IMMIGRATION ISSUES RELATING TO MILITARY SERVICE: PRACTICAL PROBLEMS AND SOLUTIONS

by Margaret D. Stock and Kristan K. Exner[*]

United States military personnel are deployed in more than 100 countries around the world.[1] Not all U.S. military personnel are U.S. citizens; about 29,000 noncitizens are currently serving on active duty, and some 8,000 new noncitizens join the military each year.[2] Military personnel also have family members who are citizens of other countries; while overseas, military members meet foreigners, marry them, have children with them, adopt children overseas, and sponsor foreigners for immigrant and nonimmigrant visas. As a result of the presence of noncitizens in the U.S. Armed Forces and the global mobility of both citizen and noncitizen military members, U.S. military personnel regularly encounter immigration issues and seek the advice of experienced immigration practitioners.

Many of the immigration laws that apply to U.S. military members and their families are the same laws that apply to other U.S. citizens and noncitizens. But there are some unique laws and unique military aspects to immigration issues. This article provides an overview of the major issues in U.S. immigration law that affect members of the U.S. military and their families. It discusses Selective Service and enlistment rules, the special rules for military naturalization, the immigration impact of different types of military discharges, and military-related issues for family members of military personnel. The article also provides a brief discussion of special laws that affect persons who do not serve in the U.S. Armed Forces but work beside military members as civilian employees or contractors.

The article also explores some common military-related issues by using examples based on real cases, some of which have been published and others that this author has advised on or handled.[3] Where applicable, footnotes will refer to the published cases on which these scenarios are based. Readers are urged to consult the actual cases for more details regarding the scenarios. The article ends by providing information about special resources available to assist military members and their families with immigration-related problems.

SELECTIVE SERVICE (DRAFT) ISSUES

Military immigration problems can be said to start with the issue of how a noncitizen may end up serving in the U.S. military in the first place. The United States has a long history of requiring military service of those who live and work here when national leaders require their service in defense of the nation. Although there is currently no military draft, the Selective Service statute applies to both U.S. citizens and immigrants. The statute states:

> [I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who . . . is between the ages of eighteen and twenty-six, to present himself for and submit to

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[*] **Margaret D. Stock** is an attorney admitted in Alaska and a lieutenant colonel, Military Police Corps, U.S. Army Reserve. Ms. Stock earned her undergraduate degree in government in 1985 at Harvard-Radcliffe, her law degree at Harvard Law School in 1992, and an M.P.A. in 2001 at the John F. Kennedy School of Government at Harvard. Ms. Stock currently serves as a drilling individual mobilization augmentee (associate professor) in the Department of Social Sciences, U.S. Military Academy. The opinions expressed in this article are her own, and not necessarily the opinions of any government agency.

Kristan K. Exner is an associate attorney in the Law Offices of Cynthia R. Exner, located in New York and Connecticut. She is a graduate of the United States Merchant Marine Academy and a lieutenant in the United States Navy Reserves. She has worked for the admiralty and maritime law firm of Hill, Betts and Nash, and is a survivor of the 2002 World Trade Center attack. She specializes in removal proceedings before the immigration courts.

[1] Global Security, "Where Are the Legions? Global Deployments of U.S. Forces," *available at* http://www.globalsecurity.org/military/ops/global-deployments.htm (listing deployments of U.S. military forces worldwide).

[2] J. Preston, "U.S. Military Will Offer Path to Citizenship," *N.Y Times* (Feb. 15, 2009) at A1.

[3] Thanks to Kathrin S. Mautino for suggesting this format in the past. This is the second time this author has followed her suggestion.

> registration . . . . The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.[4]

Certain individuals who are maintaining lawful nonimmigrant status are not required to register with Selective Service, but all other male residents of the United States, both citizen and noncitizen, are required to register unless they fall within one of the exemptions listed in a separate statute providing registration exemptions to certain persons who are already serving in the military or hold certain diplomatic posts.[5] The Selective Service System maintains a helpful chart explaining who must register and under what circumstances.[6] Failure to register as required is not only a criminal offense[7] but can result in the loss of eligibility for federal jobs, federal financial aid, and other benefits, and—in the case of noncitizens who fail to register—denial of a naturalization application.

***Example*: Registration for Selective Service by Undocumented Males**

Facts. Mario's parents brought him to the United States from Mexico when he was a small child, and he has been living in California ever since. He does not have legal status, and his parents have told him that they ran across the border with him without encountering an immigration inspector. Mario has just graduated from high school and will turn 18 next month. One of Mario's friends told him that he must register for Selective Service, but Mario is afraid to register because he fears that registering will cause the Department of Homeland Security (DHS) to become aware that he is an undocumented immigrant, triggering his deportation. Mario is hoping that Congress will pass the DREAM Act[8] so he can come out of the shadows, but it has not been enacted. In the meantime, should Mario register at the Selective Service?

Legal Analysis. All male residents of the United States born after 1959 are required to register for Selective Service upon reaching the age of 18 unless they are in lawful nonimmigrant status, such as F-1 status. The obligation to register exists until the man has either registered or reached the age of 26.[9] As a male resident of the United States, Mario is required to register, and failure to register is a criminal offense. The Selective Service System advises that it does not collect any information on whether someone is undocumented.[10] Registering may also be considered necessary to qualify for immigration benefits in the future.

***Example*: Good Moral Character Issues Involving Failure to Register**

Facts. Keith is a citizen of the United Kingdom who came to the United States on an F-1 visa in 2005, when he was a 22-year-old graduate student. He married a U.S. citizen and adjusted his status to conditional lawful permanent resident (CPR) three months ago. He has just turned 25, and at his adjustment interview the examiner at the U.S. Citizenship and Immigrations Services (USCIS) warned him that he must register for Selective Service or he could be barred from naturalizing as a citizen three years later. The examiner said that Keith could register right there at the adjustment interview, but Keith was asking so many questions that the examiner was in a hurry to conclude the interview and told Keith to register on his own at a later time. Keith is opposed to the war and doesn't want to register. Must he register? What could happen if he fails to register? Can DHS later deny Keith's citizenship application if he fails to register?

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[4] 50 USCS App. §453.

[5] 50 USCS App. §456(a). (listing registration exemption for commissioned officers, enlisted men, cadets, and other members of the U.S. Armed Forces, as well as certain diplomatic personnel).

[6] The chart can be found at www.sss.gov/PDFs/WhoMustRegisterChart_7-23-08.pdf.

[7] 50 USC App. §462(a).

[8] Development, Relief, and Education for Alien Minors Act of 2009, S. 729, 111th Cong. (2009) (a bill that would provide temporary residence to certain unlawfully present young people, allowing them to obtain permanent status if they attend college or join the military).

[9] 50 USC App. §453(a).

[10] Selective Service System, www.sss.gov. ("Selective Service does not collect any information which would indicate whether or not you are undocumented.").

