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Military Naturalization[2]

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9.0--Miscellaneous

Numerous recent news reports have disclosed that noncitizens serving in our Nation's armed forces have found it increasingly difficult to become naturalized American citizens, due to ongoing efforts by Department of Defense (DOD) bureaucrats to obstruct their ability to file for naturalization and to have their applications considered on an expedited basis.[4] DOD and the Services have also in recent years dismantled successful military naturalization programs that were put in place with the cooperation of the Department of Homeland Security (DHS), the cabinet agency that is responsible for processing naturalization applications.[5] DHS has also denied military naturalization applications at higher rates than comparable civilian

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[1] We invite the reader's attention to *www.roa.org/lawcenter*. You will find more than 2200 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2] This article is an update of a version of a similar article previously published by the American Immigration Lawyers Association. The author holds the rights to reproduce the similar material as long as credit is given to AILA. The author thanks AILA for its longstanding support in publishing her books and articles about immigration and citizenship law.

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[4] Courtney Kube, Biden's Pentagon Still Enforcing Trump Policy Blocking Citizenship Path for Troops, ACLU Says, NBC News, August 18, 2021, available at https://www.nbcnews.com/news/military/biden-s-pentagon-still-enforcing-trump-policy-blocking-citizenship-path-n1277038.

[5] Anton Schettini, Servicemember to Citizen: A Few Things to Keep in Mind, Task & Purpose, August 23, 2021, available at https://taskandpurpose.com/immigration-rundown/servicemember-to-citizen-a-few-things-to-keep-in-mind/.

applications.[6] Military officials regularly provide wrong information to military members who seek to apply for naturalization;[7] accordingly, this article will set the record straight on what "the law" says about military naturalization, rather than what is reflected in erroneous DOD and other military websites.

For more than a century, noncitizens serving in or who are veterans of the U.S. Armed Forces—both on active duty and in their Reserve Components, including the National Guard—have been permitted to obtain U.S. citizenship more quickly than other noncitizens; laws providing for such expedited citizenship date back to the Civil War era.[8] Expedited citizenship not only benefits the noncitizens serving in the military, it also benefits the government by reducing or eliminating legal problems relating to military service by noncitizens[9] and allowing these service members to work in more jobs and duty assignments.[10] Two special military-related naturalization

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[6] Tara Copp, Immigrant Soldiers Now Denied US Citizenship At Higher Rate Than Civilians, McClatchy News, May 16, 2019, available at https://www.mcclatchydc.com/latest-news/article230269884.html.

[7] While there are numerous examples on the internet of such misinformation, one such example can be found on the Military OneSource website, available at *https://www.militaryonesource.mil/financial-legal/legal/citizenship-and-immigration/us-citizenship-through-military-service/* This website wrongly states that "As of 2017, Department of Defense policy changes to how foreign-born service members may apply for U.S. citizenship . . . may impact the time it takes . . . to apply for citizenship" and fails to inform the reader that these policies have for the most part been invalidated by the Federal courts. The website goes on to wrongly state that servicemembers must serve honorably for "at least 180 days of active duty during periods of hostility" in order to apply for naturalization. This information is wrong.

[8] Act of July 17, 1862 (sec. 2166, R.S., 1878) (making special naturalization benefits available to those with service in the "armies" of the United States).

[9] Such legal problems can include claims by foreign countries that those of their citizens who serve in the U.S. military are under the jurisdiction of the foreign government for various purposes. These problems are often lessened when noncitizen service members naturalize in the United States, because the naturalization often work as an automatic renunciation of the foreign citizenship. Once a noncitizen naturalizes through military service, the United States may also require that noncitizen to renounce the foreign citizenship as a condition of service; the United States cannot require such a renunciation when the person does not yet have U.S. citizenship.

[10] A noncitizen serving in the U.S. military cannot normally obtain a security clearance or serve in any job that requires one, including the Army job of military linguist. *See* Executive Order No. 12968 (Aug. 2, 1995), 60 Fed. Reg. 40243–54 (Aug. 7, 1995) ("Where there are compelling reasons in furtherance of an agency mission, immigrant alien and foreign national

statutes provide that qualified members of the U.S. Armed Forces are permitted to apply for U.S. citizenship after one day of active duty or Selected Reserve service (when a presidential executive order regarding wartime hostilities is in effect),[11] or after one year of service (when no presidential order regarding ongoing hostilities is in effect).[12] Another statute provides for posthumous naturalization of a person who was serving or previously served in the military; this statute allows the person's bereaved relatives to obtain immigration and citizenship benefits after the person's death.

The first two military naturalization statutes—Immigration and Nationality Act (INA) INA § 329, the wartime military naturalization statute, and § 328, the peacetime military naturalization statute—contain significant differences from the naturalization statutes that apply to civilians. These differences have in the past made them attractive options for many noncitizens. These statutes, however, also contain a significant disability because a person who naturalizes under these statutes may lose American citizenship for post-naturalization bad behavior or for failure to serve honorably for five years. Thus, a noncitizen "green card" holder (Lawful Permanent Resident or "LPR") who also qualifies to naturalize under a civilian naturalization statute or statutes may be better off naturalizing through the "civilian" statutes than through military naturalization.

The Table below summarizes the main differences between the two special military statutes and the civilian naturalization provisions of the INA. Under the latter civilian provisions, noncitizen military personnel who are LPRs or U.S. noncitizen nationals[13] also may naturalize. President George W. Bush issued an executive order on military naturalization on July 3, 2002, retroactive to September 11, 2001, and that order remains in effect as of

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employees who possess a special expertise may, in the discretion of the agency, be granted limited access to classified information only for specific programs, projects, contracts, licenses, certificates, or grants for which there is a need for access. Such individuals shall not be eligible for access to any greater level of classified information than the United States Government has determined may be releasable to the country of which the subject is currently a citizen ....").

[11] *See* INA §329.

[12] *See* Immigration and Nationality Act (INA) §328.

[13] Noncitizen nationals currently include persons born in American Samoa or Swain's Island who did not inherit United States citizenship through a parent or grandparent.

this writing.[14] While that executive order remains in effect, LPR military members may be able to naturalize under more than one statute. In contrast, military personnel who are not LPRs or U.S. nationals may naturalize only under INA § 329; they cannot naturalize under the civilian statutes unless they first acquire LPR status somehow. Both LPRs and non-LPRs are eligible for posthumous naturalization under INA § 329A.

Military Naturalization: Basic Requirements under INA § 328 and INA § 329

Noncitizens filing for military naturalization under sections 328 and 329 of the INA must meet many of the requirements applicable to other applicants for naturalization. They must be attached to the principles of the Constitution and well-disposed to the good order and happiness of the United States;[15] they must be willing to bear arms on behalf of the United States;[16] they must demonstrate knowledge of the English language and U.S. history and government;[17] and they must have good moral character.[18] As indicated in the Table and described below, other requirements are either waived or modified.

A significant disadvantage also attaches to military naturalizations: persons naturalized through military service after November 24, 2003, may face possible revocation of their U.S. citizenship based on post-naturalization misconduct or failure to serve honorably for a period or periods aggregating five years.[19] Thus, anyone applying for naturalization through military service today should be cautioned that although the process provides unique advantages, the person's citizenship can be lost through post-naturalization bad behavior.

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[14] Exec. Order No. 13269 (July 3, 2002), 67 Fed. Reg. 45287 (July 8, 2002).

[15] INA § 316(a)(3); 8 Code of Federal Regulations (CFR) § 316.11.

[16] INA § 337(a)(5)(A)–(C).

[17] INA § 312(a).

[18] INA §§ 316(a)(3), 319(a)(1); 8 CFR §§ 316.2(a)(7), 316.10, and 329.2(d).

[19] INA §§ 328(f), 329(c).

Table: Naturalization Options for Military Members & Veterans

Basis for Eligibility	Time as a Lawful Permanent Resident, Age	Fees Charged	Continuous Residency	Physical Presence in the United States	Time in District or State	Naturalization in Removal Proceedings; Overseas Naturalization	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	No	Not subject to revocation on the basis of failure to serve honorably
LPR for at least three years; has been married to and living with a U.S. citizen for the three-year period (INA §319)	Must have been LPR for at least three years on the day application is filed*	Yes	Required	Required minimum of 18 months	Required	No	Not subject to revocation on the basis of failure to serve honorably
Member of the U.S. Armed Forces and has served for at least one year (INA §328)	Must be LPR on the day the application is filed, must be at least 18 years of age	No	Not Required	Not Required	Not Required	May naturalize in removal proceedings and overseas if applicant still serving in Armed Forces	Citizenship may be revoked if military member fails to serve honorably for five years
Served in the U.S. Armed Forces (active-duty status or Selected Reserve) during recognized periods of conflict and enlisted or re-enlisted inside the United States (INA §329)	LPR status not required, no age requirement	No	Not Required	Not Required	Not Required	May naturalize in removal proceedings whether currently serving or veteran & may naturalize overseas if currently serving in the Armed Forces	Citizenship may be revoked if military member fails to serve honorably for five years

* *Note*: Applicants may file for naturalization 90 days before they become eligible.

Significantly, both INA § 328 and § 329 waive the continuous residence, physical presence, and state residence requirements of the civilian

naturalization statute.[20] Thanks to changes made by the National Defense Authorization Act (NDAA) of 2004,[21] both military naturalization statutes also allow current service members and veterans to apply for naturalization without paying application or biometrics fees, effective October 1, 2004.[22] The same law allows the overseas naturalization of currently serving military personnel.[23] Both statutes further provide that military naturalization applicants may be naturalized notwithstanding the pendency of removal proceedings.[24] Finally, both statutes require an applicant to show good moral character,[25] but the period of good moral character is reduced to one year for those who apply under INA § 329.[26]

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[20] *See* USCIS Fact Sheet: Naturalization Through Military Service (June 25, 2013).

[21] National Defense Authorization Act for Fiscal Year 2004 (NDAA 2004), Pub. L. No. 108-136, 117 Stat. 1392 (2003).

[22] NDAA 2004 § 1701(b).

[23] NDAA 2004 § 1701(d); *see also* American Forces Press Service, "Troops Earn U.S. Citizenship in Iraq" (Mar. 4, 2009) (describing how more than 250 American military members were sworn in as U.S. citizens in Baghdad, Iraq, during the 13th U.S. naturalization ceremony conducted overseas since U.S. Citizenship and Immigration Services (USCIS) began overseas military naturalization ceremonies). USCIS takes the position that overseas naturalization is not available unless the person is a currently serving member of the U.S. military. Veterans must therefore naturalize inside the United States, even if they claim eligibility for naturalization under INA § 328 or § 329.

