

## LAW REVIEW 1265

### Are Illegal Immigrants Permitted To Enlist in the Armed Forces?

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9.0--Miscellaneous

**Q: President Obama recently announced a new policy for illegal immigrants who were brought to our country, by their parents, while they were still children. These folks are to be given a stay of deportation if they meet certain conditions. One way that a person could qualify for the stay would be by serving or having served honorably in the U.S. armed forces. I don't see how that is possible. Isn't there a law requiring one to be a citizen to enlist in the U.S. armed forces?**

**A:** To enlist lawfully in the Army, Navy, Marine Corps, Air Force, or Coast Guard, one must be a U.S. citizen or national or a person who has been lawfully admitted for permanent residence. The only exceptions are for residents of certain Pacific islands that have "compacts of free association" with the United States. Here is a direct quote of the pertinent language in the United States Code:

#### **"(b) Citizenship or Residency.—**

**(1)**A person may be enlisted in any armed force only if the person is one of the following:

**(A)**A national of the United States, as defined in section 101(a)(22) of the Immigration and Nationality Act ([8 U.S.C. 1101\(a\)\(22\)](#)).

**(B)**An alien who is lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act ([8 U.S.C. 1101\(a\)\(20\)](#)).

**(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 ([117 Stat. 2784](#); [48 U.S.C. 1921 note](#))).

**(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 ([117 Stat. 2823](#); [48 U.S.C. 1921 note](#))).

**(iii)**The Compact of Free Association between Palau and the United States (section 201 of Public Law 99–658 ([100 Stat. 3678](#); [48 U.S.C. 1931 note](#))).

**(2)**Notwithstanding paragraph (1), the Secretary concerned [the Service Secretary, like the Secretary of the Army] 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."

Title 10, United States Code, section 504(b) [10 U.S.C. 504(b)].

**Q: For decades, there have been many Filipinos in the U.S. armed forces, especially the Navy. How have they been able to qualify?**

**A:** The Philippines was a U.S. territory until July 4, 1946, when it became an independent country. After independence, the Republic of the Philippines (RP) had a treaty with our country, for basing rights at Clark Air Force Base and Subic Bay Naval Station. Under that treaty, citizens of the RP were permitted to enlist in the U.S. armed forces. That treaty expired almost 20 years ago. Today, a citizen of the RP must be lawfully admitted to the U.S., for permanent residence, before enlisting in our armed forces.

**Q: I have known physicians in the U.S. military who were not U.S. citizens and who came here directly from abroad for the purpose of enlisting. How was that possible?**

**A:** At times, there has been a severe shortage of physicians in the U.S. armed forces. At those times, the service secretaries have determined that the “vital to the national interest” standard was met and have used their waiver authority under 10 U.S.C. 504(b) to permit the enlistment of foreign physicians into the U.S. armed forces.

Even when the service secretaries have used this waiver authority to permit the enlistment of foreign physicians into the United States armed forces, these physicians do *not* come here directly from overseas for the purpose of enlisting. A non-citizen who goes to a U.S. embassy or consulate and asks for a visa to come to the United States to enlist will be denied entry to our country, because that is not a proper basis for lawful entry.

The physicians and other health care professionals who are recruited through this program must have been in the United States lawfully for at least two years, and the individual who is recruited must hold a U.S. medical license appropriate to his or her medical specialty.

This program is not limited to physicians—it also applies to foreigners in our country who have critical language skills that we need in our armed forces. The U.S. Army “Soldier of the Year” for 2012 was a person who enlisted through this program. He was a foreign student from Nepal, studying at the University of Nebraska, when he enlisted, and while on active duty he became a naturalized citizen.

**Q: I know a young man who was born in Tucson, Arizona 18 years ago, only hours after his mother (a citizen of Mexico) illegally entered our country. Is this young man eligible to enlist in the armed forces?**

**A:** Yes, that young man is a citizen of the United States and is eligible to enlist. The first sentence of Section 1 of the 14<sup>th</sup> Amendment (ratified in 1868) is as follows: “All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.” This constitutional language means exactly what it says. Because the young man was born in the United States, he is a citizen. For an excellent article on birthright citizenship and the original understanding of its meaning, see James C. Ho, *Defining “American”*, 9 GREEN BAG 2D 367 (2006).