Comment on OMB Control Number 1615-0056 (N-470)

Submitted By Joseph P. Whalen on October 14, 2011

The Information Collection regarding the USCIS form N-470 published in the Federal Register on October 12, 2011, includes:

> "This information collection was *previously published as an extension* of a currently approved information collection in the **Federal Register** on August 12, 2011, at 76 FR 50237, for a 60-day public comment period. *Subsequently, USCIS decided to conduct a comprehensive revision* of Form N-470 instead of extending the current edition. USCIS invites members of the public who commented on the 60-day extension to submit their comments on the revised form." *(Emphasis added.)*

I am happy to take this opportunity to offer comments on the revised form and its accompanying instructions. First, **regarding the Supporting Statement** dated 10-04-2011, A. 15 contains some obviously unintentional errors regarding the "burden" calculation background info: *"as a result of an increase of increase in the number of respondents from 621 to 525"*; and A.6 states:

> "This form is used by persons wanting to leave the country for extended periods of time without jeopardizing their **continuous presence requirement** for naturalization. *If this form were not available, certain individuals would not be able to leave the country without repercussions to their naturalization eligibility*." ***(Emphases added.)***

The last sentence above hits the nail squarely on the head. However, there is no such thing as a **continuous presence requirement** for naturalization purposes. There is a *continuous residence requirement* for most naturalization applicants which may be jeopardized due to a long absence. That requirement is both a prerequisite to the filing of an N-400 but also must be maintained, and may be disrupted, **after** filing up to the time of taking the oath. There is a separate *physical presence requirement* for most applicants for naturalization which is cumulative (sum total in the aggregate) and is an N-400 *filing prerequisite only*.

The **continuous *presence* requirement**[1] relates to the legal right and ability to rely on the extended absence benefits of INA § 316(b) and in this case (under this section of law), it is a *prerequisite to departure* from the U.S. after entry as, *or* adjustment of status to, an alien lawfully admitted for permanent residence (LPR).

[1] This is shorthand for an uninterrupted one-year period of physical presence and residence in the U.S as an LPR before departing abroad.

Alternatively, under INA § 317, the one year **continuous *presence* requirement** *may be fulfilled before or after the extended absence* but in either § 317 scenario, it must be completed prior to filing an N-400.

- Under INA § 317, the extended absence benefit may be "**invoked**" in an N-400 ***without*** *any requirement of putting USCIS on notice of one's intent to do so*.
- Under INA § 316(b), **the alien is required to** put USCIS *on notice* of an intent to potentially invoke the extended absence benefits in a future N-400 application.
- Under INA § 316(b) there is a window of opportunity to *put USCIS on notice through the filing of a form N-470*.
- Under INA § 317, there is no similar requirement but the form N-470 ***may*** be filed and ***may*** have advantages (i.e., include dependents) and ease the naturalization process later on.

Specifically pertaining to the revised form:

Part 1, item #1 states: " *...including the U.S. Armed Forces.)"* I must ask if it was intended to specify **civilian employees** but exclude military service members (soldiers, sailors...)?

Part 1, item #5 includes a welcome parenthetical proviso.

Part 2, item #13 asks about "all trips of 24 hours or more", I would assure that this is acceptable by running it by AAO and I hope that USCIS has done so. I disagree with it and here is the reason for that disagreement, *esp*. prong (4) in *Graves*.

*See Matter of Collado***,** 21 I&N Dec. 1061 (BIA 1998) which reinforced *Graves* (below) in further proclaiming *Flueti* no longer even a judicial doctrine:

> ".... Thus, we find that the *Fleuti* doctrine, with its origins in the no longer existent definition of "entry" in the Act, does not survive the enactment of the IIRIRA as a judicial doctrine. Rather, Congress has now amended the law to expressly preserve some, but not all, of the *Fleuti* doctrine, as that doctrine developed following the Supreme Court's 1963 decision."
> *At p. 1065*

*Matter of Graves***,** 19 I&N Dec. 337 (Comm'r 1985) held:

> (1) It is not possible to construe the uninterrupted physical presence requirement of section 316(b) of the Act, 8 U.S.C. § 1427(b) (1982), to allow departures from the United States. *INS v. Phinpathya*, 464 U.S. 183 (1984), followed; INTERP. 316.1(c)(3) overruled.

(2) The effect of *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), cannot be extended to statutory schemes which include a requirement of uninterrupted or continuous physical presence.