[24] INA § 328(b)(2) ("notwithstanding section 318 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, and if prior to the filing of the application, the applicant shall have appeared before and been examined by a representative of the Service"); INA § 329(b)(1) ("he may be naturalized regardless of age, and notwithstanding the provisions of section 318 as they relate to deportability and the provisions of section 331").

[25] The *USCIS Policy Manual* states that those naturalizing under INA § 328 must show five years of good moral character. However, INA § 328 has been interpreted by USCIS to allow a presumption of good moral character if the person has served honorably as documented in military records by an honorable discharge; this presumption, however, can be overcome by contrary evidence. *See Yuen Jung v. Barber*, 184 F.2d 491 (9th Cir. 1950) (rejecting argument that honorable discharge is conclusive evidence of good moral character that prevents immigration authorities from inquiring further). The latter case involved the question of whether the applicant's behavior prior to his military service could be considered; it remains to be seen whether the presumption of good moral character based on an honorable discharge can be challenged by information about a lack of good moral character during the time an applicant was in the military.

[26] The one-year good moral character requirement under INA § 329 is not statutory, but rests on a regulation and an agency interpretation that has been upheld by the courts. *See* 8 CFR § 329.2(e) and *Lopez v. Henley*, 416 F.3d 455, 457–58 (5th Cir. 2005) (upholding agency requirement that a person seeking citizenship through military service must establish good

Regarding this last requirement, the courts have held that the usual statutory bars[27] to showing good moral character for purposes of

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moral character); *Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003) (although nothing in INA § 329 requires a showing of good moral character, *Chevron* deference will be applied to uphold regulation requiring one year of good moral character). *Accord Castiglia v. INS*, 108 F.3d 1101, 1102 (9th Cir. 1997); *Cacho v. Ashcroft*, 403 F. Supp. 2d 991, 994 (D. Haw. 2004).

[27] The statutory bars to showing good moral character are found at INA § 101(f), which states:

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

(1) a habitual drunkard;

(2) [stricken]

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 212(a) of this Act; or subparagraphs (A) and (B) of section 212(a)(2) and subparagraph (C) thereof of such section [*Sic.* The phrase "of such section" probably should not appear.] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana); if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)); or

(9) one who at any time has engaged in conduct described in section 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 212(a)(2)(G) (relating to severe violations of religious freedom).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a federal, state, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was

naturalization do apply, so that—to give just one example—persons deemed to be "aggravated felons" under the immigration laws[28] cannot naturalize under the military naturalization statutes, even if they have served honorably in wartime.[29]

Thus, in the case of *Nolan v. Holmes*,[30] the U.S. Second Circuit Court of Appeals upheld the denial of a naturalization petition filed by Allen Nolan, an LPR who had served honorably in the U.S. Army during the Vietnam War. Mr. Nolan pled guilty to several federal narcotics offenses in 1996 and attempted to avoid deportation as an aggravated felon by filing an application for naturalization based on his wartime military service. The Second Circuit determined that Nolan was ineligible to naturalize under the wartime military naturalization statute because he was statutorily barred from showing good moral character, and the agency regulation requiring good moral character for military naturalization applicants was reasonable.[31]

If a military naturalization applicant is not barred statutorily from showing good moral character, he or she may still be denied naturalization if the totality of the circumstances shows a lack of good moral character in the one-year[32] or five-year[33] period and continuing to the date of naturalization. Conduct before the period also may be considered. Thus, in *Gordon v.*

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a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

[28] INA § 101(f)(8) contains the aggravated felony bar to showing good moral character. This bar applies to prevent naturalization altogether of persons convicted of an aggravated felony on or after Nov. 29, 1990, the effective date of the Immigration Act of 1990 (IMMACT 90). See 8 CFR §316.10(b)(1) ("An applicant shall be found to lack good moral character, if the applicant has been: (i) Convicted of murder at any time; or (ii) Convicted of an aggravated felony as defined in section 101(a)(43) of the Act on or after November 29, 1990.").

[29] *See, e.g.*, *Boatswain v. Gonzales*, 414 F.3d 413 (2d Cir. 2005) (holding that the aggravated felony bar in INA § 101(f)(8) applies to applicants for naturalization under INA § 329).

[30] *Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003).

[31] 334 F.3d at 202. *See also O'Sullivan v. USCIS*, 453 F.3d 809 (7th Cir. 2006) (military naturalization applicant barred from ever showing good moral character by virtue of his aggravated felony conviction).

[32] One year of good moral character is required under INA §329.

[33] USCIS takes the position that five years of good moral character are required under INA §328. 12 *USCIS Policy Manual*, pt. I, ch. 2 (updated as of Sept. 30, 2013), *available at www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter2.html*.

Chertoff,[34] a U.S. district court upheld the denial of naturalization to an active-duty Navy sailor on the grounds that the sailor lacked the required good moral character. The sailor had been convicted of three crimes during the one-year statutory period, although he had committed two of them before the relevant time period; the sailor also had various other convictions that fell outside the statutory period. The court found that the sailor's "conduct outside the one-year period, when coupled with his conviction during the statutory period, provides sufficient basis for the court to find that the Plaintiff lacks good moral character."[35] The fact that the Navy had awarded the sailor numerous medals and awards could not outweigh a series of offenses that "spanned the lifetime of his residence here in the United States."[36]

Requirements of INA § 328

Although they contain common elements, the two military naturalization statutes also diverge in significant ways. First, the peacetime military naturalization statute, INA § 328, applies at all times and requires no presidential executive order, but it does require an applicant for military naturalization to have LPR status and file during service or within six months of leaving the service if he or she seeks exemption from the usual continuous physical presence and residency requirements that apply to civilians.[37] USCIS also interprets this statute to require that the applicant must show five years of good moral character and must be 18 years of age.[38] The statute states:

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[34] *Gordon v. Chertoff*, Civil Action No. 2:04cv673 (E.D. Va. Nov. 4, 2005).

[35] *Id*.

[36] *Id*.

[37] A veteran may still file under INA §328 more than six months after being discharged, but in those cases, the veteran must meet the usual requirements under naturalization laws for continuous physical presence and "residence." Thus, there is little advantage to filing under this section—other than saving filing fees—if a person has been discharged for more than six months.

[38] 12 *USCIS Policy Manual*, pt. I, ch. 2 (updated as of Sept. 30, 2013), *available at www.uscis.gov/ policymanual/HTML/PolicyManual-Volume12-PartI-Chapter2.html*.

> A person who has served honorably at any time in the Armed Forces of the United States for a period or periods aggregating one year,[39] 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 application is filed while the applicant is still in the service or within six months after the termination of such service.
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> Exceptions.—A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this title ....[40]

This statute applies to anyone on active duty or in any of the Reserve components, including the Individual Ready Reserve or the inactive National Guard.[41] Service in a National Guard unit, however, must be during a time when the National Guard unit has been federally recognized as a Reserve Component unit.[42] The statute does not require that the person have enlisted or re-enlisted while in the United States, but it does require that he or she have LPR status. As a practical matter, few service members have chosen to naturalize under this statute since 9/11, but this statute may become important if and when the more generous wartime military naturalization statute is no longer in effect. This statute is also useful for

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[39] The NDAA for Fiscal Year 2004 reduced the period of peacetime service required under INA §328 for immigrants to qualify for naturalization from three years to one year, and this provision was made retroactive to September 11, 2001. NDAA 2004 §1701(a).

[40] INA §328.

[41] *U.S. v. Rosner*, 249 F.2d 49 (1st Cir. 1957) (INA §328 does not require an applicant to be in "active service" for the required period; inactive Reserve service also meets the statutory requirement).

[42] 12 *USCIS Policy Manual*, pt. I, ch. 2 (updated as of Sept. 30, 2013), *available at www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter2.html*. For most Guard members, this distinction is of little importance, but the distinction does make it clear that members of the State Guard units—as opposed to units of the National Guard of the United States, *see Perpich v. Dep't of Defense*, 496 U.S. 334 (1990)—are not eligible for military naturalization.

Reservists and National Guard members who have difficulty documenting that they have served on "active duty" or in the "Selected Reserve" and who therefore find it difficult to meet the documentary requirements to naturalize under INA § 329.

Requirements of INA § 329

During wartime, military personnel may also naturalize without obtaining LPR status first, as long as they have one day of active duty or Selected Reserve service. Under INA § 329, immigrants who are serving honorably in the U.S. Armed Forces may naturalize regardless of their length of time in service or their immigration status.[43] This statute applies during specified statutory periods, or when a presidential executive order exists that has invoked the statute, as shown below in the Table. Presidents have long used this statute to bestow citizenship benefits on immigrants in the military and President George W. Bush did so on July 3, 2002, proclaiming that all immigrants who have served honorably on active duty in the armed forces after September 11, 2001, shall be eligible to apply for expedited U.S. citizenship.[44] Table 2 lists the currently applicable periods of conflict in which Section 329 has been in effect by statute or presidential executive order. Note that not every overseas deployment of U.S. forces into combat is covered by this statute or by an executive order invoking this statute; for example, as of this writing, no president has issued an executive order to naturalize military personnel who served between 1991 and 2001, when the U.S. military engaged in numerous combat operations in places such as Bosnia, Haiti, Panama, and Somalia, among others. People who served in the military during those periods may naturalize under INA § 328, if they qualify, but not under INA § 329.

[43] INA §329.

[44] Exec. Order No. 13269 of July 3, 2002, 67 Fed. Reg. 45287 (July 8, 2002).

Table: Application of INA § 329

Conflict	Dates	Source of Authority	Notes
World War I	No specific dates listed but USCIS uses the dates of April 6, 1917 through November 11, 1918	INA § 329(a)	See USCIS Policy Manual, Vol. 12, Ch. 3
World War II	September 1, 1939 through December 31, 1946	INA § 329(a)	
Korean War	June 25, 1950 through July 1, 1955	INA § 329(a)	
Vietnam War	February 28, 1961 through October 15, 1978	Exec. Order No. 12081, 43 Fed. Reg. 42237 (1978)	
Grenada Campaign (but see note)	October 25, 1983 through November 2, 1983	Exec. Order No. 12582, 52 Fed. Reg. 3395 (1987) (but attempting to limit scope of INA §329 geographically)[45]	A circuit court has ruled that the Executive Order was invalid because it attempted to limit the scope of INA §329, and therefore further §329 naturalizations during this period are not permitted. *See Reyes v. INS*, 910 F.2d 611 (9th Cir. 1990). Also, President Clinton revoked the Grenada designation by Executive Order in 1994.[46]

[45] Exec. Order No. 12582 of Feb. 2, 1987, 52 Fed. Reg. 3395 (1987).

