YITH V. NIELSON AND DEFENSE STRATEGIES FOR NATURALIZATION APPLICANTS IN REMOVAL PROCEEDINGS

By Krsna Avila and Kathy Brady, ILRC

I. Introduction

This advisory focuses on defense strategies for naturalization applicants who are in removal proceedings, especially within the Ninth Circuit Court of Appeals.

In *Yith v. Nielsen*, 881 F.3d 1155 (9th Cir. 2018) the Ninth Circuit interpreted INA § 318[1] and clarified the ways that a lawful permanent resident (LPR) can naturalize despite being placed in removal proceedings.[2] Under *Yith*, an LPR may naturalize while in removal proceedings under any of the three following scenarios:

1) United States Citizenship and Immigration Service (USCIS) can adjudicate the naturalization application even if the applicant was placed in removal proceedings, as long as the proceedings were not "pursuant to a warrant of arrest";

2) A federal district court can adjudicate a naturalization application if USCIS fails to make a final decision within 120 days after the examination (naturalization interview), regardless of whether the applicant is in removal proceedings or those proceedings were "pursuant to a warrant of arrest"; or

3) While *Yith* did not concern a denial of a naturalization case, it held that if removal proceedings are not pursuant to a warrant of arrest, USCIS cannot deny the naturalization application under INA § 318. USCIS must find another basis if it wishes to deny, presumably on the merits of the application. If the applicant appeals that denial to a district court, under Ninth Circuit law, the court should be able to conduct a de novo review on the merits of the naturalization case, including if the individual is in removal proceedings. It is possible that an applicant can appeal a wrongful application of INA § 318.

Advocates will explore ways to use *Yith*, and this discussion is a starting rather than ending point. Section II of this advisory will discuss the *Yith* case and applicable laws. Section III will discuss possible defense strategies based on *Yith.*

[1] INA § 318, 8 USC § 1429, provides in pertinent part that "no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act."

[2] See INA §§ 328, 329; INS Interpretations 318.2(c) (stating that INA § 318 does not apply to certain persons who have served in the military).

Practice Tip: Although the point of this practice advisory is to determine how to obtain naturalization for your client who is in removal proceedings, it is important to represent your client on all fronts. While trying to obtain naturalization for your client, you should also be preparing in case your client is placed in removal proceedings by assessing whether your client is eligible for relief from removal, such as cancellation of removal; evaluating whether your client is removable in the first place; and assessing whether obtaining post-conviction relief to eliminate a criminal conviction would ensure that your client is not removable.

II. Background and Outline of the Case

An LPR applying for naturalization must undergo an in-person examination (commonly known as the naturalization interview) with a USCIS officer.[3] USCIS then must determine whether to grant or deny the application, within 120 days after the examination.[4] If USCIS does not grant the application, there are two possible routes to bring the application before a federal district court:

- If USCIS denies the application, the applicant may request a hearing on the denial before a USCIS immigration officer under INA § 336(a). This hearing (also referred to as a "review hearing") must be requested within 30 days of receiving the denial notice.[5] If USCIS upholds its denial after the review hearing, the applicant can file an appeal with a federal district court under INA § 310(c).[6]
- Under INA § 336(b), if USCIS fails to make a determination on a naturalization application within 120 days after the examination, the applicant may apply to federal district court for a hearing. The district court may either decide the matter by granting or denying the naturalization application, or remand the matter with instructions to USCIS.[7]

USCIS may deny, or fail to make a determination on, a naturalization application for a number of reasons. For example, it may deny an application on the grounds that the applicant has failed to establish the required good moral character or ability to speak English. In this practice advisory, we focus on USCIS' denial or failure to make a determination because the applicant has been placed in removal proceedings under INA § 318. The court in *Yith* interpreted a section of INA § 318, which provides:

[3] 8 CFR § 335.2(a).

[4] 8 CFR § 336.1(a).

[5] 8 CFR § 336.2(a).

[6] INA § 310(c), 8 USC § 1421(c), provides: "Judicial Review.-A person whose application for naturalization under this title is denied, after a hearing before an immigration officer under section 336(a), may seek review of such denial before the United States district court for the district in which such person resides in accordance with chapter 7 of title 5, United States Code. Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application."

[7] INA § 336(b), 8 USC 1447(b), provides: "If there is a failure to make a determination under section 335 before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter."

> [N]o application for naturalization shall be considered by the *Attorney General* if there is pending against the applicant a removal proceeding *pursuant to a warrant of arrest* issued under the provisions of this or any other Act. (emphasis supplied)

Turning to the facts in *Yith*, Mr. and Ms. Yith were siblings who had immigrated through their U.S. citizen stepmother. When they applied for naturalization, their cases were delayed until they filed a motion in federal district court to compel USCIS to adjudicate the applications. USCIS scheduled their examinations, and there told the Yiths that their stepmother had testified that her marriage to their father was fraudulent, and therefore the siblings had been ineligible for a visa when they entered the United States. USCIS issued notices of intent to deny their naturalization applications on the grounds that they were ineligible because they had not been lawfully admitted for permanent residence.