(3) An applicant's failure to establish that he or she has been present in the United States for an uninterrupted period of 1 year after lawful admission for permanent resident bars eligibility for preservation under section 316(b).

(4) Any departure from the United States for any reason or period of time bars a determination that an alien has been continuously physically present in the United States or present in the United States for an uninterrupted period during the period including the departure.

Specifically pertaining to the revised form instructions:

Under "**Who Should File This Form**", regarding item #1:

The inclusion of the phrase "**without any absences whatsoever**" seems to be in conflict with the information asked in Part 2, item#13 that excludes trips under 24 hours. I believe that the phrase is correct and the exclusion is in error. *See supra*.

Beyond the conflicting language noted above, this item is *ultra vires* as written because this is **not a legally mandated filing prerequisite**, *nor is it even a prerequisite to approval*. It is actually a prerequisite to departure in order to qualify to exercise the statutory right afforded by INA § 316(b) in connection with a future *N-400, Application for Naturalization*. The instructions could be improved by specifying that **one may also plan to accumulate the one uninterrupted year as an LPR prior to departure abroad and the N-470 will be invalidated (become null and void) if they don't fulfill that requirement**. *As contemplated by the statute itself, there already is a "**back-end burden of proof**" in connection with the contemplated and expected future naturalization proceedings.*

The **NOTE** regarding the importance of obtaining a re-entry permit is a vast improvement and a welcome change. It was previously easily overlooked.

The **NOTE** to the "Qualifying spouse" is intended for the spouse of a USC who will be applying under INA § 319(a) but these individuals **ONLY** fall under the provisions of INA § 316(b) **IF** *they* are the LPR employed abroad. I find the note to be a point of additional confusion that will not serve the intended purpose.

Rather than have a separate note for the spouse of a USC, the first paragraph under the heading: **Continuous residency requirements for Form N-400**, could be slightly altered to reference the minimum required 5 (or 3) years continuous residence in the U.S. in lawful permanent resident status (as an LPR) of which 30

(or 18) months of actual physical presence inside the U.S. in the aggregate is required, *as applicable*. Of course, the whole section could be dropped as superfluous. Anyone contemplating filing ***this*** form in the first place has done their homework already.

The **Exception for members of the U.S. Armed Forces** is flat-out wrong, totally unnecessary, and in fact could be **detrimental** if the U.S. ever ceases to be in a state of war. A peacetime soldier has a six-month window of opportunity to file for naturalization based on honorable service and wasting time on the form N-470 (which is NOT REQUIRED and has NO FUNCTION for a U.S. Military Member) could cause an unwanted and **disqualifying** delay. Time spent in **military service is already** officially ***considered*** to be **continuous residence and physical presence** in the U.S. and any state or USCIS Office jurisdiction ***by statute***.

INA § 328 [8 U.S.C. 1439] NATURALIZATION THROUGH SERVICE IN THE ARMED FORCES OF THE UNITED STATES

> (d) The applicant shall comply with the requirements of section 316(a) of this title, *if the termination of such service has been **more than six months** preceding the date of filing* the application for naturalization, **except that such service within five years immediately preceding the date of filing such application shall be considered as residence and physical presence within the United States.**

The final **Exception** relating to immediate naturalization eligibility under INA § 319(b) is a welcome addition but does not go far enough. Not only is a the form N-470 not required, the form N-470 is *inapplicable, prohibited and **must be denied*** as **THERE IS NO STATUTE UNDER WHICH IT MAY BE APPROVED**. As long as the issue is being addressed, perhaps USCIS should also mention the inapplicability of form N-470 to those eligible for naturalization under INA § 319 (c), (d), and (e), as well as §§ 328, 329, and 330. All of these situations would be ***incompetent filings*** and if such N-470s are not rejected outright, there should be a regulation to allow for summary dismissal as incompetent, with no right to appeal (or motion) and *any court case on the issue can arise as a part of the naturalization proceeding because **that** is the real INA benefit under consideration*. It's just a thought.

Under "**Specific Form Instructions**", instructions for part 2, item #12: there is the ability to indicate that one has **not** met the uninterrupted one -year period inside the U.S. as an LPR yet. This is understated and needs expansion. *Simply ask for the intended departure date **after** accumulating the **mandatory one-year continuous presence as an LPR required prior to departure*** if applying under INA § 316(b).

