

I Declare! I Want A New Date Of Birth On My Certificate Of Naturalization!

By Joseph P. Whalen (April 27, 2015)

The USCIS Form [N-565, Application for Replacement Naturalization/Citizenship Document](#), which currently costs \$345, is usually filed for quite valid reasons. Under normal circumstances, someone will file because their certificate has been lost, stolen, mutilated or destroyed. Other times the form is filed because there has been a legal name change due to marriage, divorce or name change by court order. Much less frequently, a gender change might occur and if properly documented will be changed on the certificate. So, as you can see there are various appropriate and *valid* purposes achieved through the filing of this form.

Conversely, there are inappropriate and *invalid* reasons for filing this form. Improper requests include unsupported name changes or changes to marital status but many of these can be remedied given time. Also, some of these requests are due to USCIS [or Legacy INS] clerical errors. In a class all by itself are requests for changes to one's date of birth. If they fall into the category of "typo" or clerical error, then it can be easily corrected and like all errors by the agency, the fee is supposed to be waived. A word of caution about the fee; if you claim that it was a mistake in certificate preparation, do not send the fee. If USCIS determines that it was **not** their fault then they will "reject" it due to there being no fee submitted. You can then reexamine the situation and re-file with fee and any required evidence.

The preceding was a bit more of a build-up than I had initially anticipated but I will now get to the point. Most requests for changes to a date of birth are denied because most are unsupported, are usually improper, and are merely attempts at fraud. Sometimes someone might want to retire early by making themselves older, "on paper only". Sometimes someone wants to make their real documents "conform" to another person's real documents. Why? You ask. It could facilitate obtaining travel documents. A sibling, cousin, niece or nephew, etc. might be desperate to emigrate, or possibly an unrelated person might pay a huge "fee" for a chance to enter the United States.

Putting all of the foregoing aside, there actually might be a legitimate reason for requesting a “correction” to one’s date of birth. Once in a while there was a deliberate lie. Sometimes people lie to make themselves younger so they can be accepted in school, or to impress a fiancé. Some folks have the misfortune to be truly “undocumented” or “under documented” due to circumstances beyond and out of their control. War, natural or human-caused disasters, or perhaps acts of terrorism might cause a person to flee abruptly. In other words, someone might literally be forced to “run for their life”.

Still others might actually be born in refugee camps with poor recordkeeping. Sometimes the workers who process the incoming refugees are forced to make educated guesses, especially when dealing with uneducated peasants who are illiterate in their own languages. Some refugees might speak indigenous languages that have no written form. Some immigrants come from cultures that record dates on a different calendar that requires difficult translations that leave room for honest mistakes that are not discovered for years.

Some of the most common mistakes are rooted in situations where official foreign documents list multiple dates in a confusing manner in a *foreign* language version of *legalese*. There may be dates of birth, registration, naming rituals, circumcision, and acknowledgement by an unwed father, or various amendments, such as adoptions and associated name changes; and perhaps relatively unrelated dates such as the parents’ dates of birth or marriage, or even divorce or death. Exactly what motivates foreign governments to record what they record, as well as how and why they record it, remains a mystery to me; and I have a Master’s Degree in Anthropology!

I will end this portion of this essay by relaying a true story. I once denied a request to change a date of birth to a date **after** the date of entry as an immigrant to this country. It raised questions concerning identity--If you were not born on the date of entry, who the hell immigrated, who are you really, how did you come to be in the U.S., and where is the person who did immigrate? It was a ridiculous and bizarre request.

Regardless of the foregoing rant, there are a few honest and legitimate reasons why a change of a date of birth should be authorized. The problem that exists today is that there is no legal authority to make such a change. Previously, there was a regulation that explicitly authorized a District Court to grant such a request through a ***Petition to Amend a Petition for Naturalization***. That old regulation was directed to the Court as the legal authority that granted the original ***Petition for Naturalization***. After the authority to Naturalize new citizens was transferred to the Attorney General and later to the Secretary of Homeland Security, the regulation was begrudgingly still used until it was repealed toward the end of 2011. That regulation is presented below,

8 C.F.R. § 334.16 Amendment of petition for naturalization.
(January 2011 version)

(a) *During pendency of petition.* An application to amend a petition for naturalization, filed prior to October 1, 1991, while such petition is pending, shall be made by the petitioner on Form N-410, with copies thereof equal to the number of copies of the petition for naturalization, and presented to the court at the hearing on the petition for naturalization. The application shall be accompanied by the fee specified in § 103.7(b)(1) of this chapter, unless it was initiated by, and for the convenience of, the government. When the court orders the petition amended, the original order shall be filed with the original petition and the copies attached to the respective copies of the petition.