The deadline for USCIS to issue a final decision on their naturalization applications was 120 days after the examination. On the 119th day, USCIS issued notices to appear, commencing removal proceedings, without adjudicating the applications. The Yiths amended their complaint in district court and asked the court to consider their naturalization applications under INA § 336(b), because 120 days had passed with no adjudication. The government asserted that INA § 318 precludes a court from considering a naturalization application when the applicant is in removal proceedings. The district court ruled against the Yiths, finding that INA § 318 did preclude it from considering a naturalization case when removal proceedings were pending.

The Ninth Circuit reversed the district court. First, it found that under INA § 318, the existence of pending removal proceedings does not preclude USCIS from considering a naturalization application, *unless* the removal proceedings were brought "pursuant to a warrant of arrest," and not simply pursuant to a notice to appear. If there is no warrant of arrest, USCIS is not barred from adjudicating the case. In addition, it found that this section of INA § 318 does not apply at all to federal courts. It found that the term "Attorney General" in § 318 refers only to the executive branch (formerly the Attorney General, now USCIS within the Department of Homeland Security[8]), not the judicial branch. Therefore, a federal court can consider the naturalization case if the applicant is in removal proceedings, including if those proceedings are pursuant to a warrant of arrest. The Ninth Circuit remanded the case to district court for further proceedings in line with its opinion.

III. Possible Defense Arguments under *Yith v. Nieslen*

Yith presents new opportunities for relief for naturalization applicants who are in removal proceedings. DHS has asserted that the only option for such applicants (other than certain military personnel[9]) has been to ask the immigration judge to terminate removal proceedings under 8 CFR 1239.2(f), in cases that involve "exceptionally appealing or humanitarian factors." With removal proceedings terminated, the naturalization case can be decided. However, the Board of Immigration Appeals (BIA) held that an immigration judge cannot consider termination unless DHS decides to make an affirmative communication that the person is prima facie eligible to

[8] Although INA § 318 refers to the "Attorney General," courts interpret this to refer to USCIS because in 2002 Congress transferred the functions of adjudicating naturalization petitions to the Department of Homeland Security, including USCIS. 6 USC §§ 202(3), 251(2), 271(b)(2); *see Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 933 (9th Cir. 2007).

[9] *See* INA §§ 328, 329; INS Interpretations 318.2(c).

naturalize.[10] Simply by remaining silent and declining to provide this communication, DHS can prevent immigration judges from even considering termination.[11]

But under *Yith*, advocates can argue that:

1) INA § 318 does *not* bar USCIS from adjudicating the naturalization case while the applicant is in removal proceedings, *unless* the proceedings were brought pursuant to a warrant of arrest (see subsection 1, below);

2) If USCIS fails to adjudicate the naturalization case within 120 days after the examination, a district court can adjudicate the case, regardless of whether the person is in removal proceedings or whether such proceedings are pursuant to a warrant of arrest (see subsection 2, below); and

3) While *Yith* did not concern a denial of a naturalization case, it held that if removal proceedings are not pursuant to a warrant of arrest, USCIS cannot deny the naturalization application under INA § 318. It follows that USCIS must find another basis if it wishes to deny, presumably on the merits of the application. Under Ninth Circuit law, if the applicant appeals that denial to a district court, the court should be able to conduct a de novo review on the merits of the naturalization case (see subsection 3, below).

1. USCIS can adjudicate the naturalization application if the LPR was placed in removal proceedings that are not "pursuant to a warrant of arrest."

Under INA § 318, "no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act."

In *Yith*, the Ninth Circuit noted that INA § 318 prevents USCIS from adjudicating a naturalization application "if there is pending against the applicant a removal proceeding *pursuant to a warrant of arrest...*"[12] The court declined to give effect to 8 CFR 318.1, which provides that for purposes of INA § 318, a notice to appear "shall be regarded as" a warrant of arrest. Instead, the court found that INA § 318 is not ambiguous, and that under the plain language of the statute the two documents are distinct: a warrant of arrest is a warrant authorizing law enforcement to seize and detain a person, and a notice to appear is not.[13] Thus, in the Ninth Circuit, USCIS may adjudicate a naturalization application for an applicant who had a notice to appear issued against them, as long as the applicant did not receive "a warrant of arrest," as distinct from a notice to appear.

