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LEGAL NEEDS OF MILITARY VETERANS, SERVICEMEMBERS, AND THEIR FAMILIES

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Immigration Issues Faced by U.S. Servicemembers: Challenges and Solutions

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> We owe no greater duty than the one we owe to the members of the Armed Forces and their families.... Tens of thousands are immigrants. Countless others have spouses or other close relatives who are immigrants or have immigration issues. Our duty to these brave men and women obligates us to ensure that their focus stays on their mission and on the safety and security of those they serve with. We must do all we can to reduce the stresses of war on the families of these brave men and women.
>
> —Rep. Zoe Lofgren, Chairwoman of the House Subcommittee on Immigration[1]

Noncitizens have served in the U.S. military since the American Revolution and, if history is any guide, will serve for years to come. Some 31,000 of the over 1.4 million individuals serving on active duty—1.5 percent of servicemembers—are noncitizens.[2] Each year 8,000 new noncitizens join the military.[3]

The immigration issues of military personnel reflect the complexity of U.S. immigration law and the challenges that immigration law practitioners see everyday. Most immigration laws apply equally to members of the military and to civilians, and thus most of the immigration-related legal needs of the two groups are similar. However, a few immigration laws apply specifically to military persons and their unique circumstances.

Below we offer an overview of these laws. We discuss naturalization options for military persons and their family members, immigration consequences of various types of military discharges and convictions, and immigration issues common among military families. We also take up one potential solution to many of these legal problems: House Resolution 6020, the "Lance Corporal José Gutierrez Act of 2008." Because this article serves only as a primer for nonimmigration law practitioners, we encourage readers who seek more detailed information to review *Immigration Issues Relating to Military Service: Practical Problems and Solutions*, a more comprehensive article by Margaret D. Stock and Kristan K. Exner.[4]

[1] *Immigration Needs of America's Fighting Men and Women: Hearing Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary*, 110th Cong. 1 (2008) (statement of Rep. Zoe Lofgren, Chairwoman, House Subcomm. on Immigration).

[2] See www.globalsecurity.org/military/agency/end-strength.htm; Blog, Immigrants in USA, Samantha Henry, Immigrants Have Proud History of Military Service, May 25, 2009, http://immigrantsinusa.blogspot.com/2009/05/immigrants-have-proud-history-of.html.

[3] Julia Preston, *U.S. Military Will Offer Path to Citizenship*, New York Times, Feb. 15, 2009, at A1.

[4] Margaret D. Stock & Kristan K. Exner, *Immigration Issues Relating to Military Service: Practical Problems and Solutions*, in Immigration & Nationality Law Handbook, 2009-10 at 921 (Rizwan Hassan ed., 2009).

Military Naturalization

In immigration law, naturalization is the final step that a lawful permanent resident takes to become a U. S. citizen. According to Sections 318 and 319 of the Immigration and Nationality Act, naturalization by application is available to an immigrant who upon application has been a lawful permanent resident for at least five years or has been one for at least three years and is married to and living with a U.S. citizen during this period.[5] Lawful permanent residents must also meet certain requirements relating to physical presence in the United States and residency.[6]

Members of the U.S. military may naturalize under the Immigration and Naturalization Act's regular naturalization provisions or under Section 328 or Section 329, both of which are special military naturalization statutes.[7] Section 328 provides generally for naturalization of lawful permanent residents through military service; Section 329 applies to both lawful permanent residents and non–lawful permanent residents but allows naturalization through honorable military service only during specified conflicts or "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 force."[8] Pres. George W. Bush issued such an order on July 3, 2002, retroactive to September 11, 2001.[9] Thus military members have been able to naturalize under Section 329 of the Immigration and Nationality Act if they had served honorably on or after September 11, 2001, and they may continue to do so until the executive order is terminated by a subsequent one.

The primary distinctions between the two military naturalization statutes are that under Section 328 a military member must have served honorably in the armed forces for at least one year and be a lawful permanent resident on the day the application is filed. Under Section 329 the military member need not have served for a specified period and need not be a lawful permanent resident. Thus, on the first day an enlistee reports for basic training, the enlistee may file a military naturalization application under Section 329. Citizenship granted under these special provisions may be revoked, however, if the military member fails to serve honorably for five years.

