MILITARY LAW REVIEW

Volume 177 **Symposium Issue** **Fall 2003**

THE LEGAL ASSISTANCE ATTORNEY'S GUIDE TO IMMIGRATON AND NATURALIZATION

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I. Introduction

On 3 July 2002, President George W. Bush signed Executive Order 13,269,[2] expediting the naturalization of aliens[3] and noncitizen nationals[4] serving in an active duty status[5] during the war on terrorism. Under this Executive Order, the President made all aliens and noncitizen nationals serving honorably on active duty during the period beginning 11 September 2001, and terminating on a date designated by future executive order, eligible for immediate naturalization.[6] The Executive Order brought naturalization issues to the forefront of the military legal assistance practice,

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2. 67 Fed. Reg. 45,287 (July 8, 2002). Note that the National Defense Authorization Act for Fiscal Year (FY) 2004 (NDAA) amended the underlying statute on which the President's executive order was based. The Act amended 8 U.S.C. section 1440(a) to include not only active duty service members, but members of the Selected Reserve of the Ready Reserve. NDAA for FY 2004, tit. XVII, § 1702 (24 Nov. 2003), 108 Pub. L. 136, 117 Stat. 1392 [hereinafter NDAA for FY 2004].

3. The term "alien" is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2000).

as many legal assistance offices were inundated with soldiers seeking information on how to apply for naturalization under the Executive Order.

Many may be surprised to learn that a person need not be a U.S. citizen to serve in its armed forces. Under federal law, in time of peace, a person must be either a citizen or a lawful permanent resident of the United States to enlist in the Army or Air Force.[7] The regular Navy and Marine Corps apply the same requirements by policy.[8] The military generally requires a service member to become a U.S. citizen, however, before he or

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4. A "national of the United States" is defined as "a citizen of the United States, or . . . a person who, though not a citizen of the United States, owes permanent allegiance to the United States." *Id.* § 1101(a)(22). *See also id.* § 1408 (providing that the following are nationals of the U.S. at birth):

> (1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;
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> (2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;
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> (3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; and
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> (4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years –
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> (A) during which the national parent was not outside the U.S. or its outlying possessions for a continuous period of more than one year, and
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> (B) at least five years of which were after attaining the age of fourteen.

See also id. § 1101(a)(29) (providing that "[t]he term 'outlying possessions of the United States' means American Samoa and Swains Island").

5. The term "serving in an active duty status" is defined as active service in the

> United States Army, United States Navy, United States Marines, United States Air Force, United States Coast Guard, or . . . [a] National Guard unit during such time as the unit is Federally recognized as a reserve component of the Armed Forces of the United States and that unit is called for active duty.

8 C.F.R. § 329.1 (2002).

she may reenlist. For example, under Army policy a soldier who is not a U.S. citizen cannot reenlist if he or she will have in excess of eight years of federal military service at the expiration of the period for which they seek to reenlist.[9]

Likewise, to be appointed as an officer in the Reserves of the armed forces, a person can be either a U.S. citizen or a lawful permanent resident.[10] A person must be a U.S. citizen, however, to receive an original appointment as a commissioned officer in the regular Army, Air Force, Navy, and Marine Corps[11] and in the National Guard.[12]

Because some service members are not U.S. citizens when they enter the armed forces, legal assistance attorneys need to know how to properly advise them on naturalization requirements. Additionally, service mem-

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6. *See* 8 U.S.C. § 1440, which provides that the President, by executive order, shall:

> designate as a period in which the Armed Forces of the U.S. are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized . . . if (1) at the time of enlistment, reenlistment, extension of enlistment or induction such person shall have been in the U.S., the Canal Zone, American Samoa, or Swains Island, or on board a public vessel owned or operated by the U.S. for noncommercial service, whether or not he has been lawfully admitted to the U.S. for Permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the U.S. for permanent residence.

Id.

7. 10 U.S.C. §§ 3253, 8253; *see also id.* § 12102(b) (providing that to be enlisted as a Reserve, a person must be a U.S. citizen or lawful permanent resident of the United States or have previously served in the armed forces or in the National Security Training Corps).

8. U.S. DEP'T OF DEFENSE, DIR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION encl. 1, para. E1.2.2.1 (21 Dec. 1993) [hereinafter DoDD 1304.26]. In addition, citizens of the federated states of Micronesia and the Republic of the Marshall Islands are eligible for enlistment in the Active and Reserve components. *Id*. at E1.2.2.4 (citing Compact of Free Association between the United States and the Government of the Federated States of Micronesia and the Government of the Marshall Islands, 99 Stat. 1770 (1986), *reprinted as amended in* 48 U.S.C. § 1681 note).

9. U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM paras. 3-9c(13), 4-8k (31 Mar. 1999). These soldiers can extend their current enlistment, however, for a period not to exceed twelve months if they have applied for naturalization to U.S. citizenship and are awaiting adjudication of the application. *Id.*

10. *See* 10 U.S.C. §§ 12201, 12241.

11. *Id.* § 532.

12. *Id.* § 313.

bers may need immigration and naturalization advice to assist their alien spouses and their spouse's children in immigrating to the United States, receiving lawful permanent resident status and, eventually, becoming naturalized U.S. citizens.

Army regulation authorizes judge advocates to provide legal assistance services on these immigration and naturalization issues.[13] Immigration law is a highly specialized field, however, and judge advocates should consider referring legal assistance clients to private attorneys specializing in immigration law if it is in the best interests of their client.[14] As with other legal assistance issues, legal assistance offices should make available a list of Reserve attorneys who specialize in this area and are willing to consider providing advice to service members and their families for Reserve points or reduced fees.

As a predicate to understanding the U.S. laws on immigration and naturalization, legal assistance attorneys should be familiar with the recent reorganization of federal immigration services. Shortly after the terrorist attacks on 11 September 2001, President Bush issued an Executive Order establishing the Office of Homeland Security "to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threat or attacks."[15] One year later, Congress passed the Homeland Security Act of 2002 (the Act), which established the Department of Homeland Security (DHS).[16] This new cabinet-level department marked the largest reorganization in the federal government in over fifty years. It absorbed twenty-two agencies and programs with a combined total of 180,000 employees.[17] One of those agencies was the Immigration and Naturalization Service (INS), which was part of the Department of Justice. The Act abolished the INS and divided its func-

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13. U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6f (21 Feb. 1996).

14. *Id.* para. 3-7h.

15. Exec. Order No. 13,228, § 2, 66 Fed. Reg. 51,812 (Oct. 8, 2001). The mission of the office was to work with executive departments and state and local governments and private entities to maintain a strategy for detecting, preparing for, preventing, protecting against, responding to, and recovering from terrorist threats or other attacks within the United States. *Id.*

16. Pub. L. No. 107-296, 25 Nov. 2002.

17. *See* U.S. DEP'T OF HOMELAND SECURITY, THE NATIONAL STRATEGY FOR HOMELAND SECURITY 47 (July 2002), *available at* http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf. "Homeland security" is defined as "a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur." *Id.* at 2.

tions into three separate departments, including the Bureau of Citizenship and Immigration Services (BCIS), to manage national immigration services policies and priorities.[18] Under the new law, the Director, BCIS is charged with adjudicating immigrant and nonimmigrant visa petitions, applications for certificates of citizenship, and naturalization applications.[19] The functions of the INS and all authorities with respect to those functions transferred to the DHS on 1 March 2003 and the INS was abolished on that date.[20]

This article begins by discussing the two ways in which a person may become a U.S. citizen: by birth (acquisition or derivation) and by naturalization. It then outlines the requirements for admission into the United States and discusses two types of nonimmigrant visas that a service member's alien fiancée or spouse may use to enter the United States. The article then explains how an alien spouse, the spouse's children, and other family members may immigrate to the United States and become lawful permanent residents. Finally, it details the specific procedures for naturalization of service members and their spouses and children and proposes amending immigration regulations to allow service members to take the Oath of Citizenship overseas.

II. U.S. Citizenship, Generally

A. Citizenship by Birth

Generally, persons born in the United States become U.S. citizens at birth. In addition, certain classes of individuals born outside the United States become citizens at birth based on the U.S. citizenship status of one or both of the individual's parents. If a service member has a child born outside the United States, the child may be a U.S. citizen at birth if the ser-

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18. Pub. L. No. 107-296, §§ 451(a)(3)(D), 471. The Act also established the Bureau of Border Security to maintain the security and enforcement functions of the INS. *Id.* sec. 442; *see also* 68 Fed. Reg. 35,273 (June 13, 2003) (promulgating rules to conform Title 8 of the Code of Federal Regulations to the governmental structures established in the Homeland Security Act).

19. Pub. L. No. 107-296, § 451(b).

20. *See generally* U.S. DEP'T OF HOMELAND SECURITY, DEPARTMENT OF HOMELAND SECURITY REORGANIZATION PLAN (2002), *available at* http://www.dhs.gov/interweb/assetlibrary/reorganization_plan.pdf.

vice member complies with specific statutory requirements on residence and physical presence.

First, a child may become a U.S. citizen at birth if the child is born in the United States or certain outlying territories. According to the Fourteenth Amendment to the U.S. Constitution, all persons born in the United States and subject to the jurisdiction thereof are U.S. citizens.[21] Those persons born in, but not subject to the jurisdiction of, the United States are generally children of foreign diplomats.[22] Additionally, Congress has conferred U.S. citizenship on persons born in certain territories under U.S. control, to include persons born in Puerto Rico,[23] the Virgin Islands of the United States,[24] Guam,[25] and the Northern Mariana Islands.[26]

Even if not born in the United States, a child may be a U.S. citizen at birth because the child's parent is a U.S. citizen. First, a child is a U.S. citizen at birth if born outside the United States and its outlying possessions[27] of parents: (1) both of whom are U.S. citizens if one of the parents had a residence[28] in the United States or an outlying possession, prior to the birth;[29] (2) one of whom is a citizen who has been physically present in the United States or one of its outlying possessions for a continuous period of

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21. U.S. CONST. amend. XIV, § 1, provides:

> All persons born or naturalized in the U.S. and subject to the jurisdiction thereof, are citizens of the U.S. and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

22. 8 C.F.R. § 1101.3(a) (2002). These children, however, may be considered lawful permanent resident aliens at birth. *Id.*

23. 8 U.S.C. § 1402.

