability exception request.

II. Disability Definitions, Medical Professionals Authorized to Complete New Form N-648, Adjudicating Currently Pending Cases and Processing Regularly Scheduled Cases

A. Disability Definitions

In the preliminary field guidance (issued in November 1995) and the proposed rule, the Service offered exact definitions of the terms physical disability, developmental disability, and mental impairment designed to reflect the amendment Congress made to section 312 of the Act. Parts of the definitions were also based on the limited Congressional guidance contained in a committee report related to the 1994 Technical Corrections Act.

As officers will note in reviewing the comments portion of the attached final rule, many commenters had concerns about the definitions we proposed. After reviewing the public comments, and after consultations with the SSA, the Service has chosen to drop the proposed definitions and rely on language that comports with the definitions used by the SSA in their regulations. As such, the wording of 8 CFR at parts 312.1(b)(3) and 312.2(b)(1) has been amended to refer to a medically determinable physical or mental impairment(s), that already has lasted or is expected to last at least 12 months. (See pages 32-34 of the attached final rule.) The phrase "medically determinable physical or mental impairments" encompasses the three disability categories noted in section 312 of the Act and refers to an impairment that has resulted from anatomical, physiological or psychological abnormalities. Using medically acceptable clinical and laboratory diagnostic techniques, these abnormalities can be shown to so limit or impair the individual as to render him or her unable to learn and demonstrate the information required by section 312. In addition, language is included in the regulation that prevents individuals whose disability resulted from the illegal use of drugs from being granted these exceptions. This was a particular concern of Congress.

B. Medical Professionals Authorized to Complete New Form N-648

Initially, the Service proposed using the corps of authorized civil surgeons to perform the disability determinations for naturalization applicants requesting an exception to the section 312 requirements. After long discussions with SSA, HHS, and the Centers for Disease Control (CDC), the decision was made not to rely on the civil surgeons to perform this function. The CDC noted that the majority of civil surgeons have expertise centered around diagnosing communicable diseases, not in making complex disability determinations. Therefore, the Service is amending 8 CFR part 312.2 with the addition of a new paragraph (b)(2), which outlines the medical professionals authorized to make the disability determinations and complete the new public use form, N-648, Medical Certification for Disability Exceptions (copy attached). A complete discussion of the rationale behind creating a new public use form is found in the Discussion of Comments section of the attached final rule.

Upon publication of the final rule, only medical doctors licensed to practice medicine in the United States or clinical psychologists licensed to practice psychology in the United States (including the United States territories of Guam, Puerto Rico, and the Virgin Islands) will be authorized to make a disability determination, utilizing the new form N-648. (Offices should note that in limited instances, certain non-immigrant doctors (e.g. some H and J visa holders) may treat patients under the supervision of a licensed doctor. In these instances, both the non-immigrant doctor and the supervising doctor should sign the N-648, including the license number of the supervising doctor.) In addition, a civil surgeon will be able to make a disability determination, but based on the surgeon's expertise with diagnosing or treating particular disabilities, not on the fact that he or she is a civil surgeon. These licensed medical professionals will be required to certify on the new form that their medical speciality, experience, and other qualifications permit them to make such a complex disability assessment. In addition, the medical doctor or licensed clinical psychologist must certify under penalty of perjury that his or her statements are true and correct.

Service officers should note that medical professionals not authorized to complete the N-648 include nurse practitioners, homoeopathic practitioners, doctors of osteopathy, physician assistants, and medical center or nursing center administrators who are not licensed medical doctors with disability experience. As is the case with all Service adjudications, the burden is on the applicant and the licensed medical professional to ensure that the N-648 is completed correctly and that the medical professional is authorized to make the certification. Offices should also note that HQ Naturalization Division is developing educational materials on the basic requirements for naturalization aimed at the medical doctors and clinical psychologists authorized to complete the N-648.

District Adjudication Officers (DAOs) are reminded that it is the responsibility of the medical professional to make the medical determination. This responsibility is clearly delineated on form N-648 in questions three and six. Officers are not medical professionals, advocates, or social workers and should not place themselves in the position of attempting to second guess the medical evaluation of the qualified medical professional certifying a disability exception on the N-648. Nor should the officers place themselves in the position of being a medical professional and thereby denying the existence of a disability. However, DAOs should not hesitate to talk with the medical doctor or clinical psychologist, after consultation with the DAO's supervisor, if the officer has a question about

the MD's or psychologist's qualifications or credentials, or questions about the disability determination. This is particularly the case if the terminology is very general and does not explain how the particular medical condition prevents the applicants from learning the requirements of section 312 of the Act. For example, an N-648 noting the disability as only hypertension would need further explanation. The officer needs to know how or why hypertension prevents the applicant from meeting the section 312 requirements. Procedures for obtaining a second certification, where deemed necessary, are discussed below.

Beyond reviewing the N-648, officers may consult with officials of other federal or state agencies if the applicant has been declared disabled by another agency and the DAO believes that such a consultation would assist with the disability determination process. DAOs should remember, however, that the fact that a person has been declared disabled by another federal or state agency does not mean that the person will automatically be granted a section 312 exception. DAOs also have the authority to request additional medical records on the applicant, but only in instances where there is a well founded belief that such documentation would allow the DAO to accurately adjudicate the request for a section 312 exception. (See Section III, Referrals for an Additional Medical Opinion.) Such a request must be documented in the record, outlining the reasons for the request and the response of the medical professional holding said records. Officers are reminded that the Privacy Act protects personal information contained in government files and should take all necessary precautions to maintain the confidentiality of sensitive medical records.

All officers should familiarize themselves with the new form N-648 prior to adjudicating any disability-related case. The new language of 8 CFR 312.2(b)(2) notes that the N-648 must be submitted as a supplement to the N-400 application when the N-400 is filed. (This will allow offices to pre-screen disability exception requests, to make any necessary modification in accessability, or to consider the option of going on-site for the interview. Offices should stress this need in all outreach efforts to immigrant and disability groups.) However, since the policy and form are new, offices for the foreseeable future should accept the N-648 if the applicant brings the form to the naturalization interview. Offices and Service Centers should also not reject an N-400 if the applicant indicates somewhere on the form or in a cover letter that they are requesting a disability exception but fail to attach the N-648.

- Service Centers receiving disability exception requests without the N-648 shall include these cases on the separate lists they will tabulate for each district office they serve. The Service Center shall mail an N-648 to the applicant with instructions to bring the form to the interview. Service Centers shall also return to the applicant any N-648 received that is not attached to an N-400, with instructions for the applicant to bring the form to the naturalization interview.
- Local Offices receiving an N-400 with a disability request without the N-648 shall mail the form to the applicant with instructions to bring the completed form back at the time of the naturalization interview.

Offices should continue to exercise the same scheduling flexibility they employ now for situations

where applicants appear with disability exception requests without first notifying the office. Offices should accept legible photocopies of the form.

C. Adjudicating Currently Pending Cases

For offices that have disability cases pending and that were received prior to the publication of the final rule, the final adjudication should be made based on the policy and guidelines noted below.

- If the officer determines the final adjudication can be granted, based on the existing medical documentation meeting the standards outlined in the final regulation, the applicant should not be required to complete and file the N-648.
- If the officer is not satisfied that the applicant's originally submitted medical certification is adequate, and a denial of the exception and N-400 would result, an N-648 should be mailed or given to the applicant with instructions to have the form completed by one of the authorized medical professional noted on the form. The form should then be submitted to the officer for review, for an additional interview if deemed necessary, and for the final adjudication.

The officer may also contact the original certifying doctor. After this consultation, if the officer is assured that the original doctor understands the requirements and certifies to the officer the existence of the disability warranting an exception, the officer should accept the disability determination and complete the processing of the case. A complete record of these actions must be noted in the applicant's alien file.

As previously noted, offices should hold any case which could be deniable due to the inability of the applicant to take the oath of allegiance until we have been provided with a complete legal analysis of this issue from the Department of Justice.

D. Processing Regularly Scheduled Cases

Each naturalization case involving a request for a disability-based exception should be processed on a case-by-case basis. In cases where the applicant has submitted the N-648 as an attachment to the N-400, officers should try to familiarize themselves as much as possible with the upcoming case prior to the actual interview. (This would include contacting the MD or clinical psychologist if there are questions, or contacting the local state medical or psychologist licensing agency to verify the standing of the professional if doubts exist.) This should give the office time to make arrangements for any physical accommodations or modifications that may be necessary for the applicant, to return incomplete applications for additional information, or to explore the possibility of going off-site to conduct the interview. DAOs should remember, however, that the actual decision on whether to accept the N-648 and thereby waive the section 312 requirements should not be made until the actual interview when the applicant is appearing before the DAO.

The decision on the N-648 should be made at the beginning of the interview, prior to the review of any other naturalization requirements. If the DAO has reason to doubt the authenticity of the N-648, then the steps for seeking additional evidence or a second certification (as outlined in section III of this document) should be followed. If possible, the steps outlined in section III should be pursued prior to the interview. If the applicant has appeared for the interview and questions arise, the case shall be continued until the questions involving the certification are answered to the satisfaction of the DAO. Offices should note that disabled applicants are still required to meet the other requirements for naturalization, including residence and good moral character.

For cases where the N-648 cannot be approved, the applicant should be advised that the N-648 is not being approved and that should be offered the opportunity to be tested on the civics and the language requirements and the DAO should proceed with the interview in English (assuming the applicant is not exempt under either 50/20 or 55/15 for the English waiver). This should be considered the first interview. If the applicant is not able to meet the requirements of section 312, the applicant should be scheduled for a re-examination in accordance with 8 CFR § 312.5(a).

For applicants who claim to be disabled during the first interview, but who have not filed an N-648, DAOs should stop the interview, give the applicant an N-648, and schedule the person for another interview. If the N-648 is not acceptable at the follow-up interview, the policy outlined above shall be followed, i.e., the applicant should be tested on English and civics and given another opportunity to meet the section 312 requirements if they fail to meet the requirements at the follow-up interview.

III. Requirements for Additional Evidence or Second Certification

In section 312.2(b)(2) of the final regulation, the Service reserves the right to require an applicant to submit additional evidence supporting the N-648 or to submit a second N-648 from another authorized professional. Offices are instructed to use extreme restraint in exercising these options, and should only do so when doubts remain after the steps outlined below have been completed. DAOs should note that the burden is on the applicant to pay for any second certification, and should take this fact into consideration. Officers should always remember that they are responsible for determining the eligibility for naturalization, not for making or rendering a medical determination.

If questions exist regarding the medical professional making the determination, DAOs should attempt to verify the license number noted on the N-648 and standing by contacting the appropriate state medical or clinical psychologist licensing agency. An answer from this agency will provide evidence regarding the validity of the medical professional's license, or might expose the existence of a fraudulent practitioner. Evidence of fraud in this instance should be handled in the standard way the officer reports similar discoveries of document fraud. Documented evidence of an applicant knowingly using the services of a fraudulent medical source shall result in the application for naturalization and request for a disability-based exception being denied. Offices should also use the state licensing organization as the source for purchasing any available directory of medical doctors

and clinical psychologists. These directories can be used as reference manuals in addition to the contacts with the state licensing offices.

Any officer who determines a second medical certification to be necessary must comply with the following procedures:

1. If questions exist regarding the disability or the actual completion of the N-648, the DAO should attempt to reach the medical professional who completed the N-648 to answer any questions the DAO may have regarding the certification. If the officer's questions are answered by this contact, the referral will not be deemed necessary and the adjudication of the naturalization case should continue.
2. If the applicant has been declared disabled by another state or federal government agency, the DAO should attempt to make contact with this agency to see if any information can be gained to clarify the questions the officer has about the certification.
3. If, after consultation with the medical certification provider, it is determined that a production of supplemental records from the applicant's medical file would satisfy the concerns of the DAO, such records shall be requested directly by the Service and reviewed. If these documents resolve all outstanding questions, the adjudication of the case shall continue without an additional certification. Officers must take all precautions to preserve the privacy and confidentiality of private medical documents.
4. If any of these procedures fail to satisfy the DAO as to the accuracy of the determination or of the validity of the credentials of the medical professional, the DAO shall consult with his or her supervisor and obtain authority to require the applicant to obtain a second disability certification.
5. Upon the SDAO's approval, the applicant shall be given another N-648, with instructions to have the form completed by an authorized medical professional other than the professional that completed the first certification. Offices should contact the local medical society or association for information and contact points. In particular, offices should not refer applicants to commercial medical referral services listed in telephone directories or to any specific medical provider. Headquarters will continue to monitor the issue of referrals and shall issue additional policy guidance, as needed.
6. Supervisory consultation and approval must be obtained and noted on the N-400 for all the steps and procedures outlined above.

The following example is a possible situation where the DAO would feel compelled to require a second certification:

An N-648 has been submitted, but the medical professional has been so vague in answering the questions that the DAO cannot clearly discern how the disability prevents the applicant from fulfilling the requirements of section 312 (i.e., "This individual has hypertension and is depressed."). While the state licensing board confirmed that the medical professional is licensed to practice medicine, efforts by the officer to obtain any type of clarification from the medical professional fail. The

applicant may suffer from hypertension and be depressed, but this alone is not enough information for an officer to approve the N-648.

It is incumbent upon the DAO to keep an accurate account of these actions and contacts in the alien file. All offices should also establish a liaison with the local or state medical board or society. This liaison effort should help the office and officer when questions arise over particular medical professionals and the professional's certifications on the N-648. This liaison should also assist the medical community in understanding the overall naturalization process and in particular the requirements of section 312.

As noted, HQ Naturalization and Field Operations are currently working on developing a standardized referral policy, and will notify field offices if it is discovered to be practical to institute such a policy.

IV. Accommodations & Modifications

All federal agencies are mandated to promote and adhere to policies that are non-discriminatory to persons with disabilities in the administration of all programs. The Rehabilitation Act of 1973 spells out these requirements. (The non-discrimination provisions of the Rehab. Act served as the basis for the Americans with Disabilities Act, which bars discrimination against persons with disabilities in non-government areas.) All INS offices are required to adhere to the principles of the Rehabilitation Act.