(b) *After final action on petition.* Whenever an application is made to the court to amend a petition for naturalization after final action thereon has been taken by the court, a copy of the application shall be served upon the district director having administrative jurisdiction over the territory in which the court is located, in the manner and within the time provided by the rules of court in which application is made. No objection shall be made to the amendment of a petition for naturalization after the petitioner for naturalization has been admitted to citizenship if the motion or application is to correct a clerical error arising from oversight or omission. A representative of the Service may appear at the hearing upon such application and be heard in favor of or in opposition thereto. When the court orders the petition amended, the clerk of court shall transmit a copy of the order to the district director for inclusion in the Service file.

[22 FR 9819, Dec. 6, 1957, as amended at 32 FR 9635, July 4, 1967; 45 FR 10313, Feb. 15, 1980; 56 FR 50496, Oct. 7, 1991]

See: [Immigration Benefits Business Transformation, Increment I: Final Rule, Vol. 76 FR No. 167; pp. 53764-53806 \(Part III\), Monday, August 29, 2011](#), which repealed this obsolete regulation and other regulations.

The current regulation governing the adjudication of the Form N-565, is [8 C.F.R. § 338.5](#). That regulation was changed in late 2011. Below are the older and current versions.

2011	2014
<p>§ 338.5 Correction of certificates.</p> <p>(a) Whenever a Certificate of Naturalization has been delivered which does not conform to the facts shown on the application for naturalization, or a clerical error was made in preparing the certificate, an application for issuance of a corrected certificate, Form N-565, without fee, may be filed by the naturalized person. The application shall be filed at the Service office having jurisdiction over the place of residence of the applicant.</p> <p>(b) If the certificate was originally issued by a clerk of court under a prior statute and the district director finds that a correction is justified and can be made without mutilating the certificate, he or she shall authorize the clerk of the issuing court, or his or her authorized deputy, on Form N-459, in duplicate, to make the necessary correction and to place a dated endorsement on the reverse of the certificate, over the clerk's or deputy's signature and the seal of the court, explaining the correction. The authorization shall be filed with the naturalization record of the court, the corrected certificate shall be returned to the naturalized person, and the duplicate Form N-459 shall be endorsed to show the date and nature of the correction and endorsement made, and then returned to the district director. No fee shall be charged the naturalized person for the correction. The district director shall</p>	<p>§ 338.5 Correction of certificates.</p> <p>(a) <i>Application.</i> Whenever a Certificate of Naturalization has been delivered which does not conform to the facts shown on the application for naturalization, or a clerical error was made in preparing the certificate, an application for issuance of a corrected certificate may be filed, without fee, in accordance with the form instructions.</p> <p>(b) <i>Court-issued certificates.</i> If the certificate was originally issued by a clerk of court under a prior statute and USCIS finds that a correction is justified and can be made without mutilating the certificate, USCIS will authorize the issuing court to make the necessary correction and to place a dated endorsement of the court on the reverse of the certificate explaining the correction. The authorization will be filed with the naturalization record of the court, the corrected certificate will be returned to the naturalized person, and the duplicate will be endorsed to show the date and nature of the correction and endorsement made, and then returned to USCIS. No fee will be charged the naturalized person for the correction.</p>

<p>forward the duplicate endorsed authorization to the official Service file.</p> <p>(c) If the certificate was originally issued by the Service, and the district director finds that a correction was justified, the necessary correction shall be made to the certificate and a dated endorsement made on the reverse of the certificate, over the signature of the district director and the seal of the Department of Justice. A notation regarding the correction shall be placed on the Form N-565 which shall be forwarded to the Service file.</p> <p>(d) When a correction made pursuant to paragraph (b) or (c) of this section would or does result in mutilation of a certificate, the district director shall issue a replacement certificate on Form N-570 and the surrendered certificate shall be destroyed.</p> <p>(e) The correction will not be deemed to be justified where the naturalized person later alleges that the name or date of birth which the applicant stated to be his or her correct name or date of birth at the time of naturalization was not in fact his or her name or date of birth at the time of the naturalization.</p> <p>[56 FR 50501, Oct. 7, 1991]</p>	<p>(c) <i>USCIS-issued certificates.</i> If the certificate was originally issued by USCIS (or its predecessor agency), and USCIS finds that a correction was justified, the correction shall be made to the certificate and a dated endorsement made on the reverse of the certificate.</p> <p>(d) <i>Administrative actions.</i> When a correction made pursuant to paragraphs (b) or (c) of this section would or does result in mutilation of a certificate, USCIS will issue a replacement Certificate of Naturalization and destroy the surrendered certificate.</p> <p>(e) <i>Data change.</i> The correction will not be deemed to be justified where the naturalized person later alleges that the name or date of birth which the applicant stated to be his or her correct name or date of birth at the time of naturalization was not in fact his or her name or date of birth at the time of the naturalization.</p> <p>[76 FR 53803, Aug. 29, 2011]</p>
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A *de novo* review of the record demonstrates that the date of birth indicated on the certificate of naturalization is erroneous and a result of a clerical error made by U.S. Citizenship and Immigration Services (USCIS). The applicant submitted a birth certificate with her permanent residence application, erroneously translated to indicate that her date of birth was April [xxxx]. The clerical error continued through her naturalization process, despite her attempt to correct the date of birth. The applicant originally listed May [xxxx] as her date of birth in the naturalization application. Although the date of birth is crossed off in red ink and corrected to April [xxxx], there is no indication that the translation error was resolved during the naturalization interview. Therefore, a correction of the naturalization certificate is justified pursuant to the regulation at 8 C.F.R. § 338.5.