Legal Analysis. All male residents of the United States born after 1959 are required to register for Selective Service upon reaching the age of 18 unless they are in lawful nonimmigrant status, such as F-1 status. The obligation to register exists until the man has either registered or reached the age of 26.[11] Keith was not obligated to register while he was maintaining F-1 status. But when he stopped maintaining F-1 status and became a CPR, he was required to register. Once he turns 26, he can no longer register. If Keith were to apply for naturalization while under the age of 26,[12] his naturalization application would be denied by USCIS if he failed to register. Assuming that he remains married to and living with his U.S. citizen wife, Keith is most likely to be applying for naturalization in about three years, when he will be 28. USCIS takes the position that failure to register is not a permanent bar to naturalization, but such failure can bar naturalization if the failure was knowing and willful and occurred during the period when the applicant for naturalization is required to establish his or her good moral character. Thus if Keith applies for naturalization when he is 28 and he has not registered, he could be barred from naturalizing for failure to show good moral character during the three years when he is required to do so under INA §319(a). To naturalize when he is 28, he must provide evidence that his failure to register was not knowing and willful but based on the facts presented here, he cannot do this.[13]

ENLISTMENT ISSUES

Today there is no draft, and the U.S. military is an all-volunteer force. Yet not everyone who is required to register for Selective Service is eligible to volunteer to serve. Volunteers for military service must meet numerous requirements, including specific immigration-related criteria. Previously, each military branch had its own laws and policies about who could enlist, but in January 2006 Congress enacted a single unified enlistment statute applicable to all the armed forces. That statute provides that enlistment in the U.S. military is limited to:

(A) A national of the United States, as defined in section 101(a)(22) of the Immigration and Nationality Act.[14]

(B) An alien who is lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act.[15]

(C) A person described in section 341 of one of the following compacts:

(i) The Compact of Free Association between the Federated States of Micronesia and the United States (section 201(a) of Public Law 108-188.[16]

(ii) The Compact of Free Association between the Republic of the Marshall Islands and the United States (section 201(b) of Public Law 108-188.[17]

(iii) The Compact of Free Association between Palau and the United States (section 201 of Public Law 99-658.[18]

(2) Notwithstanding paragraph (1), the Secretary concerned may authorize the enlistment of a person not described in paragraph (1) if the Secretary determines that such enlistment is vital to the national interest.[19]

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[11] 50 USC App. §456(a).

[12] This could happen if his wife were to take up a job overseas, perhaps as an employee of the U.S. government or a U.S. corporation.

[13] INS Memorandum, William R. Yates, "INS Advises on Effect of Failure to Register for Selective Service on Eligibility for Naturalization" (June 18, 1999), *published on* AILA InfoNet at Doc. No. 99010740 (*posted* Jul. 1, 1999).

[14] 8 USC §1101(a)(22).

[15] 8 USC §1101(a)(20).

[16] 117 Stat. 2784; 48 USC §1921 note.

[17] 117 Stat. 2823; 48 USC §1921 note.

[18] 100 Stat. 3678; 48 USC §1931 note.

[19] 10 USC §504(b) (2006).

USCIS also recently updated its employment verification regulations so that anyone authorized to enlist under this statute is also authorized to work in the United States.[20]

Although it is commonly believed that the U.S. military accepts enlistments from undocumented immigrants,[21] a simple reading of the enlistment statute confirms that this is not the case. Although unauthorized or undocumented immigrants are required to register for Selective Service, they cannot lawfully enlist in the military unless a service secretary determines that their enlistment is "vital to the national interest," as required in 10 USC §504(b)(2). Since 2003, moreover, the U.S. Armed Forces have checked every recruit's immigration status by querying a U.S. government database, so that undocumented immigrants with false "green cards" can no longer enlist as they once did.[22]

To date, no service secretary has approved the enlistment of any unauthorized immigrant, but at least one secretary has authorized the enlistment of certain persons who are not legal permanent residents (LPRs). On February 23, 2009, the U.S. Army implemented a new Department of Defense enlistment pilot program, Military Accessions Vital to the National Interest (MAVNI). Under MAVNI, non-LPRs may enlist if they are legally present in the United States in E, F, H, I, J, K, L, M, O, P, Q, R, S, T, TC, TD, TN, U, or V status, or are here as a refugee or asylee or in TPS status.[23] The program requires that a potential enlistee must have been in one of these statuses for at least two years (changing between them does not disqualify the person). If a person is qualifying for enlistment under a nonimmigrant category, the person cannot have been outside the United States for a continuous period of more than 90 days. The MAVNI program also requires that a potential enlistee speak one of many needed languages[24] or be a U.S.-licensed and educated medical professional.[25] The medical professionals are primarily doctors, dentists, and nurses, though some other medical professionals might qualify.[26] Persons who enlist under MAVNI can obtain U.S. citizenship without applying for LPR status first; for example, a J-1 doctor who meets the MAVNI requirements can enlist in the Army and apply directly for U.S. citizenship, avoiding the INA §212(e) two-year home residency requirement and the adjustment process. If the MAVNI program proves to be successful, it may be expanded to other branches of the military.

***Example*: Enlistment under the MAVNI Enlistment Program**

Facts. Archana is an Indian citizen who holds H-4 status by virtue of her marriage to Ajay, an Indian citizen who holds an H-1B visa. While in the United States in H-4 status, Archana obtained a bachelor's degree in nursing from an accredited nursing school in New Jersey and passed the licensing exam for the State of New Jersey. She has been in the United States in lawful H-4 status for more than three years, and during that

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[20] Employment Authorization & Verification of Aliens Enlisting in the Armed Forces, 74 Fed. Reg. 7993 (Feb. 23, 2009) (to be codified at 8 CFR §274a.12(d)).

[21] Deborah Davis, "Illegal Immigrants: Uncle Sam Wants You" (July 25, 2007), *available at* www.inthesetimes.com/article/3271/illegal_immigrants_uncle_sam_wants_you.

Note: This article by Ms. Davis contains many factual inaccuracies, including a statement that Immigration and Customs Enforcement (ICE) processes naturalization applications, that the U.S. military can obtain a green card for recruits, and that recruits can join the military without having a Social Security number. In fact, USCIS processes naturalization applications, not ICE; the U.S. military does not routinely sponsor its recruits for green cards; and everyone who enlists in the U.S. military must have a Social Security number.

[22] Margaret D. Stock, "Essential to the Fight: Immigrants in the Military, Five Years After 9/11," Immigration Policy Center (Nov. 2006). (discussing how a few undocumented immigrants enlisted in the military prior to the military creating a process for checking immigration status electronically with DHS).

[23] Department of Defense Fact Sheet, "Military Accessions Vital to the National Interest," *available at* www.defenselink.mil/news/mavni-fact-sheet.pdf.

[24] A list of qualifying languages can be found at www.defenselink.mil/news/mavni-fact-sheet.pdf.

[25] Doctors must be U.S.-licensed, and nurses must be U.S.-licensed *and* have obtained a bachelor's or master's degree in nursing from a U.S.-accredited school or college of nursing.

[26] Health-care workers can get more information by writing to the Army at its website at https://www.goarmy.com/info/form/GetBrcFormRedirectByUrl.do?url=/info/mavni/healthcare. Nonimmigrants can inquire at www.goarmy.com/info/mavni.

time has never left. Is she eligible for the MAVNI program? If she enlists in the Army as a nurse, can she naturalize immediately? What about her husband Ajay?

Legal Analysis. Archana appears to be eligible for enlistment under MAVNI, as she meets the requirements for enlistment as an Army nurse. Archana can elect to enlist for three years of active duty, or six years in the Selected Reserve. She can apply for U.S. citizenship as soon as she enlists,[27] and USCIS is supposed to adjudicate her application within six months.[28] Assuming she has good moral character and can pass the English and civics exam, she should be granted U.S. citizenship. Archana does not have to have LPR status in order to naturalize under the wartime military naturalization statute, INA §329. Once she is a U.S. citizen, she can file an immediate relative petition for her husband Ajay. If he is eligible, he can seek adjustment of status concurrently through a one-step application.