The Rehabilitation Act requires the Service to make reasonable accommodations and modifications to program administration to accommodate the needs of persons with disabilities. For example, every time an office sends a DAO off-site to a nursing facility or hospital to interview or to administer the oath of allegiance, an accommodation and modification has been made. Therefore, this section serves only to remind offices of this responsibility and to stress the need for offices to continue making the accommodations and modifications that are currently made on a daily basis.

Offices are reminded that making accommodations and modifications means that not all persons with disabilities will be or will attempt to be exempted from the section 312 naturalization requirements. The final rule notes that only disabled persons whose disabilities are so severe that the person is rendered unable to participate in the testing procedures for naturalization will be granted an exception from the testing requirements. Certain individuals will be able to meet the requirements section 312 imposes, but with distinct, and in many cases environmental modifications or accommodations. For example:

- Blind individuals not requesting an exception may be supplied with materials in Braille, large print, or questioned orally on section 312 civics questions.
- Hearing impaired persons may be offered a written test on civics questions, and must be provided with a sign language interpreter if one is requested.
- A person with a learning disability might be given a written civics test and granted

applicant may suffer from hypertension and be depressed, but this alone is not enough information for an officer to approve the N-648.

It is incumbent upon the DAO to keep an accurate account of these actions and contacts in the alien file. All offices should also establish a liaison with the local or state medical board or society. This liaison effort should help the office and officer when questions arise over particular medical professionals and the professional's certifications on the N-648. This liaison should also assist the medical community in understanding the overall naturalization process and in particular the requirements of section 312.

As noted, HQ Naturalization and Field Operations are currently working on developing a standardized referral policy, and will notify field offices if it is discovered to be practical to institute such a policy.

IV. Accommodations & Modifications

All federal agencies are mandated to promote and adhere to policies that are non-discriminatory to persons with disabilities in the administration of all programs. The Rehabilitation Act of 1973 spells out these requirements. (The non-discriminatory provisions of the Rehab. Act served as the basis for the Americans with Disabilities Act, which bars discrimination against persons with disabilities in non-government areas.) All INS offices are required to adhere to the principles of the Rehabilitation Act.

The Rehabilitation Act requires the Service to make reasonable accommodations and modifications to program administration to accommodate the needs of persons with disabilities. For example, every time an office sends a DAO off-site to a nursing facility or hospital to interview or to administer the oath of allegiance, an accommodation and modification has been made. Therefore, this section serves only to remind offices of this responsibility and to stress the need for offices to continue making the accommodations and modifications that are currently made on a daily basis.

Offices are reminded that making accommodations and modifications means that not all persons with disabilities will be, or will attempt to be exempted from the section 312 naturalization requirements. The final rule notes that only disabled persons whose disabilities are so severe that the person is rendered unable to participate in the testing procedures for naturalization will be granted an exception from the testing requirements. Certain individuals will be able to meet the requirements section 312 imposes, but with distinct, and in many cases environmental modifications or accommodations. For example:

- Blind individuals not requesting an exception may be supplied with materials in Braille, large print, or questioned orally on section 312 civics questions.
- Hearing impaired persons may be offered a written test on civics questions, and must be provided with a sign language interpreter if one is requested.
- A person with a learning disability might be given a written civics test and granted

additional time to complete the test.

- Persons with severe physical disabilities could respond to questions in a yes or no format, or through nodding their heads or blinking their eyes yes or no to particular questions.

This list is not all inclusive. Local offices should be creative in constructing additional accommodations and modifications to the testing procedures required by section 312. In many cases, offices currently have many modifications and accommodations already in use. Offices are encouraged to share these concepts with other offices and with their regional Adjudications contact point. However, offices and DAOs should remember that disabled applicants attempting to gain an exception to the section 312 requirements are doing so because they view their particular disability as so impairing that they cannot meet the English and civics requirements.

Aside from the modifications that can be made to the actual test administration, offices must give consideration to modifications of the actual interview. As noted above, any time a DAO goes off-site to conduct a naturalization interview or to administer the oath of allegiance, a considerable modification has been made. Another modification that offices need to consider is allowing, in limited circumstances, a disabled naturalization applicant's family member or legal guardian to accompany the applicant during the interview. For most adjudications, this suggestion is not practical. However, for many disabled applicants, the presence of a family member or guardian in the interview could have a distinct calming effect. DAOs must always remember that the naturalization interview can be a stressful experience for the non-disabled applicant. The stress factor of the interview for a person with disabilities could be even greater. Offices must be willing to make this particular accommodation and modification on a case-by-case basis.

The family member or legal guardian, at the discretion of the Service, can in some instances assist with the interview by acting as the approved English language interpreter for those applicants whose disability prevents them from fulfilling the English proficiency requirements of section 312. However, prior to the start of the interview, the DAO should make clear to the family member or legal guardian the following guidelines:

- The interview is being conducted with the applicant, not the family member or legal guardian. The DAO should make clear that the family member's or guardian's role is as interpreter, not as the actual applicant.
- Attempt to clarify and understand from the family member or legal guardian any physical motions or signals that might be used as an answer to a question asked during the interview. Family members and legal guardians should be told that the DAO cannot expect to know what particular physical motions or signals mean and thus the meanings of these signals should be established in advance.

A family member or person holding legal guardian status for a naturalization applicant with disabilities may also sign the N-648 on behalf of the applicant. The necessary signature of the N-648 only relates to authorizing the release of additional medical records to the Service.

DAOs are reminded again of the need for the utmost compassion and sensitivity in adjudicating cases where the applicant requests an exception to the section 312 requirements. Making acceptable accommodations or modifications to the testing and interview environment is our mandate under the Rehabilitation Act of 1973.

V. Oath of Allegiance

As offices are aware, Congress amended the Act at section 312 to waive the English and civics requirements for certain persons with disabilities. Many commenters felt that while disabled applicants are being offered an exception to the requirements of section 312, this exception is undermined by requiring them to take the oath of allegiance required by section 337 of the Act. Some commenters also stated that to hold these applicants to the requirements of section 337 requires them to have some limited knowledge of civics. However, Congress did not expressly waive the oath requirement when it passed the section 312 amendment concerning disabilities. As such, the oath is still required for all applicants.

As noted in section IV of this document, offices are required to make reasonable accommodations and modifications to programs in order to accommodate the needs of disabled persons. The Service currently fulfills many of these accommodations through the provisions of section of 8 CFR 337.3. While these provisions do not allow or authorize the waiving of the oath, offices are encouraged to be as accommodating as possible in granting requests for expedited administration of the oath. However, applicants must be reminded that the provisions of 8 CFR 337.3 only apply to the administration of the oath. Persons granted an expedited administration of the oath under 8 CFR 337.3 have not been granted a waiver the oath requirement, but have only been relieved of the statutory requirement that they participate in a public ceremony. Offices currently operating under an order of expeditious jurisdiction should forge a liaison with the local judiciary to facilitate requests for special ceremonies or for the authority to administratively administer the oath in 8 CFR 337.3 cases.

While it is not the role of the DAO to make a technical medical determination as to the existence of a disability, it is the responsibility of the DAO at the time of the interview to be satisfied that the disabled naturalization applicant understands the nature of the actions he or she will be taking and to some extent the actual provisions of the oath. The Service believes that many disabled applicants, while exempted from the civics knowledge requirements of section 312, will be able to have a limited but sufficient understanding of the concepts of the oath, and therefore will be eligible to complete the naturalization process. For officers making these adjudications in cases involving applicants with disabilities, this will most likely be the most difficult aspect of the adjudication. Offices are reminded, however, that this is not a new area for officers. All offices have experience adjudicating difficult cases involving extremely ill or terminally ill applicants. The practices that officers already use to determine a conceptual understanding of the oath by these individuals should simply be replicated in cases involving disabled applicants.

DAOs cannot expect that interviews with many persons with disabilities will proceed or be

Note - DOJ Civil Rights has also suggested including references to concerning use of "simplified language" for oath purposes. Waiting for specifics from INS General Counsel's Office.

conducted in the same way as with applicants without disabilities. Each interview will be unique and each applicant's capabilities regarding the oath requirement will need to be assessed on a case-by-case basis. Although a disabled applicant need not understand every word of the oath at the interview, the DAO must conclude that an applicant has an understanding of the nature of the oath. An inquiry by a DAO might include, for example, an attempt to determine whether the applicant understands that he or she is becoming a United States citizen, is giving up his or her prior citizenship, and personally and voluntarily agrees to this change of his or her status.

If the DAO concludes that an applicant does not understand the nature of the oath, that applicant cannot at present be approved for naturalization. A preliminary decision not to approve the application on these grounds must be discussed with the DAO's supervisor. If the supervisor agrees that the applicant cannot be approved based on the inability to understand the nature of the oath, note this disposition in the file and hold the application pending final resolution by the Department of Justice of certain further legal questions. The Department is considering whether the Rehabilitation Act and the INA permit further accommodation for persons otherwise prevented from naturalizing on these grounds. Further guidance on this issue will be forwarded to all adjudicating field offices as quickly as possible.

VI. Denials & Appeals

In the discussion of comments of the final rule, many commenters suggested that the Service establish a special appeal procedure for applicants with disabilities in the event their applications for naturalization are denied. The Service determined that the current procedure for appealing a naturalization denial, as specified in the Act in section 336, is adequate and should not be altered. This decision is based on the fact that the acceptance or denial of an N-648 is not a separate adjudication, but a part of the overall N-400 adjudicative process.

As is specified in 8 CFR 336.2, any applicant whose application for naturalization is denied may submit a new N-648 with supplemental documentation, including medical evidence, prior to the reconsideration hearing. This hearing should be conducted by a SDAO. Offices are reminded that in the vast majority of cases involving disability-related denials, the denial will be based on the fact that the individual cannot meet one or more of the statutory requirements of naturalization, not the fact that the Service does or does not believe that a disability exists which prevents the applicant from fulfilling the requirements of section 312.

Offices should note that the Service has requested additional public comments on alternative appeal procedures for applicants with disabilities. Field offices will be notified of any change in the current appeal procedures. However, any such change will require a separate regulatory change to the provision of 8 CFR 336. This procedure would require an initial proposed rule and digest of public comments.

VII. Training, Quality Control and Assurance & Reporting Requirements

A. Training

The need for supplemental training for DAOs responsible for adjudicating disability-related naturalization cases cannot be overemphasized. Adjudicators who received the special disability training the week of January 27, 1997, are designated as the DAO in his or her office responsible for fully informing and training additional officers on adjudicating disability exception cases. Service HQ is currently working to formulate a training module which will be part of all basic training given to entry level adjudicators. In addition, local offices should reinforce to all DAOs the responsibility each officer has in complying with the non-discriminatory provisions of Section 504 of the Rehabilitation Act of 1973.

B. Quality Control & Assurance and Reporting

Quality Control and Assurance must also play a prominent role in these adjudications. As noted in the Commissioner's memorandum of November 29, 1996, (Naturalization Quality Procedures), each office adjudicating applications for naturalization must ensure that quality assurance controls are in place at each step of the adjudicative process. In that these adjudications will be the first large-scale dealings some offices may have with applicants with disabilities, public scrutiny will be placed upon local offices. We must ensure that all applications are adjudicated fairly and correctly. Following the procedures previously outlined in this document will meet many quality control goals.

In compliance with the November 29, 1996, Quality Procedures Memorandum, supervisory review is necessary for applicants with complex cases involving other statutory eligibility determinations. It should be noted that with disability exception cases, supervisors must review and approve all adjudicating officers' requests for a second medical certification, in addition to conducting a review of the case after the adjudicating officer has made a final decision on the entire application. Since not all supervisors have been made available for disability regulation training at HQ, but must still review these cases, it is requested that supervisors receive a briefing from the officers with primary training at HQ in order to ensure that any routine adjudication processes are not disrupted.

Offices have been advised that after implementation of the disability regulation, officers who received training on the regulation at HQ should have primary responsible for the adjudication of these cases and the training of the other officers within their respective districts. SDAOs must specifically review disability cases to ensure proper processing and compliance by both the applicant and the adjudicating officer. Currently, the disability cases are included as part of the N-400 Quality Assurance checklist under the "Checklist after Interview for all cases" section ("If Sec. 312 exemption granted: verify eligibility - 50/20, 55/15; 65/20; or disability). The Quality Assurance Review Officer should note in the "comments" section that the disability exception was granted based on the attached Form N-648. On the N-400 Processing Worksheet, the adjudicating officer checks "other eligibility requirements met," annotating in the "comments" section that an N-648 was accepted. The supervisor will likewise note on the N-400 Processing Worksheet under the "applicant with complex statutory eligibility issues" section that the officer correctly adjudicated the case involving the

acceptance of the N-648. There is space in both sections for further comment.

The Service is investigating the use of a private organization, via contract, to assist with quality control by means of random samplings and reviews. We are giving the public an additional opportunity to comment on this concept, and will communicate with all field offices any decision made to implement such a policy. Offices must cooperate with any effort undertaken by HQ to ensure quality in this particular adjudicative process.

In addition to the N-400 Quality Assurance checklist, offices will be required to complete the attached Progress Worksheet for Disability Exceptions for each N-648 case. Each office shall keep a separate log file of the Progress Worksheet, separated by month. The worksheet is self-explanatory, and will serve as the information foundation of any request the Service may receive for supplemental data about disability cases, workloads, or an audit. At the end of the month, each office shall photocopy and send or e-mail their Progress Worksheet log to their respective regional office. The regions shall serve as the source for any request information or data request on how the field is processing disability exception cases. This will be an initial six month requirement for all offices. After this initial six month period, an evaluation will be made to determine whether to continue or eliminate this reporting requirement.

The Progress Worksheet will also supplement the modified G-22 report that will now track data on N-648 receipts and processing. Officers attending the January 28-29, 1997 training at HQ were fulling informed of the G-22 requirements relating to processing N-648s.

E-
FYI - Draft INS Guidelines.
Steve

HQ 70/33.2-P

DRAFT
1/30/97

Section 312 Disability Naturalization Adjudications: Supplemental Policy Guidance for Field Offices

All Regional Directors
All District Directors (except foreign)
All Officers-in-Charge (except foreign)
All Service Center Directors

Office of Examinations

This memorandum and accompanying attachments provide supplemental policy guidance on section 312 exceptions for persons with disabilities to all Immigration and Naturalization Service (INS) field offices currently adjudicating applications for naturalization.