(AAO JAN142015 01E3343) at p. 3, *Appeal Sustained; DOB Corrected.*

Currently, the proper legal authority to be utilized in a “judicial” ***Petition to Amend a Certificate of Naturalization***, is unclear. I will offer suggestions for making such a request.

28 U.S.C §1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch. 646, 62 Stat. 930; [Pub. L. 85-554, §1, July 25, 1958, 72 Stat. 415](#); [Pub. L. 94-574, §2, Oct. 21, 1976, 90 Stat. 2721](#); [Pub. L. 96-486, §2\(a\), Dec. 1, 1980, 94 Stat. 2369](#).)

28 U.S.C. §1651. Writs ¹

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, ch. 646, 62 Stat. 944; May 24, 1949, ch. 139, §90, 63 Stat. 102.)

28 U.S.C. §2201. Creation of remedy ²

(a) In a case of **actual controversy** within its jurisdiction,, as determined by the administering authority, **any court** of the United States, upon the filing of an appropriate pleading, **may declare the rights and other legal relations of any interested party seeking such declaration**, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b)

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(June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, §111, 63 Stat. 105; [Aug. 28, 1954, ch. 1033, 68 Stat. 890](#); [Pub. L. 85-508, §12\(p\), July 7, 1958, 72 Stat. 349](#); [Pub. L. 94-455, title XIII, §1306\(b\)\(8\), Oct. 4, 1976, 90 Stat. 1719](#); [Pub. L. 95-598, title II, §249, Nov. 6, 1978, 92 Stat. 2672](#); [Pub. L. 98-417, title I, §106, Sept. 24, 1984, 98 Stat. 1597](#); [Pub. L. 100-449, title IV, §402\(c\), Sept. 28, 1988, 102 Stat. 1884](#); [Pub. L. 100-670, title I, §107\(b\), Nov. 16, 1988, 102 Stat. 3984](#); [Pub. L. 103-182, title IV, §414\(b\), Dec. 8, 1993, 107 Stat. 2147](#); [Pub. L. 111-148, title VII, §7002\(c\)\(2\), Mar. 23, 2010, 124 Stat. 816](#).)

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¹ Known as the **All Writs Act**.

² Known as the **Declaratory Judgments Act**.

28 U.S.C §2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

(June 25, 1948, ch. 646, 62 Stat. 964.)

If there is a legitimate need and desire to lodge a request to make such a correction, then it should probably be posed under the rather generic “Federal Question” jurisdiction of **28 U.S.C §1331**. The formal request to the District Court should probably be styled as ***Petition to Amend a Certificate of Naturalization as a Writ for Declaratory Judgment*** requesting relief through the ***Creation of a Remedy***.

Although there is actually no longer a *specific law* that directly addresses the change to a date of birth on a *Certificate of Naturalization or Citizenship*, the issue has come up before. The District of Minnesota has some well-written case resolutions that can act as a guide. I have written of this previously and am incorporating a portion of that discussion below, but first it seems wise to point out the current regulatory language that AAO has most recently relied upon to “correct” a date of birth.

“Applicable Law

Section 338 of the Act provides the statutory authority relating to the contents of a certificate of naturalization. In addition, the regulations regarding the execution and issuance of certificates of naturalization are contained in 8 C.F.R. § 338.5, and provide, in part, that:

(a) *Application*. Whenever a Certificate of Naturalization has been delivered which does not conform to the facts shown on the application for naturalization, or a clerical error was made in preparing the certificate, an application for issuance of a corrected certificate may be filed, without fee, in accordance with the form instructions.