***Example*: Citizens Who Do Not Know They Are Citizens**

Facts. Sasha came to the United States from Nigeria on an immigrant visa at the age of 12 after her father was granted an employment-based green card and she joined him along with her mother and siblings. Her father became a naturalized U.S. citizen in 2003 when Sasha was 16 and living at home with him in New York, but he did not file to obtain Sasha's U.S. citizenship. Her parents always told Sasha that it should be her choice whether or not to become an American, and she could decide when she turned 18. Sasha was busy with school, however, and never got around to filing for citizenship when she reached the age of majority. She is now in college and wants to be commissioned as an Army officer through the Reserve Officer Training Corps—but U.S. citizenship is a requirement for commissioning. Sasha filed an N-400 application, but has been told that slow processing times make it unlikely that her application will be approved for more than a year, and she needs to sign an ROTC contract in a few months. What can Sasha do?

Legal Analysis. Sasha is already an American citizen. Under the Child Citizenship Act of 2000,[29] there are three requirements which, if met, result in automatic U.S. citizenship for a child born outside the United States: (1) the child has a parent who is a citizen of the United States, whether by birth or naturalization; (2) the child is under the age of eighteen; and (3) the child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.[30] Because Sasha met all three of these conditions at the time her father was naturalized, she has been a U.S. citizen since that date. Sasha is not required to file an N-600 to obtain proof of her citizenship; instead, she can file directly for a U.S. passport.[31] If she desires, she can request expedited issuance of the passport by paying an extra fee. Many experts would encourage Sasha to file an N-600 later, after she has the passport, so that DHS will update its records to reflect her U.S. citizenship. In the past DHS did not update its immigration files automatically when someone receives a U.S. passport, so failure to file an N-600 may lead to problems with employment verification systems such as E-Verify.[32] In some cases, DHS has also wrongly arrested citizens who derived citizenship automatically. Filing an N-600 can put DHS on notice that a person has a claim to U.S. citizenship so as to prevent such wrongful arrests and to buttress a claim for damages for wrongful detention if DHS should wrongly arrest or detain the derivative citizen. Sasha's N-400 application should be denied by DHS because she is already a citizen. Unfortunately, DHS will not readily refund the N-400 filing fee, and will require her to pay a new filing fee when she files her N-600. This case demonstrates why practitioners should always screen naturalization applicants to be sure they are not already (unbeknownst to themselves) American citizens.

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[27] INA §329, 8 USC §1440 (no minimum period of residency or physical presence required; LPR status not required as a prerequisite for naturalization).

[28] Military Personnel Citizenship Processing Act of 2008 §3.

[29] Child Citizenship Act of 2000, P.L. 106-395, 114 Stat. 1631 (Oct. 30, 2000).

[30] INA §320.

[31] At the time of this writing, passport applications were also less expensive and were being processed much more quickly than N-600 applications.

[32] DHS announced on March 4, 2009, that it was integrating passport data into E-Verify. USCIS Update, "USCIS Adds Passport Data in E-Verify Process for Foreign-Born Citizens," *available at* www.uscis.gov/files/article/e-verify_passport_4Mar09.pdf.

IMMIGRATION IMPACT OF MILITARY CONVICTIONS AND DISCHARGES

Once a noncitizen enlists in the U.S. military, he or she must be careful to serve honorably for the required period of time, or the consequences can be more severe than for a U.S. citizen who serves, misbehaves, and obtains a less-than-honorable discharge. Under the unique military naturalization statutes, persons who naturalize through military service can have their U.S. citizenship revoked if they fail to serve honorably for a period or periods aggregating five years.[33] Misbehavior while in uniform can also result in the denial of immigration benefits and possible removal from the United States upon discharge.

During their time in service, military members are subject to the Uniform Code of Military Justice (UCMJ),[34] which contains both procedural and substantive criminal law provisions. Under the UCMJ military members who are accused of misconduct can be subject to both judicial and nonjudicial punishment. Generally, nonjudicial punishment under article 15 of the UCMJ will not result in serious immigration consequences, because an "Article 15" is not a conviction. But an Article 15 can affect a good moral character determination in connection with a naturalization application.

Punishment by a court-martial can have serious immigration consequences. There are three types of courts-martial, and the level of due process that each affords is different. The first type is a summary court-martial, which provides minimal due process protections; the second type is a special court-martial (or a variant thereof called a "bad conduct discharge special" court-martial); and the third is a general court-martial, which in procedural due process protections is the military equivalent of a full-fledged federal district court criminal trial. In the past, many practitioners were under the impression that only a conviction by a general court-martial would have immigration consequences,[35] but due to changes in removal laws in recent years USCIS has been using the results of special courts-martial to support charges of removability. It is beyond the scope of this article to cover the complexities of USCIS removability determinations, but practitioners who encounter military members or former military members who have convictions by one of these courts-martial should be sure to examine the record carefully to determine the immigration consequences. Do not rely on the assumption that the level of the court-martial will shield a noncitizen from any immigration consequences.

Example: Immigration Consequences of a Special Court-Martial Conviction

Facts. Jacob was a noncitizen serving in the United States Navy.[36] In 1998 the federal government charged Jacob with conspiracy, larceny, and forgery, claiming that he assisted a civilian acquaintance in defrauding a community college. Jacob, on advice of his military defense attorney, entered into a pretrial agreement to trade a guilty plea for reduced charges. Jacob asked his attorney if there would be immigration consequences to the guilty plea, and his attorney told him not to worry. Jacob then entered a guilty plea at a special court-martial made up only of a single military judge. The military judge imposed a sentence that included three months of confinement, reduction to the lowest enlisted pay grade, and a bad conduct discharge. Eight years later, in 2006, USCIS learned of the court-martial conviction and initiated deportation proceedings against Jacob.

Legal Analysis. Jacob can take the usual steps that any noncitizen would take in this situation, which would include pursuing any possibility of having his conviction vacated through military channels. If those avenues prove unsuccessful, Jacob can seek collateral relief, such as the extraordinary relief of a writ of *coram nobis*, arguing that he would not have pled guilty but for the advice of his attorney, and that extraordinary relief is warranted. The results of courts-martial are subject to collateral review by courts inside the military justice system

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[33] Both INA §328 and INA §329 were amended in 2004 to add provisions allowing DHS to revoke U.S. citizenship granted under those sections if a person "is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years." INA §328(f), 8 USC §1439(f); INA §329(c), 8 USC §1440(c).

[34] 10 USC §§801–946.

[35] *Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008) (a judgment of guilt that has been entered by a general court-martial of the United States Armed Forces qualifies as a "conviction" for immigration purposes).

[36] This example is based on the case *Denedo v. United States*, 88 M.J. 114 (CAAF 2008), *as amended* September 19, 2008, *reconsideration denied* by *Denedo v. United States*, 66 M.J. 371, 2008 CAAF LEXIS 401 (C.A.A.F., 2008), *cert. granted* by *United States v. Denedo*, 129 S. Ct. 622, 2008 U.S. LEXIS 8524 (U.S., Nov. 25, 2008).

and by courts outside the military justice system, so Jacob must decide where to pursue relief. A writ of *coram nobis* may be granted by the military criminal appellate court just as it can be granted by civilian courts. In order to be granted relief under *coram nobis*, six requirements must be met: (1) the alleged error is of the most fundamental character; (2) no remedy other than *coram nobis* is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.[37]

Immigration Implications of a Military Discharge

Courts-martial convictions can have immigration consequences, and so too can military discharges. The chart below shows the "characterization of service" for the types of discharges that a military member may receive, and the immigration consequences of each discharge.