[46] Exec. Order No. 12913 of May 2, 1994, 59 Fed. Reg. 23115 (May 4, 1994).

Conflict	Dates	Source of Authority	Notes
Persian Gulf Conflict	August 2, 1990 through April 11, 1991	Exec. Order No. 12939, 59 Fed. Reg. 61231 (1994)[47]	
Post September 11, 2001 Conflict	September 11, 2001 to present	Exec. Order No. 13269, 67 Fed. Reg. 45287 (2002)	

INA § 329 differs in several respects from INA § 328. First, the statute requires service during certain designated periods of conflict. In the modern era, this means that the applicant must serve at least one day of active duty or one day of Selected Reserve service during a period in which an executive order specifically invokes INA § 329. Thus, in the case of *Singh v. Ganter*,[48] an Army Reserve veteran and undocumented immigrant was unable to naturalize under INA § 329 because he had served in Kosovo during a period of time in which no specific INA § 329 executive order was in effect.[49]

Second, the statute requires enlistment or re-enlistment while in the United States or other specified locations, unless the applicant has obtained LPR status. The statute applies only if:

> (1) at the time of enlistment, re-enlistment, extension of enlistment, or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, or on board a public vessel owned or operated by the United States for noncommercial service, whether or not he has been lawfully admitted to the United States for permanent residence, or
> (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence.[50]

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[47] Exec. Order No. 12939 of Nov. 22, 1994, 59 Fed. Reg. 61231 (Nov. 29, 1994).

[48] *Singh v. Ganter*, 503 F. Supp. 2d 592 (E.D.N.Y. 2007).

[49] Singh argued that an executive order designating Kosovo as a "combat zone" for Internal Revenue Service purposes also operated to invoke INA § 329, although the executive order never mentioned INA § 329. The court rejected this argument. 503 F. Supp. 2d at 593, 597.

[50] INA § 329(a).

In practice, most persons today enlist inside the United States; the few problems related to this statutory language generally involve those Pacific Islanders who are allowed to enlist in the U.S. military by treaty,[51] and who sometimes enlist while physically outside the United States. This problem is "cured" when U.S. military authorities re-enlist them inside the United States after they report for basic training.[52]

Third, under agency regulation, an applicant must establish that he "[h]as been, for at least one year prior to filing the application for naturalization, and continues to be, of good moral character."[53]

Fourth—and most important—the statute does not require a person to have LPR status unless the person has not enlisted or re-enlisted in one of the areas specified above. Persons who have two-year conditional LPR status may naturalize under this statute without having the conditions lifted,[54] and persons having no immigration status at all may also naturalize under this statute, if they meet its requirements. Accordingly, although undocumented immigrants are not permitted to enlist in the U.S. Armed Forces, those who have ended up in the military by accident[55] or through the use of false documentation[56] are sometimes—but not always—able to

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[51] *See* 10 USC § 504(b)(1)(C)(i)–(iii) (allowing persons from Micronesia, the Republic of the Marshall Islands, and Palau to enlist in the U.S. military).

[52] *See also U.S. v. Covento*, 336 F.2d 954 (D.C. Cir. 1964) (re-enlistment in United States to qualify for naturalization); *In re Zamora*, 232 F. Supp. 1017 (S.D. Cal. 1964) (same); *In re Torres*, 240 F. Supp. 1021 (D. Ariz. 1965) (same).

[53] 8 CFR §329.2(d).

[54] 12 *USCIS Policy Manual*, pt. I, ch. 3 (updated as of Sept. 30, 2013), *available at http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter3.html*.

[55] Some immigrants with an employment authorization document (EAD), but not a green card—such as someone who is in the United States with temporary protected status—mistakenly believe that they are eligible to enlist, and some military recruiters have been unaware of the difference between an EAD and a green card and have inadvertently allowed immigrants to enlist who are not actually eligible to do so.

[56] *See* D. Gillison, "The Few, the Proud, the Guilty: Marines Recruiter Convicted of Providing Fake Documents to Enlist Illegal Aliens," *Village Voice* (Oct. 11, 2005), *available at www.villagevoice.com/2005-10-11/news/the-few-the-proud-the-guilty/*. This article notes that the Pentagon began verifying the alien registration numbers of recruits with the U.S.

naturalize in wartime under INA § 329, despite their lack of LPR status. A representative example is the case of Juan Escalante, a Mexican citizen and undocumented immigrant who enlisted in the U.S. Army, inside the United States, using a false green card.[57] Escalante was naturalized while still in the Army after his case came to the attention of immigration and military authorities.[58] Although Escalante had enlisted using a false document, his military service was honorable, and he was permitted to naturalize under INA § 329.[59] Other undocumented immigrants have not been naturalized, typically because their status has been uncovered early in their military career and they have been given uncharacterized "entry level" discharges that cause USCIS to take the position that they cannot meet the INA § 329 "honorable service" requirement.[60]

Another notable difference between sections 328 and 329 is that INA § 328 does not require any specified type of service, while INA § 329 requires service in active-duty status[61] or in the Selected Reserve of the Ready Reserve. The inclusion of the latter type of service is a recent change to the statute. As noted earlier, Congress in 2003 passed the National Defense Authorization Act for Fiscal Year 2004 (NDAA 2004),[62] which amended the INA to extend the benefit of naturalization under INA § 329 to individuals who have served honorably as members of the Selected Reserve of the Ready Reserve of the U.S. Armed Forces during designated periods of

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Department of Homeland Security in 2004, after learning that undocumented immigrants were enlisting with false green cards.

[57] F. Davila, "Army Private Receives New Rank: U.S. Citizen," *Seattle Times* (Feb. 12, 2004) htt (recounting the story of Juan Escalante, an undocumented immigrant who received his U.S. citizenship through service in the Army).

[58] *Id*.

[59] *See also In Re Watson*, 502 F. Supp. 145 (D.C. 1980) ("improper induction or enlistment into the armed forces ... does not bar naturalization under § 329(a)").

[60] The issue of whether an "uncharacterized" discharge is sufficient to meet the requirements for "honorable" service is currently being litigated in multiple lawsuits around the United States at this writing.

[61] In 10 USC §101(d), "active duty" is defined as "full-time duty in the active military service of the United States [including] full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty."

[62] Pub. L. No. 108-136, 117 Stat. 1392 (2003).

hostilities.[63] This amendment was intended to correct inequities that resulted when, for example, National Guard members were placed on extended "state" duty after the 9/11 terrorist attacks because of the ongoing national emergency, yet could not qualify for military naturalization because they had not been on federally recognized active duty.[64] Before passage of NDAA 2004, service members needed federal active-duty service in order to qualify under INA § 329, but such service is no longer required. This amendment became effective as of September 11, 2001.[65]

The Selected Reserve is defined in law as those units and individuals within the Ready Reserve that have been designated by their respective services as so essential to the national military strategy that they have priority over all other Reserves. Selected Reserve members also adhere to specific training requirements, and each service determines which of its units and personnel are part of the Selected Reserve. Members of the National Guard and Reserve who train regularly are members of the Selected Reserve.[66] When a National Guard member or Reservist is a member of the Selected Reserve, he or she may now naturalize under INA § 329 based on that service. The applicant is not required to have active-duty service or be part of a National Guard or Reserve unit that has been ordered to active federal duty or mobilized. In 2010, USCIS issued a new version of Form N-426, Request for Certification of Military or Naval Service, to account for the statutory change authorizing military naturalization for members of the Selected Reserve.[67] In early 2011, USCIS also issued a memorandum authorizing the use of the National Guard Bureau (NGB) Form 22, National Guard Report of

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

[64] *See* 10 USC § 101(d) (definition of active duty does not include full-time National Guard duty).

[65] *See* INA § 329(a) (2003); *see also* NDAA 2004 §1702 (effective as if enacted on Sept. 11, 2001).

[66] 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 USC § 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.

[67] USCIS Form N-426, Request for Certification of Military or Naval Service, *available at www.uscis.gov/files/form/n-426.pdf*.

Separation and Record of Service,[68] as an alternative to the Form DD-214, Certificate of Release or Discharge from Active Duty, for those veterans who have served in the National Guard and been discharged, but who desire to apply for military naturalization as members of the Selected Reserve.[69]

USCIS has not, however, updated the Form N-426 to allow its use by persons applying under INA § 328 with other types of service; the Form N-426 only allows certification of "active duty" or "Selected Reserve" service, which creates a significant bureaucratic roadblock for persons seeking to file under INA § 328; USCIS routinely demands an N426 of INA § 328 applicants who do not have any "active duty" or Selected Reserve service.

The following hypothetical example illustrates how the military naturalization statutes work in practice. This example is based on a "real world" case but the name of the soldier and other details have been changed because his identity is not public.

Example: Naturalization of Non-LPR Selected Reserve Member

Facts. Tom came to the United States unlawfully as a small child. His parents gave him a fraudulent "green card" and he always believed that he was an LPR. He joined the Army using his fraudulent green card in 1994, before the Army started checking the validity of such cards with immigration authorities. Because Tom enlisted in 1994, he incurred an eight-year mandatory service obligation (MSO). Tom served on active duty for three years and tried to naturalize, but his naturalization application was denied under INA § 328 because immigration authorities determined that his green card was fraudulent. Tom was then discharged from active duty; he joined the New York Army National Guard to complete the remainder of his MSO. Tom was in the New York Army National Guard on September 11, 2001, when the World Trade Center was attacked by terrorists. Tom was

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[68] *See* USCIS Memorandum, D. Neufeld, "Acceptance of DD Form 214 as Certification of Military or Naval Service for Veterans of the U.S. Armed Forces" (Apr. 29, 2009), *published on* AILA InfoNet at Doc. No. 09050464 (*posted* May 4, 2009).