* * *

(e) *Data change*. The correction will not be deemed to be justified where the naturalized person later alleges that the name or date of birth which the applicant stated to be his or her correct name or date of birth at the time of naturalization was not in fact his or her name or date of birth at the time of the naturalization.” *Id.* at p. 2

Please take note that I have not mentioned the Administrative Procedures Act (APA). The reason for that is that the APA is irrelevant to this discussion. *APA Judicial Review* is a request to re-examine a Final Agency Action. This essay has been devoted to devising an approach to present a specific issue to a District Court in order to obtain a court order to submit to USCIS as evidence. This essay has been an attempt to craft and advocate for an approach to obtaining a court order as a prerequisite to filing a Form N-565 that asks for a change or “correction” to a date of birth stemming from circumstances beyond and/or in-place of mere clerical error. As for the District of Minnesota, as promised, I offer the following excerpt from my earlier writing of [March 2011](#):

“Petitions To Amend Certificates Of Naturalization:

Various applicants have taken USCIS to court seeking orders to amend their certificate of naturalization as to their dates of birth. As examples, see: [Hussain v. U.S. Citizenship & Immigration Servs., 541 F. Supp. 2d 1082 \(D. Minn. 2008\)](#); [Kouanchao v. U.S. Citizenship & Immigration Servs., 358 F. Supp. 2d 837, 840 \(D. Minn. 2005\)](#); [In re Yu Hong Ting, 446 F. Supp. 203, 204 \(S.D.N.Y. 1978\)](#); [In re Konsh, 188 F. Supp. 136, 138 \(E.D.N.Y. 1960\)](#).

Court Criticism Of The Regulations:

Hussain was decided by United States District Judge Patrick J. Schiltz on March 27, 2008, in Minnesota. He performed a painstaking analysis on the topic and was rather critical of the regulations.

In discussing 8 CFR § 334.16(b), the Judge said:

“This regulation specifies certain procedural requirements, but it provides virtually no substantive guidance to a court that is asked to order USCIS to issue an amended certificate of naturalization. Indeed, the regulation does not even directly address certificates of naturalization, but instead discusses the process for amending petitions for naturalization, including those petitions that have already been granted. Because amending an already-granted petition for naturalization seems like an oddly indirect way to go about obtaining an amended certificate of naturalization, the Court asked the parties if they had been able to identify any

reason for this procedure. Both parties admitted that they had not.....”

“First, the parties agree that Hussain is not seeking a review of USCIS’s decision to deny his application for an amended certificate.”

“Thus, both parties agree that USCIS lacks the power to make the change that Hussain seeks — and that, as a result, the Court owes no deference to USCIS’s decision to deny Hussain’s application for an amended certificate.

Second, as noted, the regulation under which Hussain seeks relief — 8 C.F.R. § 334.16(b) —on its face gives courts the power to amend petitions for naturalization, but not the power to amend certificates of naturalization. The government concedes, however, that § 334.16(b) implicitly gives the Court the power to order USCIS to issue Hussain an amended certificate of naturalization.” [Emphasis added.]

Judicial Need For Regulatory Guidance:

Following an exhaustive legal and factual analysis of numerous cases from around the country and spanning decades, Judge Schiltz drew some very insightful conclusions. USCIS would be well served to take advantage of the detailed work done already.

Judge Schiltz concludes his analysis thusly:

“In sum, each of the relevant cases involves unique facts — facts reflecting the unique paths to citizenship taken by the various petitioners. As a result, distilling a set of abstract legal principles from these decisions is difficult.

In general, though, it appears that courts have granted petitions to amend when:

- (1) there is clear and convincing evidence that the birth date on the certificate of naturalization is wrong;
- (2) there is little or no evidence that the petitioner acted fraudulently or in bad faith either when he or she initially provided the incorrect birth date to immigration authorities or

when he or she later sought to amend the certificate of naturalization; and

(3) there is reliable evidence supporting the birth date that the petitioner now alleges is correct.”

At the very least, the 10th Circuit Court of Appeals has specifically rejected *Hussain* as to finding of a *cause of action* via the now repealed regulation, [8 C.F.R. § 334.16\(b\)\(2010\)](#). USCIS had conceded the cause in *Hussain*. In certain other cases, however, where there was no concession, no cause was found due to the shift of naturalization authority from the judiciary to the executive branch. Therefore, since the court had not granted any petition for naturalization, it was without authority to amend the non-existent petition; or do anything to the administratively granted applications for naturalization. It was quite reasonable to oppose the cause in those cases when the petitioners were attempting to invoke the former regulatory authority to amend a naturalization petition. I fully agree.

I am now advocating a different approach as stated above on pages 6 and 7. I have included the excerpt from *Hussain* for Judge Schiltz’ well-crafted framework for review of the merits of the request. I hope that USCIS will issue a regulation adopting the framework or at least acknowledge the potential to file a Writ (or Petition) for Declaratory Judgment and the ability for a District Court to Create a Remedy. While I will not state that the three-point analytical framework stated by Judge Schiltz is the only approach or the end-all-and-be-all approach, it is at least a darn good place to start. If this essay helps just one person, it will have been worth the effort to write it.



Dated this 27th day of April, 2015.

X

/s/ *Joseph P. Whalen*

That’s my two-cents, for now!