24. *Id.* § 1406.

25. *Id.* § 1407.

26. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the U.S. of America, Article III, Act of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, *as amended by* Act of December 8, 1983, Pub. L. No. 98-213, 9, 97 Stat. 1461; Act of September 30, 1996, Pub. L. No. 104-208, div. A, Title I, § 101(d), 110 Stat. 3009-181, 3009-196, *reprinted as amended in* 48 U.S.C. § 1801 note.

27. *See supra* note 4 for the definition of "outlying possessions."

28. The term "residence" means "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33).

29. *Id.* § 1401(c).

one year prior to the birth of the child, and the other who is a national, but not a U.S. citizen;[30] or (3) one of whom is an alien and the other is a citizen who, prior to the birth, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after the age of fourteen.[31] Additionally, a child is a U.S. citizen at birth if born in an outlying possession of parents one of whom is a citizen who has been physically present in the United States or one of its outlying possession for a continuous period of one year at any time prior to the child's birth.[32] If the citizen parent is a service member, any periods of honorable service are included in satisfying the physical-presence requirement.[33]

If a service member who is a U.S. citizen has a child born out of wedlock outside the United States, the child is not automatically a U.S. citizen under the above analysis. If the service member is female, her child will be a U.S. citizen at birth only if the service member previously had been physically present in the United States or one of its outlying possessions for a continuous period of one year.[34]

It is more difficult, however, for a male service member who has a child overseas born out of wedlock to establish that his child is a U.S. citizen. First, the service member father must have been physically present in the United States or an outlying possession for a period or periods totaling not less than five years, at least two of which were after the age of fourteen, prior to the birth of the child.[35] The law goes further, requiring that a blood relationship be established; that the service member father (unless deceased) agree in writing to provide financial support until the child reaches eighteen;[36] and that while the child is under eighteen, the child is legitimated under the law of the child's residence or domicile, the service member acknowledges paternity in writing under oath, or the child's pater-

30. *Id.* § 1401(d).

31. *Id.* § 1401(g).

32. *Id.* § 1401(e).

33. *Id.* In addition, periods of employment with the U.S. government, or periods during which a citizen parent is physically present abroad as the dependent unmarried son or daughter and member of household of a service member or person employed with the U.S. government are included to satisfy the physical-presence requirement. *Id.*

34. *Id.* § 1409(c).

35. *Id.* § 1409(a).

36. The requirement that the father agree in writing to provide financial support for the child until the child reaches eighteen was added in 1986. *See* Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655, *reprinted in* 8 U.S.C. § 1409 note.

nity is established by adjudication of a competent court.[37] The more difficult proof requirements for citizen fathers than for citizen mothers was recently challenged based on the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution.[38] In *Nguyen v. INS*, the Supreme Court rejected the constitutional challenge to the law, finding that the different statutory requirements for a child's acquisition of citizenship depending on whether the citizen parent is a mother or father was consistent with the Equal Protection Clause.[39]

Even if a service member's child, including an adopted child,[40] does not obtain U.S. citizenship at birth, the child still may be eligible automatically to become a U.S. citizen, if the child is under the age of eighteen and residing in the legal and physical custody of the service member.[41] A child obtaining citizenship through this means is discussed later in this article.[42]

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37. 8 U.S.C. § 1409(a)(4).

38. U.S. CONST. amend. V.

39. 533 U.S. 53, 58 (2001). The Court found that, to pass equal protection scrutiny, it must be established that the classification serves an "important government object and that the discriminatory means employed" are "substantially related to the achievement of those objects." *Id.* at 60 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, (1982)). The Court found two governmental interests: (1) the importance of assuring that a biological parent-child relationship exists; and (2) the determination to ensure that the child and the parent have some demonstrated opportunity or potential to develop real, everyday ties that provide a connection between parent and child and, in turn, the United States. *Id.* at 60, 64-65. The Court found that the means Congress used to further these objectives, that is, the additional requirements if the child's citizen-parent is the father, are substantially related to these important governmental objectives. *Id.* at 68.

40. 8 U.S.C. § 1101(b)(1)(E) (Supp. 2002) defines a "child" to include:

> (i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or
> (ii) subject to the same provision as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (F)(i) [pertaining to the adoption of orphans abroad]; (II) was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years.

Id.

41. *Id.* § 1431(a).

42. *See infra* pt. V.D.

B. Citizenship through Naturalization

In addition to the methods discussed above, the only other way in which a person may become a U.S. citizen is to become naturalized. The power to admit aliens is an inherent right of any sovereign nation.[43] The Constitution recognizes this power by authorizing the Congress to "establish a uniform rule of naturalization."[44] Consequently, only Congress, and not the states, is authorized to regulate immigration.[45] Pursuant to its constitutional authority, Congress has passed several laws dealing with immigration and naturalization, culminating in the enactment in 1952 of the Immigration and Naturalization Act (the Act).[46] The Act sets forth the procedures for immigrating to the United States and becoming a naturalized U.S. citizen. The steps that an alien must take to legally enter the country and become a lawful permanent resident and the subsequent procedures for naturalization are discussed in the remainder of this article.

III. Aliens not Authorized Admission into the United States

The legal assistance attorney may need to provide assistance to service members whose alien spouse and spouse's children (if any) wish to enter the United States. For an alien to legally enter the United States, an immigration officer must inspect and authorize the alien's entry.[47] The Act delineates myriad reasons for which an alien may not be eligible for admission, these grounds include: health, economic, criminal, moral, security, and previous violations of the immigration laws. The legal assistance attorney must be familiar with these grounds for exclusion to properly

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43. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

44. U.S. CONST. art. I, § 8, cl. 4.

45. *See* De Canas v. Bica, 424 U.S. 351, 355 (1976) (citing *Fong Yue Ting*, 149 U.S. at 698; Henderson v. Mayor of New York, 92 U.S. 259 (1876); Chy Lung v. Freeman, 92 U.S. 275 (1876); Passenger Cases, 7 How. 283 (1849)). Nevertheless, the fact that aliens are the subject of a state statute, standing alone, does not render the state statute a regulation of immigration. *See De Canas*, 424 U.S. at 356.

46. Immigration and Naturalization Act of 1952, Pub. L. No. 414, 66 Stat. 166 (codified as amended at 8 U.S.C. (2000 & Supp. 2002)).

47. The terms "admission" and "admitted" mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

advise the service member on whether his or her spouse is eligible to enter the United States.

A. Health-Related Grounds

If an alien has a communicable disease of public health significance, he or she generally is not eligible for admission into the United States.[48] These diseases include human immunodeficiency virus (HIV) infection, active tuberculosis, gonorrhea, and infectious state syphilis.[49] Additionally, an alien who seeks admission into the United States as an immigrant,[50] or who seeks adjustment of status to that of a lawful permanent resident, must be vaccinated against vaccine-preventable diseases.[51] Finally, aliens are inadmissible if they have a physical or mental disorder that poses a threat to the property, safety or welfare of the alien or others, or is a drug abuser[52] or addict.[53] Waivers are available to some aliens for these health related requirements.[54]

B. Criminal-Related Grounds

Aliens are also inadmissible if they have been convicted of, or admit to committing, certain crimes. The first such crimes are those of moral turpitude and violations of state, federal, or foreign controlled substance laws.[55] The Act does not define the phrase "crimes of moral turpitude." Moreover, federal regulations provide only that the conduct must consti-

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48. *Id.* § 1182(a)(1)(A)(i). Waivers may be granted for alien spouses or unmarried sons or daughters, or minor unmarried lawfully adopted children and for any alien who has a child who is a U.S. citizen, a lawful permanent resident alien, or an alien who possesses an immigrant visa. *Id.* § 1182(g).

49. *See* 42 C.F.R. § 34.2(b) (2002).

50. An "immigrant" means every alien except those who enter the country as non-immigrants. *See* 8 U.S.C. § 1101(15).

51. *Id.* § 1182(a)(1)(A)(ii). These diseases include mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B, and hepatitis B. *Id.* Certain internationally adopted children are exempt from this requirement. *Id.* § 1182(a)(1)(C).

52. The term "drug abuse" is defined as "[t]he non-medical use of a substance listed in section 202 of the Controlled Substances Act, as amended (21 U.S.C. [§] 802) which has not necessarily resulted in physical or psychological dependence." 42 C.F.R. § 34.2(g).

53. 8 U.S.C. § 1182(a)(1)(A)(iii). The term "drug addiction" is defined as "[t]he non-medical use of a substance listed in section 202 of the Controlled Substances Act, as amended (21 U.S.C.[§] 802) which has resulted in physical or psychological dependence." 42 C.F.R. § 34.2(h).