> **Example:** Laura applied for naturalization. Before her application was adjudicated, the government issued Laura a notice to appear (NTA) to place her in removal proceedings. They did not issue a warrant for her arrest.
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> Advocates should assert that under *Yith*, USCIS cannot deny Laura's case under INA § 318 because the removal proceedings were not pursuant to a warrant, and thus the limits imposed by § 318 do not apply. USCIS can adjudicate the application on the merits. Because § 318 does not apply, Laura should not be required to obtain an order terminating removal proceedings under 8 CFR 1239.2(f) in order for USCIS to adjudicate the application. If USCIS fails to reach a decision on the application within 120 days after the

[10] *See, e.g.*, *Matter of Hidalgo*, 24 I&N Dec. 103, 106 (BIA 2007).

[11] *Id.* at 108-110 and see concurring and dissenting opinion by Board member Filppu.

[12] *Yith*, 881 F.3d at 1165 (emphasis in the original).

[13] *Yith*, 881 F.3d at 1165-68. The court disagreed with *Klene v. Napolitano*, 697 F.3d 666, 670 (7th Cir. 2012), which had deferred to 8 CFR 318.1.

examination, Laura can ask a federal district court to adjudicate her application under INA § 336(b). See subsection 2, below. If USCIS denies the application, Laura can file an appeal to a federal district court, which can conduct a de novo review of the basis for denial, under INA § 310(c). See subsection 3, below.

Example: Bao applied for naturalization. After his interview, but before a final decision, ICE issued Bao an NTA and attached an administrative warrant for his arrest. If this is interpreted to mean that his removal proceedings are "pursuant to a warrant of arrest," then USCIS may *not* adjudicate his naturalization application, under INA § 318. What happens next can vary.

- Bao can ask the immigration judge to terminate removal proceedings under 8 CFR 1239.2(f) so that the pending naturalization application could be adjudicated by USCIS. However, if DHS declines to affirmatively communicate its opinion that Bao is prima facie eligible to naturalize, the immigration judge cannot consider the termination request.[14]

- If instead USCIS simply fails to rule on his application within 120 days after the interview, Bao can ask a federal district court to adjudicate the application on the merits under INA § 336(b). See subsection 2, below.

- If USCIS denies his application under § 318 because removal proceedings are pending, Bao can appeal the denial to federal court under INA 310(c). However, the court will only consider the basis upon which USCIS denied Bao, which is that INA § 318 applies.[15] Under *Yith,* the question should be: is Bao in fact in removal proceedings "pursuant to" a "warrant of arrest," so that INA § 318 applies to his case?

Pursuant to a warrant of arrest. If USCIS issues a notice of intent to deny under INA § 318, advocates can explore arguments that the client is not subject to § 318, because the pending removal proceedings are not "pursuant to a warrant of arrest issued under the provisions of this or any other Act." In *Yith,* the court concluded that for purposes of § 318 the definition of a "warrant of arrest" includes a warrant issued under INA § 236, and that a notice to appear (NTA) is distinct from a warrant of arrest.[16]

The court did not define when removal proceedings are "pursuant to" such a warrant, and advocates should consider arguments on this point. For removal proceedings to be "pursuant to" a warrant, must the warrant have been served on the individual, as well as provided to the immigration court at the time that the NTA is initially filed? Arguably, old administrative warrants that never were served, and new warrants that are added to the file after removal proceedings are commenced, do not trigger INA § 318. Going forward, DHS may try to build the record for *Yith* purposes. In its 2018 memorandum on new policies for issuing an NTA, USCIS directed staff in the Ninth Circuit to "consult with counsel before issuing an NTA" in a naturalization case, "based on the decision in *Yith v. Nielsen*, 881 F.3d 1155 (2018)."[17] USCIS may intend to create a record that the removal proceedings are "pursuant to" an arrest warrant, so that it can deny the application solely under INA § 318. Advocates report that DHS has filed warrants of arrest with the NTA in some cases involving LPRs in removal

[14] See discussion of *Matter of Hidalgo*, 24 I&N Dec. 103, 106, 108 (BIA 2007), above.

[15] See *Bellajaro v. Schiltgen*, 378 F.3d 1042, 1043 (9th Cir. 2004).

[16] "In short, a 'warrant of arrest' for purposes of § 1429 [INA § 318] is a writ issued under § 1226 [INA § 236] authorizing law enforcement personnel to arrest and detain an alien pending the results of removal proceedings." *Yith*, 881 F.3d at 1166.

[17] See footnotes 19 and 23 of USCIS, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens* (June 28, 2018) at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf.

proceedings. In cases where a warrant of arrest was not issued and served prior to the filing of the NTA with the immigration court, advocates should be prepared to argue that removal proceedings are not "pursuant to" a warrant of arrest.

2. A federal district court can adjudicate the naturalization application when USCIS has taken more than 120 days to make a decision following the examination, regardless of whether the applicant is in removal proceedings or the removal proceedings are "pursuant to a warrant of arrest."