Immigration Implications of Military Discharge

Characterization of service	Immigration consequences
Honorable discharge	Eligible for all military naturalization benefits, but U.S. citizenship may be revoked if the person failed to serve honorably for a period or periods aggregating five years.
General discharge under honorable conditions	Eligible for all military naturalization benefits, but U.S. citizenship may be revoked if the person failed to serve honorably for a period or periods aggregating five years.
Other than honorable discharge	Not eligible for military naturalization benefits. If the person had already naturalized through military service before the discharge, U.S. citizenship may be revoked if the person failed to serve honorably for a period or periods aggregating five years. Additionally, if the person was discharged for misconduct, there may be immigration consequences.
Bad conduct discharge	Not eligible for military naturalization benefits. If the person had already naturalized through military service before the discharge, U.S. citizenship may be revoked if the person failed to serve honorably for a period or periods aggregating five years. Additionally, if the person was convicted by a Bad Conduct Discharge Special Court-Martial of a criminal offense, the conviction may lead to removal charges.
Dishonorable discharge (called a "dismissal" when given to officers)	Not eligible for military naturalization benefits. If the person had already naturalized through military service before the discharge, U.S. citizenship may be revoked if the person failed to serve honorably for a period or periods aggregating five years; Additionally, if the person was convicted by a General Court-Martial of a criminal offense, the conviction is indisputably a federal criminal conviction for immigration law purposes, and may lead to removal.

A service member who is discharged may be able to apply for his or her discharge to be upgraded, either through the Discharge Board of the particular service or through a military Board for the Correction of Military Records. Upgrading a discharge may make an ineligible person qualify for military naturalization benefits. For more information about upgrading a military discharge,[38] it is advisable to consult a military or civilian attorney who is familiar with the upgrade process before attempting it.

In addition to the five types of discharges that are distinguished by the characterization of the person's service as honorable or otherwise, noncitizens can face adverse immigration consequences from certain administrative discharges that, although generally characterized as honorable, have specific statutory immigration consequences. Two such discharges are the administrative discharge on account of alienage and the administrative discharge given to conscientious objectors. An alienage discharge may make a person perma-

[37] *Id.*

[38] *See* 10 USC §1553.

nently ineligible for U.S. citizenship.[39] Furthermore, INA §329 states that "no person who is or has been separated from [military] service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section." Thus a service member who seeks to naturalize under the wartime military naturalization statute presumably cannot have been discharged on account of alienage or as a conscientious objector.

In some cases noncitizens who face potentially adverse immigration consequences as a result of misconduct while they were on military duty can avoid those consequences through effective advocacy by their immigration attorneys. The following is one such example.

***Example*: Desertion from the Military**

Facts. Amelio became a legal permanent resident in June 2003 and joined the Army for a six-year enlistment shortly thereafter. After basic training, he filed an application for naturalization under the special military wartime naturalization statute.[40] While the application was pending, Amelio was deployed to Iraq, where he served in an infantry unit. Amelio was sent home for two weeks of leave in the middle of his deployment; at the end of the leave he decided not to return to Iraq. After he was absent without leave for thirty days, the Army classified him as a deserter. Several months later Amelio was stopped for a traffic violation and the police discovered that he was listed as a deserter in the National Crime Information Center database. Amelio was arrested and returned to the Army's control. When he went back to his unit, his commander advised him that he could accept an administrative discharge for alienage or be court-martialed and face a potential federal conviction and a more serious bad conduct or dishonorable discharge. Amelio accepted the alienage discharge in 2006. Is Amelio barred from becoming a United States citizen?

Legal Analysis. Amelio is likely ineligible for naturalization under the wartime military naturalization statute, but may be able to obtain citizenship through a regular application if he is otherwise eligible. The wartime military naturalization statute prohibits the naturalization of anyone who is discharged on account of alienage.[41] While Amelio will be unable to naturalize under this statute, Amelio is an LPR who may be able to naturalize under INA §316.[42] Amelio is not necessarily barred from naturalizing because of desertion. Although the law bars the naturalization of anyone who "at any time during which the United States has been or shall be at war, deserted or shall desert the military, air, or naval forces of the United States,"[43] this bar to naturalization does not apply unless the person has been convicted by a court martial or other court of competent jurisdiction. Amelio was not convicted by a court-martial because he accepted an administrative discharge in lieu of court-martial. Amelio's listing on official military records as a deserter does not in itself bar him from naturalizing.[44] On the other hand, the administrative discharge on account of alienage may be problematic because of INA §315(a), which makes permanently ineligible for citizenship "any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces . . . on the ground that he is an alien."[45] But not all noncitizens who are discharged from the military on account of alienage are permanently barred—if an alien did not know the consequences of the discharge, he may not be barred from citizenship.[46] The U.S. Court of Appeals for the Ninth Circuit recently ruled that the "ineligible to citizenship"

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[39] INA §315, 8 USC §1426 ("any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces . . . on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."); see also National Immigration Project of the National Lawyers Guild and Daniel Levy, *U.S. Citizenship & Naturalization Handbook* (Eagan, MN: Thomson West, 2006), §8:26–8:32 (military-related bars to naturalization).

[40] INA §329.

[41] INA §329(a), 8 CFR §329.1.

[42] INA §316(a).

[43] INA §314.

[44] INS Interpretation 314.1.

[45] INA §315(a).

[46] 8 CFR §315.2(b)(4).

provisions only apply where there is a draft in place,[47] and there is no draft today. Amelio may be able to file a regular naturalization application and obtain U.S. citizenship despite his failure to complete his enlistment contract.

MILITARY NATURALIZATION CASES

Military personnel may be able to naturalize under several different statutes. Personnel with LPR status may naturalize under the regular naturalization statutes that apply to all LPRs, or under either of two special statutes that apply only to military members. Military personnel who are not LPRs may generally only naturalize under INA §329, which applies during specified conflicts, or "during any other period which the President by Executive Order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force."[48] President George W. Bush issued such an executive order on July 3, 2002, retroactive to September 11, 2001, and that order remains in effect as of this writing.[49] While that executive order remains in effect, military members may continue to naturalize under INA §329. The table below compares and contrasts the different options available to military naturalization applicants.

Naturalization Options for Military Personnel

Basis for Eligibility	Time as a Lawful Permanent Resident	Fees Charged	Continuous Residency	Physical Presence in the United States	Time in District or State	Revocation of Citizenship
LPR for at least five years (INA §318)	Must have been LPR for at least five years on the day application is filed.*	Yes	Required	Required minimum of 30 months	Required	Not subject to revocation on the basis of failure to serve honorably.
LPR for at least three years, have been married to and living with a U.S. citizen for this three years	Must have been LPR for at least three years on the day the application is filed.*	Yes	Required	Required minimum of 18 months	Required	Not subject to revocation on the basis of failure to serve honorably.
Served in the U.S. Armed Forces during recognized periods of conflict and enlist or reenlist(INA §329)	Not required.	No	Not Required	Not Required	Not Required	Citizenship may be revoked if military member fails to serve honorably for five years.
Member of the U.S. Armed Forces and have served for at least one year (INA §328)	Must be LPR on the day the application is filed.	No	Not required	Not required	Not required	Citizenship may be revoked if military member fails to serve honorably for five years.