54. *See* 8 U.S.C. § 1182(g) (Supp. 2002).

tute a crime under the criminal law of the jurisdiction where it occurred and that a decision on whether a crime constitutes one of moral turpitude must be based on the moral standards generally prevailing in the United States.[56] For example, in finding that involuntary manslaughter, as defined by Missouri law as recklessly causing the death of another person, constituted a crime of moral turpitude, the Board of Immigration Appeals stated that moral turpitude "refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[57] One test used to decide whether a crime is one of moral turpitude is "whether the act is accompanied by a vicious motive or a corrupt mind."[58]

An alien may be admissible, however, if he or she committed a crime before the age of eighteen and more than five years before the visa application date.[59] Additionally, an alien may be admitted if the maximum penalty possible for the crime did not exceed imprisonment for more than one year and, if convicted, the alien was not sentenced to more than six months confinement.[60]

In addition, a person is inadmissible if convicted of two or more crimes, other than purely political offenses.[61] Further, an alien who is a trafficker in any controlled substance or in any listed chemical[62] or who is the spouse or child of such a person who has, within the past five years, obtained financial or other benefits from the illicit activity of that alien, and knew or reasonably should have known that the benefit was from the person, is inadmissible.[63]

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55. *Id.* § 1182(a)(2)(A). If the offense relates to a single offense of simple possession of thirty grams or less of marijuana, it may be waived. *Id.* § 1182(h). Waivers also are available for offenses of moral turpitude under certain circumstances. *Id.*

56. 22 C.F.R. § 40.21.

57. Matter of Franklin, 20 I&N Dec. 867, 868 (BIA 1994).

58. *Id.*

59. 8 U.S.C. § 1182(a)(2)(A)(ii).

60. *Id.*

61. *Id.* § 1182(a)(2)(B). The term "purely political offenses" includes convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious, or political minorities. 22 C.F.R. § 40.22(d).

62. *See* 21 U.S.C. § 802(33)-(35), for the definition of a "listed chemical."

63. 8 U.S.C. 1182(a)(2)(C).

C. Economic Grounds

Aliens who are likely to become public charges are also inadmissible. Factors that the BCIS considers in deciding whether an alien is likely to become a public charge are the alien's age, health, family status, assets, resources, financial status, education level, and skills.[64] Additionally, U.S. citizens, including service members, who are seeking to sponsor an alien spouse, a child, or to adjust the status of an alien spouse who entered the country under a fiancée "K" visa, must execute an affidavit of support.[65] Legal assistance attorneys must explain the legal ramifications of the affidavit of support to service members before they execute this document. The affidavit of support is legally enforceable against the service member by the sponsored alien, the federal government, any state, or other entity that provides means-tested public benefits to the person sponsored.[66] In the affidavit, the service member agrees to provide support to the sponsored alien at an annual income of not less than 100 percent of the federal poverty line.[67] The affidavit of support is enforceable until terminated when the alien: (1) becomes a naturalized U.S. citizen; (2) ceases to hold the status of lawful permanent resident and has departed the United States; (3) is credited with working forty qualifying quarters; or (4) dies.[68] Therefore, even if the service member subsequently divorces the sponsored alien spouse, the service member is still obligated under the signed affidavit to support the alien until the obligation is terminated for one of the reasons described above.

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64. *Id.* § 1182(a)(4)(A)-(B).

65. *Id.* § 1182(a)(4)(C); *see* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-864, Affidavit of Support Under Section 213A of the Act (May 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-864.htm.

66. *Id.* § 1183a(a)(1)(B); *see also* 8 C.F.R. § 213a.1 for the definition of "means-tested public benefit."

67. *See* 8 U.S.C. § 1183a(f)(3) (providing that if the sponsor is on active duty in the U.S. military, other than active duty for training, and the person(s) sponsored is a spouse or child, the service member's income must equal at least 100 percent of the federal poverty line). Under the 2003 guidelines, 100 percent of the poverty line for a household of two is $12,120.00. For each additional member, the guidelines add $3,140.00. The 2003 monthly basic pay of a private, E-2, for example, is $1,290. *See* The 2003 Federal Poverty Guidelines *at* http://aspe.hhs.gov/poverty/03fedreg.htm; *see also id.* § 1183a(a)(1)(A) (providing that generally the sponsor (non-service member) must agree to support the sponsored alien at an annual income of 125 percent of the federal poverty line).

68. *Id.* § 1183a(3); 8 C.F.R. § 213a.2(e); *see* 42 U.S.C. § 414 (defining "quarters").

D. Security Grounds

Generally, an alien who enters the United States to engage in any activity that violates U.S. law relating to espionage or sabotage, any other unlawful activity, or any activity the purpose of which is the opposition to or control or overthrow of the government by force, violence, or other unlawful means is inadmissible.[69] Congress expanded federal law regarding the inadmissibility of aliens for security grounds by broadening the definition of terrorist activity after the terrorist attacks on 11 September 2001. Prior to Congress passing the USA Patriot Act in 2001,[70] inadmissible aliens included aliens who were members of a terrorist organization or who engaged in, or were likely to engage in, terrorist activity, those who incited terrorist activity, and those who were a representative of a foreign terrorist organization. The USA Patriot Act broadened terrorist activities to include an alien who is a representative of a political, social or other similar group who publicly endorses terrorist activity. It also includes aliens who use their position of prominence within a country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, and the spouse or child of such an alien, if the terrorist activity occurred within the last five years. [71] Moreover, the USA Patriot Act expanded the definition of "terrorist activity" to include not only using explosives and firearms with intent to endanger the safety of individuals or to cause substantial damage to property, but also the use of other weapons or dangerous devices.[72]

Others who are inadmissible for reasons of national security include an alien whose entry would have potentially serious adverse foreign policy consequences for the United States,[73] an alien who is or has been a member of or affiliated with the Communist Party or other totalitarian party,[74] an alien associated with the Nazi government of Germany who participated in

69. 8 U.S.C. § 1182(a)(3)(A).

70. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, tit. IV, § 411(a), 115 Stat. 345, 394 (codified at 8 U.S.C. § 1182(a)(3)(B)).

71. 8 U.S.C. § 1182(a)(3)(B) (2000 & Supp. 2002). As an exception, a spouse or child is not inadmissible if they did not know or should not reasonably have known of the activity or whom the consular officer or attorney general has reasonable grounds to believe has renounced the activity. *Id.*

72. *Id.* § 1182(a)(3)(B)(iii).

73. *Id.* § 1182(a)(3)(C)(i).

the persecution of any person because of race, religion, national origin, or political opinion,[75] or an alien who engaged in genocide.[76]

Finally, the President has the authority to suspend the admission of persons into the United States by proclamation.[77] Since 1997, Presidents have suspended the entry of persons who are senior officials of the National Union for Total Independence of Angola and their adult family members,[78] persons responsible for repressing the civilian population in Kosovo,[79] persons impeding the peace process in Sierra Leone,[80] and persons responsible for actions that threaten international stabilization efforts in the Balkans and those responsible for wartime atrocities in that region.[81]

E. Violation of Immigration Laws

Generally speaking, an alien who is present in the United States without being properly admitted is considered an inadmissible alien. This does not apply to certain women and children who qualify for immigrant status as immediate relatives and who are battered.[82] Further, those who fail to

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74. *Id* § 1182(a)(3)(D)(i). As an exception, an alien is not excluded if he or she can establish that the membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purpose of employment, food rations, or other living essential, or if the alien is not a threat to the security of the United States and he or she can establish that the membership or affiliation terminated at least two years before the application date or five years before the application date in the case of an alien with the party controlling the government that is a totalitarian dictatorship as of such date. *Id.* § 1182(a)(3)(D)(ii), (iii). Additionally, in the discretion of the attorney generally, to assure family unity, an alien may not be excluded if the alien is the parent, spouse, child, or sibling of an alien lawfully admitted for permanent residence for humanitarian purposes. *Id.* § 1182(a)(3)(D)(iv). If an alien continued his or her membership or affiliation in a proscribed organization after reaching the age of sixteen, only the person's activities after age sixteen are pertinent to a decision of whether continuation of membership or affiliation is or was voluntary. 22 C.F.R. § 40.34(d) (2002).

75. 8 U.S.C. § 1182(a)(3)(E)(i).

76. *Id.* § 1182(a)(3)(E)(ii).

77. *Id.* § 1182(f).

78. 62 Fed. Reg. 65,987 (Dec. 16, 1997).

79. 64 Fed. Reg. 62,561 (Nov. 17, 1999).

80. 65 Fed. Reg. 60,831 (Oct. 13, 2000).

81. 66 Fed. Reg. 34,775 (June 29, 2001).

82. 8 U.S.C. § 1182(a)(6)(A)(ii).

attend removal proceedings or who violate the terms of a student nonimmigrant visa are inadmissible for five years after the date of the violation.[83]

Similarly, aliens who have been previously removed from the United States because they misrepresented a material fact in seeking to procure a visa, falsely claimed citizenship, or were not in possession of valid entry documents are inadmissible for five years. Aliens who have been removed two or more times, or at any time if convicted of an aggravated felony, are inadmissible for twenty years.[84] Other aliens who have been removed or who depart the United States while an order of removal is outstanding are inadmissible for ten years.[85]

Aliens who were unlawfully present[86] in the United States for more than one hundred and eighty days, but less than one year, and who voluntarily depart the United States prior to commencement of removal proceedings are inadmissible for three years. If the alien was unlawfully present for one year or more, the alien is inadmissible for ten years.[87] The BCIS may waive this provision in the case of an immigrant who is the spouse or child of a U.S. citizen or lawful permanent resident if the refusal of admission would result in extreme hardship to the citizen or lawful permanent resident spouse or parent.[88] Service members may apply for such a waiver if their spouses were illegally in the United States, then left the country, and are now unable to return to join their service member spouse because of their previous illegal presence in the United States.

Once the legal assistance attorney finds that the service member's alien spouse and any children of the spouse are eligible to enter the United States, the attorney must determine the process by which they may enter. Although an alien legally may enter the United States through many programs, including the parole, refugee, or asylum programs, a service mem-

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83. *Id.* § 1182(a)(6)(B), (G).

84. *Id* § 1182(a)(9)(A).

85. *Id.*

86. The term "unlawful presence" includes periods of time in which the alien is unlawfully present in the United States after the expiration of the period of stay authorized or is present without being admitted or paroled. It does not include periods of time in which the alien is under eighteen, or has an application for asylum pending, or is a beneficiary of family unity protection. *Id.* § 1182(a)(9)(B)(ii)-(iii).