Minor procedural differences between military and civilian naturalization applications relate to verification of the military member's service by the U.S. Citizenship and Immigration Service (USCIS), and advocates should note that members of the military need not pay application filing fees or biometrics fees if they file naturalization applications under Section 328 or Section 329. USCIS must process their applications within six months of filing.

Naturalization cases are often the most straightforward in immigration practice, and military naturalization cases are no exception. With no complicating factors, processing is quick, but, as in any area of immigration practice, consulting an experienced practitioner is advisable before filing an application. Complicated naturalization cases are among the most common types of cases of the American Immigration Lawyers Association's Military Assistance Program.[10]

Immigration Impact of Military Convictions and Discharges

In immigration law generally, criminal convictions can have severe collateral consequences. A plea agreement or sentence that is a "good deal" for a criminal

[5]See 8 U.S.C. §§ 1429–1430.

[6]See generally Ira J. Kurzban, Kurzban's Immigration Law Sourcebook 1305 (11th ed. 2008) (1990).

[7]See 8 U.S.C. §§ 1439–1440 (2009).

[8]Immigration and Nationality Act § 329(a) (2009), 8 U.S.C. § 1440(a).

[9]Exec. Order No. 13,269, 67 Fed. Reg. 45287 (July 8, 2002).

[10]See case example *infra* regarding U.S. Navy Airman Karla Arambula de Rivera.

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 one 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 one failed to serve honorably for a period or periods aggregating five years.
Other than honorable discharge	Not eligible for military naturalization benefits. If one had already naturalized through military service before the discharge, U.S. citizenship may be revoked if one failed to serve honorably for a period or periods aggregating five years. If one was discharged for misconduct, there may be immigration consequences.
Bad conduct discharge	Not eligible for military naturalization benefits. If one had already naturalized through military service before the discharge, U.S. citizenship may be revoked if one failed to serve honorably for a period or periods aggregating five years. If one 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 one had already naturalized through military service before the discharge, U.S. citizenship may be revoked if one failed to serve honorably for a period or periods aggregating five years. If one 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.

Source: Margaret D. Stock & Kristan K. Exner, *Immigration Issues Relating to Military Service: Practical Problems and Solutions*, in Immigration & Nationality Law Handbook, 2009-10 at 927 (Rizwan Hassan ed., 2009). Chart was compiled by Stock.

defendant who is a U.S. citizen can have devastating consequences for a noncitizen—often resulting in mandatory deportation or a permanent bar to U.S. citizenship.

Military discharges characterized as less than honorable also have serious immigration consequences. Under Sections 328 and 329 the citizenship of military persons who naturalize through military service may be revoked if they fail to serve honorably for the required five-year period. Punishment or conviction by a court-martial can also have serious immigration consequences.[11]

Courts-martial may try both "military offenses" that are listed in the punitive articles of the Uniform Code of Military Justice and civilian offenses. Courts-martial are of three types: summary, special, and general. A general court-martial is the military equivalent of a federal district court criminal trial; the others—"lower" courts-martial proceedings—provide lesser due process protections. Most often, the lower-level courts-martial try offenses that would be misdemeanors in civilian criminal court.[12] In the past, many immigration practitioners assumed that only a conviction by a general court-martial would have immigration consequences, but recent changes in the law have called this assumption into question.[13] An immigration court may treat even civilian misdemeanors as "aggravated felonies" that can lead to mandatory deportation and a permanent bar to U.S. citizenship.[14] Similarly a lower level of court-martial no longer guarantees that a military member will not face immigration consequences.

[11] *United States v. Denedo*, 129 S. Ct. 2213 (2009), www.supremecourtus.gov/opinions/08pdf/08-267.pdf.

[12] Estela I. Velez Pollack, *Military Courts-Martial: An Overview*, Congressional Research Service Report for Congress, May 26, 2004, www.fas.org/man/crs/RS21850.pdf.

[13] *In re Rivera-Valencia*, 24 I&N Dec. 484 (B.I.A. April 2, 2008), www.usdoj.gov/eoir/vll/intdec/vol24/3607.pdf.

[14] See the definition of "aggravated felony," Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101(a)(43). The crimes described in this statute need not be "felonies" in order to make them "aggravated felonies" under immigration law.

Military discharges can also have immigration consequences, many of them severe. Each type of discharge that a military member may receive has its own immigration consequences (see chart).