A 1994 technical amendment to the Immigration and Nationality Act extended an exception to disabled applicants regarding all the section 312 requirements. The attached final rule, to be published in the Federal Register on February 4, outlines the background history of the amendment, the efforts of INS to implement this new policy, and the new regulatory text.

Effective upon publication in the Federal Register, offices shall immediately institute the policy outlined in the final regulation and in this document. Previously distributed drafts of this document and the previously distributed field guidance, dated November 21, 1995, used as a basis for adjudicating section 312 disability exception requests shall no longer be used. In order to ensure consistency, individuals with pending cases shall be required to submit the new form N-648, Medical Certification for Disability Exceptions, and shall have the principles outlined in this document applied to their final adjudication. It is expected that the policy and guidelines outlined in the attachments will be followed consistently by all adjudications officers. In addition, offices should conduct community outreach and education on this regulation as discussed in the attached policy guidance.

Changes to 8 CFR §§ 312.1 and 312.2 reflect our efforts to make the regulation consistent with the amended statute. In particular:

- The wording of § 312.1(b)(3) has been changed, with new language on disability-based exceptions found on page 32 of the attached final rule. Offices should note that previous wording directly referencing blindness and deafness have been removed.
- The current §312.2(b) has been redesignated as paragraph (c) and a new paragraph has been added as paragraph (b)(1) to provide a disability-based exception to the civics requirements (page 33 of the attached rule).
- A new paragraph at 8 CFR 312.2(b)(2) has been added to explain the medical certification process for a disability exception.

The Service is committed to ensuring that the implementation of the procedures outlined in

DRAFT

this document are followed. Since a primary mission of the INS is to provide service, applicants with a legitimate claim to the disability exception provisions should be facilitated through the adjudication process. At the same time, Service officers must also utilize credible approaches to deterring fraud and abuse that are applicable to all adjudications for benefits under the Act and must remember that what may what seems like fraud may in reality be a lack of information about the naturalization process on the part of certain individuals with disabilities. Service officers must also continue to ensure that applicants who are granted section 312 exceptions continue to meet all other applicable eligibility requirements for naturalization.

Since many disability-related cases will be emotionally charged, all INS offices and adjudication officers are directed to use compassion, discretion, and sensitivity in adjudicating any request for a section 312 disability-based exception. The same level of discretion and sensitivity INS officers apply to orphan adoption cases should be replicated in all section 312 disability exception cases.

Many aspects of this regulatory revision are new and therefore we fully expect field offices to have many questions. We realize that all questions will not be answered within this document. However, we plan to distributing regular updated supplemental policy guidance memoranda for policy and procedural issues not answered by this document. Headquarters will also depend on all field offices to bring unique cases and situations to our attention in order that the experience may be shared with other offices.

Questions about the policy outlined in the attachment to this memorandum and in the Federal Register final rule may be directed to Staff Officer Craig Howie, HQ Naturalization Division. Questions regarding the new form, the new training module, or quality assurance compliance may be directed to Staff Officer Jody Marten, HQ Naturalization Division. Both officers may be reached on 202/514-5014.

Louis D. Crocetti
Associate Commissioner

Attachments

§312 DISABILITY ADJUDICATIONS: SUPPLEMENTAL FIELD POLICY GUIDANCE

I. Introduction

The Immigration and Naturalization Technical Corrections Act of 1994 amended section 312 of the Immigration and Nationality Act (the Act) to afford naturalization applicants with physical or developmental disabilities or mental impairments an exception to English language proficiency and United States history and government (civics) knowledge requirements. This amendment augmented the pre-existing exception that persons with disabilities were afforded regarding only the English proficiency requirements of section 312.

On November 21, 1995 the INS issued preliminary guidance to all naturalization adjudicating offices on the section 312 disability exceptions. On August 28, 1996, a proposed rule was published in the Federal Register, proposing to amend the Service regulations at part 312 to accommodate these new disability exceptions. During the Fall of 1996, the Service reviewed and digested the 228 comments that were submitted by the public pursuant to the proposed rule. The resulting final rule, scheduled to be published in the Federal Register on February 4, 1997, contains substantial changes to the provisions of the proposed rule and the preliminary guidance. In particular:

- Direct reference to the three disability categories in the regulatory language of 8 CFR 312 has been replaced with language complementing the disability terminology used by the Social Security Administration (SSA) in their regulations (i.e., "medically determinable physical or mental impairment or combination of impairments").
- Creation of a new public use form, N-648, Medical Certification for Disability Exceptions, to be used by any applicant requesting an exception to the section 312 requirements based on a disability. A copy of the form is included with this document. Offices are advised to accept photocopies of the N-648 until the form has been placed in full circulation following printing by the Government Printing Office (a process which could take more than six months).
- The elimination of the proposed use of the civil surgeons to make the disability determinations. In the place of the civil surgeons, the INS will allow only licensed medical doctors or licensed clinical psychologists to complete the N-648.

As noted in the accompanying documentation, these exceptions for persons with disabilities are not blanket exemptions from the requirements mandated by section 312. With accommodations or modifications, certain applicants with disabilities will be able to meet the section 312 requirements, just as they are accommodated today in many instances. To institute a policy of blanket exemptions would play into the stereotypical concept that persons with disabilities are not able to participate in mainstream activities. Such a policy would be contrary to the provisions of section 504 of the Rehabilitation Act of 1973 with which all federal government agencies must comply. Therefore, all adjudications for a section 312 exception based on a disability will be made on a case by case basis. It would be discriminatory to formulate policy which states that everyone with a particular disability

DRAFT

is exempted from the section 312 requirements when some individuals with the disability could well take part in the testing requirements imposed by section 312 with reasonable accommodations or modifications.

All offices must note that the provisions contained within the documents in this package are effective immediately upon publication of the final rule in the Federal Register and must be followed without exception. Due to the substantial changes the Service has made to the provisions of the proposed rule, the public is being allowed a 60 day comment period on the final rule. This will not affect the authority or responsibility of all local offices to proceed with these adjudications immediately and without delay. Any changes that may result from further public comments will be issued in writing to all field office.

Service offices adjudicating naturalization applicants should make note of the changes to the regulatory language of 8 CFR part 312. Of particular concern to officers should be these changes:

- The wording of § 312.1(b)(3) has been changed, with new language on disability-based exceptions found on page 32 of the attached final rule. Offices should note that previous wording directly referencing blindness and deafness have been removed.
- The current §312.2(b) has been redesignated as paragraph (c) and a new paragraph has been added as paragraph (b)(1) to provide a disability-based exception to the civics requirements (page 33 of the attached rule).
- A new paragraph at 8 CFR 312.2(b)(2) has been added to explain the medical certification process for a disability exception and an explanation of the new form, N-648, Medical Certification for Disability Exceptions.

Adjudication officers receiving the special two-day training at HQ during the week of January 27, 1997, should be the officers initially adjudicating disability-based applications for section 312 exceptions. This corps of officers will be responsible for ensuring the complete dissemination of the information and policies contained in this document to additional adjudications officers within each naturalization adjudicating office and shall ensure that these officers are familiar with these policies prior to the adjudication of disability-related exception cases. These trained officers should also work closely with the district director or officer-in-charge to ensure that full information about this regulation is provided to information officers, congressional, and public affairs officers and others within their office who will be answering questions from the public.

Each office is responsible for conducting local community outreach to inform and educate organizations that assist immigrants, persons with disabilities, the elderly, and others to whom this regulation may apply. Representatives of medical and psychological organizations and government agencies such as SSA and Health and Human Services (HHS) should be included in this outreach. Each office should endeavor to educate members of the medical and immigrant assistance communities about the naturalization process and the requirements of this regulation as soon as possible following publication in the Federal Register. Such information dissemination will improve the ability of the assistance groups and medical professionals to accurately apply the disability-based

exceptions in appropriate cases and will help deter abuse of the process.

All offices are reminded of the intense public scrutiny the INS will be placed under as this program moves forward. For many officers, this will be their first experience adjudicating cases involving applicants with disabilities. Officers are therefore reminded to always use discretion and compassion in making adjudications involving persons with disabilities. The same level of compassion and discretion that has in the past been applied to cases involving orphan adoptions is to be applied to any section 312 disability exception request.

II. Disability Definitions, Medical Professionals Authorized to Complete New Form N-648 & Adjudicating Currently Pending Cases

A. Disability Definitions

In the preliminary field guidance (issued in November, 1995) and the proposed rule, the Service offered exact definitions of the terms physical disability, developmental disability, and mental impairment designed to reflect the amendment Congress made to section 312 of the Act. Parts of the definitions were also based on the limited Congressional guidance, contained in the one committee report issued that related to the 1994 Technical Corrections Act.

As officers will note in reviewing the comments portion of the attached final rule, many commenters had concerns about the definitions we proposed. After reviewing the public comments, and after consultations with the SSA, the Service has chosen to drop the proposed definitions and rely on language that comports to the definitions used by the SSA in their regulations. As such, the wording of 8 CFR at part 312.1(b)(3) has been changed and at 312.2(b)(1) has been amended to refer to medically determinable physical or mental impairment(s), that already has or is expected to last at least 12 months. (See pages 32-33 of the attached final rule.) The phrase "medically determinable physical or mental impairments" encompasses the three disability categories noted in section 312 of the Act and refers to an impairment that has resulted from anatomical, physiological or psychological abnormalities. Using medically acceptable clinical and laboratory diagnostic techniques, these abnormalities can be shown to so limit or impair the individual as to render him or her unable to learn and demonstrate the information required by section 312. In addition, language is included in the regulation that prevents individuals whose disability resulted from the illegal use of drugs from being granted these exceptions. This was a particular concern of Congress.

B. Medical Professionals Authorized to Complete New Form N-648

Initially, the Service proposed using the corps of authorized civil surgeons to perform the disability determinations for naturalization applicants requesting an exception to the section 312 requirements. After long discussions with SSA, HHS, and the Centers for Disease Control (CDC), the decision was made not to rely on the civil surgeons to perform this function. The CDC noted that the majority of civil surgeons have expertise centered around diagnosing communicable diseases, not in making complex disability determinations. Therefore, the Service is amending 8 CFR part 312.2

DRAFT

with the addition of a new paragraph (b)(2), which outlines the medical professionals authorized to make the disability determinations and complete the new public use form N-648, Medical Certification for Disability Exceptions (copy attached). A complete discussion of the rationale behind creating a new public use form is found in the Discussion of Comments section of the attached final rule.

Upon publication of the final rule, only licensed medical doctors or licensed clinical psychologists will be authorized to make a disability determination, utilizing the new form N-648. The term licensed medical doctor includes doctors who are specialists, such as board certified psychiatrists. In addition, any civil surgeon meeting these criteria will be able to make a disability determination, but based on the surgeon's expertise with a particular disability, not on the fact that he or she is a civil surgeon. These licensed medical professionals will be required to certify on the new form that their medical speciality, experience, and other qualifications permit them to make such a complex disability assessment. In addition, the medical doctor or licensed clinical psychologist must certify under penalty of perjury that his or her statements are true and correct. Service officers should note that medical professionals not authorized to complete the N-648 include nurse or homoeopathic practitioners, physician assistants, and medical center or nursing center administrators who are not licensed medical doctors with disability experience. As is the case with virtually all Service adjudications, the burden is on the applicant and the licensed medical professional to ensure that the N-648 is completed correctly and that the medical professional is authorized to make the certification.

District Adjudication Officers (DAOs) are reminded that it is the responsibility of the medical professional to make the medical determination. This responsibility is clearly delineated on form N-648 in questions three and six. Officers are not medical professionals, advocates, or social workers and should not place themselves in the position of attempting to second guess the medical evaluation of the qualified medical professional certifying a disability exception on the N-648. Nor should the officers place themselves in the position of being a medical professional and thereby denying the existence of a disability. However, DAOs should not hesitate to talk with the medical doctor or clinical psychologist, after consultation with the DAO's supervisor, if the officer has a question about the MD's or psychologist's type of certification or questions about the disability determination. This is particularly the case if the terminology is very general and does not explain how the particular medical condition prevents the applicants from learning the requirements of section 312 of the Act. For example, an N-648 noting the disability as only hypertension would need further explanation. The officer needs to know how or why hypertension prevents the applicant from learning the section 312 requirements. Procedures for obtaining a second medical opinion, where deemed necessary, are discussed below.

Beyond reviewing the N-648, officers may consult with officials of other federal or state agencies if the applicant has been declared disabled by another agency, and the DAO believes that such a consultation would assist with the disability determination process. DAOs also have the authority to request additional medical records on the applicant, but only in instances where there is a well founded belief that such documentation would allow the DAO to accurately adjudicate the request for a section 312 exception. (See Section III, Referrals for an Additional Medical Opinion.)

Such a request must be documented in the record, outlining the reasons for the request and the response of the medical professional holding said records. Officers should also take all necessary precautions to maintain the confidentiality of sensitive medical records.

All officers should familiarize themselves with the new form N-648 prior to adjudicating any disability-related case. The new language of 8 CFR 312.2 (b)(2) notes that the N-648 must be submitted as a supplement to the N-400 application when the N-400 is filed. (This will allow offices to pre-screen disability exception requests, to make any necessary modification in accessability, or to consider the option of going on-site for the interview.) However, since the policy and form are new, offices for the foreseeable future should accept the N-648 if the applicant brings the form to the naturalization interview. Offices should accept legible photocopies of the form.

C. Adjudicating Currently Pending Cases

For offices that have cases pending related to a request for a disability exception, the final adjudication should be made based on the policy and guidelines noted in the final rule. In order to ensure consistency, all applicants with a currently pending request for an exception based on the preliminary guidance will be required to have the new form N-648 completed and submitted to the Service for review. Offices will need to mail applicants with pending requests for a disability exception, based on preliminary field guidance, an N-648 as soon as possible. This policy will avoid having two standards applied to the adjudication.

III. Requirements for Additional Evidence or Second Certification

In section 312.2(b)(2) of the final regulation, it is noted that the Service reserves the right to require an applicant to submit additional evidence supporting the N-648 or to submit a second N-648 from another authorized professional. Offices are instructed to use extreme restraint in exercising these options, and should only do so when doubts remain after the steps outlined below have been completed. DAOs should note that the burden is on the applicant to pay for any second certification, and should take this fact into consideration. Officers should always remember that they are responsible for determining the eligibility for naturalization, but not for making or rendering a medical determination.