87. *Id.* § 1182(a)(9)(B)(i).

88. *Id.* § 1182(a)(9)(B)(v).

ber's spouse and the spouse's children generally enter through either the nonimmigrant or immigrant visa programs.

IV. Nonimmigrant Visas

An alien who desires to come to the United States temporarily for a specific purpose, such as to vacation or attend college, must apply for a nonimmigrant visa. There are many types of nonimmigrant visas, depending on the purpose for entering the United States. Generally, legal assistance attorneys do not see clients seeking nonimmigrant visas, with two exceptions: (1) service members seeking a K nonimmigrant visa for a fiancée or spouse living abroad awaiting an immigrant visa; and (2) service members who are lawful permanent residents seeking a V nonimmigrant visa for their spouse and/or children awaiting approval of an immigrant visa. This article only addresses these two nonimmigrant visas.

A. General Requirements

To gain admission to the United States as a nonimmigrant, an alien must have a nonimmigrant visa and a passport valid for six months.[89] If an applicant is admitted at a port of entry, he or she receives a Form I-94, Arrival-Departure Record.[90] If the alien remains in the United States beyond the period of authorized stay, the nonimmigrant visa is void. The alien then may be ineligible for readmission to the United States as a nonimmigrant, except on the basis of a visa issued in a consular office located in the country of nationality or if the Secretary of State finds extraordinary circumstances.[91]

An alien seeking a nonimmigrant visa may request a waiver of most grounds of inadmissibility under the Act.[92] An applicant for a K visa who is inadmissible may file a waiver at the consular office considering the visa

89. 8 C.F.R. § 212.1 (2002). *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-129, Petition for a Nonimmigrant Worker (Dec. 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-129.htm; U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-539, Application to Change/Extend Nonimmigrant Status (Sept. 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-539.htm.

90. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-94, Arrival-Departure Record (Aug. 1997).

91. 8 U.S.C. § 1202.

application.[93] The consular office then forwards the request for waiver to the BCIS for decision.[94]

B. "K" Nonimmigrant Visas

There are two types of K visas: (1) those for a U.S. citizen's fiancée who wishes to travel to the United States to be married, and the fiancée's children; and (2) those for a U.S. citizen's spouse and children who wish to travel to the United States while awaiting approval of their immigrant visas. Aliens admitted to the United States as nonimmigrant K visa holders are authorized to work for the period of the authorized stay.[95]

If a service member wants to marry his or her alien fiancée in the United States, the service member must file a visa petition[96] on behalf of the fiancée and any minor children of the fiancée.[97] Along with the visa petition, the service member must file evidence to establish that he or she has met the alien fiancée in person within two years of filing the visa petition, has a bona fide intention to marry, and that both are legally able and willing to conclude a valid marriage in the United States within ninety days of arrival.[98] If the service member does not marry the sponsored fiancée within the ninety-day period, the fiancée must leave the United States or the fiancée will be subject to removal.[99] The fiancée is not eligible to receive an extension of his or her stay.[100] Moreover, legal assistance attorneys who have clients applying for a K visa must take care to inform them

92. *Id.* § 1182(d) (2000 & Supp. 2002). Waivers may be granted to aliens who are ineligible for admission because of certain security related grounds. *See id*., *as implemented by* 22 C.F.R. § 40.301.

93. U.S. Department of Homeland Security, Immigration and Naturalization Service, Form I-601, Application for Waiver of Grounds of Excludability (Jan. 2002).

94. 8 C.F.R. § 212.7(a)(1).

95. *Id.* § 214.2(k)(9). Fiancées and their children must have an approved employment authorization. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Service, Form I-765, Application for Employment Authorization (May 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-765.htm. *Id.* § 274a.12(a)(6). Spouses and their children must apply for employment authorization. *See id*. § 274a.12(a)(9).

96. *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Service, Form I-129F, Petition for Alien Fiancée (Nov. 2001) [hereinafter Form I-129F], *available at* http://www.immigration.gov/graphics/formsfee/forms/i-129f.htm.

97. 8 U.S.C. § 1184(d) (2002 Supp.)

98. *Id.*

99. *Id.*

100. 8 C.F.R. § 1214.1(c)(3) (2002).

that once the alien spouse and children enter the United States they should immediately apply to adjust their status to that of permanent resident alien.[101]

Congress established the second type of K visa in 2000 under the Legal Immigration Family Equity (LIFE) Act.[102] This visa allows a service member's alien spouse and the spouse's children[103] to enter the United States while awaiting approval of an immigrant (permanent) visa. [104] After the alien spouse and children obtain their K visas, they may enter the United States for a period of two years.[105] They also may apply for an extension of their stay under certain circumstances.[106] Prior to the LIFE Act, a service member who married an alien overseas had to wait for approval of an immigrant visa before the alien spouse and any children could legally enter the United States. The alien spouse frequently waited for as long as one year for the Department of State to issue the immigrant visa.[107] This led to extended separations of military families when the service member transferred to the United States prior to the alien spouse receiving an immigrant visa.

The LIFE Act expanded the K visa to address these family separations. To take advantage of the new K visa, the service member must first file an immigrant visa petition with the BCIS on the alien spouse's behalf to begin the immigration process.[108] The service member must then file a visa petition[109] for a nonimmigrant K visa for his or her spouse and any children. Once the BCIS approves the visa petition for a "K visa", they inform the American consulate in the country where the marriage took

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101. *See infra* pt. V.E. for a discussion of how to apply for an adjustment of status to that of permanent resident alien.

102. Legal Immigration Family Equity Act of Dec. 21, 2000, Pub. L. No. 106-553 § 1103, 114 Stat. 2762 (codified at 8 U.S.C. §§ 1101(a)(15)(K), 1255, 1184, 1186a) [hereinafter LIFE Act]; *see also* BCIS interim rules implementing the new law at 66 Fed. Reg. 42,587 (Aug. 14, 2001) (codified at 8 C.F.R. pts. 248, 1212, 1214, 1245, 1274a).

103. Children must be under twenty-one years of age and unmarried to meet the definition of "child." 8 U.S.C. § 1101(b)(1) (2000 & Supp. 2002).

104. This nonimmigrant classification status is known as the "K visa" because it is found at subsection 101(15)(K) of the Immigration and Naturalization Act, codified at 8 U.S.C. § 1101(a)(15)(K).

105. Or, in the case of a child, until the child reaches his or her twenty-first birthday, whichever is shorter. *See* 8 C.F.R. § 1214.2(k)(8).

106. *Id.* § 1214.2(j)(10). The applicant must show that he or she has pending either an application for an immigrant visa, or an application for adjustment to that of permanent residence. *Id.*

107. 66 Fed. Reg. 42,587, para. I.A. (Aug. 14, 2001).

place.[110] The alien spouse must then apply for a nonimmigrant K visa in that country.[111] If legal assistance attorneys are involved in the visa process early, they should ensure that the service member client is aware that if he or she marries overseas, the alien spouse must apply for the nonimmigrant K visa in the country where the marriage took place.

The K visas of a spouse and any children are automatically terminated thirty days following the denial of a visa petition for an immigrant visa; the denial or revocation of an application for adjustment of status to lawful permanent residence; a divorce from the U.S. citizen sponsor becomes final; or, if the child, the marriage of the child.[112]

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108. The petition requests the BCIS to classify the alien spouse as an immediate relative for immigration purposes. *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Petition for Alien Relative, Form I-130 (June 2002) [hereinafter Form I-130], *available at* http://www.immigration.gov/graphics/formsfee/forms/i-130.htm. 22 C.F.R. § 41.81(b).

109. *See* Form I-129F, *supra* note 96.

110. The soldier must also file a Form I-129F to obtain a nonimmigrant K visa for the spouse and children. Prior to implementation of the LIFE Act rules, "K" nonimmigrants were designed as "K-1," for the fiancée of a U.S. citizen, and "K-2," for their children. For the sake of consistency, the original classification designations were not changed. Therefore, U.S. citizen spouses and children are designated as "K-3" and "K-4," respectively. *See* 66 Fed. Reg. 42,588, para. I.C. (Aug. 14, 2001). Applications for K-3/K-4 status must be sent to: The Bureau of Citizenship and Immigration Services, P.O. Box 7218, Chicago, IL 60680-7218. The Form I-129F is a temporary solution to the need for a new form. The BCIS plans to design a new form for this purpose, but because LIFE is already effective and a process was needed to implement it immediately, Form I-129F is being used until further notice. Applicants are cautioned not to fill out section (B)(18) and (B)(19) of the form. *Id.* at 42,589, para. II.B.

111. 8 U.S.C. § 1184(p)(2) (Supp. 2002). To obtain the K visa, the alien spouse must file a nonimmigrant visa application. *See* U.S. Dep't of State, Nonimmigrant Visa Application, Form DS-156 (2001), *available at* http://travel.state.gov/DS-0156.pdf; 22 C.F.R. § 41.103. The spouse must also submit a Form I-693, Medical Examination, when he or she appears at the consulate to apply for the K visa from the State Department. *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Medical Examination of Aliens Seeking Adjustment of Status, Form I-693 (Apr. 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-693.htm; 22 C.F.R. § 41.108. The consular officer must determine the eligibility of an alien to receive a V nonimmigrant visa as if the alien were an applicant for an immigrant visa, except that the alien is exempt from the vaccination requirements of 8 U.S.C. § 1182(a)(1) (2000) and the labor certification requirement of 8 U.S.C. § 1182(a)(5) (2000 & Supp. 2002). 22 C.F.R. § 41.81(d).

112. 8 U.S.C. § 1184(p)(3) (Supp. 2002); *see also* 8 C.F.R. § 1214.2(j)(11).