[47] *Gallarde v. INS*, 486 F.3d 1136 (9th Cir. 2007).

[48] INA §329(a).

[49] Ex. Or. No. 13,269 of July 3, 2002, 67 Fed. Reg. 45,287 (July 8, 2002).

Basis for Eligibility	Time as a Lawful Permanent Resident	Fees Charged	Continuous Residency	Physical Presence in the United States	Time in District or State	Revocation of Citizenship
	Note: Applicants may file for naturalization 90 days before they become eligible.					

As a procedural matter, military naturalization applications differ somewhat from civilian ones. To apply, noncitizen service members must file an N-400 along with Form N-426, which verifies dates of military and honorable service, and Form G-325B, which requires biographical information. USCIS will independently verify the military member's service through its liaison channels with the military, so while the N-426 must be signed by a military official, the G-325B need contain only the basic biographical information on the applicant, and his or her signature, but need not be certified.

By law, USCIS cannot require service members to pay an application filing fee or a biometrics fee for naturalization cases filed under INA §328 or §329. Military personnel can elect to sign a form authorizing the release of their enlistment fingerprints to DHS so they do not have to report to an application support center (ASC) for biometrics. If a military member wishes to have fingerprints taken at an ASC, he or she may visit any domestic ASC without an appointment even if not yet having filed an N-400. Service members may also have their fingerprints taken at select military installations in the United States by USCIS personnel using mobile fingerprinting equipment. Service members stationed overseas may have their fingerprints taken manually at U.S. military installations or U.S. embassies and consulates using the FD-258 fingerprint card.

Most military naturalization cases are fairly straightforward and quickly processed, but the following examples highlight some of the more unusual or difficult issues practitioners may encounter.

Military Wartime Naturalization of Unauthorized Immigrants

Facts. Juan is serving on active duty in the United States Army. He enlisted in the United States after September 11, 2001, and has completed a tour of duty in Iraq. Juan has heard a "street rumor" that he can become a naturalized United States citizen despite the fact that he enlisted in the Army using a false green card. Juan is an undocumented immigrant from Mexico and has never had lawful permanent residence. Can he become a citizen, even if he has never had lawful permanent residence?

Legal Analysis. Yes, Juan can naturalize, despite his lack of lawful status. Any person serving honorably on active duty during wartime—whether or not he has been lawfully admitted for permanent residence—can naturalize, as long as he enlisted inside the United States.[50] Juan's naturalization interview and ceremony can be completed overseas if he is deployed overseas when it is time for his interview.[51]

***Example*: Military Wartime Naturalization of National Guard and Reserve Members**

Facts. Ulysses is serving in a drilling unit of the California National Guard. He has never been deployed overseas, but he has completed his National Guard basic training and has been regularly attending his drills (weekend training meetings) for a few months. Ulysses has CPR status, but he has not yet lifted the conditions on his status. Can he become a citizen as a result of his service in the National Guard? Must he lift the conditions on his CPR status before his N-400 can be approved?

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[50] INA §329(a).

[51] American Forces Press Service, "Troops Earn U.S. Citizenship in Iraq" (Mar. 4, 2009) *available at* www.defenselink.mil/news/newsarticle.aspx?id=53336 (describing how more than 250 American military members were sworn in as U.S. citizens in Baghdad, Iraq, during the thirteenth U.S. naturalization ceremony conducted overseas since USCIS began overseas military naturalization ceremonies).

Legal Analysis. Ulysses can naturalize under INA §329, the wartime military naturalization statute. This statute was amended by the National Defense Authorization Act of 2004 (NDAA 2004) to include members of the Selected Reserve,[52] and drilling National Guard units are part of the Selected Reserve.[53] Ulysses need not lift the conditions on his CPR status to apply because INA §329 allows for naturalization of qualified military personnel regardless of their immigration status. He can avoid being fingerprinted again by signing a form giving USCIS permission to use his military enlistment fingerprints for naturalization purposes, but if he goes to an ASC, his fingerprints will likely clear more quickly. The catch with earning citizenship through military service is that once he is naturalized, Ulysses may lose his citizenship if he fails to complete five years of honorable service.[54] Ulysses can complete this honorable service in any component of the military, including the National Guard.

***Example*: Military Peacetime Naturalization**

Facts. [For the purposes of this example, assume that the President has declared an end to hostilities and INA §329 is no longer in effect.] Mary obtained her LPR status a few months ago and joined the Army shortly thereafter, selecting a job as a preventive medicine specialist. While she is attending Army training at Fort Sam Houston, Texas, her instructors tell her about Army scholarships in the Army Nurse Corps. To be an Army nurse, however, she must be a U.S. citizen. If Mary enlisted when the wartime naturalization statute was no longer in effect, must Mary wait until she has been an LPR for five years before she can apply for U.S. citizenship through military service?

Legal Analysis. If she enlisted and is serving in peacetime, Mary can apply to naturalize after one year of honorable military service.[55] She must have LPR status to apply under INA §328, a significant fact that distinguishes the peacetime military naturalization statute from the wartime military naturalization statute. No particular period of LPR status is required, but one year of military service is necessary before the application can be filed.

***Example*: Naturalization While in Removal Proceedings**

Facts. Karla[56] is an active duty U.S. Navy sailor who has been placed in removal proceedings by USCIS for failure to timely file an I-751 to lift the conditions on her CPR status.[57] As an active duty member of the U.S.

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[52] NDAA 2004 §1702 ("Section 329(a) of the Immigration and Nationality Act (8 USC 1440(a)) is amended by inserting 'as a member of the Selected Reserve of the Ready Reserve or' after 'has served honorably'").

[53] 10 USC §10143 ("Within the Ready Reserve of each of the reserve components there is a Selected Reserve. The Selected Reserve consists of units, and, as designated by the Secretary concerned, of Reserves, trained as prescribed in section 10147(a)(1) of this title [10 USCS §10147(a)(1)] or section 502(a) of title 32, as appropriate."). Title 32 units are National Guard units, and drilling National Guard members are part of the Selected Reserve, as are drilling Reservists.

[54] INA §329(c) ("Citizenship granted pursuant to this section may be revoked in accordance with section 340 [8 USCS §1451] if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years.").

[55] INA §328, 8 USC §1439 ("A person who has served honorably at any time . . . for a period or periods aggregating one year, and who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's application, in the United States for at least five years, and in the State or district of the Service in the United States in which the application for naturalization is filed for at least three months, and without having been physically present in the United States for any specified period, if such petition is filed while the applicant is still in the service or within six months after the termination of such service."). Prior to this statute being enacted, military personnel had to serve for three years in peacetime before qualifying for naturalization through peacetime military service.

[56] This example is based on the case of Karla Rivera, a Navy sailor who testified before the House Immigration Committee on May 20, 2008. *See* Statement of Airman Karla Arambula de Rivera, U.S. Navy, Before the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law (May 20, 2008), *available at* http://judiciary.house.gov/hearings/pdf/Rivera080520.pdf.