[69] USCIS Policy Memo, "Eligibility for Members of the National Guard of the United States to Naturalize under Section 329 of the Immigration and Nationality Act and Acceptance of NGB Form 22 as Certification of Military Service for National Guard Veterans; Revision to the AFM Chapter 72.2(d)(3); AFM Update AD10-42" (Jan. 24, 2011), *published on* AILA InfoNet at Doc. No. 11042933 (*posted* Apr. 29, 2011).

immediately placed on state duty with the National Guard for more than a year as part of "Operation Trade Center." Although he wore his National Guard uniform and was paid by the state of New York for his duty, he was not on federal active-duty orders. In 2002, at the end of his eight-year MSO, Tom was honorably discharged from the National Guard. Is Tom eligible to naturalize under INA § 329, as a member of the Selected Reserve, although he is not an LPR?

Legal Analysis. Yes, Tom is eligible to naturalize under INA § 329 because of the amendment made to that section in 2003, which added membership in the "Selected Reserve of the Ready Reserve" as a qualifying type of service that will allow naturalization under this statute, retroactive to September 11, 2001.[70] A member of the National Guard who is performing state duty is a member of the Selected Reserve of the Ready Reserve, and need not be an LPR to naturalize during designated periods of conflict. Tom's duty is shown on his NGB Form 22, and USCIS will accept this form in lieu of a DD-214 or N-426 to show his qualifying military service. Because Tom performed duty after September 11, 2001, in the Selected Reserve of the Ready Reserve, Tom is eligible for military naturalization under INA § 329. He is not eligible for naturalization under INA § 328 because he lacks LPR status.

Naturalization of Persons Ineligible to Adjust Status

INA § 329 also allows persons who are otherwise inadmissible or removable under the immigration laws to naturalize. Thus, someone who is subject to the grounds of inadmissibility under INA § 212[71] may potentially naturalize under INA § 329, so long as he or she can show the requisite good moral character and meet the law's other requirements. For example, a J-1 exchange visitor visa holder who enlists in the military during wartime can naturalize under INA § 329, notwithstanding the

[70] National Defense Authorization Act, Nov. 24, 2003 (effective as if enacted on Sept. 11, 2001, as provided by §1705(a) of the Act, which appears at 8 USC § 1439 note).

[71] INA § 212. This is a very complex law that contains numerous reasons that bar noncitizens from obtaining LPR status, including such things as admitting to using marijuana or failing to get vaccinated.

existence of a "bar to admissibility" that requires the person to go back to his or her home country for two years under INA § 212(e).[72]

Likewise, someone who is inadmissible for having made a false claim to U.S. citizenship may be able to naturalize under INA § 329 because making a false claim to U.S. citizenship is a ground of inadmissibility[73] and a ground of deportability,[74] but not an absolute bar to naturalization.[75] Although a false claim to U.S. citizenship may be taken into account in considering, under the totality of the circumstances, whether a military member has good moral character, USCIS may still naturalize the person under INA § 329. Thus, Luis Lopez, a 10-year decorated war veteran and undocumented immigrant, was able to naturalize under INA § 329 despite having used a false California birth abstract to enlist in the U.S. Army.[76] USCIS determined that Sergeant Lopez's decade of honorable military service, multiple combat deployments, and numerous military awards outweighed his use of a false document to enlist originally.

Certification of Honorable Service

The key to naturalization through military service is that the military service must have been "honorable," as determined by the branch of the U.S. Armed Forces in which the person served or is serving. If the person is still serving at the time that the naturalization application is filed, then the

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[72] Under INA §212(e), a holder of a J-1 visa is often ineligible to apply for certain other nonimmigrant visas or permanent residence without obtaining a waiver of the requirement that he or she reside outside the United States for an aggregate of two years following departure from the United States.

[73] INA §212(a)(6)(C)(ii)(I) ("Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act ... or any other Federal or State law is inadmissible.").

[74] INA §237(a)(3)(D)(i) ("Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this Act … or any Federal or State law is deportable.").

[75] The bars to showing good moral character, which also operate to bar a noncitizen from naturalizing during the period when good moral character is required, are found at 8 USC §1101(f). Two of these bars are permanent, and cannot be overcome with the passage of time—the bar based on a conviction for murder, and the bar based on an aggravated felony conviction on or after November 29, 1990.

[76] M. Jordan, "Soldier Finds Minefield on Road to Citizenship," *Wall Street Journal*, Feb. 10, 2011, at A9.

character of the person's service is determined by the statements on the Form N-426, which must be filed with the N-400 application package.[77] A representative of the military branch in the grade of O-6 (or higher)[78] must complete Form N-426, and certify the person's service as honorable or otherwise.[79]

It is worth briefly discussing the requirement that an officer in the grade of O-6 (or higher) must certify Form N-426. This is a relatively new requirement, dating to October 17, 2017, when DOD bureaucrats decided that they disliked the previous rule that any official with access to the military member's personnel records could certify Form N-426. Prior to October 2017, any military personnel official could certify the form. After DOD created a new requirement that only an officer of the grade of O-6 could sign the form, there was a dramatic drop in the filing of military naturalization applications because it proved difficult for service members to find an officer of such a grade to sign the form (which requires a "wet ink" signature, among other things). Although this requirement was challenged in court, a Federal judge upheld the requirement, which remains in effect today. Military members continue to report grave difficulty in getting the required O-6 signature, and this continues to cause delays in their naturalization filings. Readers will also be amused to know that USCIS, the immigration agency charged with processing military naturalizations, is unfamiliar with common military rank abbreviations, and will reject a Form N-426 signed, say, by Navy "CAPT Samuel F. Wright" unless CAPT Wright also writes "O-6" after his name on the form.

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[77] On October 13, 2017, DOD adopted a policy requiring noncitizens serving in the U.S. military to meet additional criteria before being issued a certified N-426, including a minimum service requirement. On August 25, 2020, this rule was struck down in federal court. *See Samma v. U.S. Dept. of Defense*, Civil Action No. 20-cv-1104 (DDC 2020).

[78] An "O-6" is a Colonel in the Army, Air Force, and Marine Corps, and a Captain in the Navy or Coast Guard. The requirement for an N-426 to be certified by such a high-ranking officer was created by the Trump Administration in an internal memo. The requirement has served to stop many military members from filing for naturalization because it has proven quite difficult for many military personnel to find and communicate their need for a certified N-426 to these senior officers, who are also often unfamiliar with the form and fill it out incorrectly.

[79] The certification may be made by any military official who has access to the individual's military personnel file; military personnel files are now maintained online, so a military personnel official need not have a "paper file" to certify the form.

If the person has been discharged from the military, then USCIS will accept an uncertified Form N-426 as long as it is submitted with a copy of Defense Department Form DD-214 or NGB Form 22.[80]

While USCIS has been deferential to the needs of the National Guard, USCIS has not been so accommodating to non-Guard Reservists. USCIS has no stated documentation that allows Reservists who are not in the National Guard to submit an uncertified Form N-426 and such persons are regularly unable to file for naturalization as a result. USCIS repeatedly demands Form DD-214, the Certificate of Release or Discharge from Active Duty, from Reservists, including Reservists who have not received any DD-214 in years because they have not performed the type of active duty that results in the issuance of a DD-214. Accordingly, a Reservist who tries to apply for military naturalization should expect to receive nonsensical demands from USCIS for a DD-214 to cover periods of Reserve duty where no DD-214 was ever issued.

USCIS will review the DD-214 or NGB Form 22 to determine whether the person's service was honorable or otherwise,[81] and will verify this information with military authorities.

The forms contain information on the dates of service, the type of discharge, the character of the service, and information explaining why the person was discharged. USCIS will review all of this information to determine whether a person is eligible for military naturalization. There are six possible discharge types that may appear on the forms: honorable, general under honorable conditions, other than honorable, bad conduct, dishonorable, and entry level. The entry-level discharge may further be described as "uncharacterized," "under other than honorable," or "honorable." USCIS takes the position that only a discharge that is described as "honorable" or "under honorable conditions" will meet the person's burden to show eligibility for military naturalization.[82] The issue whether "uncharacterized" discharges allow a

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[80] *See* USCIS Memorandum, D. Neufeld, "Acceptance of DD Form 214 as Certification of Military or Naval Service for Veterans of the U.S. Armed Forces" (Apr. 29, 2009), *published on* AILA InfoNet at Doc. No. 09050464 (*posted* May 4, 2009).

[81] *Id*.

[82] *See* 12 *USCIS Policy Manual*, pt. I, ch. 2 and 3 (updated as of Sept. 30, 2013) ("Both 'Honorable' and 'General Under Honorable Conditions' discharge types qualify as honorable service for immigration purposes.").

person to naturalize through military service is being litigated at this writing in multiple lawsuits.

Example: Effect of an Uncharacterized Entry-Level Discharge

Facts. Adeniran is an LPR who enlisted in the U.S. Navy in May 2007, entered active duty in July 2007, and was discharged in September 2007—one month and 10 days after entering active duty—after the Navy discovered that he was suffering from a mood disorder. Adeniran did not complete basic training. Instead, he was administratively discharged and given a Form DD 214 that stated his "character of service" as "uncharacterized." Might Adeniran naturalize through wartime military service, despite having failed to complete training and having received an entry-level discharge?

Legal Analysis. USCIS takes the position that Adeniran is not eligible for military naturalization under INA § 329, which provides for expedited naturalization during certain times of declared military hostilities. USCIS believes that an "uncharacterized" entry-level discharge does not qualify a person for military naturalization under the expedited wartime military naturalization statute.[83] When a noncitizen seeks naturalization under INA § 329, "the burden is on the alien applicant to show his eligibility for citizenship in every respect."[84] Without litigation, Adeniran cannot meet that burden because he cannot provide evidence that the Navy considers his service to be honorable. One Federal court has stated that if expedited military naturalization were allowed under these circumstances, the United States would be extending "the high privilege of citizenship to troubled or otherwise ineligible recruits who could pass a disqualifying condition past a recruiter and remain in the military for a minimal length of time. This scenario would create ... an unwarranted loophole."[85] This issue is, however, currently being litigated in several lawsuits around the United States. Moreover, Adeniran will be able to naturalize once he meets the "regular" naturalization requirements applicable to any LPR, including five

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[83] *Oyebade v. Lee*, 2010 U.S. Dist. LEXIS 74112, 2010 WL 2927207 (S.D. Ind.).

[84] *See INS v. Pangilinan*, 486 U.S. 875, 883–84, 108 S. Ct. 2210, 100 L. Ed.2d 882 (1988) (stating that the burden is on the alien applicant to show his eligibility for citizenship in every respect).