The complexity of immigration law cannot be overstated, and in no arena is it more treacherous than when dealing with criminal convictions. The same applies to military tribunals and discharges (see chart). When advising a military member who receives a less than honorable discharge, be sure to consult an experienced immigration law practitioner as well as a military or civilian attorney familiar with military discharges.

Immigration Issues for Military Family Members

In today's global society, millions of U.S. citizens have family members who were not born in this country. For members of the military, the assurance that these spouses, children, and other family members are safe and well is critical to servicemembers' mission readiness, focus, and effectiveness in protecting the United States. Military families are entitled under the Immigration and Nationality Act to a variety of immigration benefits such as expedited or overseas naturalization, and many issues arise in these cases.

The American Immigration Lawyers Association's Military Assistance Program, discussed below, handles cases involving family members. Two particularly difficult issues deserve special consideration.

Conditional Permanent Residents. Under Section 216 of the Immigration and Nationality Act, one who receives permanent resident status based on marriage to a U.S. citizen is a "conditional permanent resident" when the couple has been married for less than two years at the time the status is granted. To have the conditions removed the couple must file a joint petition within ninety days of the second anniversary of the grant of conditional permanent residence.[15] USCIS often requests additional documentation to prove that the two married people are living together; USCIS schedules an interview at which both husband and wife must be present. As might be imagined, this requirement can wreak havoc for active-duty military persons, who cannot comply with the ninety-day limit because of the demands of military life. Constant deployments and changes of station often result in failure to receive USCIS notice of the need to petition for the removal of conditions. Failure to respond to USCIS can cause further problems, as in the example below.

U.S. Navy Airman Karla Arambula de Rivera came to the United States from Mexico as a little girl. She married a U.S. citizen and became a conditional permanent resident before enlisting in the Navy. She applied to remove the conditions and adjust her status, but the required form I-751 was rejected by USCIS as having been improperly filed. Subsequently Navy Legal Assistance advised Rivera to file an N-400 naturalization application because she had been serving honorably in the Navy during wartime. She did so and reported to her ship in Norfolk, Virginia. While she was completing training, USCIS terminated Rivera's conditional resident status and placed her in removal proceedings. Although she was stationed in Virginia, Rivera was required to appear in immigration court in California at her own expense. A Navy Legal Assistance attorney prepared a successful motion to change venue to Arlington, Virginia, but was unsuccessful in convincing the immigration judge to terminate proceedings. Soon after, a volunteer attorney prepared Rivera for her upcoming naturalization interview at the USCIS office in Norfolk and accompanied her to the interview. The adjudicating officer informed Rivera and her attorney that the U.S. Department of Homeland Security agreed to terminate the proceedings because of Rivera's prima facie eligibility for naturalization. Rivera was naturalized at the USCIS office that afternoon.

Although this case was resolved favorably, it shows the inflexibility of immigration law and the frustration that immigration issues often cause our military personnel. Congress must find a better

[15]Immigration and Nationality Act § 216, 8 U.S.C. §1186a.

way to resolve immigration problems affecting servicemembers.

Undocumented Family Members. Under current law, undocumented spouses, children, parents, or minor siblings of U.S. military personnel have no easy way to legalize their immigration status in the United States. Even in the event that an immigrant visa is available, a family member must first leave the country to apply for an extreme hardship waiver and demonstrate that the military member would suffer extreme hardship if the family member is not permitted to live in the United States. Extreme hardship is interpreted narrowly, and the waiver is notoriously difficult to obtain. If the waiver is denied, the family member is barred from coming to the United States for ten years or, in some cases, permanently.[16]

U.S. Air Force pilot Christine Navarro testified in May 2008 before the House Subcommittee on Immigration about her family's immigration ordeal. Navarro's noncitizen husband made a prior oral claim to U.S. citizenship at the border; although he was not convicted of any crime, this incident resulted in the denial of his visa application. Her husband is now permanently barred from entering the United States, and Navarro is a de facto single parent, caring for her 3-year-old son who has cerebral palsy. Under current law, no waiver is available for her husband, and Navarro must choose between her family and the job that she loves, serving in the U.S. Air Force, because she cannot serve in the Air Force while living in Mexico with her spouse.