Any officer who determines a second medical certification to be necessary must comply with the following procedures:

1. If questions exist regarding the disability or the actual completion of the N-648, the DAO should attempt to reach the medical professional for answers to the DAO's questions. If the officer's questions are answered by this contact, the referral will not be deemed necessary, and the adjudication of the naturalization case should continue.
2. If questions exist regarding the medical professional making the determination, the DAO should attempt to verify the license number noted on the N-648 by contacting the appropriate state medical or clinical psychologist licensing agency. An answer

DRAFT

from this agency will provide evidence regarding the validity of the medical professional's license, or might expose the existence of a fraudulent practitioner. Evidence of fraud in this instance should be handled in the standard way the officer reports similar discoveries of document fraud. Documented evidence of an applicant knowingly using the services of a fraudulent medical source shall result in the exception and application for naturalization being denied.

3. If the applicant has been declared disabled by another state or federal government agency, the DAO should attempt to make contact with this agency to see if any information can be gained to clarify the questions the officer has about the certification.
4. If, after consultation with the medical certification provider, it is determined that a production of supplemental records from the applicant's medical file would satisfy the concerns of the DAO, such records shall be requested and reviewed. If these documents resolve all outstanding questions, the adjudication of the case shall continue without a second referral. Officers must take all precautions to preserve the privacy and confidentiality of private medical documents.
5. If any of these procedures fail to satisfy the DAO as to the accuracy of the determination or of the medical professional, the DAO shall consult with his or her supervisor and obtain authority to require the applicant to obtain a second disability certification.
6. Upon approval, the applicant shall be given another N-648, with instructions to have the form completed by an authorized medical professional other than the professional that completed the first certification. Until definitive guidance can be issued regarding who should perform these referrals, offices should contact the local medical board or society for information and contact points on referrals. In particular, offices should not refer applicants to commercial medical referral services listed in telephone directories or to any specific medical provider.
7. Supervisory consultation and approval must be obtained and noted in the record for all the steps and procedures outlined above.

An example of a situation where the DAO might feel compelled to require a second certification would be in a case where the medical evaluation, as noted on the N-648, is so vague that the officer cannot clearly discern what is the actual disability or combination of disabling impairments, how the impairments prevent the applicant from learning the section 312 information, and the efforts to obtain clarification from the medical profession making the certification fail. It is incumbent upon the DAO to keep an accurate account of these actions and contacts in the alien file. All offices should also establish a liaison with the local or state medical board or society. This liaison effort should help the office and officer when questions arise over particular medical professionals and the professional's certifications on the N-648.

As noted, HQ Naturalization and Field Operations are currently working on a standardized referral policy, and will notify field offices as soon as the policy is finalized.

IV. Accommodations & Modifications

All federal agencies are mandated to promote and adhere to policies that are non-discriminatory to persons with disabilities in the administration of all programs. The Rehabilitation Act of 1973 spells out these requirements. (The non-discriminatory provisions of the Rehab. Act served as the basis for the Americans with Disabilities Act, which bars discrimination against persons with disabilities in non-government areas.) All INS offices are required to adhere to the principles of the Rehabilitation Act.

The Rehabilitation Act requires the Service to make reasonable accommodations and modifications to program administration to accommodate the needs of persons with disabilities. All offices currently do make accommodations and modifications on a daily basis. For example, every time an office sends a DAO on-site to a nursing facility or hospital to interview or to administer the oath of allegiance, an accommodation and modification has been made.

Offices are reminded that making accommodations and modifications means that not all persons with disabilities will be exempted from the section 312 naturalization requirements. The final rule notes that only disabled persons whose disabilities are so severe that the person is rendered unable to participate in the testing procedures for naturalization will be granted an exception from the testing requirements. Certain individuals will be able to meet the requirements section 312 imposes, but with distinct modifications or accommodations. For example:

- Blind individuals may be supplied with materials in Braille, large print, or questioned orally, and perhaps in their native language, on section 312 civics questions.
- Hearing impaired persons may be given a written test on civics questions.
- A person with a learning disability might be given additional time to complete a written civics test.
- Persons with severe physical disabilities could respond to questions in a yes or no format, or through nodding their heads or blinking their eyes yes or no to particular questions.

This list is not all inclusive. Local offices should be creative in constructing additional accommodations and modifications to the testing procedures required by section 312. In many cases, offices currently have many modifications and accommodations already in use. Offices are encouraged to share these concepts with other offices and with their regional Examinations contact point. However, offices and DAOs should remember that disabled applicants attempting to gain an exception to the section 312 requirements are doing so because they view their particular disability as so impairing that they cannot meet the English and civics requirements.

Aside from the modifications that can be made to the actual test administration, offices must give consideration to modifications of the actual interview. As noted above, any time a DAO goes on-site to conduct a naturalization interview or to administer the oath of allegiance, a considerable modification has been made. Another modification that offices need to consider is allowing a disabled

DRAFT

naturalization applicant's family member to accompany the applicant during the interview. For most adjudications, this suggestion is not practical. However, for many disabled applicants, the presence of a family member in the interview could have a distinct calming effect. DAOs must always remember that the naturalization interview can be a stressful experience for the non-disabled applicant. The stress factor of the interview for a person with disabilities could be even greater. Offices must be willing to make this particular accommodation and modification on a case by case basis. The family member, at the discretion of the Service, can in some instances assist the interview by acting as the approved English language interpreter for those applicants whose disability prevents them from fulfilling the English proficiency requirements of section 312.

DAOs are reminded again of the need for the utmost compassion, discretion, and sensitivity in adjudicating cases where the applicant requests an exception to the section 312 requirements. Making acceptable accommodations or modifications to the testing and interview environment is our mandate under the Rehabilitation Act of 1973.

V. Oath of Allegiance

As offices are aware, Congress amended the Act at section 312 to provide persons with disabilities an exception to only the English and civics requirements. Therefore, many feel that while disabled applicants are being offered an exception to the requirements of section 312, we are in fact holding these same applicants to a double standard by requiring them to take the oath of allegiance required by section 337 of the Act. To hold these applicants to the requirements of section 337 requires them to have a limited knowledge of civics, some have stated.

As stated in the introduction to the regulation, Congress did not address the oath requirement when it passed the section 312 amendment concerning disabilities. Any change in this policy, whether from newly discovered court precedent or statutory amendment, will be related to all field offices as quickly as possible. Until such a time, the oath is still required for all applicants.

As noted in section IV of this document, offices are required to make reasonable accommodations and modifications to programs in order to accommodate the needs of disabled persons. The Service currently fulfills many of these accommodations via the provisions of section 337.3 of 8 CFR. While these provisions do not allow or authorize the waiving of the oath, offices are encouraged to becoming more accommodating in granting requests for expedited administration of the oath. However, applicants must be reminded that the provision of 8 CFR 337.3 only apply to the administration of the oath. No one granted an expedited administration of the oath under 8 CFR 337.3 has been waived this requirement, only the statutory requirement that the applicant participate in a public ceremony. Offices currently operating under an order of exclusive jurisdiction should forge a liaison with the local judiciary to facilitate requests for special ceremonies or for the authority to administratively administer the oath in 8 CFR 337.3 cases.

While it is not the role of the DAO to make a technical medical determination as to the existence of a disability, it is the responsibility of the DAO to be satisfied that the disabled

naturalization applicant understands the actions he or she is taking, and to some extent the actual provisions of the oath. The Service believes that many disabled applicants, while excepted from the civics knowledge requirements of section 312, will be able to have a limited understanding of the concepts of the oath, and therefore will be eligible to complete the naturalization process. For officers making these disability-based adjudications, this will most likely be the most difficult aspect of the adjudication.

As noted in the previous section of this document, family members may assist the DAO in understanding the responses of certain disabled applicants. However, prior to the start of the interview, the DAO should attempt to clarify and understand from the family member any physical motions or signals that might be used as an answer to a question asked during the interview.

DAOs cannot expect that interviews with many persons with disabilities will proceed or be conducted in the same way as with applicants without disabilities. Each interview will be unique and each applicant's capabilities regarding the oath requirements will need to be assessed on a case by case basis. However, the DAO conducting the interview with a disabled applicant must be assured that the core qualifications specified by the oath are in some form understood by the applicant. These core qualifications are that the applicant:

- Understands that he or she is becoming a United States citizen.
- Understands that he or she is renouncing his or her allegiance to their prior nation of citizenship.
- Personally and voluntarily agrees to this change in his or her status.

The DAO must be assured that the disabled applicant has some conceptual level of understanding of these core qualifications, but not necessarily every exact word of the oath.

Applicants who cannot satisfy the DAO of an understanding of these aforementioned qualifications, whether disabled and entitled to an exception to the section 312 requirements or non-disabled, cannot be naturalized under the current structure of the Act. A denial of an application for naturalization based on the inability to understand the concepts of the oath should be initially discussed with the DAOs supervisor, and the written denial must cite the failure to meet the statutory requirements of the Act at section 337. Offices are reminded of the extreme sensitivity of this issue with the public. As previously noted, any legal analysis or discoveries which might change this policy will be forwarded to all adjudicating field offices as quickly as possible.

Offices should note that the Service is seeking further legal guidance on the issue of the oath requirement. Offices should not deny any disability-related case, based on the applicant's inability to take the oath, until this further legal guidance is provided to all field offices.

VI. Denials & Appeals

In the discussion of comments of the final rule, many commenters suggested that the Service

DRAFT

establish a special appeal procedure for applicants with disabilities in the event their applications for naturalization are denied. The Service determined that the current procedure for appealing a naturalization denial, as specified in the Act in section 336, is adequate and should not be altered. This decision is based on the fact that the acceptance or denial of an N-648 is not a separate adjudication, but a part of the overall N-400 adjudicative process.

As is specified in 8 CFR 336.2, any applicant whose application for naturalization is denied may submit additional independent evidence, including medical evidence, prior to the reconsideration hearing. This hearing should be conducted by a SAO. Offices are reminded that in the vast majority of cases involving disability-related denials, the denial will be based on the fact that the individual cannot meet one or more of the statutory requirements of naturalization, not the fact that the Service does or does not believe that a disability exists which prevents the applicant from fulfilling the requirements of section 312.

Offices should note that the Service has requested additional public comments on alternative appeal procedures for applicants with disabilities. Field offices will be notified of any change in the current appeal procedures. However, any such change will necessitate a separate regulatory change to the provision of 8 CFR 336, which would require an initial proposed rule and digest of public comments.

VII. Training, Quality Control & Quality Assurance

The need for supplemental training for DAOs responsible for adjudicating disability-related naturalization cases cannot be over emphasized. Adjudicators who receive the special disability training the week of January 27, 1997, are designated to be the DAO in his or her office to adjudicate disability exception cases for the first 60 days after the publication of the final rule in the Federal Register. These DAOs are also to share the concepts and materials gained at this session with fellow officers in their respective district. Service HQ is currently working to formulate a training module which will be part of all basic training given to entry level adjudicators. In addition, local offices should reinforce to all DAOs the responsibility each officer has in complying with the non-discriminatory provisions of Section 504 of the Rehabilitation Act of 1973.

Quality Control and Assurance must also play a prominent role in these adjudications. As noted in the Commissioner's memorandum of November 29, 1996 (Naturalization Quality Procedures), each office adjudicating applications for naturalization must ensure that quality assurance controls are in place at each step of the adjudicative process. In that these adjudications will be the first large-scale dealings some offices may have with applicants with disabilities, public scrutiny will be placed upon local offices. We must ensure that these applications are adjudicated fairly and correctly. Following the procedures previously outlined in this document will meet many quality control goals.

In compliance with the November 29, 1996 Quality Procedures Memorandum, supervisory review is necessary for cases with "applicants with complex cases involving other statutory eligibility

determinations." It should be noted that with disability exception cases, supervisors must review and approve all adjudicating officers' requests for a second medical certification, in addition to conducting a review of the case after the adjudicating officer has made a final decision on the entire application. Since not all supervisors have been made available for disability regulation training at HQ, but must still review these cases, it is requested that supervisors receive briefing from the officers with primary training at HQ by February 4, 1997 in order to ensure that any routine adjudication processes are not disrupted.

Offices have been advised that for the first 60 days after implementation of the disability regulation, officers who received training on the regulation at HQ must be solely responsible for the adjudication of these cases and the training of the other officers within their respective district. For the next 60-day period, these same officers are responsible for review of all disability cases. Currently, the disability cases are included as part of the File Review Attestation worksheet under both the "Checklist after Interview" section, and the "Continued Cases" section. On the N-400 Processing worksheet, the adjudicating officer checks "other eligibility requirements met" and the supervisor notes the officer correctly adjudicated a case where the issue was an "applicant with complex statutory eligibility issues." There is space in both sections for further comment. We are reviewing whether to expand the processing worksheet to allow for more detailed coverage of an N-400 application with an attached N-648, or whether the comments section is sufficient for more explanation.

As noted previously in this document, SAOs must specifically review disability cases to ensure proper processing and compliance by both the applicant and the adjudicating officer. Additional guidance concerning a mandatory tracking log for these disability-related cases may be found in the attached documentation.

The Service is investigating the use of a private organization, via contract, to assist with quality control by means of random samplings and reviews. We are giving the public an additional opportunity to comment on this concept, and will communicate with all field offices any decision made to implement such a policy. Offices must cooperate with any effort undertaken by HQ to ensure quality in this particular adjudicative process.

On Page 10, CRT proposes to add "or guardian" after "family member" each time it appears in the first incomplete paragraph.

On Page 11, substitute the following for all the full paragraphs:

DAOs cannot expect that interviews with many persons with disabilities will proceed or be conducted in the same way as with applicants without disabilities. Each interview will be unique and each applicant's capabilities regarding the oath requirements will need to be assessed on a case-by-case basis. Although a disabled applicant need not understand every word of the oath, the DAO must be assured that an applicant has an understanding of the nature of the oath. An inquiry by a DAO might include, for example, an attempt to determine whether the applicant understands that he or she is becoming a United States citizen, is giving up his or her prior citizenship, and [CRT proposes to delete "personally and"] voluntarily agrees to this change of his or her status.