[85] *Oyebade v. Lee*, 2010 WL 2927207 (S.D. Ind.) at 5.

years of residence in the United States as an LPR. He may also be able to naturalize by seeking an upgraded discharge through his military branch.

Removal Proceedings Not a Bar to Military Naturalization

Another unique aspect of the special military naturalization statutes is that they specifically allow military personnel to naturalize notwithstanding the pendency of removal proceedings. For example, Karla Rivera,[86] an active-duty U.S. Navy sailor who was placed into removal proceedings by USCIS for failure to timely file an I-751, Petition to Remove the Conditions of Residence, to lift the conditions on her conditional lawful permanent resident (CLPR) status,[87] was naturalized under INA § 329 because she served on active duty after September 11, 2001. Under INA § 318, an alien cannot usually naturalize while in removal proceedings, but INA §§ 328 and 329 contain an exception for military personnel, who may naturalize despite being in removal proceedings.[88] Once Karla Rivera naturalized, the immigration judge terminated removal proceedings.

Because military naturalization offers this unique avenue of relief to potentially removable foreign nationals, U.S. Immigration & Customs Enforcement (ICE) will sometimes exercise its discretion favorably when determining whether to place a military member or veteran into removal

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[86] Described in the text is 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*.

[87] ICE Memorandum, M. Forman, "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), *published on* AILA InfoNet at Doc. No. 06051664 (*posted* May 16, 2006). Under the Forman memo, U.S. Immigration and Customs Enforcement (ICE) has a policy of requiring consideration of certain factors before a military member or veteran can be placed in removal proceedings. 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 removal proceedings when they have failed to file an I-751 timely, or under certain other circumstances.

[88] INA §328(a)(2) ("notwithstanding section 318 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) ("he may be naturalized regardless of age, and notwithstanding the provisions of section 318 as they relate to deportability and the provisions of section 331").

proceedings or to reinstate a removal order against a noncitizen with prior military service. In a 2004 internal memorandum, an ICE official stated that "ICE should not initiate removal proceedings against aliens who are eligible for naturalization under sections 328 or 329 of the INA, notwithstanding an order of removal."[89] The same memorandum also explains that an honorable discharge "by no means serves to bar an alien from being placed in removal proceedings," but that several factors should be taken into account when deciding whether to do so.[90] In a June 17, 2011, memorandum to all ICE officials, ICE Director John Morton also reiterated that ICE employees should exercise prosecutorial discretion using all relevant factors, one of which is "whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat."[91] Mr. Morton further stated that being a veteran or member of the U.S. Armed Forces is a positive factor that "should prompt particular care and consideration."[92] While these memos are no longer in effect, as a matter of current practice, ICE does ask about military service when determining whether to place a person into removal proceedings;[93] CBP and USCIS do not. In the past several years, CBP and USCIS have both been routinely tossing current military members and honorably discharged military veterans into removal proceedings, mostly for "technical" violations of immigration law, but President Joseph Biden has professed a desire to instruct these agencies to stop this unfortunate practice.

Military-Related Bars to Naturalizing

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[89] ICE Memorandum, M. Forman, "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), *published on* AILA InfoNet at Doc. No. 06051664 (*posted* May 16, 2006).

[90] *Id*.

[91] ICE Memorandum, J. Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities" (June 17, 2011), *published on* AILA InfoNet at Doc. No. 11061734 (*posted* June 17, 2011).

[92] *Id*.

[93] U.S. Government Accountability Office, Immigration Enforcement: Actions Needed to Better Handle, Identify, and Track Cases Involving Veterans (June 2019), available at https://www.gao.gov/assets/700/699549.pdf.

Some noncitizens who have served in the military are ineligible to naturalize, either through military or civilian naturalization statutes, because they have tried to avoid their military obligations. Two different statutes may apply. The first one, INA § 314, states:

> A person 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, or who, having been duly enrolled, departed, or shall depart from the jurisdiction of the district in which enrolled, or who, whether or not having been duly enrolled, went or shall go beyond the limits of the United States, with intent to avoid any draft into the military, air, or naval service, lawfully ordered, shall, upon conviction thereof by a court martial or a court of competent jurisdiction, be permanently ineligible to become a citizen of the United States. . .

This statute has been interpreted by USCIS to apply to anyone who has been convicted by a court-martial as a deserter, but it does not apply to those who have been merely charged—but not convicted—of desertion, or those who have only been convicted of AWOL (absent without leave).[94] This statute is discussed further below.

The second statute, INA § 315, applies to noncitizens who have obtained "alienage" discharges from the US Armed Forces. This statute states:

> [A]ny alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States 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.[95]

Exceptions to the latter bar may apply to persons who can establish by clear and convincing evidence that (1) they had no liability for military service, (2) that they did not request an "alienage" exemption, (3) their discharge was based on grounds other than alienage; (4) they were misled by a US

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[94] 12 *USCIS Policy Manual*, pt. I, ch. 4 (updated as of Sept. 30, 2013), *available at http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter4.html*.

[95] INA §315.

Government or foreign government authority regarding their exemption from military service; (5) they received an alienage discharge but later were inducted anyway; (6) they had served a certain minimum period of time prior to requesting an alienage exemption, or (7) prior to requesting an exemption from military service, they had served in the armed forces of their own country for a certain period of time, and that country had an agreement with the United States providing for a reciprocal exemption from military service for American nationals.[96]

The first step in determining whether a person is ineligible for naturalization because of the person's behavior while performing military service is to determine what type of discharge the person has received. Determining the character of the discharge is not the final step, however, because some persons with honorable discharges can still be barred from naturalizing. For example, noncitizens can be barred from naturalizing when they are granted administrative discharges that are honorable in character but given for reasons that prevent their naturalization. Thus, when a noncitizen has received an honorable discharge, USCIS will also review Form DD-214 or NGB Form 22, Report of Separation and Record of Service, to determine the reason for the discharge. The forms typically contain a code that indicates the reason for a person's discharge from the military. The U.S. Department of Defense (DOD) will not publicly release the list of the codes and their meaning, for privacy reasons, but a military member should be able to obtain a statement of the meaning of the codes on his or her Form DD-214 from his or her military personnel office.

Two reasons for receiving an honorable discharge—alienage and conscientious objection—can lead to denial of a naturalization application. Because of INA § 315, an honorable or other discharge given on grounds of alienage may make a person permanently ineligible for U.S. citizenship.[97]

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[96] 12 *USCIS Policy Manual*, pt. I, ch. 4 (updated as of Sept. 30, 2013), *available at http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter4.html*.

[97] INA §315 ("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* D. Levy, *U.S. Citizenship and Naturalization Handbook* (Thomson West, 2010–11 ed.), § 7:77–7:83 (military-related bars to naturalization).

Moreover, although it is not a permanent bar, 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."[98] Thus a service member who seeks to naturalize under INA § 329, the wartime military naturalization statute, presumably cannot have been discharged on account of alienage or as a conscientious objector, even if he or she received an honorable discharge. There is no similar bar in INA § 328, the peacetime military naturalization statute, but the permanent bar of INA § 315 may apply to such a person.

The permanent alienage bar does not apply unless the service member voluntarily seeks a discharge on account of alienage. Thus, in the case of *In Re Watson*,[99] Lennox Watson, a citizen of Guyana, was able to naturalize through wartime military service although his National Guard unit learned that he was not an LPR and gave him an involuntary discharge. Watson had entered the United States on a student visa in 1969; he enlisted in the National Guard in 1976. He completed four months of active-duty training in 1977 and reported back to his unit for duty. In 1978, his unit discharged him honorably when he was unable to produce a green card. Watson then applied for naturalization under INA § 329, the wartime naturalization statute. U.S. immigration officials opposed his naturalization on the grounds that he had been discharged from the National Guard "on account of alienage," but a federal district court held that Watson was eligible to naturalize because Watson had not requested the discharge, and the legislative history indicated that involuntary discharges for the government's convenience—even if they were "on account of alienage"—would not bar a veteran from naturalizing.[100]

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[98] INA § 329(a)(2).

[99] *In Re Watson*, 502 F. Supp. 145 (D.D.C. 1980) (improper induction or enlistment into the U.S. Armed Forces is not a bar to naturalization under INA §329).

[100] *In Re Watson*, 502 F. Supp. at 149 ("[H]e made no secret of his alien status when he enlisted or later; ... he was given obsolete forms to complete at the time of his enlistment, forms which did not show that service in the National Guard was restricted to United States citizens and permanent resident aliens. Improper induction or enlistment into the Armed Forces, with the knowledge of the armed forces, does not bar naturalization under §329(a)"). *See also In Re Apollonio*, 128 F. Supp. 288 (S.D.N.Y. 1955) (alien naturalized under 1953 military naturalization statute despite illegal induction into the army with the knowledge of the army, and subsequent involuntary discharge on account of alienage).

Another military-related bar to naturalization is the desertion bar discussed above. A person is barred from naturalizing if he or she, "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."[101] Under the Uniform Code of Military Justice, desertion requires an intent to remain away permanently or an intent to avoid hazardous duty or shirk important service;[102] thus, the law does not bar the naturalization of persons who have been convicted of the lesser included offense of "absent without leave."[103] For the desertion bar to apply, the person must have been convicted by a court-martial or other court of competent jurisdiction.[104]

Noncitizens who received an alienage discharge or a less than honorable discharge may be able to naturalize under the civilian naturalization statutes. For example, an LPR who is administratively discharged from the U.S. Armed Forces after being charged with desertion is not necessarily barred from naturalizing as a civilian. 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,"[105] this bar to naturalization does not apply unless the person has been convicted by a court-martial or other court of competent jurisdiction. If a person was not convicted by a court-martial because he accepted an administrative discharge in lieu of court-martial, he or she may be able to naturalize, notwithstanding the desertion charge. A person's being listed on official military records as a deserter does not in and of itself bar him or her from naturalizing.[106] Again, however, the person must meet the usual requirements for naturalization, including

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[101] INA § 314.

[102] Art. 86, UCMJ.

[103] Art. 85, UCMJ. If a person has been away from duty for more than 30 days, the government in a court martial is allowed to assume that there was no intent to return, and the burden shifts to the defense to show that there was an intent to return.

[104] INS Interpretation 314.1 ("While conviction of desertion by court-martial was first required by the above 1940 statute, the courts imposed a similar requisite under the earlier law; and, neither an admission of desertion, a finding of desertion by a civil court, nor a listing of a person on official military records as a deserter precluded naturalization in the absence of the required conviction.")