Military members such as Navarro have experienced this complex and sometimes broken system the hard way, as she told Congress: "[W]hat you hear on television from the so-called experts is not true—it is not easy to stand in line and get legal."[17]

H.R. 6020: Lance Corporal José Gutierrez Act of 2008

Lance Corporal José Gutierrez of the U.S. Marine Corps, one of the first U.S. military members to be killed in Operation Iraqi Freedom in March 2003, was a Guatemalan immigrant who came to the United States illegally and ultimately died for a country that was not even his own. His story has proved to be particularly poignant to the American public and compelling to members of Congress.[18]

H.R. 6020, the Lance Corporal José Gutierrez Act of 2008, would amend the Immigration and Nationality Act to meet many of the immigration challenges described here. H.R. 6020 would

- make eligible for naturalization under Section 329 anyone who served in the armed forces honorably in support of contingency operations;
- extend the period for applying for military naturalization from six months to one year following the completion of eligible service;
- codify the factors to be considered in initiating removal proceedings against active-duty military personnel or veterans;
- restore discretion to immigration judges to grant relief for active-duty military personnel, veterans, and their family members who are in removal proceedings;
- exempt from specified grounds of inadmissibility or deportation an alien who is a member or veteran of the armed forces or an immediate family member of the military member or veteran;
- authorize the secretary of homeland security to waive certain grounds of admissibility and removability for military family members;

[16]See, e.g., Ira J. Kurzban, Kurzban's Immigration Law Sourcebook 95 (11th ed. 2008) (1990); Julie C. Ferguson, AILA's Focus on Waivers Under the Immigration and Nationality Act 75–95 (American Immigration Lawyers Association 2008).

[17]*Immigration Needs of America's Fighting Men and Women: Hearing Before the Subcommittee. on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary*, 110th Cong. 19 (2008) (statement of Christine Navarro, KC-5 Aircraft Commander, U.S. Air Force), http://judiciary.house.gov/hearings/pdf/Navarro080520.pdf.

[18]Rebecca Leung, *The Death Of Lance Cpl. Gutierrez*, CBS News.com, Aug. 20, 2003, www.cbsnews.com/stories/2003/04/23/60II/main550779.shtml.

- exempt from numerical immigrant visa limitations aliens who are eligible for a family-sponsored immigrant visa and are either a spouse or child of an alien serving in the armed forces;
- direct the secretary of homeland security to adjust to permanent resident status an alien who is a parent, spouse, child, or minor sibling of an armed forces eligible member who has served honorably during the specified period of hostilities; and
- waive certain grounds of inadmissibility for the purposes of adjustment and allow for posthumous benefits in certain circumstances.[19]

Critics of this bill suggest that it is a form of "amnesty" for "criminal aliens" who have served in the U.S. military. These critics decry the immigration benefits that the bill proposes to grant to family members of servicemen and women. The bill's most controversial provision would waive numerous grounds for removal of immigrants serving in the military and their families. The bill's detractors claim that it overlooks the perpetration of serious crimes in its effort to provide relief to military families.

Cong. Lamar Smith of Texas, for example, feels that H.R. 6020 goes too far in offering citizenship to distant family members of military personnel: "I understand that, in a time of war, the American people feel an enormous debt of gratitude to the U.S. military service members and their families," he said to the House Judiciary Committee. "However, that gratitude is no reason to offer immigration benefits to nearly every person related to someone who has served in the armed forces."[20]

Opponents also criticize the flexibility that the bill would grant to U.S. immigration judges. Current law often ties immigration judges' hands and gives them no discretion. Mark Krikorian, executive director of the Center for Immigration Studies, which claims a "proimmigrant, low-immigration vision," says that making exceptions for the noncitizen spouses of soldiers is like giving a criminal a "get-out-of-jail-free card."[21]

These are the voices of the "usual suspects" who oppose any change in the law that offers a path to citizenship for undocumented immigrants. But that is not what this bill advocates; rather, it proposes to enhance military readiness and increase morale by allowing some flexibility in the often complex and arbitrary immigration laws that affect military families.