[57] Memorandum, Marcy Forman, Acting Director of Investigations, U.S. Immigration & Customs Enforcement, "Issuances of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens With United States Military Service" (June 21, 2004) [hereinafter, the "Forman Memo"] *available at* http://www.bibdaily.com/pdfs/Forman%206-21-04.pdf. Under the Forman memo, U.S. Immigration & Customs Enforcement (ICE) has a policy of requiring a high level of review before a military member or veteran can be placed in removal proceed-

continued

military, she is eligible to naturalize under INA §329 because she served on active duty after September 11, 2001, when an executive order by President Bush became effective, authorizing U.S. military members to naturalize. Can she go forward on her naturalization application despite being in removal proceedings?

Legal Analysis. Karla can go forward with her naturalization application despite being in removal proceedings. Under INA §318 an alien cannot normally naturalize while in removal proceedings, but INA §328 and §329 contain an exception for military personnel, who may naturalize notwithstanding the fact that they are in removal proceedings.[58] Once Karla naturalizes, the immigration judge will terminate removal proceedings.

IMMIGRATION ISSUES FOR MILITARY FAMILY MEMBERS

Many military members have noncitizen parents, spouses, or children. Given the unique nature of modern military service, certain unusual immigration benefits may apply to military families. The following examples offer a taste of the range of issues that may arise in family member cases.

Example: Expedited Naturalization of Spouses and Children of Military Personnel

Facts. Silvia is married to Douglas, a U.S. citizen who is in the Marine Corps. Silvia obtained her CPR based on her marriage a few months ago, and her daughter Lydia (Douglas's stepdaughter) was also granted CPR status. Douglas has now received Permanent Change of Station (PCS) orders to Japan from the Marine Corps, and the Corps will allow Silvia and Lydia to accompany him. They will be in Japan, living and working, for three years. Can Silvia naturalize immediately? What about Lydia?

Legal Analysis. INA §319(b) allows for the expedited naturalization of LPRs who are married to U.S. citizens when the U.S. citizen is stationed abroad as an employee of the U.S. government, with certain American institutions of research, with certain American firms or corporations or their subsidiaries, with certain public international organizations, or as a religious practitioner or missionary with a denomination having a bona fide organization in the United States.[59] This statute applies when the LPR spouse plans to accompany the U.S. citizen on the overseas assignment. Sylvia can file an N-400 application immediately, even if she does not meet the normal residency and physical presence requirements. Sylvia must be in the United States at the time of naturalization. Lydia may derive U.S. citizenship when Sylvia naturalizes if Lydia meets the requirements for derivative U.S. citizenship under INA §320 or §322.

Example: Applying the Violence Against Women Act to Family Members of Military Personnel

Facts. Amira was working as a civilian translator for the U.S. government in Iraq when she met Anthony, a U.S. citizen Army soldier who was assigned to the base where she was working. Anthony began courting Amira and asked Amira's father for permission to marry her. Amira's father reluctantly gave his permission, and Anthony then took Amira to Jordan, where he married her in a religious ceremony attended by several of his Army buddies. After the wedding Anthony told Amira that he would file U.S. immigration papers for her, but when he learned that Amira was pregnant with his child, Anthony became physically abusive and refused to file the papers. His tour of duty in Iraq over, Anthony eventually flew home to the United States, abandoning Amira, whose family then disowned her for shaming the family's honor. Amira has never been in the United States, and she never resided in the United States with Anthony. Is there anything that can be done for Amira?

Legal Analysis. Amira may be eligible to self-petition for an immigrant visa as the battered spouse of a U.S. citizen under the immigration provisions of the Violence Against Women Act (VAWA). Under this law, a spouse, child, or parent who is subject to extreme cruelty or who has been battered may file a self-petition

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ings. USCIS, however, does not consider itself bound by the Forman memo, and has been—at the time of this writing—routinely placing military members in proceedings when they have failed to file an I-751 timely, or under certain other circumstances.

[58] INA §328, 8 USC §1439 ("notwithstanding section 318 [8 USCS §1429] insofar as it relates to deportability, such applicant may be naturalized immediately if the applicant be then actually in the Armed Forces of the United States"); INA §329(b)(1), 8 USC §1440(b)(1) ("he may be naturalized regardless of age, and notwithstanding the provisions of section 318 [8 USCS §1429] as they relate to deportability and the provisions of section 331 [8 USCS §1442]").

[59] INA §319(b).

as the immediate relative of her U.S. citizen abuser.[60] Normally this law does not apply unless some of the abuse took place in the United States, but there is an exception for cases where the abuser was a U.S. military member or U.S. government employee serving overseas.[61] Amira can file an I-360 with the Vermont Service Center and request consular processing her petition is approved. Given the circumstances, Amira may also be eligible for refugee status or perhaps a Special Immigrant Visa as an Iraqi who worked for the U.S. government in Iraq (see section below on military contractors for a further discussion of this option).

***Example*: Overseas Naturalization of Spouses and Children of Military Personnel**

Facts. Zita is married to Lom, a naturalized U.S. citizen who is in the U.S. Army. Zita obtained her LPR through her marriage to Lom, but soon afterward Lom was given orders to be stationed in Germany, and Zita was permitted by the Army to accompany him. Must Zita file an N-470 to preserve her residence for naturalization purposes? Will she interrupt her residency in the United States when she travels on military orders to Germany to accompany Lom? Must she obtain a reentry permit before departing or risk abandoning her LPR status? Finally, can Zita naturalize overseas?

Legal Analysis. The National Defense Authorization Act of Fiscal Year 2008 (NDAA 08) amended INA §319 to treat residence and physical presence abroad as residence and physical presence in the United States for purposes of section 316(a) of the INA when an LPR is authorized to accompany a U.S. military member overseas on the member's official orders. Thus if the Army has given Zita official orders to accompany Lom on his overseas tour of duty, Zita need not file an N-470 because her residence overseas is treated by statute as residence and physical presence in the United States. The NDAA 08 also amended INA §284 to clarify that an LPR who lives overseas with her U.S. military spouse under official military orders will not be deemed to have abandoned or relinquished her LPR status.[62] Finally, NDAA 08 added a subsection to the naturalization law, allowing for the overseas naturalization of LPRs who are married to U.S. military members who are stationed overseas where the spouse has been authorized to accompany the military member.[63] The first overseas military naturalization for a military spouse was held on May 29, 2008, in Frankfurt, Germany.[64] The NDAA 08 also provided similar benefits to the children of U.S. military members,[65] and the first overseas naturalization of a child took place in Yokosuka, Japan, on February 27, 2009.[66] The USCIS provides detailed information on its website about how it processes overseas naturalization cases.[67]

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[60] INA §§204(a)(1)(A)(iii)–(vii) & (B)(ii)–(iii); 8 USC §§1154(a)(1)(A)(iii)–(vii) & (B)(ii)–(iii); 8 CFR §204.2(c), (e).

[61] INA §204(a)(1)(A)(v); 8 USC §1154(a)(1)(A)(v).

[62] National Defense Authorization Act for Fiscal Year 2008 [hereinafter, NDAA 08], Pub. L. No, 110-181, §673.

[63] NDAA 08 §674, which states:

> (1) In the case of [an LPR] who is the spouse of a [U.S. military] member [], is authorized to accompany such member and reside abroad with the member pursuant to the member's official orders, and is so accompanying and residing with the member in marital union, such residence and physical presence abroad shall be treated, for purposes of subsection (a) and section 316(a), as residence and physical presence in—
>
> (A) the United States; and
>
> (B) any State or district of the Department of Homeland Security in the United States.
>
> (2) Notwithstanding any other provision of law, a spouse described in paragraph (1) shall be eligible for naturalization proceedings overseas pursuant to section 1701(d) of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136; 8 USC §1443a).