If the DAO concludes that an applicant does not understand the nature of the oath, that applicant cannot be naturalized under current statute and regulations. A denial of an application for naturalization based on the inability to understand the nature of the oath should be initially discussed with the DAOs supervisor, and the written denial must cite the failure to meet the statutory requirements of the Act at section 337. Offices are reminded of the extreme sensitivity of this issue with the public. As previously noted, the Service is seeking further legal guidance on the issue of the oath requirement, and any legal analysis or discoveries which might change this policy will be forwarded to all adjudicating field offices as quickly as possible.

7

OMB cleared version

Elena – Here is the disability reg – Steve got you the guidance, I think.

– Diana

BILLING CODE: 4410-10

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 299, 312, and 499

[INS No. 1702-96]

RIN 1115-AE02

Exceptions to the Educational Requirements for Naturalization for Certain Applicants

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule with request for comments.

SUMMARY: This final rule amends the Immigration and Naturalization Service (the Service) regulations relating to the educational requirements for naturalization of eligible applicants under section 312 of the Immigration and Nationality Act (the Act), as amended by the Technical Corrections Act of 1994. This amendment provides an exception 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." The final rule establishes an administrative process whereby the Service will adjudicate requests for these exceptions while providing the public with an opportunity to comment on portions of the adjudicative process which the Service is altering in response to public comments from the previously published proposed rule.

DATES: This final rule is effective [Insert date of publication in the FEDERAL REGISTER].

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 address by calling (202) 514-3048 to arrange an appointment.

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

SUPPLEMENTARY INFORMATION:

Background

On October 25, 1994, Congress enacted the Immigration and Naturalization Technical Corrections Act of 1994. Section 108(a)(4) of the Technical Corrections Act amended section 312 of the Act to provide an exemption to the United States history and government ("civics") requirements for persons with "physical or developmental disabilities" or "mental impairments" applying to become naturalized United States citizens. This exception complemented an existing exception for persons with disabilities with regard to the English language requirements for naturalization. Enactment of this amendment marked the first time Congress authorized an exception from the civics requirements for any individual applying to naturalize.

The Technical Corrections Act did not specifically define the terms developmental disability, mental impairment, or physical disability. Congress did, however, provide limited guidance for

defining these terms in the Report of the House of Representatives Committee on the Judiciary, H. Rpt. 103-387, dated November 20, 1993. Based in part on the language of this report, the Service provided preliminary guidance to field offices on November 21, 1995, defining the three categories of disabilities and requiring disabled persons seeking an exception from the section 312 requirements to obtain an attestation verifying the existence of the disability from a designated civil surgeon.

On August 28, 1996, the Service published a proposed rule at 61 FR 44227-44230 proposing to amend 8 CFR part 312 to provide for exceptions from the section 312 requirements for persons with physical or developmental disabilities or mental impairments. In the preamble to the proposed rule, the Service noted that these exceptions were not blanket waivers or exemptions for persons with disabilities. Creation of blanket waivers would be contrary to the requirements of section 504 of the Rehabilitation Act, which provides for equal (with modifications/accommodations) but not special treatment for disabled persons in the administration of Justice Department programs. The proposed rule provided that an exception would only be granted to those individuals with disabilities who, because of the nature of their disability, could not demonstrate the required understanding of the English language and knowledge of United States civics, even with reasonable modifications or accommodations.

The Service proposed that all disability eligibility determinations be based on medical evidence in the form of individual, one-page assessments by civil surgeons or qualified individuals or entities designated by the Attorney General, attesting to the existence of the applicant's disability. As is the case with virtually all Service adjudications for benefits, it was noted that it is 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 noted that it would comply with section 504 of the Rehabilitation Act of 1973 by providing reasonable modifications and/or accommodations to its testing procedures for applicants with disabilities. In addition, the Service noted that an applicant would be deemed unable to participate in the testing procedures only in those situations where there are no reasonable modifications that would enable the applicant to participate.

After the Service completed digesting the comments received from the public and after meeting with other federal benefit-granting agencies with extensive experience in administering disability related programs, it became clear that considerable changes would be made to the proposed rule. As such, the Service is implementing the policies contained in this rule while also seeking additional comments from the public addressing our changes.

Discussion of Comments

The Service received 228 comments from a variety of sources, including federal and state governmental agencies, disability rights and advocacy organizations, and private individuals. While the Service has identified 11 specific comment areas that warrant discussion, the majority of comments address three specific areas relating to the proposed rule, in particular, the definitions of the disabilities proposed by the Service at §§ 312.1(b)(3)(i) and 312.2(b)(1)(i), the use of the civil surgeons as the medical professionals making the disability determinations at § 312.2(b)(2), and the other statutory requirements for naturalization. The Service also notes that of the 228 comments, 46 were in the form of two separate "form memoranda" which the Service speculates were circulated among commenters. Some commenters attached these memoranda to a cover letter, while others placed the form memorandum onto their own letterhead. An additional 12 form letters, all from the same social services agency yet signed by various staff, were also received.

The Service appreciates the overall in-depth comments that were received, especially from other federal agencies and various disability advocacy organizations. All these comments have assisted the Service in understanding matters of concern to the disabled community, a constituent group that until now the Service has only interacted with on a limited basis. The following is a summarized discussion of the comments, opening with an issue statement, followed by a summary of the public comments, and concluding with the Service response. The discussions are listed in order according to the volume of comments received for each topic.

Definitions of the Disabilities

Issue. Should the Service change the definitions noted in the proposed rule to comport with existing federal statutes and regulations? The Service proposed to amend §§ 312.1(b)(3)(i) and 312.2(b)(1)(i) of 8 CFR with definitions of physical disability, developmental disability, and mental impairment based upon the language of the legislative history as noted in H.R. No. 103-387. These definitions included provisions which excluded disabilities that were temporary in nature, that were not the result of a physical or organic disorder, or that had resulted from an individual's illegal use of drugs. H.R. No. 103-387 did not clarify whether the Congress was referring to the abuse of illegal drugs or legal drugs. Each definition included language which specified that the disability must render the individual unable to fulfill either the requirements for English proficiency or to participate in the civics testing procedures even with reasonable modifications.

Summary of public comments. The disability definitions received 138 comments, the largest number of specifically referenced comments. The majority of commenters noted that while it was appreciated that the Service was attempting to follow the intent of Congress, as based on the limited legislative history, it was the obligation of the Service to use definitions already in existence and that

comport with existing federal statutes. In particular, 62 comments directly referenced the position that the Service is required to use existing definitions that comport with other federal statutes, such as definitions found in the Americans With Disabilities Act and the Developmental Disability Act of 1978. These commenters also expressed particular concern over the proposed definition of developmental disability. They noted how there is disagreement within the medical community as to whether certain disabilities, such as mental retardation, are indeed developmental in nature as opposed to being a mental impairment.

As noted previously, the Service, in following the legislative history, excluded disabilities in the proposed definitions that were acquired (to exclude persons whose disability was the result of the illegal use of drugs) or disabilities non-organic or temporary in nature. Of the comments addressing the definitions, 39 specifically admonished the Service to revisit this decision. According to these commenters, by adopting the definitions as listed in the proposed rule, the Service would be excluding a large number of disabled naturalization applicants. For example, individuals suffering from Post Traumatic Stress Disorder or individuals whose disability resulted from an accident would not be covered by the definitions as proposed by the Service, in that both these disabilities are acquired. An additional 18 commenters noted that the definitions proposed by the Service were too narrowly drawn. They repeated the argument that by enacting such narrowly drawn definitions the Service would potentially exclude large numbers of disabled individuals who might qualify for these Congressionally mandated exceptions.

Eight commenters noted that the Service had not included specific references to particular disabilities in the proposed rule. It was therefore suggested that the Service modify its definitions to include particular disabilities such as mental retardation and deafness and particular diseases such as

Alzheimers to the language of the final rule. One commentator noted that the seriously ill should be considered physically disabled for the purposes of gaining an exception to the section 312 requirements.

Ten separate commenters noted that the proposed language of the disability definitions would not take into consideration persons with combination disabilities. It was cited that while an individual with combination disabilities might not meet the criteria for an exception in a single category, the individual's combination of disabilities might prevent them from being able to meet the requirements of section 312, even with reasonable modifications. An example given noted that an individual with mild dementia who also suffers from hearing loss or blindness may not be able to learn the required English and civics information. Taken singularly, these disabilities might not automatically warrant an exception for the individual. However when combined, the commenters agreed on the likelihood of the individual being unable to satisfy the requirements of section 312 increase, and thus may warrant the granting of an exception.

Response. The Service has devoted considerable time in evaluating the comments addressing the disability definitions, and has consulted with other federal agencies whose experience in developing and implementing disability-related benefit programs is much more extensive than that of the Service (notably the Department of Health and Human Services and the Social Security Administration). The Service has also revisited the exact language of the Act at section 312 as well as the legislative history.

As noted, the Service has consulted with the Social Security Administration (SSA) since the publication of the proposed rule in order to gain a better understanding of disability-related programs in general. While the criteria upon which the SSA renders an individual disabled for an SSA financial

benefit (the focus being on an individual's inability to support themselves financially) is wholly different from the Service adjudication process for an Immigration and Nationality Act benefit, the Service finds no compelling reason why the definitions upon which these adjudications are based should not be standard between the two agencies.

Therefore, the Service is modifying the proposed rule with regard to the definitions of the disabilities as found at § 312.1(b)(3)(i) and § 312.2(b)(1)(i). The Service is electing to use language that for the most part comports with the regulatory language utilized by the SSA. In the revised language, the three categories of disabilities as noted in the Act are not specifically mentioned but are referenced as medically determinable physical or mental impairment(s), thereby using accepted medical and regulatory language already enacted and found within the SSA regulations. Modifications have been made to SSA's suggested language in order to maintain the Congressional intent that individuals whose disabilities are the result of the illegal use of drugs not be eligible for an exception to the section 312 requirements

Also included in the regulatory language are provisions to recognize combination impairments, as suggested by commenters and in keeping with the standards used by the SSA. However, the Service has elected not to include specific references to particular disabilities within the regulatory text found in §§ 312.1(b)(3) and 312.2(b)(1). The Service believes that inclusion of particular named disabilities could have the possible effect of limiting the scope of the proposed exceptions. In other words, some disabled applicants, not seeing their particular disability noted in the text of 8 CFR part 312 might not believe they are covered by the potential exception and thus might not attempt to gain an exception even though they might be fully eligible.

By adopting these changes, the Service is addressing the public's concern regarding the

proposed regulation's consistency with existing federal regulations and statutes. We are also ensuring that the particular concerns that Congress elected to include in the legislative record are observed, while acknowledging that adopting a broad definition of disability is mandated by the Act. However, the burden will still be on the applicant, via the medical certification, to demonstrate to the satisfaction of the Service how the disability prevents the applicant from learning the information required by section 312 of the Act. The Service believes that it is possible to create a humane process without creating a blanket exception policy within the regulatory language and within the administration of this program. As previously noted, creation of a blanket exception would have the tacit effect of perpetuating the stereotype that persons with disabilities are unable to participate fully in mainstream activities and would thus be contrary to the provisions of section 504 of the Rehabilitation Act of 1973.

Disability Determinations: Use of the Civil Surgeons and Creation of a Form

Issue. Should disabled applicants be required to be examined by a civil surgeon in order to obtain a disability certification? In the proposed rule at 8 CFR 312.2(b)(2), the Service noted that disabled applicants desiring a disability exception to the requirements of English proficiency and civics must submit medical certification attesting to the presence of the disability, executed by a designated civil surgeon or qualified individuals or entities designated by the Attorney General. The Service did not define the terms qualified individuals or entities, but did specifically request public comments on the requirements of the medical certification process and in particular on the circumstances under which the Service should consider the use of qualified individuals or entities other than civil surgeons.

Summary of public comments. The public responded with 125 comments directly addressing this aspect of the proposed rule. The majority of commenters had concerns over the use of civil

surgeons. It was noted by 101 commenters, including HHS (the controlling federal agency for civil surgeons), that the majority of civil surgeons are in general family practice and thus not experienced in making complex disability determinations. In addition, it was noted that civil surgeons currently base the majority of their examinations for the Service on matters relating to the admissibility of immigrating aliens and communicable diseases. This diagnosis of communicable diseases does not relate to the disability determination process, according to these commenters.

Many commenters, acknowledging the Service's need to maintain integrity in the medical determination process, noted that it would be imposing a great burden on the disabled applicant to limit the attestation process to only civil surgeons and the unknown "qualified individuals or entities." Forty-seven commenters therefore directly requested the Service to allow disabled applicants to use the medical services of the person's attending physician, medical specialist, or clinical case worker rather than mandating an examination by a civil surgeon. Several of these commenters also noted that the Service must consider the stress potentially placed on persons with mental impairments if forced to undergo an examination by someone other than their own physician.

In addition to the above noted reasons offered for not limiting the medical certification process to the civil surgeons, 25 commenters stated that the pool of civil surgeons was too small to adequately serve all disabled applicants who might attempt to avail themselves of the disability exceptions. The small pool of civil surgeons could potentially result in disabled applicants having to wait months for appointments.

It was noted by 10 commenters that the cost of going to a civil surgeon could be prohibitive for many persons with disabilities on fixed incomes or public assistance, especially if the civil surgeon is required to consult with medical professionals who specialize in disabilities prior to issuing a

certification. Commenters noted that the Service should take this factor into consideration prior to finalizing any policy that would require the predominant use of civil surgeons in the disability determination process. Six commenters noted that the Service should be obliged to provide disabled applicants with lists of bilingual physicians qualified to render the necessary disability certification, and one commenter requested that the Service compose lists of specialists, such as psychiatrists and clinical case workers, that disabled applicants could use in locating a medical professional qualified to make the disability certification.

Three commenters requested the Service to abandon the proposed certification process altogether and adopt a procedure similar to that currently utilized by the SSA in making disability determinations. Another commenter stated that the certification process should be changed, and suggested that disability determination authority be given to the district director in every local Service office. According to this writer, this policy would dissuade a large number of individuals who view the section 312 disability exceptions as a means of avoiding the English language statutory requirement.