Many military members currently fighting overseas find themselves simultaneously fighting their government back home, as that government creates bureaucratic obstacles to family members' access to benefits under the immigration law by refusing family members' entry into the United States or even seeking to deport military members or their families. These outcomes are in spite of the stated policy of the U.S. Immigration and Customs Enforcement that it will not attempt to place active-duty military personnel in removal proceedings.[22]

We receive calls daily from military members who are desperate to resolve their family members' immigration problems. These men and women seek only to ensure that while they are overseas their families will remain safe and secure, waiting for them when they return from deployment. The paralyzing fear that military members feel for their families' well-being impedes military readiness.

[19]Lance Corporal José Gutierrez Act of 2008, H.R. 6020, 110th Cong. (2008), http://thomas.loc.gov/cgi-bin/query/D?c110:2:./temp/~c110ZIaACY; see also H.R. 6020, To Amend the Immigration and Nationality Act to Protect the Well-being of Soldiers and Their Families, and for Other Purposes, WashingtonWatch.com (Oct. 4, 2008), http://bit.ly/9dnOf.

[20]Michael Board, Immigration Laws Could Be Expanded to Include Family Members of Service Members: Touchy Debate Pits "Support for the Troops" Against "Amnesty" Claims (Sept. 18, 2008), http://bit.ly/IK2rI.

[21]Beth Wang, *Deployed and Deported*, Chicago Reporter, Nov.–Dec. 2008, at 14, http://bit.ly/NqN7Z.

[22]See Memorandum from Marcy M. Forman, U.S. Immigration and Customs Enforcement, on Issuance 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) (on file with Susan Timmons).

Military family members who are out of compliance with immigration laws face the most difficult problem in the military immigration community, and in many cases harsh laws offer no waivers or opportunities to regulate one's immigration status. Often, as in the case of U.S. Air Force pilot Christine Navarro, they result in military members being forced to choose between abandoning their families and leaving the U.S. military. Congress must find a way to provide relief for these fighting men and women.

The last major action on H.R. 6020 was taken on October 3, 2008, when thirteen additional sponsors signed on, for a total of nineteen, and the House Committee on the Judiciary reported favorably on the bill and passed it on to the full House, with an amendment to name the bill for Gutierrez.[23] The House has yet to vote on H.R. 6020.

Resources for Nonimmigration Law Practitioners

Legal assistance offices, staffed by both military and civilian attorneys and attached to military units, offer free legal services to military personnel on a wide variety of legal issues.[24] However, few of these offices have staff members with immigration expertise, nor are legal assistance office attorneys permitted to practice in immigration court.

In recent years judge advocate general (JAG) attorneys were inundated with complex immigration legal questions that require review by attorneys with expertise in immigration matters. In response the JAG Corps turned to American Immigration Lawyers Association attorneys nationwide. The result was the January 2008 launch of the association's Military Assistance Program, an ambitious pro bono project to assist U.S. military personnel whose spouses or families face unusual immigration law obstacles.[25] The program, which has had an impact during its short tenure, provides free immigration assistance to military persons—active-duty, reserve component, and retired personnel—and their families. American Immigration Lawyers Association volunteer attorneys handle military-related immigration matters on a case-by-case basis.

Since the program began, more than two hundred members have volunteered. Thus far the program has assisted in more than three hundred military cases, covering all branches of service and running the gamut of immigration law.

One of the beneficial unintended consequences has been to bring the struggles of immigrant military families to the attention of the U.S. Department of Defense and the Department of Homeland Security, which are slowly attempting to respond to the complex challenges, and of Congress, whose legislative agenda is being shaped by the problems that the Military Assistance Program is highlighting.

The immigration issues of U.S. servicemen and women are numerous and complex, and our current immigration law is irrational at best. The system is broken and outdated, and navigating it can be precarious. Servicemen and women, citizens and immigrants alike, deserve a system that works and is a better reflection of the values and traditions that make America the land of liberty and opportunity—the land which they have pledged to protect for all of us. These immigration challenges must be met if military readiness and morale are to be enhanced. To do nothing dishonors the sacrifices of these brave men and women and their families.

Authors' Note

The views expressed here are ours alone and do not necessarily reflect the positions, views, or opinions of the U.S. Military Academy, the Department of the Army, the Department of Defense, or any other government agency.

COMMENTS?

We invite you to fill out the comment form at www.povertylaw.org/reviewsurvey. Thank you.

—The Editors

[23]See http://bit.ly/wQvkU.

[24]See generally http://bit.ly/RJTKv.

[25]See generally www.aila.org/military.

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