[64] American Forces Press Service, "Soldier's Wife Becomes First Military Spouse Naturalized Overseas" (Jun. 1, 2008), *available at* www.defenselink.mil/news/newsarticle.aspx?id=50065.

[65] NDAA 08 §674(b), codified at INA §322(d), 8 USC §1433(d).

[66] USCIS Press Release, "First Child Becomes a U.S. Citizen Overseas," Feb. 27, 2009, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=893fb1a8784bf110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

[67] USCIS, "Frequently Asked Questions: Immigration Information for Members of the U.S. Armed Forces and Their Families," *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=731ad4d176d1e110VgnVCM1000004718190aRCRD&vgnextchannel=0a9ab58f71e14110VgnVCM1000004718190aRCRD.

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***Example*: Posthumous Benefits for the Parents, Spouses, and Children of Military Personnel**

Facts. Annelisa is married to Richard, a U.S. citizen in the U.S. Army. Richard and Annelisa filed a one-step application for Annelisa to adjust her status, but Richard was deployed to Afghanistan before USCIS adjudicated the application. While deployed in Afghanistan, Richard was killed in combat. Can Annelisa continue with the adjustment application? What laws apply to her situation?

Legal Analysis. The National Defense Authorization Act for Fiscal Year 2004[68] allows the spouses, parents, and minor children of U.S. citizens who are killed in combat, or who dies from a combat-related injury, to retain their status as the immediate relatives of a U.S. citizen, despite the U.S. citizen's death, if the U.S. citizen served in the military.[69] Annelise remains the immediate relative of a U.S. citizen and can go forward with her adjustment application. USCIS will require her to interfile an I-360 in place of the I-130 that was filed by Richard. After she receives her LPR status, Annelisa can immediately file for naturalization under INA §319(d).[70]

Practitioners should note that this benefit also extends to family members of U.S. citizens who formerly served in the U.S. military but were not employed by the U.S. military at the time they died in combat or of combat-related injuries. Benefits under this provision can extend to the family members of a U.S. citizen employee of a private contractor who formerly served in the U.S. military but who died in combat while employed by a private contractor.[71]

MILITARY CONTRACTORS AND CIVILIAN EMPLOYEES OF THE MILITARY

The ongoing wars in Iraq and Afghanistan have involved not only members of the U.S. Armed Forces but also numerous U.S. civilian employees of the Department of Defense and many defense contractors. Civilian employees and defense contractors do not benefit from the specific immigration statutes that apply only to members of the U.S. Armed Forces. But there are a few special immigration provisions that do apply to civilian employees and contractors. Section 319(b) of the INA, for example, which allows for the expedited naturalization of an LPR spouse of a U.S. citizen, can sometimes apply to civilian employees or contractors. Congress has also passed laws creating special immigrant visa categories for certain Iraqi and Afghan citizens who have worked for the U.S. government overseas. The examples below highlight some of the unique immigration laws that apply.

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[68] Pub. L. No. 108-136, 117 Stat. 1392 (NDAA 2004). Sections 1701 through 1705 contain immigration-related provisions, some of which are not codified in the United States Code, so practitioners must refer to the text of the NDAA to support applications for benefits under these provisions.

[69] NDAA 2004 §1703 ("in the case of an alien who was the spouse of a citizen of the United States at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, if the citizen served honorably in an active duty status in the military, air, or naval forces of the United States and died as a result of injury or disease incurred in or aggravated by combat, the alien (and each child of the alien) shall be considered, for purposes of section 201(b) of such Act, to remain an immediate relative after the date of the citizen's death, but only if the alien files a petition under section 204(a)(1)(A)(ii) of such Act within 2 years after such date and only until the date the alien remarries.").

[70] INA §319(d), 8 USC §1430(d) ("Any person who is the surviving spouse, child, or parent of a United States citizen, whose citizen spouse, parent, or child dies during a period of honorable service in an active duty status in the Armed Forces of the United States and who, in the case of a surviving spouse, was living in marital union with the citizen spouse at the time of his death, may be naturalized upon compliance with all the requirements of this title except that no prior residence or specified physical presence within the United States, or within a State or a district of the Service in the United States shall be required. For purposes of this subsection, the terms "United States citizen" and "citizen spouse" include a person granted posthumous citizenship under section 329A [8 USCS §1440-1].").

[71] In the *Matter of Dahianna Heard*, USCIS Decision Reopening Visa Petition Proceeding And Request for Evidence (undated decision, in possession of the author) ("The requirements under section 1703(a)(1) are: (a) the citizen spouse must have served honorably on active duty in the Armed Forces, and (b) the citizen spouse must have died from injury or disease incurred in or aggravated by combat. . . . Unlike section 329A(b)(2) of the Immigration and Nationality Act, however, section 1703(a)(1) does not expressly require that the deceased person must have been in the Armed Forces at death."); *but see also Hootkins v. Chertoff*, 2009 U.S. Dist. LEXIS 3243 (C.D. Cal., Jan. 6, 2009) (certifying class action regarding "widow penalty").

Example: **Special Immigrant Visas for Certain Government Employees and Contractors**

Facts. Mohammed, an Iraqi citizen who has never been to the United States, has been working in Iraq as a civilian translator for a U.S. Army contractor since late 2007. He has been a dedicated employee and the Army soldiers who work with him have nothing but good things to say about him. Mohammed likes his work so much that he would like to join the U.S. Army, but Army rules prohibit him from enlisting because he has no U.S. immigration status. To join the Army he must obtain LPR status (he does not qualify under the MAVNI program). Mohammed's family is in Iraq, and none have U.S. citizenship or LPR status. Mohammed's employer cannot sponsor him because they do not have a U.S. job for him. Aside from winning the diversity lottery, how can Mohammed obtain LPR status?

Legal Analysis. Mohammed may be eligible to file a Special Immigrant Visa (SIV) petition as a translator or other employee of the U.S. government in Iraq. If he obtains an SIV, Mohammed will become an LPR upon arriving in the United States and being admitted as an immigrant. Once he is an LPR, he can enlist in the Army and immediately apply for U.S. citizenship under INA §329.

There are two Special Immigrant Visa programs[72] that may apply to this situation, but their requirements are somewhat different. Section 1059 of the National Defense Authorization Act for Fiscal Year 2006[73] created a special immigrant visa program aimed solely at Afghan and Iraqi translators. When initially created, the program had an annual cap of 50 visas each fiscal year; that cap was temporarily raised to 500 for two fiscal years but reverted back to 50 for FY2009. Individuals who file or have filed under section 1059 after September 30, 2008, are subject to the annual cap of 50 for FY 2009.

Under this program Mohammed must show that he is a national of Iraq or Afghanistan who has worked directly with the U.S. Armed Forces or under chief of mission authority as a translator or interpreter for at least 12 months. He must obtain a favorable written recommendation from a general officer in the chain of command of the U.S. Army unit that he supported. He must clear a background check and screening, and must be otherwise eligible to receive an immigrant visa, except that the inadmissibility grounds relating to "public charge" do not apply. He must file an I-360 according to the instructions on the USCIS or DOS website and pay a filing fee. Mohammed appears to qualify for this program, but the quota number is so low that it is unlikely he will actually obtain an immigrant visa through this program.