Under "**When To File**" item #1 goes too far in stating that the uninterrupted year **must** be completed **before you can file**. This is more than is specified in the actual statute. It is wrong and will not stand up to judicial review, dump it now before it is too late to avoid embarrassment.

Under INA § 316(b)(1), the N-470 is *preferably* **filed** sufficiently in advance of going abroad to work for an extended period (generally to allow the LPR to have some sense of confidence that they actually qualify and also to reassure the employer that they are not harming their employee or that the employee will bail out of the assignment). The N-470 must be filed **by a certain deadline** (before being absent for one full year). The N-470 mechanism was set up pursuant to the Congressionally devised statutory scheme in order to accomplish two things:

> (1) *Put USCIS on notice of the LPR's intention* to potentially, prospectively, and/or eventually utilize INA § 316(b) extended absence benefits, and
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> (2) Preserve eligibility to file for naturalization as expeditiously and easily as allowed in a *prospective* N-400, *Application for Naturalization*, with confidence.

Under INA § 316(b)(2), the statute requires that "such person **proves** *to the satisfaction of* the Attorney General [now USCIS] **that his absence** from the United States **for such period has been for such purpose**" in conjunction with a future application for naturalization. Paragraph (b)(2) creates a "back-end burden of proof" *to substantiate that the absence was actually for the purpose* that the applicant previously put USCIS "on notice of" when (s)he filed the N-470.

The "one year prerequisite" is **NOT** a *filing* prerequisite. The "one-year inside the U.S. as an LPR" requirement **is** a *prerequisite to the exercise of the statutory right* to the extended absence benefit under INA § 316(b). The applicant **is *obligated*** to file an N-470 before the window of opportunity to apply *slams shut at one-year absent from the U.S.* ***after qualifying to depart*** *in the first place*. In so doing, the applicant will have timely sought acknowledgement from USCIS of his or her intention to *potentially* exercise that right in the future. Proving that (s)he was actually qualified to file the N-470 is something that will be subject to verification during the N-400 naturalization proceedings, therefore, ***overemphasizing the non-existent filing prerequisite is an exercise in futility***.

I will emphasize again that the "required one-year inside the U.S. as an LPR" is not even a prerequisite to the approval of the N-470. This is due to the same "back-end burden of proof" to substantiate the sustained qualifications for the absence which is required in connection with a future N-400 naturalization proceeding.

As an example, someone might have obtained their LPR status via an Immigrant Visa obtained through a sibling. During the long wait for the visa, life went on. When the visa became available, this sibling of a USC and spouse and let's say two of their kids got their visas and travelled to the U.S. to secure LPR status. They were not quite as ready to start a new life in a new nation as they thought. The mom in this family unit was able to transfer to an American affiliate-sister company of the large company she worked for for around 20 years. They appreciate her and don't want to lose the expertise she has. After a time, she convinces them to send her back for a while so that her kids can finish high school and college, respectively. The particulars of the employer and job qualify and the N-470 is approved and the family goes back. After 16 months, the company offers mom a golden-parachute retirement and she takes it. Her kids need another year to finish their school programs. They stay abroad for an extra year **AFTER** the qualifying employment ended.

Regardless of whether mom qualified *at the time of filing* the N-470, or *at the time of approval* of the N-470, or if she *had to wait post-approval of the N-470 BEFORE departing abroad*, she grievously erred by ceasing the qualifying employment and then staying abroad too long after the covered period ended. They could have taken up to six months to pack up, wind up affairs, and return without significantly hampering N-400 eligibility.

On the other end of the spectrum, suppose that the the golden-parachute retirement deal was not a factor and we throw a different factor into the mix.

Suppose she **filed** the N-470 **after** having **LPR** status for **only 7 months** and indicated that she would wait until she had been inside the U.S. for a full year before relocating abroad? On what legal basis could the N-470 be denied **that would stand up in court**? She has sought to put USCIS on notice of her intent. She has sought to make sure that her employment qualifies. She affirmatively acknowledged that she understood that she would be required to wait before departing abroad. Lastly, it is an existing legal requirement to prove it all later during naturalization proceedings.

Back to the form instructions: Still under "**When To File**" - in the first column at the top of page 4, the separated, short, and very specific treatment of **Religious Workers** is a welcome improvement to the form instructions.