B. "V" Nonimmigrant Visas

Similar to the K visa for a U.S. citizen's alien spouse and their children living abroad, the Life Act established the V visa for the alien spouses and children of lawful permanent residents of the United States.[113] Service members who are lawful permanent residents may use the new V visa to bring their spouses and children to the United States while awaiting approval of an immigrant visa. Additionally, service members may petition for visas for their spouses and minor children who are already in the United States.

To be eligible for a V Visa, the alien spouse must have a Petition for Alien Relative[114] filed with the BCIS on his or her behalf by the lawful permanent resident service member spouse or parent on or before 21 December 2000 and have been waiting for at least three years after filing the visa petition for immigrant status.[115] If the spouse and children are living abroad, they may apply for the visa at a consular office.[116] If the spouse and children are already living in the United States, they may apply for a V visa through the BCIS.[117] The alien is authorized to engage in employment during the period of admission.[118] The BCIS admits the spouse of a

113. The LIFE Act, 114 Stat. at 2762, § 1102.

114. Form I-130, *supra* note 108.

115. 8 U.S.C. § 1101(15)(V). The individual must be waiting at least three years either because a visa number (priority number) has not yet become available, or because BCIS has not yet adjudicated the Form I-130 or the Form I-485, Application to Register Permanent Residence or to Adjust Status. *Id.*

116. 8 C.F.R. § 1214.15(a). These individuals are admitted to the United States in V-1 (spouse), V-2 (child), or V-3 (dependent child of the spouse or child who is accompanying or following to join the principal beneficiary) status. *Id.* The consular office determines the eligiblity of the alien to receive a nonimmigrant V visa as if the alien were an applicant for an immigrant visa, except that the alien is exempt from the vaccination requirement of 8 U.S.C. § 1182(a)(1), the labor certification requirement of 8 U.S.C. § 1182(a)(5), and inadmissibility, under 8 U.S.C. § 1182(a)(9)(B), due to unlawful presence in the United States. 22 C.F.R. § 41.86.

117. 8 C.F.R. § 1214.15(f). To apply for the V nonimmigrant visa, aliens living in the United States must submit an application to change their nonimmigrant status. U.S. Dep't of Homeland Security, Bureau of Citizenship and Naturalization Services, Form I-539, Application to Extend/Change Nonimmigrant Status (Sept. 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-539.htm. They also must submit a fingerprint fee and a medical examination form without the vaccination supplement. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-693, Medical Examination of Aliens Seeking Adjustment of Status (Apr. 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-693.htm. *Id.*

118. 8 U.S.C. § 1184(o)(1).

lawful permanent resident for a period not to exceed two years. The child of a lawful permanent resident is admitted for a period not to exceed two years or the day before the alien's twenty-first birthday, whichever comes first.[119]

Moreover, similar to the K visa, the period of authorized admission as a nonimmigrant pursuant to a V visa terminates thirty days following the denial of a visa petition for an immigrant visa; the denial or revocation of an application for adjustment of status to lawful permanent residence; a divorce from the lawful permanent residence sponsor becomes final; or, if a child, the marriage of the child.[120]

The bars for unlawful presence in the United States do not prevent eligible persons from obtaining a V visa, or from being readmitted to the United States with a V visa following travel abroad. Unless the person seeks and is granted a waiver, however, these grounds for inadmissibility will prevent the alien from adjusting status to lawful permanent resident for the applicable three year or ten year period.[121]

V. Immigrant Visas

An alien who desires to come to the U.S and remain permanently is referred to as an "immigrant" and must apply for an immigrant visa.[122] Generally, the classes of aliens who may be issued immigrant visas and acquire the status of a lawful permanent resident are limited to family-based immigrants, employment-based immigrants, and diversity-based immigrants.[123] The legal assistance attorney, however, generally only will see clients seeking to immigrate under the family-based immigrant pro-

119. 8 C.F.R. § 1214.15(g)(1)-(2). The BCIS may extend this two-year period for alien spouses another two-year period upon proper application and approval. In the case of children, the status may be extended for two years or the day before the alien's twenty-first birthday, whichever comes first. *Id.* § 1214.15(g)(3).

120. *Id.* § 1214.15(j)(1).

121. 8 U.S.C. § 1184(o)(3) (Supp. 2002).

122. *See* 8 U.S.C. § 1101(15) (defining "immigrant" as any alien except one who enters the country as a nonimmigrant).

123. *See generally id.* § 1151(a) (2000).

gram, or as special immigrants. Therefore, this article discusses in detail only those classes of immigrant visas.

A. Special Immigrants

An immigrant who enlisted outside the United States under a treaty or agreement in effect on 1 October 1991 allowing nationals of that state to enlist in the U.S. Armed Forces may be eligible to immigrate to the United States.[124] To be authorized special immigrant status, the individual must have served honorably on active duty in the U.S. military after 15 October 1978, for a period of either: (1) twelve years, if separated under honorable conditions; or (2) six years, if on active duty at the time of seeking special immigrant status, and reenlisted to incur a total active duty service obligation of at least twelve years.[125] The spouse and child of any such immigrant also may be accorded special immigrant status if they accompany or follow to join the immigrant.[126]

B. Family-Based Immigrant Visas

1. Immediate Relatives of U.S. Citizens

Legal assistance attorneys, especially those stationed overseas, are likely to advise service members on how to obtain immediate relative visas to bring their alien spouses to the United States. Immediate relatives include a service member's spouse, unmarried children under the age of twenty-one,[127] and, if the service member is at least twenty-one years of

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124. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 601-210, REGULAR ARMY AND ARMY RESERVE ENLISTMENT PROGRAM para. 2-4a(5) (28 Feb. 1995) (allowing citizens of the Federated States of Micronesia, Palau and the Republic of Marshall Islands to enlist in the U.S. Army).

125. 8 U.S.C. § 1101(a)(27)(K) (Supp. 2002).

126. *Id.*

127. A child is an unmarried person under twenty-one who is a child born in wedlock; born out of wedlock if legitimated before the child is eighteen years of age or if the father had a bona fide parent-child relationship with the child; a stepchild if the marriage that resulted in that status took place before the child reached eighteen years of age; a child adopted while under the age of sixteen or the natural sibling of such child who is also adopted by the same parent(s) and was adopted while under the age of eighteen. *Id.* § 1101(b)(1) (Supp. 2002). Additionally, the BCIS determines whether a child satisfies the age requirement using the age of the alien on the date on which the petition is filed to classify the alien as an immediate relative. *Id.* § 1151(f)(1).

age, the service member's parent.[128] Additionally, if the service member dies and he or she had been married to the alien for at least two years and was not legally separated at the time of the service member's death, the alien spouse and any children of the alien spouse remain eligible for immigration as an immediate relative, if the spouse applies for immigrant status within two years of the service member's death. This time limit tolls if the spouse remarries within the two-year period.[129]

In addition, the law provides certain protections for battered spouses and children. An alien may "self-petition" as an immediate relative if the alien entered the marriage or intended marriage to the U.S. citizen in good faith and during the marriage or relationship intended by the alien to be a legal marriage, the alien or the alien's child is battered or subject to extreme cruelty by the alien's spouse or intended spouse.[130] Additionally, an alien spouse may be granted immigrant status if the spouse can show that he or she was a bona fide spouse of a U.S. citizen within the past two years whose spouse lost or renounced citizenship status within the past two years related to an incident of domestic violence, or who can demonstrate a connection between the termination of the marriage within the past two years and battering or extreme cruelty by the U.S. citizen spouse.[131] The denaturalization, loss or renunciation of citizenship, death of the abuser, divorce, or changes to the abuser's citizenship status after filing a visa petition does not affect the approval of the visa petition or, for approved visa petitions, does not affect the alien's ability to adjust status to that of lawful permanent resident alien.[132]

2. Family-Sponsored Immigrants

In addition, a legal assistance attorney may advise a client on how to obtain an immigrant visa for a service member's other family members. If not classified as an immediate relative, then a family member is considered

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128. *Id.* § 1151(a)(2)(A)(i).

129. *Id.*

130. *Id.* § 1151(a)(1)(A)(iii)(I). The phrase "was battered by or was the subject of extreme cruelty" includes being the victim of any act or threatened act of violence, including forceful detention which results or threatens to result in physical or mental injury. It also includes psychocological or sexual abuse or exploitation, to include rape, incest, molestation, or forced prostitution. 8 C.F.R. § 204.2 (c)(vi) (2002).

131. 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(bbb)-(ccc).

132. *Id.* § 1154a(1)(vi). *See infra* pt. IV.F. (discussing lawful permenent resident alien status).

a family-sponsored immigrant. Unlike the immediate relative immigrant, the Act sets a ceiling on the number of family-sponsored immigrants who may immigrate to the United States each year.[133] Moreover, the number of family-sponsored immigrants cannot be less than 226,000 in any given fiscal year.[134]

The Act divides the family-sponsored immigrants into four separate preference categories, each with its own quota. The first preference is for unmarried children of U.S. citizens. As a practical matter, these children will be over the age of twenty-one because unmarried children under the age of twenty-one generally may immigrate under the immediate relative category.[135] The number of visas issued each fiscal year cannot exceed 23,400, plus any visas not required for the fourth preference.[136]

The second preference is distinct from the other three because in the second preference the petitioner is a lawful permanent resident and not a U.S. citizen. In this category the petitioner may sponsor his or her spouse and children or unmarried sons or daughters over the age of twenty-one.[137] Therefore, service members who are lawful permanent residents may petition to have their spouses, children, and unmarried children over the age of twenty-one immigrate to the United States under this category. The number of visas that may be issued in this category in each fiscal year cannot exceed 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000 and any visas not required for the first

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133. *See generally* 8 U.S.C. § 1151(c). The worldwide level of family-sponsored immigrants for a fiscal year is equal to 480,000 minus the sum of immediate relatives for the previous fiscal year and the number of parolees in the second preceding fiscal year, plus the difference (if any) between the maximum number of employment-based immigrant visas during the previous fiscal year and the number of visas actually issues. The number of parolees does not include those who departed the U.S. within 365 days or who acquired that status under a provision of law that exempts such adjustment from the numerical limitations on the worldwide level of immigration. *Id.*

134. *Id.* § 1151(c)(2).

