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Pending Application for Naturalization as Basis for Termination

An Immigration Judge may terminate removal proceedings to allow an alien "to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility[1] for naturalization" and the case involves "exceptionally appealing or humanitarian factors." 8 C.F.R. § 1239.2(f). It is well established that neither the BIA nor Immigration Judges "have authority with respect to the naturalization of aliens." Matter of Cruz, 15 I&N Dec. 236, 237 (BIA 1975); Matter of Hidalgo, 24 I&N Dec. 103, 105-06 (BIA 2007).[2] Once removal proceedings are in progress, DHS is barred from considering an alien's application for naturalization, rendering it impossible for an alien to establish prima facie eligibility for naturalization. Perriello v. Napolitano, 579 F.3d 135, 141 (2d Cir. 2009). Furthermore, through the enactment of IMMACT 90, DHS is barred from considering an alien's application for naturalization during removal proceedings, rendering it impossible for an alien to establish prima facie eligibility for naturalization while he is in removal proceedings. Perriello v. Napolitano, 579 F.3d 135, 141 (2d Cir. 2009). Moreover, in Hidalgo, the BIA made it clear that both the BIA and Immigration Judges lack the authority to make determinations of prima facie eligibility for naturalization. 24 I&N Dec. at 106. Essentially, 8 C.F.R. § 1239.2(f) was rendered null by the provisions of IMMACT 90.

[1] An aggravated felony conviction bars an applicant from demonstrating the good moral character necessary to naturalize. Kai Tung Chan v. Gantner, 464 F.3d 289, 294 (2d Cir. 2006). If the conviction has been waived pursuant to former INA § 212(c) for the purposes of deportation, it does not preclude the government from considering the conviction for the purposes of naturalization. Chan, 464 F.3d at 294-95.

[2] In 1975, in Matter of Cruz, the BIA held that prima facie eligibility for naturalization could be established by an affirmative communication from DHS or by a declaration of a district court that the alien would be eligible for naturalization but for the pendency of the removal proceedings or the existence of an outstanding order of removal. 15 I&N Dec. at 237. However, in 2007, the BIA found that Cruz is no longer good law, based on changes in immigration law, "insofar as it contemplated that aliens would obtain declarations from courts as to prima facie eligibility for naturalization." Perriello, 579 F.3d at 140 (citing Hidalgo, 24 I&N Dec. at 105). The language of INA § 310(a) precludes courts from making such declarations, as it grants exclusive jurisdiction over naturalization applications to the Attorney General. Hidalgo, 24 I&N Dec. at 105.