Response. In determining a final policy for the disability determination process, the Service acknowledges that it must be responsive to the needs of the applicant base, especially the needs of persons with disabilities. However, it is also the obligation of the Service to balance these needs with the necessity of maintaining integrity in the disability determination process. Only one commenter addressed the fact that the Service will be faced with instances of fraud in the administration of this program and that the Service must be ever-vigilant when non-disabled applicants attempt to present themselves to the Service as disabled and therefore eligible for a disability exception. Having a structured process for the determination of a disability is critical to the Service's obligation to

maintain an adjudicative process with integrity.

The Service has concluded that the public is justified in its concern over the near exclusive dependence on the civil surgeons in the disability determination process. Therefore, the Service is proposing to eliminate all references to the use of the civil surgeons in the determination process. (However, any civil surgeon meeting the criteria outlined below will be able to make a disability determination, but based on the surgeon's expertise with a particular disability, not on the fact that he or she is a civil surgeon.)

The Service is proposing that only licensed medical doctors, which includes medical doctors with specialities such as board certified psychiatrists, and licensed clinical psychologists who are experienced in diagnosing disabilities, make the determinations that will be used by the Service. This policy will address the concerns of the public regarding the use of civil surgeons, the perception that the available pool of civil surgeons is too small to meet the needs of the disabled community, and the possible high cost of medical visits to several doctors in order to verify the existence of a disability. This determination process will be effective upon publication of this rule while the Service also investigates other possible methods for having disabled applicants gain a disability certification from professionals within the medical community.

The selective list of licensed health care providers eligible to render a disability determination is critical to the Service obligation that fraud not corrupt this program or the adjudicative process. Further safeguards can be found in the proposal of the Service to require the medical professional making the disability determination to (1) sign a statement that he or she has answered all the questions in a complete and truthful manner and agrees, with the applicant, to the release of all medical records relating to the applicant that may be requested by the Service, and (2) an attestation

stating that any knowingly false or misleading statements may subject the medical professional to possible criminal penalties under Title 18, United States Code, Section 1546. Title 18, United States Code, Section 1546 provides in part:

> ...Whoever knowingly makes under oath, or as permitted under penalty of perjury under Section 1746 of Title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement - shall be fined in accordance with this title or imprisoned not more than ten years, or both.

In addition to the criminal penalties of Title 18 noted above, the applicant and licensed medical professional are subject to the civil penalties under section 274C of the Act, Penalties for Document Fraud, 8 U.S.C. 1324c.

The Service has many concerns over the preservation of integrity but cannot expect the public to wait for the implementation of a possible alternative determination process. Other federal agencies have advised the Service that their experience with accepting documentation from attending physicians has in some instances been negative. For this reason, the Service has elected to reserve the right to request additional medical records relating to the applicant's disability if the Service has reason to question the disability determination or certification.

The Service is also reserving the right to refer the applicant to another authorized licensed health care provider for a supplemental disability determination. This option will be invoked when the Service has credible doubts about the veracity of a medical certification that has been presented

by an applicant. The Service will likely be faced with cases where non-disabled individuals, fully capable of meeting the functional English and United States civics requirements of section 312, will attempt to gain a disability exception. Therefore, the Service must be free to use reasonable means to prevent fraud in the disability determination process and to ensure that the integrity of United States citizenship is preserved.

The Service notes that it is not the responsibility of this agency to provide disabled applicants with lists of bilingual medical professionals, nor is it the responsibility of the Service to provide lists of licensed health care providers qualified to perform the disability determinations. The burden is on the applicant to provide the documentation deemed necessary for the Service to make a determination as to the qualifications of the applicant for any benefit requested under the Act.

The public must also note that the naturalization program is financed entirely by the fees paid by the naturalization applicant. No Congressionally appropriated funds are dedicated to the naturalization adjudicative process. The creation of any alternative determination process would need to be financed either by the user fees paid by applicants or by other as yet unidentified non-fee sources of funding. The Service desires to learn the public viewpoint on various alternative disability determination processes.

In its proposed rule, the Service specifically requested public comments on the requirements for the medical certification. Only two commenters made specific suggestions that the Service would better serve the public as well as its own interests by creating a new public use form. Initially, the Service proposed that the medical professional making the certification issue a one-page document, attesting to the origin, nature, and extent of the applicant's condition as it relates to the disability exception. The certification was specified to be only one page in an attempt to keep applicants from

submitting entire medical histories that the Service has no experience with or capacity to archive.

The Service has determined that the creation of a new public use form will be a benefit to both the Service and the public. In particular, creation of a form will take the burden off both the applicant and the licensed medical professionals with regard to information dissemination. The form's instructions will include complete explanations of the disability categories and define which licensed medical professionals can execute the certification. A new form will allow the licensed medical professionals to state simply, via reference to the instructional guidelines, how the applicant's disability prevents the applicant from learning the information needed to fulfill the requirements of section 312 of the Act. The form will also allow the licensed medical professionals an opportunity to comment on how their particular medical experience qualifies them to render complex disability assessments.

As previously noted, the Service also believes that a form will ensure the integrity of the disability determination process (a vital concern of the Service) by requiring the licensed medical professionals to sign and declare that the examination and certification is accurate under penalty of perjury. The new form will also allow for the submission of additional background medical documentation, upon request of the Service, which may reduce the likelihood of fraud. Lastly, Service offices will be advised, and the public should note, that the Service will accept photocopies of the new Form N-648, Medical Certification for the Disability Exception, until the form becomes fully available to the public.

Other Naturalization Requirements

Issue. Must disabled naturalization applicants meet the other requirements for naturalization, including the ability to take an oath of renunciation and allegiance? In order for an applicant for

naturalization to be approved, the Service must be satisfied that the applicant has met the requirements as stipulated in the Act. The 1994 Technical Corrections Act amended the Act regarding the requirements found in section 312, but did not amend the requirements found in section 316 (Requirements as to Residence, Good Moral Character, Attachment to the Principles of the Constitution, and Favorable Disposition to the United States). Neither did it amend section 337 (Oath of Renunciation and Allegiance). Therefore, the Service did not address any of the other requirements for naturalization in the proposed rule.

Summary of Public Comments. While the Service did not address the other requirements for naturalization, 92 commenters did make direct references to these requirements. The vast majority of these writers (89 of the 92) stated that it was incumbent upon the Service to waive the other naturalization requirements for applicants with disabilities, in particular the oath of allegiance. Commenters stated that the intent of Congress was to relieve the disabled from requirements they could not be expected to meet, to remove barriers in the naturalization process for the disabled applicant, and not to create an additional test whereby disabled applicants would in effect be tested on their ability or capacity to take the oath.

Writers stated that while Congress did not directly address the issue of the other requirements for naturalization, it was the obligation of the Service to comply with Congressional intent and waive the oath requirement. These commenters stated that by not waiving the oath, the Service would place the disabled applicant in a situation of being exempt from the civics requirements of section 312, but required to have a working knowledge of civics in order to take and understand the oath of allegiance. Writers further stated that this situation of exempting certain requirements but holding the disabled applicant to other requirements would be a violation of the Rehabilitation Act of 1973

and the Department of Justice regulations. These regulations prohibit the government from utilizing "criteria or methods of administration the purpose or effect of which would...(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons" (28 CFR 39.130 (b)(3))

These writers noted it was not only the obligation of the Service to follow Congressional intent, but that the Service has the authority to waive the oath requirement for any applicant under the Service authority to naturalize applicants via the administrative naturalization process. This administrative naturalization authority was given to the Service by Congress as part of the Immigration Act of 1990. Twenty of these writers also suggested that the Service consider the alternative idea of allowing a family member, legal guardian, or court appointed trustee to stand in for the disabled applicant during the administration of the oath. This would in effect create an oath by proxy procedure, available to the disabled applicant when the disability prevents the applicant from understanding the language of the oath

Two writers stated that the Rehabilitation Act of 1973 and companion disability-related statutes were enacted to ensure fairness to disabled persons with regard to employment and physical accessibility. Therefore, they do not relate to the naturalization process. These commenters stated that the other naturalization requirements, in particular the oath, are mandatory and should not be waived for any applicant, disabled or not. One additional writer suggested that the Service seek clarification from Congress on the issue of disabled applicants unable to meet all the requirements for naturalization.

Response. The Service did not address the issue of the oath in the proposed rule since Congress did not amend section 337 of the Act in the 1994 Technical Amendment Act. However,

the Service realizes the concern that exists within the disability community as to this naturalization requirement.

The Service already makes reasonable accommodations in cases where individuals are unable, by reason of a disability, to take the oath of allegiance in the customary way prescribed in section 337 of the Act. For example, it is the common practice of all Service offices to conduct naturalization interviews and to administer the oath of allegiance outside of the local Service office in instances where the applicant is either home-bound or confined to a medical facility.

Such accommodations remain available for disabled individuals who signal their willingness to become United States citizens and to give up citizenship in other countries. Whether further accommodations or waivers of the oath requirement are possible within the existing statutory framework present difficult legal issues which the Service will address through further guidance or regulations as soon as possible.

Acceptance of Disability Certifications from Other Government Agencies

Issue. Should the Service accept disability certifications issued by other government agencies? In the proposed rule at § 312.2(b)(2), the Service noted that it may consult with other federal agencies in determining whether an individual previously determined to be disabled by another federal agency has a disability as defined in the proposed rule language. This consultation could be used in lieu of the Service-required medical certification.

Summary of public comments. Thirty-eight commenters stated that the Service should be obligated to accept a certification of a disability from a federal or state governmental agency in lieu of having the disabled naturalization applicant seek an additional medical certification.

Response. The Service has consulted with other federal agencies regarding this matter. It

was pointed out to the Service that with most agencies, the determination of a disability leads to either a financial or medical benefit. The SSA noted that the criteria they review prior to granting an individual a disability benefit (in particular, can the person work and thus support themselves financially) is entirely different than the requirements that all applicants applying for naturalization must meet. In addition, a disability which might render an individual eligible for a financial or medical benefit from another federal or state agency may not in all cases render the same individual unable to learn the information required by section 312 of the Act.

After careful review, the Service has determined that it will not accept certifications from other government or state agencies as absolute evidence of a disability warranting an exception to the requirements of section 312. However, and as noted in the proposed rule, the Service reserves the right to consult with other federal agencies on cases where an applicant has been declared disabled. The Service notes that the unquestioned acceptance of another agency's disability determination would equate to a blanket waiver of the section 312 requirements for anyone with a disability that has been so recognized by another agency. Such a blanket waiver, based on stereotypical speculation that persons with disabilities are unable to participate in mainstream activities, is contrary to the provisions of section 504 of the Rehabilitation Act of 1973.

Appeal Language

Issue. Should a special appeal procedure be created for disabled naturalization applicants?

Summary of public comments. Twenty-six commenters noted that in the proposed rule, the Service failed to include any references to an appeal procedure for a disabled naturalization applicant who is denied naturalization based on the Service not accepting a medical certificate attesting to a disability. Six of these commenters stated that since Service officers were not medical professionals,

they should be obliged to accept a medical certificate. These same commenters additionally stated that any applicant's certificate that might be denied be afforded an immediate appeal to the local Service district director. Three commenters suggested that the Service be required to obtain independent medical evidence prior to denying any naturalization case, based on questions about the disability certification. Twelve commenters stated that the Service should be obligated to establish a separate appeal process for disabled applicants, also repeating the request that the appeal be forwarded immediately to the local Service district director.

Response. All applicants seeking to naturalize, including disabled applicants, may avail themselves of the hearing procedure already in place in the event the naturalization application is denied. Applicants may request a hearing on a denial under the provision of section 336 of the Act. The regulations governing these hearings are found at § 336.2. The review hearing will be with other than the officer who conducted the original examination and who is classified at a grade level equal to or higher than the grade of the original examining officer. Applicants may submit additional independent evidence as may be deemed relevant to the applicant's eligibility for naturalization. If the denial is sustained, the applicant may seek de novo reconsideration in federal court. With the additional training Service adjudication officers will receive regarding disabilities and the disability-based exception to the requirements of section 312, the Service is of the opinion that in the interim, the current hearing procedure for a denied naturalization application is sufficient.

In the interest of making an accommodation, the Service is considering a modification to the current hearing procedure. The procedure under consideration contemplates using the current hearing process augmented with an independent medical opinion issued on the disability finding. This opinion could be issued by a medical professional that the applicant has been referred to by the

Service, especially in instances where the Service officer questions the medical certification. An augmented hearing process would need to be financed through the user fees paid by the applicant or by other as yet unidentified non-fee sources of funding. As noted previously, the naturalization program is entirely funded by user fees, with no additional funding appropriated by the Congress. The Service welcomes additional public comments on this idea. However, such a procedure would necessitate a separate regulatory amendment to 8 CFR 336.2.

Reasonable Modifications/Accommodations, Special Training, and Quality Control

Issue. Should examples of reasonable modifications and accommodations to the naturalization testing procedure be included in the language of the regulation? Noted in the preamble to the proposed rule were statements that pursuant to section 504 of the Rehabilitation Act of 1973, the Service would make reasonable modifications and accommodations to its testing procedures to enable naturalization applicants with disabilities participation in the process.

Summary of public comments. Twenty-two commenters raised specific references to the modifications and accommodations. In particular, commenters felt that the Service should include in the text of the final rule examples of the modifications or accommodations which might be afforded the disabled applicant during the testing and interview process. Writers stressed that appropriate modifications depend upon the applicant's individual needs. One commenter stated that it would be more efficient for the Service to interview persons with disabilities off-site rather than modifying each officer's work station in each Service office for complete disability access.

Response. The Service is in full compliance with its obligations under section 504 of the Rehabilitation Act and provides accommodations and modifications to the testing procedures when required. The Service currently makes regular accommodations and modifications for disabled

applicants for the full range of its services.

However, the Service has reservations about including language within the text of the regulation detailing specific accommodations or modifications. It is the opinion of the Service that the appropriate place for such language is in the accompanying field policy guidance and instructions that will be distributed to all Service offices upon publication of this final rule. Service offices are routinely reminded of the obligations section 504 places on all governmental agencies regarding accommodating persons with disabilities. The Service notes that it is current Service policy to conduct off-site testing, interviews, and where authorized, off-site swearing-in ceremonies in appropriate situations.