135. *See id.* § 1151(a).

136. *Id.* § 1153(a)(1).

137. *Id.* § 1153(a)(2). For purposes of deciding whether the alien qualifies as a child under the age of twenty-one, the age of the alien is calculated on the date on which the immigrant visa number becomes available for the alien, but only if the alien sought to acquire the status of a lawful permanent resident alien within one year of such availability reduced by the number of days during which the applicable petition was pending. 8 U.S.C. § 1153(h)(1) (2003).

preference category. No less than seventy-seven percent of this number must be allocated to spouses and children.[138]

If a service member who is a lawful permanent resident files a visa petition for an alien child and the service member later becomes a naturalized U.S. citizen, the service member may convert the visa petition to classify the alien child as an immediate relative. In such cases, the alien child must be under the age of twenty-one at the time of the parent's naturalization to qualify as an immediate relative.[139] In addition, if the visa petition is for an alien unmarried son or daughter (over the age of twenty-one) and the service member parent becomes a naturalized U.S. citizen, the visa petition may be converted to a visa petition to classify the unmarried son or daughter as a family-sponsored immigrant of a U.S. citizen under the first preference.[140]

The third preference is for married sons and daughters of U.S. citizens. The number of visas in this category cannot exceed 23,400, plus any visas not required for preference one and two immigrant visas.[141] If the son or daughter later divorces, the service member may convert the visa petition to one to classify the alien either as an immediate relative or as an unmarried son or daughter of a citizen under the first preference. To be classified as an immediate relative, the son or daughter must be under the age of twenty-one on the date of the termination of the marriage.[142]

Finally, the fourth preference is for brothers and sisters of a U.S. citizen, if such citizen is at least twenty-one years of age. The number of visas in this preference cannot exceed 65,000, plus the number of visas not required for the other three preferences.[143]

In addition to the quotas in each preference category, the Act limits the number of visas that may be issued to aliens from any one country. Generally, the total number of family-sponsored immigrant visas that are available to individuals of any single foreign state cannot exceed seven

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138. *Id*. § 1151(f)(2).

139. *Id.*

140. *Id.* § 1154(k)(1). The son or daughter may file a written statement with the BCIS that he or she elects not to have such conversion occur, but regardless of whether a petition is converted, the son or daughter maintains the initial priorty date for the visa application. *Id.* § 1154(k)(2)-(3).

141. 8 U.S.C. § 1153(a)(3) (2000).

142. *Id.* § 1151(f)(3).

143. *Id.* § 1153(a)(4).

percent of the total number of such visas available in the preference category for each fiscal year.[144]

C. Diversity-Based Immigrant Visas

A legal assistance attorney may recommend that a client or the client's family members apply for an immigrant visa under the Diversity-Based Immigrant Visa Program. Each fiscal year, the United States allows 55,000 aliens to immigrate worldwide under this program.[145] To be eligible, an alien must have at least a high school education or its equivalent, or at least two years of work experience in an occupation which requires at least two years of training or experience within five years of the date of application.[146] Only natives of low-admission states may apply under the diversity-based program.[147] The BCIS uses a formula to determine what states constitute low-admission states; such states are generally those that for the previous five fiscal years the BCIS has issued a low number of immigrant visas. The alien may only file one visa petition in a fiscal year. If more than one visa petition is filed, the alien is disqualified.[148]

The diversity-based immigrant visas are awarded through an annual lottery conducted by the Department of State's National Visa Center, which chooses winners randomly from qualified applicants.[149] Each year the Department of State issues a notice published in the Federal Register on how to apply for the diversity-based program lottery.[150] There is no specific form to apply for this type of immigrant visa. An alien may file a

144. *Id.* § 1152(a)(2) (Supp. 2002). If the total number of visas available in the family-spnsored and employment-sponsored categories exceeds the number of applicants, the seven percent limitation does not apply. *Id.* § 1152(a)(2). Additionally, for spouses and children of lawful permanet resident aliens under preference two, seventy five percent of the visas available (that is, seventy seven percent of the total number of visas made available under this category) are issued without regard to the seven percent limitation. *Id*. § 1152(a)(4).

145. *Id.* § 1151(e). The Nicaraguan and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160 (1997), stipulates that beginning as early as 1999, and for as long as necessary, 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. *Id.*

146. *Id.* § 1153(c).

147. *Id.* (as implemented by 22 C.F.R. § 42.33(a)(1)).

148. 22 C.F.R. § 42.33(a)(4).

149. Applications are assigned a number in a separate numerical sequence established for each regional area. All assigned numbers are separately rank-ordered at random by a computer. *Id.* § 42.33(c).

visa petition using a sheet of plain paper on which is typed the alien's name, date and place of birth, country that the alien claims to be a native, names, dates, and places of birth of spouse and children, current mailing address, and consular office nearest the applicant's place of residence. The alien must sign the application and forward it, with a photograph, to the appropriate consular center in Kentucky designated by the Department of State based on the applicant's region.[151]

D. Procedures for Obtaining an Immigrant Visa

The road to becoming a naturalized U.S. citizen begins with the service member/sponsor filing a visa petition for an immigrant visa. Once approved, the alien then must file an application for an immigrant visa. After the alien receives the immigrant visa, he or she must travel to the United States and apply for adjustment of status to that of lawful permanent resident. This process may prove long and complicated, but legal assistance attorneys can smooth the way by being involved in the process early, advising the client regarding the proper documents that must be filed, and maintaining points of contact at the BCIS and consular office.

1. Visa Petitions

For an alien to be classified as an immediate relative or family-sponsored immigrant, the U.S. citizen service member must file a Petition for Alien Relative,[152] on behalf of the sponsored individual.[153] A widow or widower of a U.S. citizen service member, a spouse or child of an abusive citizen, and an Armed Forces Special Immigrant may self-petition by filing a Form I-360, Petition for Amerasian, Widow, or Special Immigrant.[154] If the petitioning service member resides in the United States, he or she

150. For example, for the FY05 program, applicants must file their petition with the appropriate consular center between Saturday, 1 October 2003, and Tuesday, 30 December 2003. *See* the U.S. Department of State, Bureau of Consular Affairs Visa Services Instruction for the 2005 Diversity Immigrant Visa Program, *available at* http://www.travel.state.gov/dv2005.html.

151. 22 C.F.R. § 42.33(b).

152. *See* Form I-130, *supra* note 108.

153. 8 C.F.R. § 204.1(a)(1).

154. *Id*. §§ 204.1(a)(2)-(3), 204.9(a). *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-360, Petition for Amerasian, Widow, or Special Immigrant (Sept. 2000), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-360.htm.

must file the visa petition with the BCIS office having jurisdiction over the place where the service member resides.[155] If the service member resides outside the United States, he or she must file the visa petition either at the BCIS office located in the country where the service member resides or, if there is no BCIS office in that country, at the U.S. consulate office.[156]

With the visa petition, the service member must include supporting documents which establish both that the service member is a U.S. citizen and the claimed relationship of the service member to the sponsored alien. If it would cause unusual delay or hardship to obtain proof of birth in the United States, a service member stationed outside the United States may submit a statement from his or her commander stating that the personnel records of the unit show that the service member was born in the United States on a certain date.[157]

2. Visa Application

Once the visa petition is approved, the BCIS notifies the petitioning service member and forwards the approved visa petition to the Department of State's National Visa Center. The Center then forwards the visa application documents directly to the sponsored alien, to include the Form DS-230, Application for Immigrant Visa and Alien Registration.[158] Generally, the alien must submit the application and other required documents, including a valid passport, to the consular office having jurisdiction over the alien's place of residence.[159] The alien must also submit to a medical examination to ensure that he or she is not inadmissible on health related grounds,[160] submit a Form I-864, Affidavit of Support Under Section

155. *Id.* § 204.1(e)(1).

156. *Id.* § 204.1(e)(2)-(3). An overseas BCIS officer may not accept or approve a petition filed by an abused spouse or child. These petitions must be filed in the BCIS office in the U.S. having jurisdiction over the self-petitioners place of residence in the United States. *Id.* § 204.1(e)(2).

157. *Id.* § 204.1(f)(1), (2)(v). A self-petitioner filing based on physical abuse must submit evidence of abuse which may include reports and affidavits from police, judges and other court officials, clergy, social workers, and school officials. *Id.* § 204.2(c)(2)(iv).

158. 22 C.F.R. § 42.63(a) (2002). *See* U.S. Department of State, Form DS-230, Application for Immigrant Visa and Alien Registration (May 2001), *available at* http://travel.state.gov/DS-0230.pdf.

213A of the Act,[161] and appear personally before a consular officer to execute the application and for an interview.[162]

Once the application is approved, the consular office issues the immigrant visa, OF-155A, Immigrant Visa and Alien Registration.[163] The visa is generally good for six months.[164] For immediate relatives and special immigrants, the consular office issues the visa immediately after it is approved.[165] Aliens immigrating under the family–sponsored immigrant visa program, however, generally are not immediately eligible to travel to the United States because of the quota and per country numerical limitations on family-sponsored immigrant visas. Consequently, their visas contain a number allocated by the Department of State based on the date their visa petitions were properly filed.[166] The Department of State publishes a Visa Bulletin each month listing the filing dates of the visa petitions that they are working on for that month.[167]

E. Lawful Entry and Adjustment of Status

1. Generally

To enter the United States, the immigrant must have a valid unexpired immigrant visa and a valid unexpired passport or other required travel doc-

159. 8 U.S.C. § 1202 (2000); *see also* 22 C.F.R. § 42.61(a) (providing that an alien who is physically present in an area but who has no residence in that area may submit their application at the consular office having jurisdiction in that area if the alien will be in the area for the period required to process the application. If an alien is in the U.S., the alien must submit their application to the consular office in the area of their last residence prior to entering the U.S.). Applicants must also submit a copy of a police certificate(s); a certified copy of any prison record, military record, and birth certificate; and certified copies of any other records or documents that the consular officer deams necessary. 22 C.F.R. § 42.65(b).