[105] INA §314.

[106] INS Interpretation 314.1.

showing that he or she is an LPR and has shown good moral character during the required statutory period.

On the other hand, the administrative discharge—even an honorable one—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."[107] The wartime military naturalization statute specifically prohibits the naturalization of anyone who is discharged on account of alienage.[108]

Thus, in a case involving Thanapong Sakaranapee, an LPR who had sought an early discharge from the U.S. Navy based on his status as a foreign national, the U.S. Court of Appeals for the Sixth Circuit upheld a federal district court dismissal of his INA § 329 naturalization appeal.[109] Sakaranapee had been warned, when he sought his discharge, that he would be permanently barred from becoming a U.S. citizen; he accepted the discharge anyway. When he later applied for naturalization under the general naturalization statute,[110] the immigration agency denied Sakaranapee's application on the grounds that he had received an alienage discharge;[111] Sakaranapee then failed to appeal that denial. Following the denial of this naturalization application, however, Sakaranapee sought to naturalize under INA § 329; once again, his application was denied, and it was the denial of this naturalization application that was reviewed by the circuit court. The circuit court upheld the denial, holding that "INA § 329 plainly indicates that it applies to all service members, both enlisted and drafted,"[112] and rejecting Sakaranapee's argument that the statute's alienage bar should apply only to persons who have been drafted.

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[107] INA § 315(a).

[108] INA § 329(a); 8 CFR §329.1; as noted above, the peacetime military naturalization statute, INA §328, contains no similar bar.

[109] *Sakarapanee v. Dep't of Homeland Sec'y*, 616 F.3d 595 (6th Cir. 2010).

[110] INA § 316.

[111] *See* INA § 315(a) ("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* 8 CFR § 315.2(b)(4).

[112] 616 F.3d at 599.

A different result was reached in an earlier case in the U.S. Court of Appeals for the Ninth Circuit, where an LPR veteran was able to naturalize under INA § 316 despite an alienage discharge from the U.S. Armed Forces.[113] According to the Ninth Circuit, not all noncitizens who are discharged from the military on account of alienage are permanently barred from naturalizing—if a foreign national did not know the consequences of the discharge, he may not be barred from citizenship.[114] The circuit court also ruled that the "ineligible to citizenship" provisions apply only when there is a draft in place,[115] and there is no draft today. Thus, an LPR who seeks discharge from the military on account of alienage may be able to file a civilian naturalization application and obtain U.S. citizenship despite his failure to complete his enlistment contract—at least in the Ninth Circuit.[116]

A member of the military who is absent without leave or who has deserted can expect to be detained upon an encounter with US law enforcement or immigration authorities, because such persons are generally reported to the National Crime Information Center (NCIC) so that they can be returned to military authorities for disciplinary action and possible court-martial. Such persons should also expect the information to appear when they apply for naturalization and undergo biometric screening. Immigration authorities will typically detain the person and notify the nearest military installation to come get the person, who will then be processed through the military justice system.

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. Julio became an LPR in June 2003 and joined the U.S. Army for a six-year enlistment shortly thereafter. After basic training, he filed an

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[113] INA §316(a); 8 USC §1427(a).

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

[115] *Id*.

[116] *See Skarapanee v. Dep't of Homeland Sec'y*, 616 F.3d at 598 ("No other court has joined the Ninth Circuit in its interpretation of INA § 315, and the government stated at oral argument that it believes Gallarde to have been wrongly decided.").

application for naturalization under the special military wartime naturalization statute.[117] While the application was pending, Julio was deployed to Iraq, where he served in an infantry unit. Julio 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 30 days, the Army classified him as a deserter. Several months later Julio was stopped for a traffic violation and the police discovered that he was listed as a deserter in the NCIC database. Julio 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. Julio accepted the alienage discharge in 2006. Is Julio barred from becoming a U.S. citizen?

Legal Analysis. Julio is probably ineligible for naturalization under the wartime military naturalization statute, but he may be able to obtain citizenship through a civilian application if he is otherwise eligible. The wartime military naturalization statute prohibits the naturalization of anyone who is discharged on account of alienage.[118] Although Julio will be unable to naturalize under this statute, Julio is an LPR who may be able to naturalize under INA § 316.[119]

Julio 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,"[120] this bar to naturalization does not apply unless the person has been convicted by a court-martial or other court of competent jurisdiction. Julio was not convicted by a court martial; he accepted an administrative discharge in lieu of court martial. Julio's listing on official military records as a deserter does not in itself bar him from naturalizing.[121] 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

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[117] INA §329.

[118] INA §329(a); 8 CFR §329.1.

[119] INA §316(a).

[120] INA §314.

[121] INS Interpretation 314.1.

"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."[122] 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.[123] The Ninth Circuit recently ruled that the "ineligible to citizenship" provisions only apply when there is a draft in place,[124] and there is no draft today. Julio may be able to file a naturalization application and obtain U.S. citizenship despite his failure to complete his enlistment contract.

Military Naturalization: Procedure

As a procedural matter, military naturalization applications differ somewhat from civilian ones. One key difference is that military naturalization applications may typically be filed much earlier than civilian naturalization applications. A military member who is applying for naturalization under INA § 329 (naturalization through U.S. military service during a designated period of hostilities) need not be an LPR and may file the Form N-400 after having completed one day of honorable service on active duty or in the Selected Reserve of the Ready Reserve.

In most cases, the earliest that an INA § 329 naturalization application can be submitted as a practical matter for enlisted persons is during basic training; however, Selected Reserve and National Guard members may submit an application as soon as they begin performing duty in the Selected Reserve and can obtain a certified N-426 from their Reserve unit.[125] Individuals in the enlisted delayed entry program (DEP) are typically not eligible to apply as they do not perform any formal military duty until they report for basic training, and they may be summarily discharged from the DEP without having served honorably and without receiving a DD-214.

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[122] INA §315(a).

[123] 8 CFR §315.2(b)(4).

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

[125] Some noncitizens are permitted to serve as officers in the Army Reserve; they may need to apply for citizenship so that they can obtain security clearances to go on active duty—they cannot report for active duty until they obtain U.S. citizenship. By law, noncitizens cannot serve as officers in the National Guard.

Members of the military who apply for naturalization under INA § 328 (naturalization with one year or more of U.S. military service) may file the N-400 as soon as they have LPR status and have completed one year of honorable military service of any type (including Delayed Entry Program service). However, they typically have difficulty finding anyone to certify an N-426 for them; and as stated earlier, the Form N-426 is not designed for INA § 328 cases, despite being required by USCIS. USCIS will reject applications filed before a military member meets the eligibility requirements, so military members should be careful not to apply until they meet those requirements.

Previously, military naturalization applications could only be filed by mail using Form N-400, but USCIS updated its Electronic Immigration System (ELIS) in 2020 to allow military members and veterans to file their N-400s electronically—at least in cases where the military member has an "A number," also called a "USCIS number." Military personnel who do not have an "A number" report that they cannot file an N-400 using ELIS.

Members of the military must complete the biometrics requirements that apply to any naturalization applicant. If a military member or veteran wishes to have fingerprints taken at an Application Support Center (ASC), he or she may visit any domestic ASC without an appointment even if he or she has not yet filed an N-400; the military member or veteran should show his or her military ID or other proof of military service and will be fingerprinted without a fee for naturalization purposes. Military personnel who plan to naturalize during basic training may have their fingerprints taken at an ASC before they report to basic training. Military personnel also can elect to sign a form authorizing the release of their enlistment fingerprints to the U.S. Department of Homeland Security (DHS) so they do not have to report to an ASC for biometrics; USCIS takes the position, however, that only military members overseas can use this option and anyone serving domestically must go to an ASC to be fingerprinted. Moreover, the transfer of enlistment fingerprint data between the military services and DHS may be slow, so it is typically more efficient for a military member or veteran to be fingerprinted at an ASC. Service members were formerly permitted to have their fingerprints taken at select military installations in the United States by USCIS personnel using mobile fingerprinting equipment, but this practice was halted under the Trump Administration. Finally, military naturalization applicants who are overseas may have their fingerprints taken manually at

U.S. military installations or U.S. embassies and consulates using the FD-258 fingerprint card.

To apply for military naturalization, military naturalization applicants must file an N-400 and should specify whether they are applying under INA § 328 or INA § 329. Military naturalization applicants should file their naturalization applications at the location specified in the instructions to the Form N-400 (or electronically). If they are currently serving abroad, they should also specify the overseas USCIS office at which they would like their application processed. Please note that USCIS closed most of its overseas offices under the Trump Administration so that overseas processing of military naturalization cases is now typically very slow.

Next, the applicant must submit a certified Form N-426, which verifies dates of military and honorable service, but the N-426 need not be certified if the applicant has been discharged and the uncertified N-426 is accompanied by a copy of Form DD-214 or NGB Form 22. Past USCIS instructions have stated that Form G-325B, Biographic Information, is also required, but currently serving members of the military are no longer required to file Form G-325B,[126] because USCIS will independently verify the military member's service through its liaison channels with the military.[127] Some USCIS offices continue to require Form G-325B in veterans' cases or in "regular" naturalization cases involving veterans, so a veteran may want to submit Form G-325B. If the form is submitted, the G-325B must contain only the basic biographical information on the applicant and his or her signature but need not be certified.[128]

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[126] *See* Naturalization for Certain Persons in the U.S. Armed Forces, 75 Fed. Reg. 2785 (Jan. 19, 2010, *effective* Feb. 18, 2010) ("This rule also amends the regulations to remove the requirement to submit Form G-325B, Biographic Information, with Form N-400, Application for Naturalization, for applicants applying for naturalization through service in the military").

[127] *See* USCIS *Adjudicator's Field Manual*, Appendix 72-21, Military G-325B Processing ("Effective Feb. 18, 2010, Form G-325B, Biographic Information, is no longer required for any Form N-400 that is pending or filed under section 328 or 329 of the Act. The information that was previously taken from the G-325B to conduct the Defense Clearance Investigative Index (DCII) query is now taken directly from the N-400. *See* AFM Chapter 72.2(d). *Also see* 8 CFR §§328.4 and 329.4 as amended by Naturalization for Certain Persons in the U.S. Armed Forces, 75 Fed. Reg. 2785–87 (Jan. 19, 2010 [*effective* Feb. 18, 2010]).").