Four commenters suggested that the Service create special training directed at Service officers in all local Service offices. This training would remind officer staff of their responsibilities under section 504 of the Rehabilitation Act and offer staff examples of exact modifications and accommodation to the testing procedures. An example might be the officer taking into account the special testing needs of naturalization applicants with learning impairments. The Service agrees with this suggestion and will initiate special training for local district office adjudication officers. Program staff at Service Headquarters are currently working on the creation of this training module and plan to provide this special training as close to the publication of the final rule as possible. The Service asks the public for suggested training methods which may be of value to the adjudication officers responsible for hearing those cases where the applicant is requesting a disability-based exception to the requirements of section 312.

In addition to the special training efforts that will be undertaken, the Service is committed to ensuring that substantial quality control mechanisms are followed regarding these disability-related

naturalization adjudications. Currently, all Service offices responsible for processing naturalization cases must comply with mandatory quality control procedures. These procedures include regular supervisory review of every stage of the naturalization process, from clerical data entry and final decisions, to regular Form N-400 random samplings. These quality control procedures are not optional instructions that Service offices are encouraged to follow. These procedures are mandatory for every office. The Service is committed to ensuring that all naturalization cases are handled properly, administratively processed correctly, and adjudicated fairly.

The Service will supplement these current quality control procedures with additional procedures particularly directed at cases where applicants have requested an exception from the requirements of section 312. These procedures will include the previously referenced special training efforts for local Service adjudicators as well as supplemental random samplings of cases where the applicant has a disability and has requested an exception. The Service is currently investigating the possibility of entering into a contract with a private entity to perform these random samplings. Such an arrangement would ensure an unprecedented level of objectivity in reviewing disability-related cases. It would also allow the Service to gain independent medical viewpoints on these disability adjudications as well as opinions on medical certifications which may have been questioned by the local Service officer. The Service requests public comments on additional quality control methods which may assist the Service in ensuring that its disability related adjudications are fair and accurate

Exemption of all section 312 Requirements for the Elderly

Issue. Should the Service grant a total exemption to the elderly for the requirements of section 312 of the Act?

Summary of public comment: While the proposed rule did not address the issue of applicants

over the age of 65 being exempted from all requirements of section 312, 16 commenters urged the Service to adopt such a policy. Writers based their requests on the assumption that applicants over the age of 65 are inherently unable to learn a new language or information on United States civics due to their advanced age. Therefore, commenters suggested a new policy whereby elderly applicants would have the naturalization requirements found under section 312 waived. One additional writer asked that the Service waive the English requirements for any legal immigrant attempting to naturalize.

Response. Section 312 of the Act offers no blanket exemption to applicants over the age of 65 with respect to the English proficiency requirements. Congress has afforded naturalization applicants over the age of 50 with 20 years of permanent residence and applicants over the age of 55 with 15 years of permanent residence an exemption from the English language requirements. Congress has not, however, expanded these exemptions to other groups. Congress has also granted "special consideration" to applicants over the age of 65 with 20 years of permanent residence regarding the civics knowledge requirements. (The Service will address the section 312 "special consideration" provisions in the overall regulatory revision of 8 CFR part 312.)

The Service cannot create a new exemption category to the Act. Only the Congress has the authority to amend the Act. As such, the Service cannot act on this particular suggestion.

Treating Applicants with Disabilities with Compassion and Discretion

Issue and summary of public comments. The need for compassion and discretion in adjudicating disability naturalization cases. In the Service's preliminary guidance to field offices regarding section 312 disability naturalization cases, dated November 21, 1995, offices were reminded to use compassion and discretion in their dealings with disabled applicants. Fifteen

commenters noted that this language was missing from the proposed rule and requested the Service to include said language in the text of the final rule.

Response. The Service understands the desire of the disabled advocacy community to have this language included in the final rule. However, the Service feels that such language is more appropriate for inclusion in the supplemental policy guidance that will be distributed to field offices upon publication of this rule. The special training previously mentioned that the Service will require for adjudication officers will also stress the need for compassion and discretion in dealings with all applicants for benefits under the Act.

A Single Test and Single Determination

Issue and summary of public comments. Should the Service use a single test and single determination process? Seven commenters noted that the proposed rule implies that there are two separate tests, due to the structure of the regulation which addresses English proficiency at § 312.1 and knowledge of United States civics at § 312.2. The Service was therefore urged to adopt a single test format. These commenters also suggest that the Service only require one determination for the medical certification process.

Response. The Service notes that while the current structure of the regulation features two distinct parts regarding English proficiency and knowledge of United States civics, current procedures do, in effect, offer applicants a single test. During the mandatory naturalization interview, the applicant's verbal English proficiency is determined by the spoken interaction between the adjudication officer and the applicant. Most civics testing is also done orally, which provides the adjudication officer with additional evidence of the applicant's English proficiency. The public should also note that in the Request for Comments contained in the proposed rule, the Service emphasized

that the entire regulatory structure of 8 CFR part 312 was under review. Commenters' suggestions about combining the requirements of §§ 312.1 and 312.2 into one consolidated section shall be considered during the redrafting of 8 CFR part 312.

With regard to the request for a single determination of the disability, the Service will require each applicant requesting an exception to the requirements found at section 312 to submit a single medical certification. The certification should note the existence of the disability, and the recommendation of the medical professional that the applicant be exempted from the requirements of section 312. This certification must address, however, both the English proficiency and United States civics knowledge requirement and the applicant's inability to meet either one or both of the requirements. This is necessary since both requirements must be met in order for the individual to be naturalized, absent a waiver.

Expedited Processing for Applicants with Disabilities

Issue and summary of public comments. Should persons with disabilities be afforded expedited processing of their naturalization applications? Four commenters addressed the issue of expedited processing of naturalization applications for persons with disabilities. Three writers stated it was the obligation of the Service to expedite these naturalization cases, in that the applicant's status with other government agencies regarding eligibility for social service benefits could be affected by the applicant's not being a United States citizen. One of these commenters suggested that the Service institute a 30-day processing window for disabled applicants, to ensure that the Service could grant the applicant any reasonable modification necessary to possibly take part in the normal testing procedure. One writer noted that the disabled should not be granted expedited processing in that such an accommodation would be inconsistent with current Service policy.

Response. The policy of the Service, found in the Operating Instructions at §103.2(q), is to process all applications in chronological order by date of receipt. This procedure ensures fairness and equity for all applicants. The Service shall continue to observe this procedure with regard to naturalization applications from persons with disabilities. The public should note, however, that any applicant able to show evidence of an emergent circumstance may request an exception to this policy from the local district director. It is within the discretion of the district director to either grant or deny a request for expedited processing of any Service adjudication.

Miscellaneous Comments

Ten commenters implored the Service to take into consideration their particular personal circumstances surrounding disability naturalization cases currently or about to be submitted to the Service. While the Service has empathy for these writers, the proposed rule for which comments were solicited addressed procedural issues, not particular cases. The Service is confident that each of these individual cases will be adjudicated equitably when presented to an adjudications officer for review.

One writer expressed dismay that the Service was considering an exception to the section 312 requirements for certain disabled aliens attempting to naturalize. This writer stated that disabled aliens should be required to return to their native countries and that the United States should focus its attention on assisting native-born disabled citizens. The Service would note that the 1994 Technical Corrections Act mandates this change to the Services' regulations. The Service is obligated to follow the direction of the Congress when Congress so amends the Act.

One commenter suggested that the Service embark upon a media campaign in order to notify disabled persons about the provisions of this legislative change. The writer speculated that there is

no method in existence by which the Service can notify the disabled community of this possible exception. Based on the number of comments received from various disabled rights advocacy groups, the Service is of the opinion that the vast majority of individuals who might benefit from this exception will have a means of being informed about the provisions of the exceptions. The Service would also note that it is working with the SSA on informational materials for all alien SSA beneficiaries who may wish to apply for naturalization.

One writer noted that the current application for naturalization, Form N-400, should be amended to include references to the disability related exceptions. The Service recognizes this problem and notes that the N-400 is currently under revision. Any revision will include information regarding the disability exceptions to the section 312 requirements and will be submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act.

Another commenter requested that the Service be flexible in adjudicating naturalization applicants from disabled persons. The Service has every intention of being flexible in these adjudications to the extent allowable under the law. The special training effort that will be instituted should assist the Service in meeting the goals of being flexible and fair in the adjudication of these naturalization applications.

Request for comments

The Service is seeking public comments regarding the final rule. In particular, the Service is seeking comments regarding the modifications made to the proposed rule, published at 61 FR 44227. It should again be noted that the Service is engaged in an additional revision of 8 CFR part 312. That additional revision will be issued as a proposed rule, also with a request for public comments.

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.

Executive Order 12988

This interim rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act. The OMB control number for this collection is contained in 8 CFR part 299.5, Display of control numbers.

List of Subjects

8 CFR Part 299

Immigration, reporting, and record keeping requirements.

8 CFR Part 312

Citizenship and naturalization, Education.

8 CFR Part 499

Citizenship and naturalization.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 299--IMMIGRATION FORMS

1. The authority citation for part 299 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103; 8 CFR part 2.

2. Section 299.5 is amended by adding the entry for Form "N-648", to the listing of forms, in proper numerical sequence, to read as follows:

§ 299.5 Display of control numbers.

*****

INS form No.	INS form title	Currently assigned OMB control No.
*****		
N-648	Medical Certification for the Disability Exception	1115-XXXX
*****		

PART 312--EDUCATIONAL REQUIREMENTS FOR NATURALIZATION

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

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

4. 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 a medically determinable physical or mental impairment or combination of impairments which has lasted or is expected to last at least 12 months, to demonstrate an understanding of the English language as noted in paragraph (a) of this section. The loss of any cognitive abilities based on the direct effects of the illegal use of drugs will not be considered in determining whether a person is unable to demonstrate an understanding of the English language. For purposes of this paragraph, the term medically determinable means an impairment that results from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques to have resulted in functioning so impaired as to render an individual unable to demonstrate an understanding of the English language as required by this section, or that renders the individual unable to fulfill the requirements for English proficiency, even with reasonable modifications to the methods of determining English proficiency as outlined in paragraph (c) of this section.

* * * * *

5. 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 to demonstrate a knowledge and understanding of the fundamentals of the history, and of the principles and form of government of the United States because of a medically determinable physical or mental impairment, that already has or is expected to last at least 12 months. The loss of any cognitive skills based on the direct effects of the illegal use of drugs will not be considered in determining whether an individual may be exempted. For the purposes of this paragraph, the term medically determinable means an impairment that results from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques to have resulted in functioning so impaired as to render an individual to be unable to demonstrate the knowledge required by this section or that renders the individual unable to participate in the testing procedures for naturalization, even with reasonable modifications.

(2) Medical certification. All persons applying for naturalization and seeking an exception from the requirements of § 312.1(a) and paragraph (a) of this section based on the disability exceptions must submit Form N-648, Medical Certification for Disability Exceptions, to be completed by a licensed medical doctor or a licensed clinical psychologist. Form N-648 must be submitted as an attachment to the applicant's Form N-400, Application for Naturalization. These medical professionals shall be experienced in diagnosing those with physical or mental medically determinable impairments and shall be able to attest to the origin, nature, and extent of the medical condition as

it relates to the disability exceptions noted under § 312.1(b)(3) and paragraph (b)(1) of this section. In addition, the medical professionals making the disability determination must sign a statement on the Form N-648 that they have answered all the questions in a complete and truthful manner, that they (and the applicant) agree to the release of all medical records relating to the applicant that may be requested by the Service, and that they attest that any knowingly false or misleading statements may subject the medical professional to the penalties for perjury pursuant to Title 18, United States Code, Section 1546 and to civil penalties under section 274C of the Act. The Service also reserves the right to refer the applicant to another authorized medical source for a supplemental disability determination. This option shall be invoked when the Service has credible doubts about the veracity of a medical certification that has been presented by the applicant. An affidavit or attestation by the applicant, his or her relatives, or guardian on his or her medical condition is not a sufficient medical attestation for purposes of satisfying this requirement.

*****

(Approved by the Office of Management and Budget under control number 1115-0208)

PART 499--NATIONALITY FORMS

6 The authority citation for part 499 continues to read as follows:

Authority: 8 U.S.C. 1103; 8 CFR part 2.

7. Section 499.1 is amended by adding the entry for the Form "N-648", in proper numerical sequence, to the listing of forms, to read as follows:

§ 499.1 Prescribed forms.

*****

Form No.	Edition date	Title and description
*****		
N-648	XX/XX	Medical Certification for the Disability Exception

Dated:

Doris Meissner,

Commissioner,

Immigration and Naturalization Service.

Note: The attached Medical Certification for Disability Exceptions, Form N-648, will not appear in the Code of Federal Regulations.

Diana Fortuna 02/21/97 04:09:15 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Stephen C. Warnath/OPD/EOP
Subject: Rollout of disability reg and guidance

FYI, assuming you are thinking about whether to add this to our list of potential events: one problem that Steve and I talked about is that we would presumbly want such an event to stress the welfare angle, but we don't want critics to say we are relaxing the citizenship process to keep people on welfare/SSI. (This isn't true, but they might say it.) An alternative message might be that the Administration is doing all it can within the law to naturalize eligible people with disabilities, and this will have the happy side effect of helping some of those at risk in the welfare law, but citizenship only goes so far, as it should -- that we need the President's proposal to be enacted to really help those in need.

Warnath

To: Bruce Reed
Elena Kagan

From: Stephen Warnath SW
Diana Fortuna DF

Subject: INS Disability Naturalization Guidelines

Date: January 31, 1997

This memo is a quick summary of events that led to a postponement in releasing INS guidelines (and regulations) on processing naturalization applications for persons with disabilities.

The document the INS planned to release Monday defines the circumstances under which a legal immigrant with a disability can become a citizen. The thorniest legal question the INS faces is how far to go in adjusting the oath of citizenship. (Accommodations are required by civil rights laws.) A consensus developed that the INS document had not been adequately vetted within DOJ or with OMB; and certainly we had not been given an opportunity to digest its contents.

The task facing us now is to ensure that the INS and DOJ have fully explored the options so that they further each of the Administration's three goals in this area: protecting the most vulnerable, such as the severely mentally retarded, from loss of SSI and Medicaid benefits; safeguarding the integrity of the citizenship process; and working to build support on the Hill for our broader legal immigrant "fix" legislation.