160. *See infra* pt. III.A. (discussing medical grounds for inadmissibility).

161. *See infra* pt. III.C. (discussing affidavits of support).

162. 22 C.F.R. § 42.62(a).

163. *Id.* § 42.73(a).

164. 8 U.S.C. § 1201(d); *see also* 22 C.F.R. § 42.72.

165. 8 U.S.C. § 1202.

166. *See* 8 C.F.R. § 204.19(c); 22 C.F.R. § 42.73(a).

167. *See* U.S. Dep't of State, *Visa Bulletin* (Sept. 2003), *at* http://travel.state.gov/visa_bulletin.html. For example, the Visa Bulletin for September 2003 reflected that the Department of State was working on first preference petitions filed on 8 April 2000, generally, and 22 September 1994 for those aliens from Mexico and 15 April 1989 for those from the Philippines. *Id.*

uments.[168] To remain in the United States permanently, the immigrant must apply to adjust his or her status to that of lawful permanent resident.[169] The alien applies for adjustment of status by submitting Form I-485, Application for Permanent Residence,[170] to the BCIS director having jurisdiction over the applicant's residence.[171] An immigration officer must interview each applicant for adjustment of status, unless waived by the Service.[172] There are several categories of aliens who are either restricted or ineligible for adjustment of status, to include those employed in the United States without authorization and those aliens who are not in a lawful immigration status on the date of filing the application for adjustment of status to that of lawful permanent resident, except for immediate relatives.[173]

While the application is pending, the immigrant generally may not depart the United States or the application will be deemed abandoned, unless the BCIS first grants the applicant parole.[174] The BCIS will adjudicate the application within ninety days of the date of the interview, unless the interview is waived. If the director approves the joint visa petition, he or she provides written notice to the alien and the alien must report to the BCIS office for processing for a Permanent Resident Card.[175]

2. Special Immigrants

If the alien received an immigrant visa as an armed forces special immigrant, he or she follows the procedures outlined, above. If the service

168. 8 U.S.C. § 1181(a).

169. The term "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20).

170. 8 C.F.R. § 1245.2(a)(3). *See* U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services, I-485, Application for Permanent Residence (Feb. 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-485.htm.

171. 8 C.F.R. § 1245.2(a)(1).

172. *Id.* § 1245.6.

173. 8 U.S.C. § 1255(c) (Supp. 2002), *as implemented by* 8 C.F.R. § 1245.1(b)-(c) (2002).

174. 8 C.F.R. § 1245.2(a)(4)(i). A K-3, K-4, or V visa holder is not considered to have abandoned an application if upon return the applicant is admissible as a K-3, K-4, or V visa nonimmigrant. *Id.* § 1245.2(a)(4)(i)(C)-(D). *See supra* note 110, for the definitions of K-3 and K-4 nonimmigrant visas.

175. *Id.* § 1216.4(c)-(d).

member's alien spouse or child is outside the United States, the alien may file Form I-824, Application for Action on an Approved Application or Petition,[176] with the BCIS office that approved the original application.[177] If the BCIS becomes aware that the armed forces special immigrant failed to complete his or her active duty service for reasons other than an honorable discharged, the alien may become subject to removal.[178]

3. Conditional Permanent Resident Status

An alien spouse and the spouse's children receive only conditional lawful permanent resident status if: (1) the alien spouse entered the country as an immediate relative or the spouse of a lawful permanent resident; and (2) the alien spouse and sponsoring service member were married within twenty-four months before the date the alien obtained the status of lawful permanent resident by virtue of the marriage. Moreover, a spouse and a spouse's child who entered the United States pursuant to a fiancée K visa also receive only conditional lawful permanent resident status.[179] If, before the second anniversary of the alien receiving conditional lawful permanent resident status, the BCIS determines that the marriage was entered into for the purpose of procuring the alien's admission as an immigrant or has been judicially annulled or terminated, other than through the spouse's death, or a fee or other consideration was given for filing a visa petition for immigration, the BCIS will terminate the alien's conditional permanent residence status.[180] If the visa petition is denied, the BCIS provides written notice to the alien and requires the alien to surrender any Permanent Resident Card previously issued. The denial cannot be appealed, but the alien may seek review during removal proceedings.[181]

The conditional permanent resident and the service member spouse who filed the original immigrant visa petition or fiancée petition must jointly file a Form I-751, Petition to Remove the Conditions on Residence[182] during the ninety-day period before the second anniversary of the alien's obtaining the status of conditional permanent resident.[183] Depen-

176. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-824, Application for Action on an Approved Application or Petition (Dec. 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-824.htm.

177. 8 C.F.R. § 1245.8(d).

178. *Id.* § 1245.8(e).

179. 8 U.S.C. § 1186a(a)(1), (g) (2000).

180. *Id*. § 1186a(b) (Supp. 2002).

181. 8 C.F.R. § 1216.4(d)(2) (2002).

dent children of conditional permanent residents who acquired conditional status concurrently with the parent may be included in the visa petition.[184] Failure to file within the ninety-day window will terminate the spouse's permanent resident status, except if the spouse can show good cause and extenuating circumstances for failing to file within this ninety-day window.[185] The BCIS will attempt to provide notice to the spouse about the beginning of the ninety-day period, but not providing notice does not affect termination of the status for failure to apply for removal of the conditional status.[186] Upon filing the petition for removal of the conditional status, the alien and sponsoring service member generally must be interviewed by a BCIS officer at an office having jurisdiction over the residence of the joint petitioners.[187]

The BCIS may provide special provisions for service members who deploy overseas and are unable to jointly file a petition. For example, if a sponsoring service member is deployed in support of *Operation Enduring Freedom*, the service member may be unable to sign the joint petition requesting removal of the conditional status or to appear before a BCIS officer for the personal interview. The BCIS has recognized this problem and issued special instructions for such situations.[188] Under the policy memorandum, if the service member's deployment is imminent and the service member has already filed the petition to remove the conditional status, the Service Office must make "every effort" to complete adjudica-

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182. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-751, Petition to Remove the Conditions on Residence (June 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-751.htm.

183. 8 U.S.C. § 1186a(d)(2), as implemented by 8 C.F.R. 1216.4(a). If a joint petition cannot be filed because of the termination of the marriage through annulment, divorce, or death, or the refusal of the spouse, the petitioning spouse may apply for a waiver if the spouse can show: (1) removal from the U.S. would result in extreme hardship; (2) the marriage was entered into in good faith, but terminated other than by death, and the conditional resident was not at fault; or (3) the marriage was entered into in good faith but during the marriage the alien spouse or child was battered by or subjected to extreme cruelty committed by the citizen or permanent resident spouse or child. 8 C.F.R. § 1216.5(a)(1).

184. 8 C.F.R. § 1216.4(a)(2).

185. 8 U.S.C. § 1186a(c)(2).

186. *Id.* § 1186a(a)(2)(B)-(C).

187. 8 C.F.R. § 1216.4(b). The director of the service center may waive the interview requirement. *Id.*

188. Memorandum, Immigration and Naturalization Service Policy, subject: Removal of Conditional Resident Status If Conditional Resident Is the Spouse of an Individual Serving Abroad in the U.S. Armed Forces of Operation Enduring Freedom (Jan. 7, 2002), *available at* http://www.bcis.gov_graphics/lawsregs/handbook/Attach_ConStatPub.pdf.

tion of the petition prior to the service member's deployment.[189] If the BCIS cannot adjudge the petition before the service member deploys, the BCIS places the petition on "overseas hold" pending his or her return from abroad.[190]

If the service member has already deployed and his or her spouse's conditional status is due to expire, the BCIS will accept a petition signed by the conditional resident only, if the petition is accompanied by evidence that the service member's spouse is deployed.[191] In addition, the policy provides that the BCIS service center may approve the petition without an interview, unless the petition's supporting documentation does not warrant approval. In that case, the service center must schedule the case for an interview and place the case on "overseas hold."[192]

Under this policy, the BCIS will initially extend the alien spouse's conditional resident status for one year.[193] If the service member has not returned from abroad within one year, the service center will revalidate the extension of the conditional status in six-month increments.[194] The service member must remember to contact the BCIS service center immediately upon his or her return from the deployment, so that the BCIS may adjudicate the request to remove the spouse's conditional status.

VI. Naturalization

Once an alien immigrates to the United States, he or she has completed the first step toward becoming a naturalized U.S. citizen. Before applying for naturalization, the alien generally must have been a lawful permanent resident for five years. There are several categories of lawful permanent residents, however, who do not have to wait five years. Several of these categories apply specifically to service members and their spouses and children. This section discusses the general requirements for natural-

189. *Id*. at 1.

190. *Id.*

191. *Id.* at 2. Such evidence may include "a photocopy of the service member's travel orders, a letter from the commanding officer, or other appropriate documentation signed by responsible military personnel." *Id.*

192. *Id.*

193. *Id.* That is, the conditional resident's Form I-551, is extended. *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-551, Permanent Resident Card (June 1999).

194. *Id.*

ization and then details the specific categories that apply to service members and their families.