On the Evidentiary Burden and Burden of Proof:

The granting of an N-470 is a far-cry from pre-adjudicating an N-400. The following well-worn blurbs plucked from AAO Decisions citing earlier administrative and judicial precedents, reiterate that the burden of proof is squarely on the LPR to show full eligibility for naturalization.

> "There must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v. United States*, 449 U.S. 490, 506 (1981). 8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989).
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> A person may only obtain citizenship in strict compliance with the statutory requirements imposed by Congress. *INS v. Pangilinan*, 486 *U.S.* 875, 884 (1988). Moreover, "it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect" and that any doubts concerning citizenship are to be resolved in favor of the United States. *Berenyi v. District Director, INS*, 385 U. S. 630, 637 (1967).

The N-470 can be quite easily invalidated after approval in conjunction with an N-400 denial. The N-400 may be reviewed administratively via the filing of an N-336 and is subject to further tiers of judicial review under INA § 310(c) and all the way to the U.S. Supreme Court. The errant approval of an N-470 is NOT sufficient in and of itself to demand naturalization of someone who is not fully eligible for naturalization in every respect. On the other hand, an erroneously denied N-470 or an extremely delayed N-470 adjudication **may** eventually result in a *nunc pro tunc* approval. ***While a requirement for a solid one-year as an LPR inside the U.S. would be an easy prerequisite for adjudicators to deal with, it does not actually exist in the statute.***

Under "**Processing Information**" there is a possibility of a fee waiver and I know that this is allowed under the regulations but **in the future**, USCIS should not allow for fee waivers because **this is really an employment-based benefit**. I would not even make an allowance for a "non-profit" or "religious" employer because, if they can afford to send someone abroad for a year or more (and potentially their entire family, i.e. household) then they can afford the $330 filing fee (or whatever it is set at in the future).

Something Is Missing:

The form instructions and the N-472 Decision Notice (Approval) should contain the **same plain-language warning statement(s)**[2]. The substance should at least include the fact that circumstances which arise post-approval **may** invalidate that Approval **and** have negative consequences to naturalization, **or** possibly even LPR status. The Approval does not vitiate the need for a re-entry permit. A change in or end to approved employment will necessitate a swift return to the U.S. Filing taxes inappropriately and/or incorrectly may invalidate LPR status. Also the LPR and/or any member of the household may be deemed as "seeking admission" under INA §101 (a)(13)(C)(i)-(vi), as applicable:

> (13) (A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.
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> (B) An alien who is paroled under section 212(d)(5) or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.
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> (C) An **alien lawfully admitted for permanent residence** in the United States shall **not** be regarded as **seeking an admission** into the United States for purposes of the immigration laws **unless** the alien-
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> (i) has *abandoned* or *relinquished* that status,

[2] In a country that allowed an award of a million dollars to be paid by a fast-food establishment with deep pockets because it failed to tell someone that spilling hot coffee in her lap would hurt, I don't think USCIS would be out of line to tell people that they can endanger their naturalization eligibility by doing some disqualifying things.

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has *engaged in illegal activity* after having departed the United States,

(iv) has departed from the United States while *under legal process seeking removal* of the alien from the United States, including removal proceedings under this Act and extradition proceedings,

(v) has *committed an offense* identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a), or

(vi) is attempting *to enter at a time or place other than as designated* by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

It must be remembered that even with a re-entry permit and an approved N-470 (N-472 Approval Notice in hand), after 180 days, the LPR must still be admissible and have done nothing to jeopardize that admissibility or their underlying LPR status. The re-entry permit keeps the green card valid as a travel and entry document for an absence of up to two years when they are presented together (not to suggest that the green card must be presented with the re-entry permit).

Oddball Scenarios:

- A person with an N-472, who did NOT obtain a re-entry permit would be in a good position to easily obtain an SB-1 returning resident visa.
- For an individual LPR who is serving in a capacity that would be qualified under INA § 317, they could file an N-470 from abroad and later seek an SB-1 visa, enter the U.S. and apply for a re-entry permit, get fingerprinted, depart, and have the re-entry permit delivered abroad.
- An LPR who went abroad and worked without putting USCIS on notice by seeking an advance determination on the issue of eligibility under INA § 316(b) by filing an N-470, may be forced to cease the employment and return to the U.S. or endanger not only naturalization eligibility but also LPR status.

An LPR who has to rely on INA § 316(b) is definitely NOT similarly situated to the LPR covered under INA § 317.