[128] According to USCIS, "USCIS notes that it does not use the G-325B in its adjudication of Forms N-400, or for any other purpose," 75 Fed. Reg. 2785, 2786, so the continued insistence of some examiners that the form be submitted is mystifying.

By law, USCIS cannot require military naturalization applicants to pay an application filing fee or a biometrics fee for naturalization cases filed under INA § 328 or § 329.[129]

In mid-2009, the U.S. Army and USCIS started a program whereby noncitizen Army recruits were able to file their naturalization applications when they reported to basic combat training (BCT), and they had those applications adjudicated so that the soldiers graduated from BCT and become U.S. citizens at the same time.[130] USCIS accepted the applications at the Army's BCT sites, assisted the soldiers with completing the applications, interviewed and tested the soldiers while they were at BCT, and conducted a ceremony (in conjunction with Army authorities) for soldiers whose applications are approved. The U.S. Navy implemented a similar process at its Great Lakes boot camp training site,[131] and the U.S. Air Force also began naturalizing recruits during basic training graduation at Lackland Air Force Base in Texas.[132] In early 2013, the U.S. Marine Corps also began implementing boot camp naturalizations, leaving the U.S. Coast Guard as the only military service that did not allow them. Unfortunately, the Trump Administration suspended all basic training naturalization programs in early 2018. Military members now report grave difficulty in filing a military naturalization application during their basic training.

Military members can still file the application by mail or electronically while at basic training if they can obtain the required "O-6" signature on Form N-426. A military member who wishes to file for naturalization at basic training should bring the completed Form N-400, Application for Naturalization, and an uncertified Form N-426, Request for Certification of Military or Naval Service[133] to basic training. Depending on the branch of

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[129] INA §328(b)(4), and INA §329(b)(4).

[130] USCIS News Release, "52 Soldiers Become U.S. Citizens at Army Basic Training" (May 6, 2010). *See also* Congressional Letter Exchange Between Z. Lofgren, M. Thornberry, *et al*., (July 9, 2010) and DHS Secretary J. Napolitano (Aug. 30, 2010).

[131] S. M. Schafer, "Army, Navy Add Citizenship Option to Boot Camp," *Associated Press* (Apr. 21, 2011).

[132] M. Joseph, "Five AF Basic Trainees Become U.S. Citizens," *Air Force Print News* (Sept. 8, 2011).

[133] The Form N-426, Request for Certification of Military or Naval Service, is *available at www.uscis.gov/files/form/n-426.pdf.*

service and unit, the person may have the opportunity to submit the application packet, have the naturalization interview, and take the oath of allegiance to become a U.S. citizen before graduating from basic training.[134] Current anecdotal reports indicate that only the Navy has been successful in processing such cases recently, but one can hope that the other Services will soon follow the Navy's example.

Naturalization of Veterans

Persons currently serving in the military usually encounter multiple problems with their military naturalization applications, but veterans often face additional hurdles when applying. The most significant issue for veterans (and for anyone filing under INA § 328) is to obtain certification of the N-426. In the past, some veterans experienced significant difficulties when trying to get this form certified. As result, USCIS has created new avenues to make it easier for military veterans—but not current members of the military—to file for naturalization.

First, some military installations now have a designated USCIS Military Liaison who can help veterans with the application process and certify the Form N-426. The installation's personnel or legal office may be able to assist a veteran in locating the USCIS Military Liaison. The personnel or legal office may also have access to the veteran's records and may help the veteran or service member to find an O-6 who can certify the N-426.

If a veteran seeks to naturalize through military service but has been separated from the military, the veteran should complete the form and submit it, uncertified, with a photocopy of the veteran's Form DD-214, Certificate of Release or Discharge from Active Duty. The photocopy of Form DD-214 should include all dates of military service listed on Form N-426 and should identify the type of separation and character of service (this information is usually found on the "Member-4" page of the current version of the Form DD-214). Selected Reservists may not have a DD-214, or the DD-214 may show only limited periods of active duty. In these situations, USCIS should accept alternative evidence of service, such as military orders and military retirement points records. A veteran who is unable to submit a

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[134] Refer to the USCIS Document Checklist (M-477) for a list of documents that may be needed to submit with the application packet; *available at www.uscis.gov/files/article/attachments.pdf*.

photocopy of a Form DD-214 may contact the relevant military personnel records center to request a copy.

Veterans can obtain assistance by making an online request through the eVetRecs online system of the National Archives and Records Administration,[135] by filing Standard Form 180,[136] or by using the U.S. Armed Forces Legal Assistance Locator.[137] A nearby Veterans Administration office may also be able to obtain the veteran's Form DD-214.

USCIS takes the position that the veteran must have received an honorable or general under honorable conditions discharge to be eligible for naturalization under INA § 328 or § 329. An LPR veteran with another type of discharge may be able to naturalize through the "regular" naturalization procedures, but currently not through INA § 328 or § 329.

Example: Naturalization of Noncitizen Veteran with Complex Immigration Problems

Facts. Marco was born in Mexico in 1955 but came to the United States as an LPR in 1971. He enlisted and served in the U.S. Army from 1972 to 1975 and received an honorable discharge. Shortly after his discharge, he was convicted of alien smuggling and served six months in jail. After being released from jail, he went back to Mexico for several years. In 1990, he returned to the United States, was caught by immigration authorities, and was placed in deportation proceedings. He went to his first immigration court hearing in 1991 but failed to show up for any further hearings and an *in absentia* deportation order was issued. Following issuance of the order, he left the United States for Mexico again. In 2000, he returned to the United States by entering without inspection. He is now married to a U.S.

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[135] *See* U.S. National Archives and Records Administration, Request Your Military Service Records Online, by Mail, or by Fax, *available at www.archives.gov/veterans/military-service-records/*.

[136] *See* U.S. National Archives and Records Administration, Standard Form 180, *www.archives.gov/research/order/standard-form-180.pdf* .

[137] U.S. Armed Forces Legal Assistance Locator, *available at http://legalassistance.law.af.mil/content/locator.php*.

citizen and wants to clear up his immigration situation. Can he solve all his immigration problems by naturalizing through his military service?

Legal Analysis. Yes, Marco appears to be eligible to naturalize under INA § 329, which does not require him to have LPR status. Marco should file an N-400 application under INA § 329 and enclose a copy of his Form DD-214 and an uncertified N-426. Marco need not pay a fee for filing this application. Although alien smuggling is potentially an "aggravated felony" that might bar a person from naturalizing, Marco's alien smuggling conviction pre-dates 1990, so it is not a bar to naturalizing through military service.[138] Under USCIS regulations, Marco must show one year of good moral character to naturalize under INA § 329.

Posthumous Military Naturalization under INA § 329A

As of March 6, 1990, service members may be granted citizenship posthumously; prior to that date, posthumous citizenship occurred only by private legislation. President Bush's 2002 executive order declaring that immigrants in the military were eligible for expedited naturalization after September 11, 2001, also triggered the application of INA § 329A, the statute that allows posthumous U.S. citizenship to be granted to noncitizens who are serving honorably during certain periods of conflict[139] when they die "as a result of injury or disease incurred in or aggravated by"[140] military service.

A deceased immigrant may be granted posthumous citizenship under this statute regardless of his or her immigration status, and the grant of posthumous citizenship may confer immigration benefits on his or her parents, spouse, and children.[141] The next of kin or other approved representative of the deceased must file an application for posthumous citizenship within two years of the death, or by November 24, 2005,

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[138] *See* 8 CFR §316.10(b)(1)(ii).

[139] INA §329A, added by Section 2 of the Posthumous Citizenship for Active Duty Service Act of 1989, Pub. L. No. 101-249, 104 Stat. 94 (Mar. 6, 1990).

[140] INA §329A(b)(2).

[141] INA §319(d); 8 CFR §319.3(a); see sections 1703(f)–(h), 1705 of Pub. L. No. 108-136 (2004) (effective as if enacted on Sept. 11, 2001). Potential benefits to certain family members include retention of immediate relative status, the ability to self-petition for an immigrant visa, and the ability to naturalize immediately upon being granted LPR status.

whichever is later.[142] The application is filed on Form N-644, which should be accompanied by evidence of the person's military service and the circumstances of his or her death. If the application is approved, the person is deemed to be a U.S. citizen as of the date of the person's death.

Checking on the Status of a Military Naturalization Application

During the naturalization application process, it may be necessary to check on the status of the application, update a military member's address in the system, or request expedited handling of a case because of an upcoming deployment. USCIS has established a special telephone number and e-mail address for military personnel to use to contact USCIS regarding military-related immigration matters. An e-mail may be sent to militaryinfo@uscis.dhs.gov or the military member may call the USCIS Military Help Line, 1-877-CIS-4MIL (1-877-247-4645).[143] Be sure to include the name and alien number (A-number or USCIS number) of the service member in any e-mail message.

Under the Military Personnel Citizenship Processing Act, enacted on October 9, 2008, USCIS was required to process military-related citizenship applications within six months of filing, or provide the service member with an explanation of why the case has not been processed, but this law was subject to a sunset provision and is no longer in effect.[144] USCIS has recently

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[142] *See* INA §329A.

[143] *See* USCIS News Release, "USCIS Launches Toll-Free Military Help Line" (Aug. 13, 2007).

[144] INA §328(g) states:

> Not later than 6 months after receiving an application for naturalization filed by a current member of the Armed Forces under subsection (a), section 329(a), or section 329A, by the spouse of such member under section 319(b), or by a surviving spouse or child under section 319(d), United States Citizenship and Immigration Services shall—
>
> (1) process and adjudicate the application, including completing all required background checks to the satisfaction of the Secretary of Homeland Security; or
>
> (2) provide the applicant with—
>
> (A) an explanation for its inability to meet the processing and adjudication deadline under this subsection; and
>
> (B) an estimate of the date by which the application will be processed and adjudicated.

For more information, see USCIS Letter, W. Janssen, "Notification of Processing Delay - Form N-400" (May 16, 2011).

been processing military-related naturalization applications somewhat slowly in recent years, but the electronic filing system has caused some improvement in processing times; absent some unusual circumstances, cases inside the United States are now typically processed within about a year after filing.[145] In cases where there are delays, the most common reasons for the delay are:

The O-6 who signed the N-426 did not fill it out correctly. Common errors include failure to write "O-6" on the form, failing to sign the form with a "wet ink" signature, failure to check the correct boxes on the form, failure to put the O-6's place of employment, and failure to fill in all the spaces on the form.

