

AILA BACKGROUNDER

“CITIZENSHIP AND NATIONALITY” IN NSEERS

Background: The National Security Entry-Exit Registration System (“NSEERS”) provides that “nonimmigrant aliens who are nationals or citizens of a country designated by the Attorney General” must comply with certain “Special Registration” requirements or face harsh consequences, including deportation. “Entry registration” began in October 2002 and continues to this day. “Call-in registration” began on November 15 and the last registration period concluded on April 25, 2003.

However, throughout this process, the government failed to provide clear guidelines to either the public or its personnel that would allow for uniform and consistent determinations of nationality or citizenship. Legal determinations as to citizenship and nationality are inherently complex and the only real guidance from the government for making such determinations came in the form of the following oversimplified definitions:

- “Citizen: A person owing allegiance to and entitled by birth or naturalization to the protection of a state.”
- “National: A person owing permanent allegiance to a state.”

Instead of clarifying the issue, these “definitions” perpetuated the confusion. For example: (1) many people born in a state may owe no allegiance to it and/or may not be entitled to its protection; (2) naturalization may automatically cause loss of prior citizenship; and (3) in many cases, mere birth in a country does not confer automatic citizenship.

Johnny Williams, then Executive Associate Commissioner of the Immigration and Naturalization Service, Office of Field Operations, noted in a September 5, 2002, Memorandum that “[i]f the inspecting officer learns that a nonimmigrant possesses dual nationality from one of these ... countries and is applying for admission using another nationality not cited in the FR notice, the officer *shall* refer the nonimmigrant for special registration.” (Emphasis in original.) By Memorandum dated September 13, 2002, Mr. Williams noted that if an officer has “reason to believe” that the person is a national or citizen of a designated country, “the alien *shall* be registered.” (Emphasis in original.) The second memorandum further noted that “[t]he fact that a nonimmigrant alien is born in a country designated in the FR does not, in and of itself, constitute a reason to believe that the alien is a citizen or national of that country.” No further clarification was provided on the nuances of the determination.

Issue: Under both the entry registration and call-in registration programs, the question of whether a person is a “national or citizen” of a particular country has been the source of substantial confusion. Without clear definitions for these legal constructs, many members of the immigrant community were unable to determine whether the registration requirements applied to them. Because a failure to register results in harsh consequences (criminal penalties and permanent inadmissibility), these definitional problems must be corrected.

Entry Registration: In most cases involving entry registration, the definition of ‘citizen’ and ‘national’ is unproblematic because it is a decision made by a consular officer or a Bureau of Customs and Border Protection (BCBP) officer. All citizens and nationals from five designated countries are required to register upon entry and BCBP officers have broad discretion to register any other individuals based on separate criteria. In other words, in the entry registration context, the government is making the determination *for* the foreign national. Moreover, in the usual case, the government provides such person

with documentary notice of that determination by issuing the person an I-94 Record with an “NSEERS REGISTRANT” designation and an “FIN” number.

Nevertheless, the situation is different for Canadian citizens, many of whom also might be deemed nationals or citizens of a designated country. For those entering in visitor status, no I-94 Record is issued, so there is no record of the inspection or the determination as to nationality made by an immigration officer. Likewise, for Canadian citizens who possessed a multiple entry I-94 Record prior to the implementation of NSEERS, subsequent entries are not annotated on that I-94. As a result, similar to Canadian citizens entering the U.S. as visitors, no record is created that an immigration officer has made a determination that entry registration was not required. This lack of any record creates a significant risk for such individuals because other government officials have no way of verifying that an inspection and nationality determination occurred. A subsequent immigration officer thus could conclude that the individual *is* a national or citizen of one of the designated countries and/or that the individual was subject to one of the call-in registration groups and failed to comply – subjecting that individual to harsh penalties.

Call-In Registration: The determination of nationality and citizenship in the call-in registration context was much more problematic because it involved two separate determinations – one by the foreign national and the other by a Bureau of Citizenship and Immigration Services (BCIS) officer. All nonimmigrants in the U.S. during the call-in registration period had to make a preliminary determination regarding whether they would be considered a “national or citizen” of one of the twenty-five designated countries. As suggested above, such a determination can be difficult for individuals who are or may be nationals or citizens of multiple countries. Many individuals did not understand that being born in, or having parents from, one of the designated countries might lead them to be considered a national of such country. Instead, many reasonably believed that entry into the U.S. using a passport issued by a non-designated country excluded them from the call-in registration requirements. This confusion exposed people to the harsh consequences tied to failing to comply with call-in registration.

The persistent confusion regarding the definition of “national or citizen” carried over to the determinations made by BCIS officers when individuals presented themselves for registration. The lack of consistent guidance to BCIS officers led some to take the approach that an individual should be registered if there is any possibility that he or she *could* be a national or citizen of a designated country. This goes well beyond the “reason to believe” standard articulated in the entry registration context and unnecessarily subjected many individuals to the administrative and legal burdens that flow from call-in registration. Furthermore, in all cases in which the BCIS officer determined that the individual was *not* subject to registration, *no record* or document was created to confirm that the individual appeared at a BCIS facility during the registration period. As with the Canadian situation described above, the lack of a record creates the risk that a different government officer may later conclude that the individual was subject to, and failed to comply with, the call-in registration requirements.

AILA’s Position: The solutions to the problems identified above are fairly straightforward. First, the Department of Homeland Security (DHS) must establish a uniform standard for the terms “national” and “citizen” that will lead to consistent determinations by different individuals, be they lay people or government officers. Second, the BCBP and BCIS must establish a uniform procedure for documenting (a) that an officer has determined that an individual is *not* subject to registration, and (b) that an individual *has* attempted to comply with the registration requirements.