To recount the events leading to the postponement: Yesterday afternoon we received a draft of INS guidance to its field offices designed to assist in implementing recently finished regulations.[1] This was the first time we received anything about the content of these guidelines. We learned this morning for the first time that the INS planned to issue those guidelines today. In addition, we learned that the INS had arranged Congressional, press and outside group briefings starting Monday. Finally, HHS, SSA and other Administration entities with a substantial interest in disability, welfare and health issues with a significant interest in these guidelines would be briefed at the same time as the general briefings with no opportunity to put in place means to help respond to any questions or problems posed by the guidelines.

We raised questions with INS about how it drafted its document to try to make sure that INS had done everything possible to perfect its guidance. Instead, we learned that there appeared to be unresolved issues or concerns by some, including within OIRA and DOJ's Office of Civil Rights and Office of Legal Counsel. Moreover, the guidance seemed confusing: it made conclusory legal

---

[1]The INS recently finished regulations addressing the naturalization process for disabled individuals, including issues of legally required accommodations and waivers of tests that are part of becoming a U.S. citizen. These regulations were initially called for by statute two years ago and are widely anticipated.

judgments that seemed to erect an insurmountable barrier to citizenship for seriously impaired individuals while, at the same time, calling that outcome into question by indicating that more legal analysis was ongoing and more guidance could be anticipated. As previously mentioned, other agencies that deal with health and welfare were not going to have any opportunity to be ready to help respond to this significant guidance because they were going to be briefed at the same time as Congress, the press and outside groups.

A further concern was whether we might inadvertently confuse the governors' consideration of welfare resolutions if this was released in the middle of their deliberations.

Unfortunately, invitations for briefings on Monday had to be rescinded and INS had to recall the regulations from the Federal Register. This is awkward and may be embarrassing, but we believe that it would be worse not to be fully confident that the guidelines are the Administration's best effort to protect America's most helpless individuals within what the laws allow.

We anticipate a very short postponement, perhaps to the end of next week or the following week.

Elena

TO: Elena Kagan
Steve Warnath
Wendy White

FROM: Diana Fortuna Diana

CC: Laura Oliven
Debra Bond

DATE: January 13, 1997

Attached is a memo from a disability advocacy organization that is suing the INS over its implementation of a 1994 law that required the INS to waive parts of the citizenship test for certain people with disabilities. This advocate (Pat Wright) apparently met with the new chief of staff as part of a larger group of civil rights leaders, and somehow this memo to Rahm emerged from it. I am not sure what he plans to do with it.

The group wants two things:

(1) A waiver or "accommodation" of the oath of allegiance: INS says that the 1994 law clearly did not allow waiver of the oath. The second notion -- that of accommodation -- is based on Section 504 of the Rehab Act, which requires the government to provide accommodations for people with disabilities. This is an interesting argument and I imagine will be considered in the lawsuit.

(2) They want a "tolling" or grace period that would allow SSI and other federal benefits to continue to be paid for legal immigrants who have pending citizenship applications at INS. Elena, I imagine you must have gone over this territory pretty carefully in August.... Am I right to assume that this option is not legally permissible?

Diana — 1. We do not generally have legal authority to toll.
2. Why don't you check w/ Randy Moss at OLC to see what he thinks of the accommodation issue. I'd suppose one could argue that if we have a legal obligation to accommodate and have not done so — and as a result of that violation of law, a person has been unable to become a citizen — then we must toll application of the statute. But that strikes me as a pretty big "if."
Elena
cc: Bruce

DREDF Disability Rights Education and Defense Fund, Inc.

Law, Public Policy, Training and Technical Assistance

MEMORANDUM

TO: **Erskine Bowles, Chief of Staff**
THE WHITE HOUSE

FROM: Patrisha Wright PW
DISABILITY RIGHTS EDUCATION & DEFENSE FUND

RE: **Citizenship For Immigrants w/ Disabilities**

DATE: January 13, 1997

Thank you for meeting with me and other members of the Leadership Conference on Civil Rights on January 9. Attached is a copy of the memo that DREDF sent to Rahm Emanuel.

I need to emphasize that the Administration's response must be a "tolling" or "grace period" which allows the continued payment of SSI and other federal public benefits to affected legal immigrants with disabilities until their citizenship applications are approved by INS.

MEMORANDUM

TO: Rahm Emanuel, THE WHITE HOUSE

FROM: Patrisha Wright, Stephen Rosenbaum
DISABILITY RIGHTS EDUCATION & DEFENSE FUND

RE: Citizenship For Immigrants w/ Disabilities

DATE: January 10, 1997

This memo follows yesterday's meeting between the White House Chief of Staff and the Leadership Conference on Civil Rights.

Immigrants ("lawful permanent residents") who have lived in the U.S. for more than five years and are not "excludable" (e.g., for violating laws, evading the draft, failing to pay taxes, trafficking in narcotics, defrauding the INS) are eligible for citizenship or "naturalization." Applicants must pass tests in English literacy and in knowledge of American history and government; submit fingerprints and photos; and complete a personal INS interview which tracks the written application itself (personal data, marital and family status, employment history, organizational memberships, etc.).

In October 1994, Congress adopted technical amendments waiving the English literacy and civics tests for applicants unable to comply "because of physical or developmental disability or mental impairment..." 8 U.S.C. § 1423(b)(1). More than two years after passage of the amendments, the INS has yet to adopt final rules implementing the statute. Local immigration officers, relying on a 2-page internal memorandum and individual discretion, have not applied the 1994 statute consistently and have made it virtually impossible until the last few months to get a waiver. Moreover, once having granted a waiver, these officers have held up applications when they are not satisfied the would-be citizen has the capacity or willingness to take the oath of allegiance. In effect, naturalization involves 3 components: English/civics tests, interview and the "oath requirement."

This stonewalling means long-term legal immigrants who lack a sufficient work history and are not veterans will be cut off such federal benefits as SSI and Medicaid within a matter of months under the Personal Responsibility Act -- unless their citizenship applications can be approved by an already backlogged INS. The immigration service estimates there are 300,000 applicants nationwide who might seek a disability waiver.

The INS did not publish proposed regulations to implement the waiver until August 1996, following the filing of a class action lawsuit by Disability Rights Education & Defense Fund, Asian Law Caucus and others. *Chow v. Meissner*, No. C-96 2422 SI (N. Dist. Calif.). An interim rule is pending at OMB and is expected to be published by next month, notwithstanding the Government's litigation posture that the statute is not subject to notice-and-comment rulemaking.

INS and DoJ have refused to seriously discuss settlement until the Court rules on their pending motion to dismiss the lawsuit on the ground that plaintiffs have not suffered any harm because none of their applications had actually been denied -- only delayed. This motion was argued October 31, along with plaintiffs' motions for nationwide class certification and a preliminary injunction to insure compliance with the spirit of §504 of the Rehabilitation Act of 1973 and the technical amendments to the immigration act. Rather than talk compromise with plaintiffs' counsel, INS has punished witnesses whose affidavits have been submitted in support of the pending motions. These witnesses -- who are neither parties to the litigation nor counsel -- have been subjected to petty harassment by senior agency officials, which interferes with their ability to serve their clients and to freely give testimony.[1]

The Government attorneys have also stated that they will not "make policy" in the context of settlement, even if the ad hoc and ambiguous policy they now defend is at odds with both the Attorney General and INS Commissioner's intensive campaign to promote citizenship and the Administration's articulated desire to soften the harsh effects of welfare reform. The victims of this policy are lawful immigrants who are disabled or elderly.

Even if the impending interim rule establishes a streamlined and uniform process for documenting a disability and determining who qualifies for a waiver, it is not expected to resolve an equally fundamental problem: Processing applicants with severe developmental disabilities, including interview questions about their capacity or willingness to take the oath. This would mean providing reasonable accommodations for the full range of disabilities and impairments or modification of the application and interview/examination process and reconciling the oath requirement with the liberalized purpose of Congress' waiver statute.

For more details, please call Stephen Rosenbaum or Arlene Mayerson of DREDF at 510-644-2555.

Attachments: Legal Background
§504 Applicability
Plaintiff Profiles
Text of Oath

---

[1] One attorney affiant was advised by the Los Angeles INS District Deputy Director, on the very afternoon of a court hearing on the pending motions, that she could no longer attend meetings of the Los Angeles Naturalization Advisory Committee. Similarly, the Chicago Acting INS District Director informed the Illinois immigrant and refugee coalition's citizenship task force that he would not attend the December meeting of that body if task force member affiants from the Polish American Association, Travelers and Immigrants Aid and World Relief were also present.

LEGAL BACKGROUND

1. The Immigration and Nationality Act, as amended prescribes the requirements for naturalization. 8 U.S.C. §§ 1401 et seq. Among other things, applicants are required to pass an English language test and an American history and government examination. 8 U.S.C. § 1423. Prior to becoming citizens, applicants must take an oath of allegiance and renunciation in a public or expedited ceremony. 8 U.S.C. § 1448.

2. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 is applied to the Department of Justice. It provides, in pertinent part, that:

> No otherwise qualified individual with a disability in the United States, as defined in [29 U.S.C. § 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive agency."

3. The Immigration and Nationality Technical Corrections Act of 1994 (§ 108(d)), 8 U.S.C. § 1423(b)(1) In 1994, creates a waiver of the tests for applicants with disabilities such that the English language and history and government requirements "shall not apply to any person who is unable because of physical or developmental disability or mental impairment to comply therewith." In adopting the Technical Corrections Act, Congress sought "to promote the acquisition of U.S. citizenship by relaxing or eliminating certain burdensome and unreasonable testing and residency requirements." Hse. Comm'ee on the Judiciary, Hse. Rep. No. 103-387 at 3-4.

4. The INS Associate Commissioner issues an intra-agency memorandum on November 21, 1995 to INS District Directors and other field directors and officers providing "preliminary guidance" on the agency's interpretation of the waiver. The guidance memo states that it was the intent of Congress to grant a "general waiver" of the testing requirements, but that applicants must still meet all other requirements of naturalization. The memo instructs adjudications officers to apply the waiver on a case-by-case basis.

5. The INS Commissioner and Attorney General are sued for not implementing the disability waiver. *Chow v. Meissner*, No. C-96 2422 SI (N. Dist. Calif.)

6. INS publishes a proposed rule on August 28, 1996 which focuses on the requirements for medical certifications and the professionals who should be designated to make the certifications. It makes broad, non-specific references to reasonable accommodations for applicants and is silent with regard to the oath of allegiance. 61 Fed. Reg. 44,222.

SECTION 504 REQUIRES REASONABLE ACCOMMODATIONS OR MODIFICATIONS

As a federal agency, the INS is bound by § 504 of the Rehabilitation Act of 1973, as amended, to provide modifications to enable persons with disabilities to benefit from its programs, including naturalization. Reasonable modifications may include, without limitation, wheelchair-accessible test sites, sign language interpreters, Braille material -- as well as modifications in the naturalization test format or test administration procedures. The principle of reasonable modification also is applicable to the administration of the oath of allegiance.

The accommodation or modification for applicants with developmental disabilities could include a facilitator for someone who is unable to express a willingness to take the oath (e.g., someone who knows a developmentally disabled person well and can assist that person in communication with others and with comprehension of a complex situation). See e.g., Technical Assistance Manual to Title II of the ADA, II-3.6100, Illus. 2 at p. 14 (Dept. of Justice 1993).

Similarly, if the Service were to determine that the applicant does not understand the "purpose and responsibilities of the naturalization procedures," 8 C.F.R. Pt. 316.12(a), an applicant's family members or professional contacts (social workers, teachers, or guardians) could attest through sworn statements that the applicant is unable to fully understand the oath, but would nonetheless be able to abide by it. An alternative accommodation would be for the applicant's family to establish a temporary or limited conservatorship, with the conservator attesting to the applicant's obligations set forth in the oath.

Modifications such as these could be accomplished by the INS without undue administrative burden or fundamental alteration of the naturalization process. See, 28 C.F.R. Pt. 39.150(a). Moreover, reasonable accommodation is necessary to ensure that applicants are able to participate in the naturalization process and enjoy the benefits and privileges that flow from citizenship.

PLAINTIFF PROFILES

M.C. immigrated from Hong Kong in 1969 and worked as a janitor. She is 85 years old and has been diagnosed with multi-infra dementia. M.C. applied for naturalization in April 1994 and almost one year later was scheduled for an INS interview, which she attended with her daughter. After showing the INS officer a letter from M.C.'s doctor and requesting a disability waiver, the daughter was told the waiver did not exist and was not allowed to accompany her mother into the interview room. M.C. was informed that she failed her interview because she could not communicate in English. In December 1995, however, M.C. received a written denial stating that she failed to satisfy the knowledge of history and government requirement. M.C. appealed the denial in January 1996 and appeared for a hearing in February 1996. She again requested a disability waiver and was told that the waiver did not exist and that she needed to satisfy the English literacy requirements. INS denied her appeal on the ground that she had failed to satisfy the English literacy requirements. M.C. was not aware that there was a procedure to reopen her case and was told that her appeal was the final step in her naturalization application. After she joined the lawsuit, M.C. received a letter stating her file would be reopened for reconsideration and that she would be requested to appear at another interview.

British national L.K.L. has mental retardation. She failed her first citizenship interview in October 1995 and was told by INS officers to return for an interview in February 1996. Between interviews, she received private tutoring to help her pass the tests. At the end of her second interview, L.K.L. came into the waiting room in tears. Her sister-in-law claims INS officers told her, "it looked like L-- K--'s whole family was trying to force her to become a citizen." L.K.L. was told not to contact INS in any way, but to await instructions on how to proceed. Her application was approved shortly after she and other plaintiffs filed suit.

M.H.C. of South Korea appeared for her May 1996 interview. Her caseworker had written to INS when she applied a year earlier describing her mental disability. She also presented a letter from her Stanford University neurologist. INS officers told M.H.C. she needed to return after two months with a letter from one of the agency's designated doctors. When her attorney asked to see this requirement in writing, he was told the "internal memo" could not be released. She was approved after the suit was filed.

M. R-B. of Mexico went to her INS interview in January 1996 and was told to return with a doctor's letter. No one advised her the letter had to be from a doctor on the INS' designated list. M. R.-B. provided a letter in March 1996 from a state agency physician stating that she had mental retardation and a seizure disorder, but has not been interviewed again.

OATH OF ALLEGIANCE

8 CFR § 237.1(a)

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.