The person is not an LPR and does not qualify for § 329 benefits because he or she did not serve in the military during a time when § 329 was in effect.

Background checks have not been completed. Completion of background checks can be held up for a variety of reasons, including the fact that the U.S. Department of Defense (DOD) has an open investigative file on the person. DOD may have such a file on a person for a variety of reasons, including some reasons that are quite innocuous—such as the fact that a request for a limited access security clearance is pending or DOD is running other background checks on the person.

The person submitted an uncertified N-426 without a Form DD-214 to confirm military service, and USCIS has been unable to confirm the person's military service.

Fingerprints have not been completed, or the fingerprints submitted were not usable. To speed up the process, the person may want to report to the nearest ASC or USCIS mobile fingerprinting unit and have fingerprints taken again.

USCIS sent a Request for Evidence and the person has not supplied the required evidence, or the evidence submitted was deemed inadequate.

The person moved and did not notify USCIS of the new address.

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[145] *See, e.g.*, USCIS Press Release, "USCIS Naturalizes First Soldier in Military Pilot Recruiting Program" (July 27, 2009) (reporting a processing time of one month).

The person moved to a new jurisdiction after filing the application, and USCIS has transferred the file to the new location, which has caused a delay in adjudicating the case.
The person is deployed overseas and USCIS has been unable to coordinate with the Department of Defense to arrange for an overseas interview and naturalization ceremony.

The person is not a member of the U.S. Armed Forces, but is a contractor, member of a foreign military force, or member of some auxiliary organization (*e.g.*, the Civil Air Patrol) and is not statutorily eligible for military naturalization benefits.

Regarding background checks, a brief discussion is in order on the issue of the "titling" of military personnel in connection with military criminal investigations. "Titling" is a procedure whereby military criminal investigators put a person's name in the "subject" block of a military criminal investigative report.[146] Military investigators may do so without meeting probable cause standards and without having any determination made as to the person's guilt or innocence. The "titling" of the person in such a report causes the person's name to be entered into the Defense Clearance and Investigations Index (DCII) and into other indexes, such as the Army's Crime Records Center. A person who is "titled" in a military investigative report may have difficulty getting his or her naturalization application approved in a timely manner, even if he or she was never charged or convicted of any offense. DHS has access to the DCII and there have been reports that "hits" in the DCII have caused delays in the naturalization process.

If a military naturalization case is delayed significantly without explanation, the applicant or the applicant's attorney may file a Form DHS-7001, Case Problem Submission Worksheet (CIS Ombudsman), to seek assistance from the CIS Ombudsman's office. Alternatively, the service member may want to contact a lawyer experienced with how to litigate in federal court when a naturalization case is delayed unreasonably.[147]

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[146] *See* P. Ham, *"*The CID Titling Process—Founded or Unfounded?" *The Army Lawyer*, DA-PAM 27-50-309 (Aug. 1998), at 1–19.

[147] *See, e.g.*, R. Pauw, *Litigating Immigration Cases in Federal Court* (AILA 3rd Ed. 2013). For more information, see USCIS Letter, W. Janssen, "Notification of Processing Delay - Form N-400" (May 16, 2011).

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

Example: Military Wartime Naturalization of Unauthorized Immigrants

Facts. Juan is serving on active duty in the U.S. Army. He enlisted in the United States after September 11, 2001 and has completed a tour of duty in Iraq. Juan has heard that he can become a naturalized U.S. 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.[148] Juan's naturalization interview and ceremony can be completed overseas if he is deployed overseas when it is time for his interview.[149]

Example: Military Wartime Naturalization of Service Member with False U.S. Citizenship Documents

Facts. Robert joined the U.S. Marine Corps in 1997. At the time, Robert believed that he was a U.S. citizen; his mother had told him that he was born in California in 1979 and he has a California birth certificate. Robert has been serving honorably in the Marine Corps and has earned numerous medals and awards. He has also registered to vote, gotten a driver's license, and traveled across the international border on a regular basis, using his California birth certificate or his U.S. military ID card. In 2007, however, Robert applied for a U.S. passport, and the U.S. Department of State (DOS) advised Robert that its investigation had uncovered the fact that he had

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[148] INA §329(a).

[149] American Forces Press Service, "Troops Earn U.S. Citizenship in Iraq" (Mar. 4, 2009) (describing how more than 250 American military members were sworn in as U.S. citizens in Baghdad, Iraq, during the 13th U.S. naturalization ceremony conducted overseas since USCIS began overseas military naturalization ceremonies).

really been born in Mexico and was not a U.S. citizen. Robert talked to his mother, who confessed that she had in fact given birth to him in Mexico. Now that Robert has learned that he is not a U.S. citizen, can he naturalize through military service?

Legal Analysis. Yes, Robert can naturalize as a U.S. citizen under INA § 329. 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.[150] Robert's naturalization interview and ceremony can be completed overseas if he is deployed overseas when it is time for his interview.[151] By USCIS regulations, Robert will have to show one year of good moral character, but a false claim to U.S. citizenship in the past does not bar him from naturalizing as long as he has not given false testimony under oath within the past year; false testimony under oath is a statutory bar to showing good moral character.[152]

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 drills (weekend training meetings) for a few months. Ulysses has CLPR 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 CLPR status before his N-400 can be approved?

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[150] INA §329(a).

[151] American Forces Press Service, "Troops Earn U.S. Citizenship in Iraq" (Mar. 4, 2009) (describing how more than 250 American military members were sworn in as U.S. citizens in Baghdad, Iraq, during the 13th U.S. naturalization ceremony conducted overseas since USCIS began overseas military naturalization ceremonies).

[152] *See* INA §101(f)(6); INS Interpretation 316.1(g)(3)(iii) ("false statements in an application, whether or not made under oath, do not constitute "testimony"); *Kungys v. United States*, 485 U.S. 759, 780 (1988) ("testimony" is limited to oral statements under oath); *Torres-Guzman v. INS*, 804 F.2d 531, 533 (9th Cir. 1986) (explaining that what constitutes "false testimony" has been defined narrowly to cover only statements made under oath in front of a court or tribunal); *accord Phinpathya v. INS*, 673 F.2d 1013, 1018–19 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 183 (1984).

Legal Analysis. Ulysses can naturalize under INA § 329. This statute was amended by the NDAA 2004 to include members of the Selected Reserve,[153] and drilling National Guard units are part of the Selected Reserve.[154] Ulysses need not lift the conditions on his CLPR 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.[155] 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 U.S. Army shortly thereafter, selecting a job as a preventive medicine specialist. While she is attending army training at Fort Sam in Houston, her instructors tell her about 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?

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[153] 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'").

[154] 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 USC §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.

[155] INA §329(c) ("Citizenship granted pursuant to this section may be revoked in accordance with section 340 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.").

Legal Analysis. If she enlisted and is serving in peacetime, Mary can apply to naturalize after one year of honorable military service.[156] 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 some type of military service—including the Delayed Entry Program—is necessary before the application can be filed. Mary may have difficulty, however, filing the application if she cannot find an O-6 who is willing to certify her Form N-426.

Military Naturalizations: Appeals of Denials

Military members whose military naturalization applications are wrongly denied may file Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings. Previously, a military naturalization applicant whose N-400 was denied was required to pay a fee to appeal the denial on Form N-336.[157] This requirement meant that it was less expensive to re-file the N-400 than to appeal a wrongful denial of a previously filed military naturalization case. Effective November 23, 2010, there is no fee for Form N-336 if it is filed by an applicant who has filed an N-400 under INA § 328 or § 329 (*i.e.*, who is a member or veteran of any branch of the U.S Armed Forces) and whose application has been denied.[158]

This article has summarized the current law regarding the naturalization of members and veterans of the US Armed Services. The information in this

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[156] INA §328 ("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.

[157] *See*, *e.g.*, *Adiemereonwu v. Gonzales*, Civil Action No. 3:04-DV-2072-M (N.D. Tex. July 14, 2005) (no exception for veterans to payment of filing fee for Form N-336).

[158] USCIS Memorandum, D. Neufeld, "Processing N-400s Filed Under INA 328 and 329 When Applicant Fails to Respond to a Request for Evidence or for Appearance" (Apr. 15, 2009), *published on* AILA InfoNet at Doc. No. 09042068 (*posted* Apr. 20, 2009).

article was current as of the date of publication, but immigration laws and regulations are constantly changing, so I recommend that anyone reading this article consult with an immigration law expert or otherwise check for the latest information before filing a military naturalization application. Also please keep in mind that military recruiters, drill sergeants, and even some JAG Legal Assistance officers are not always expert in immigration and citizenship law—and so relying on their statements about someone's eligibility for military naturalization can be problematical.

Sample Cover Letter for
Military Naturalization Application
MAILING ADDRESS

DATE

MEMORANDUM FOR
U.S. CITIZENSHIP AND IMMIGRATION SERVICES,
P.O. BOX 4446, CHICAGO, IL 60680-4446[159]

SUBJECT: Application for Citizenship of (put Soldier/Veteran's Name and A-Number here; if no A-Number, put the Soldier's Social Security Number here) under Section [328/329—Select applicable section] of the Immigration and Nationality Act

1. The enclosed Soldier/Veteran's application for citizenship contains the following documents:

__ Form N-400, completed and signed.

__ Two passport style photographs.

__ Form N-426, signed and certified [Alternatively, a signed but uncertified N-426 and a certified DD-214].

__ Form G-325B [May be certified or uncertified—Veterans only]

__ Authorization for USCIS Usage of Military Fingerprints, filled out, signed, and dated (if the applicant is overseas and cannot attend an ASC appointment in the United States).

__ Other documents (If any other document(s) listed in N-400 instructions applies (apply) to this Soldier/Veteran, list it (them) here.).

2. The following contact and interview information applicable to this Soldier/Veteran includes but is not limited to the following items: Soldier/Veteran's e-mail address(es) and telephone numbers:

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_____

_____

[159] For U.S. Postal Service (USPS) only. For FedEx, UPS, or DHL deliveries, address as follows:

USCIS
Attn: Military N-400
131 S. Dearborn, 3rd Floor
Chicago, IL 60603-5517

Soldier/Veteran's preferred interview site (if Soldier is in Basic Training, list Basic training site). _____
Civilian U.S. mailing address (if applicable):
_____

(signature)
Encl FULL NAME