If USCIS fails to decide an application for naturalization within 120 days after an applicant's examination (naturalization interview), the applicant can ask a federal district court to adjudicate the application under INA § 336(b). Section 336(b) provides that the court has the power to approve or deny the application, or remand it to USCIS with instructions.

In *Yith,* the government argued that once an applicant is placed in removal proceedings, INA § 318 strips the district court of its jurisdiction under INA § 336(b). The Ninth Circuit disagreed. It found that INA § 318 does not apply to federal courts at all. It found that the term "Attorney General" in § 318 refers only to the executive branch (formerly the Attorney General, now USCIS within the Department of Homeland Security[18]), and does not apply to the judicial branch.[19] Under *Yith*, the rule in the Ninth Circuit is that when the 120 days have passed after the examination without USCIS making a final determination, the applicant may bring the naturalization application before the federal district court and the court can adjudicate it, regardless of whether the applicant is in removal proceedings, or whether such proceedings are pursuant to a warrant of arrest.[20]

> **Example:** Let's return to the example of Bao. After his interview, but before a final decision, ICE issued Bao an NTA and attached an administrative warrant for his arrest. If USCIS fails to adjudicate his application within 120 days after the interview, Bao can ask a federal district court to adjudicate it under INA § 336(b). He can do this even if he is found to be in removal proceedings "pursuant to a warrant of arrest," because *Yith* held that INA § 318 simply does not apply to federal courts.

3. Under *Yith*'s interpretation of INA § 318, USCIS can deny a naturalization application under § 318 only if the pending removal proceedings are "pursuant to a warrant of arrest." If that is not the case, then USCIS must identify another basis for denial, presumably the merits of the naturalization application. If USCIS denies on the merits, the applicant can appeal the denial to federal district court, which can make a de novo ruling on the merits. The applicant also might be able to appeal a wrongful application of § 318.

Yith addressed a case where USCIS failed to rule on the naturalization application within the required 120 days, not where USCIS *denied* the application. However, in interpreting INA § 318, the court made a finding that affects USCIS denials. The Ninth Circuit in *Yith* held that § 318 does *not* bar USCIS from adjudicating a naturalization application, unless the proceedings are "pursuant to a warrant of arrest." Therefore, applicants for naturalization whose removal proceedings are not pursuant to a warrant of arrest can continue to press USCIS to adjudicate the application. They should not need to obtain an immigration court order to terminate proceedings under 8 CFR 1239.2(f) in order for USCIS to consider the application. (Or, rather than press for a USCIS decision, they may decide to wait the 120 days and take the case directly to district court under INA § 310(c). See subsection 2, above.)

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[18] See footnote 8.

[19] *Yith*, 881 F.3d at 1161.

[20] See discussion at *Yith*, 881 F.3d at 1161-1165.

In that situation, if USCIS wishes to deny naturalization it must find some reason other than INA § 318 to do so. Generally, this would be by denying the naturalization application on the merits. If USCIS denies the application on the merits, under INA § 310(c) the applicant can appeal that decision to district court, and the court can review the case on the merits. The district court's review under § 310(c) is robust: its "review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application."

If instead USCIS applies INA § 318, the applicant may be able to appeal that ruling under INA § 310(c) as well. For example, the applicant could appeal on the grounds that § 318 should not apply because the removal proceeding was not "pursuant to a warrant of arrest."

Some courts have held that because § 318 bars USCIS from adjudicating a case, USCIS cannot properly deny the case but must hold it in abeyance. However, the Ninth Circuit ruled differently in *Bellajaro v. Schiltgen*, 378 F.3d 1042, 1043 (9th Cir. 2004). It found that INA § 310(c) "plainly confers jurisdiction on district courts to review any denial of an application for naturalization" and that INA § 318 does not remove this jurisdiction. The court found that where immigration authorities "denied Bellajaro's naturalization application on the ground that [INA § 318] precludes the application from being considered while removal proceedings are pending," a district court could properly take the appeal and review that basis for denial. The Ninth Circuit concluded that "the district court had jurisdiction under [INA § 310(c)] to review the denial of Bellajaro's application for naturalization even though removal proceedings were pending, but the scope of that review is limited to the ground for the denial," i.e., it was limited to reviewing the application of § 318. In Mr. Bellajaro's case, the Ninth Circuit found that § 318 was correctly applied. *Bellajaro* at 1043-1044. Advocates who wish to litigate that § 318 was not correctly applied in their case should explore citing *Bellajaro* and appealing the denial to district court.

Yith opens up the possibility for clients in removal proceedings to naturalize and avoid removal. We encourage advocates to explore the various arguments presented in this practice advisory, and others, especially if their clients have limited options to avoid removal. The ILRC would love to hear from advocates who employ these and related arguments in proceedings.