Section 1244 of NDAA 08 authorizes 5,000 special immigrant visas for Iraqi employees and contractors each year for fiscal years 2008 through 2012, as well as their spouses and children. These visas are available for certain Iraqi nationals who worked for or were contractors of the U.S. government in Iraq for at least one year after March 20, 2003. Iraqis who qualify pay no filing fees or biometric fees; they file an I-360 in accordance with the instructions posted on the USCIS or DOS website. Any unused slots roll over into the 5,000 authorized for the following fiscal year. If the numerical limitation for FY 2012 is not reached, any unused numbers from that year may be used in FY 2013, but numbers will not carry forward into FY 2014. Eligible translators who filed under section 1059 before October 1, 2008, but were unable to adjust status or receive an immigrant visa because USCIS reached the cap of 500 for section 1059 cases automatically become eligible to receive a visa number under the section 1244 program. Mohammed's best option may be to apply for both programs. He may also be eligible to enter the United States as a refugee, depending on the facts of his case and whether he can meet the definition of a refugee.

The U.S. Department of State has posted detailed information about the process of filing for Iraqi Special Immigrant visas, and answers to frequently asked questions, on its Web site.[74] The site also contains a link to an Arabic translation of the information on section 1244 applications. The USCIS provides less detailed but similar information on its website, but it is available only in English.

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[72] There is also a new Special Immigrant Visa program for Afghans. *See* Afghan Allies Protection Act of 2009, enacted in the Omnibus Appropriations Act, Pub. L. No. 111-8 (Mar. 11, 2009), §§601–602.

[73] 8 USC §1101 note.

[74] *See* http://travel.state.gov/visa/immigrants/info/info_3738.html#3 (for section 1059 applications) or http://travel.state.gov/visa/immigrants/info/info_4172.html (for section 1244 applications).

***Example*: Naturalization of Civilian Employees and Contractors**

Facts. Abdul is an unmarried Iraqi citizen who entered the United States in January 2007 as a special immigrant under section 1059 of the National Defense Authorization Act for Fiscal Year 2006. Three months after he arrived in the United States, received his LPR status, and took up residence in New Jersey, Abdul got a job as a translator with a U.S. defense contractor. The defense contractor immediately sent Abdul back to Iraq to work as a translator for the military, and Abdul gave up his New Jersey apartment. He worked in Iraq for the contractor continuously for fifteen months before returning to the United States for three weeks of training. He then returned to Iraq for another year, and is still there. Abdul never filed an N-470 or requested a reentry permit from USCIS; the company told him that it was not necessary because he was working for a U.S. government contractor. Abdul's mother is now asking Abdul when he can sponsor her for an immigrant visa, but Abdul knows that he must be a U.S. citizen to sponsor his mother. When Abdul gets back to the United States, can he apply for U.S. citizenship? Because of his extensive absences from the country, will he face any special difficulties in trying to obtain U.S. citizenship when he does apply?

Legal Analysis. Abdul is not a member of the U.S. Armed Forces. As a civilian he must meet the requirements of INA §318 to naturalize as a U.S. citizen. Under INA §318 an LPR must meet both physical presence and continuous residency requirements to naturalize. Section 318(a) states that Abdul must have "resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application [must have been] been physically present therein for periods totaling at least half of that time." If Abdul had stayed in the United States when he obtained his LPR status, he would have been eligible to naturalize in January 2012. However, he departed for more than a year after he received his LPR and did not file any application to preserve his residency. Under INA 318(b), "[a]bsence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship . . . shall break the continuity of such residence, except [] in the case of a person who has been physically present and residing in the United States, after being lawfully admitted for permanent residence, for an uninterrupted period of at least one year, and who thereafter is employed by or under contract with the Government of the United States." This section of the INA does not apply to Abdul, however, because he was not in the United States for a year before he left to work in Iraq. Furthermore, Abdul never filed an N-470 to preserve his residence. Thus he appears to have broken the continuity of his residence and must essentially "start the clock over" on his five years of residency. In regard to physical presence, INA §318(c) provides that persons exempted from the continuous residency requirement can also be relieved of the physical presence requirement if they are "employed by, or under contract with, the Government of the United States." Had Abdul been in the United States for a year before taking the job with the defense contractor, he may have been able to preserve his residency for naturalization purposes, and then INA §318(c) would have relieved him of the physical presence requirement. Abdul would then have been able to qualify to naturalize in 2012, right on schedule. Under these facts, however, Abdul is out of luck. He should either stop working overseas until he can reestablish his U.S. residency or join the U.S. military and naturalize as a member of the armed forces under the wartime military naturalization statute, which waives all continuous residency and physical presence requirements. Abdul is also potentially subject to the INA's rules regarding abandonment of lawful permanent residence, but discussing that issue fully is beyond the scope of this article.

SPECIAL RESOURCES AVAILABLE FOR SOLVING MILITARY IMMIGRATION PROBLEMS

Military personnel can use the free legal services provided by the legal assistance office (LAO) attached to their unit. These offices are staffed by both military and civilian lawyers who provide military members with a wide range of legal services, from assistance with wills and powers of attorney to substantive advice on family law, contract law, landlord-tenant law, and many other matters. While many LAOs do not have staff with immigration law expertise, there are offices at some larger bases with attorneys or paralegals experienced in immigration matters. A practitioner handling a military case near a large military base may want to consult with the base LAO for information on local practice and procedure with regard to issues that come up regularly, such as whether a local military doctor has been authorized by USCIS to perform immigration medical exams, how long the nearby USCIS office is taking to process military naturalization cases, or

whether local USCIS practice is to waive the presence of a deployed military spouse at adjustment and I-751 interviews.

The USCIS also provides special resources for military personnel and their families who have immigration issues. USCIS staffs a dedicated military helpline[75] and posts updated information about military naturalizations and other military-related issues on the USCIS website on a regular basis.[76] It even has a special e-mail address (militaryinfo.nsc@dhs.gov) to which military members may direct inquiries about their naturalization cases or notify USCIS about changes of address.

The Army's Human Resources Command has published *The Soldier's Guide to Citizenship*, which is available to all Army members through the Army's Human Resources Command website. Unfortunately, this website is not publicly accessible, but practitioners who represent Army soldiers should ask their clients to obtain a copy of this helpful guide, for it contains checklists and other useful information for processing Army naturalization cases.[77]

Finally, the American Immigration Lawyers Association has a unique partnership with DOD in a pro bono program called the AILA Military Assistance Program (AILA MAP). This program allows military members and their families who seek expert assistance with an immigration issue to draw on the skills of AILA pro bono volunteers.[78]

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[75] The number is 1-877-CIS-4MIL (1-877-247-4645). USCIS News Release, "USCIS Launches Military Help Line" (Aug. 13, 2007), *available at* www.uscis.gov/files/pressrelease/MilitaryHelpLine081307.pdf.

[76] USCIS, "Information for Members of the Military and Their Families," *available at* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=0a9ab58f71e14110VgnVCM1000004718190aRCRD&vgnextchannel=0a9ab58f71e14110VgnVCM1000004718190aRCRD.

[77] This author also has a PDF copy of the *Soldier's Guide* and can provide it to fellow immigration lawyers upon request.

[78] Information about AILA MAP is available at www.aila.org/military.