A. General Naturalization Requirements

Generally, a person must be a lawful permanent resident who is at least eighteen years of age,[195] has resided continuously within the United States for at least five years and been physically present in the United States for periods totaling two and one-half years, and has resided[196] within the State or BCIS district in which the person files the application for at least three months before the person may apply for naturalization.[197] Additionally, after the person applies for naturalization, the person must reside continuously within the United States until he or she becomes a citizen.[198] Moreover, during this entire period, the person must be of good moral character,[199] attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States.[200]

An applicant for naturalization also must show that he or she has an understanding of the English language, including the ability to read, write, and speak English,[201] and a knowledge and understanding of the fundamentals of the history and principles and form of government of the United

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195. 8 U.S.C. § 1445(b) (2000).

196. For applicants serving in the Armed Forces and who are not eligible for naturalization under other special categories, the applicant's residence is the state or BCIS Service District where the applicant is physically located for at least three months preceding filing an application for naturalization, or the location of the residence of the applicant's spouse or minor children, or the applicant's home of record. 8 C.F.R. § 316.5(b) (2002).

197. 8 U.S.C. § 1427(a).

198. *Id.* If the applicant is absent from the United States for more than six months but less than one year for any of the continuous residence requirements, the continuity of the residence is broken, unless the applicant can establish that he or she did not abandon his or her residence in the United States during the period of the absence. *Id.* § 1427(b). Also, if the applicant is absent for a continuous period of one year or more, the continuity of the applicant's residence in broken, except if the applicant is employed abroad by the U.S. Government; certain American firms; public international organizations; or performing religious duties. *Id.* §§ 1427(b), 1428.

199. *See* 8 C.F.R. § 316.10 (discussing what constitutes a lack of good moral character, including convictions for murder, aggravated felony, and crimes of moral turpitude; a failure to support dependents; and an extramarital affair that tended to destroy an existing marriage).

200. 8 U.S.C. § 1427(a). *Also see* 8 C.F.R. § 316.11 (providing that attachment and favorable disposition contemplate the exclusion of those who are hostile to the basic form of U.S. government, or who do not believe in the principles of the Constitution).

States.[202] A BCIS officer may examine the applicant during the naturalization interview regarding these skills. The officer determines the applicant's ability to speak English from answers to questions normally asked during the examination.[203] The officer tests the applicant's ability to read and write English and his or her knowledge of U.S. history and government using the BCIS authorized Federal Textbooks on Citizenship.[204] Alternatively, the applicant may take a standardized citizenship test within one year of his or her application, but a BCIS officer still must examine the applicant on his or her ability to speak English during the naturalization interview.[205]

B. Special Categories for Service Members

1. Honorable Service in the Armed Forces During Hostilities

The first special category allows service members to apply to become naturalized U.S. citizens if serving during certain periods of hostilities designated by the President through executive order.[206] Most recently, as explained in the beginning of this article, President Bush declared, by executive order, such a period of hostility beginning 11 September 2001 and ending on a date designated by future executive order.[207] A service member applying under this executive order must comply with the general requirements for naturalization. The service member must show that he or she has been for at least one year prior to filing for naturalization, and continues to be, of good moral character, attached to the principles of the Con-

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201. The requirement to understand the English language does not apply to a person who, on the date of filing an application for naturalization, is over fifty years of age and has been living in the United States for periods totaling twenty years or more after being lawfully admitted for permanent residence, or to an applicant who is over fifty-five years of age and has been living in the United States for periods totaling fifteen years after lawful admission for permanent residence. 8 U.S.C. § 1423(b)(2).

202. *Id.* § 1423(a). The literacy, history and government requirements do not apply if the applicant is unable to show knowledge and understanding of these subjects because of a physical or mental impairment that already has or is expected to last at least twelve months. A person must file a Medical Certification for Disability Exceptions, to apply for the exception. U.S. Dep't of Homeland Security, Bureau of Citizenship and Naturalization Services, Form N-648, Medical Certification for Disability Exceptions (Apr. 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/n-648.htm. 8 C.F.R. §§ 312.1(b)(3), 312.2.

203. 8 C.F.R. § 312.1(c)(1).

204. *Id.*

205. *Id.* § 312.3(a).

stitution, and favoring the good order and happiness of the United States.[208] The service member may be naturalized regardless of age, however, and no residence or physical presence in the United States is required.[209]

Legal assistance attorneys must note that regardless of whether the service member has been admitted for permanent residence, to be eligible for citizenship under this category, the service member must have been in the United States, the Canal Zone, American Samoa, or Swains Islands, or on board a public vessel owned or operated by the United States for noncommercial service at the time of the enlistment, reenlistment, extension of enlistment or induction. If the service member was not in any of these locations at the time described, the service member is not eligible for naturalization under this provision unless he or she became a lawful permanent resident after their enlistment or induction.[210] Therefore, if the

206. *See* 8 U.S.C. § 1440 (allowing for naturalization through honorable service during WWI, WWII, and the Korean and Vietnam Conflicts); *see also* Reyes v. INS, 910 F.2d 611 (9th Cir. 1990) (striking down a presidential executive order permitting service members serving in Grenada to benefit from this provision on the grounds that the President does not have the authority to make area restrictions under the statute, only time restrictions); Exec. Order No. 12,582, 3 C.F.R. § 201 (1987); 8 U.S.C. § 1440-1 (permitting the grant of posthumous citizenship to service members who serve honorably in an active duty status during such a designated period of hostility and die as a result of injury or disease incurred in or aggravated by that service). Note, that the NDAA for FY 2004, tit. XVII, § 1703 amended the Immigration and Naturalization Act by extending posthumous benefits to surviving spouses, children and parents. NDAA for FY 2004, *supra* note 2, at tit. XVII, § 1703.

207. *See infra* pt. I. To be eligible for naturalization under this category, the service member must show that his or her service was honorable, as determined by the military department, and that he or she was not separated from service because of alienage; was not a conscientious objector who performed no military, air or naval duty; and did not refuse to wear the military uniform. 8 C.F.R. § 329.1.

208. 8 C.F.R. § 329.2(d). Additionally, citizenship granted pursuant to this executive order may be revoked if the service member is subsequently separated under other than honorable conditions. 8 U.S.C. § 1440(c).

209. 8 U.S.C. § 1440(b). Additionally, the servicemember is not required to pay naturalization fees, except fees required by the state. *Id.* § 1440e.

210. *Id.* § 1440(a). Note, however, that by statute, a person must be either a citizen or a lawful permanent resident of the United States to enlist in the Army or Air force. *See* 10 U.S.C. §§ 3253, 8253. The Navy and Marine Corps apply the same requirement by policy. *See* DoDD 1304.26, encl. 1, para. E1.2.2.1. Additionally, citizens of the federated states of Micronesia or the Republic of the Marshall Islands are eligible for enlistment. Therefore, although under 8 U.S.C. § 1440 a service member may be eligible for naturalization because of honorable service during a designated period of hostilities without being a lawful permanent resident, there may be an issue that a service member who is not a lawful permanent resident fraudulently enlisted in the U.S. military.

service member enlisted in the Philippines, for example, he or she would not be eligible to be naturalized under this provision unless the service member had subsequently obtained lawful permanent residence status.

2. Persons with One Year of Service in the U.S. Armed Forces

Another special category is for persons who have served for one year in the U.S. Armed Forces. To be eligible to apply for naturalization under this category, a person must show that he or she has served honorably in the U.S. Armed Forces for a period or periods aggregating one year and, if separated from the armed forces, was never separated except under honorable conditions.[211] Under Department of Defense (DOD) policy, a service member who desires to become naturalized through military service cannot be separated prior to completion of this period, unless the service member's performance or conduct does not justify retention or the service member is transferred to inactive duty in a reserve component to complete a reserve obligation or attend a recognized institution of learning under an early release program.[212]

If the person is in the military when he or she files the application, or is within six months of leaving the service, the person does not have to show that he or she has been physically present in the United States for any specified period of time, or has resided in the State or BCIS district in which the application is filed for at least three months.[213] The service member applying for naturalization under this category may prove good moral character, attachment to the principles of the U.S. Constitution, and favorable disposition toward the good order and happiness of the United

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211. 8 U.S.C. § 1439(a) (as amended by the NDAA for FY 2004, tit. XVII, § 1701(a) which reduced the time in service from three years to one year). The person must have served in either an active or reserve status in the Army, Navy, Marines, Air Force or Coast Guard, or in a unit of the National Guard during a time when the unit is federally recognized as a reserve component of the U.S. Armed Forces. 8 C.F.R. § 328.1. "Honorable service" means that military service must be designated as honorable service by the military department. Any service that is designated to be other than honorable does not qualify. *Id.*

212. *See* U.S. DEP'T OF DEFENSE, DIR. 5500.14, NATURALIZATION OF ALIENS SERVING IN THE ARMED FORCES OF THE U.S. AND OF ALIEN SPOUSES AND/OR ALIEN ADOPTED CHILDREN OF MILITARY AND CIVILIAN PERSONNEL ORDERED OVERSEAS para. 4.1.3. (30 Oct. 1970) (C1, 7 May 1997).

213. 8 U.S.C. § 1439(a).

States during such service by an authenticated copy of the person's service record.[214]

C. Special Categories for Spouses of U.S. Citizens

In addition to the special categories for service members, there are several categories for spouses of U.S. citizens that reduce or eliminate the residence and physical presence requirements for eligibility to become naturalized U.S. citizens. Legal assistance attorneys need to be familiar with these categories to properly advise their clients.

1. Spouses of U.S. Citizens, Generally

Lawful permanent residents who are married to U.S. citizens must comply with the general requirements for naturalization, except for the residency requirements. A spouse of a U.S. citizen only need show that, after being admitted as a lawful permanent resident, the spouse has resided continuously within the United States for at least three years, and during the three years immediately preceding the date of filing the application, has been living in marital union with the citizen spouse, who has been a U.S. citizen during that three years.[215] The spouse also must show that he or she has been physically present in the United States for periods totaling at least one and one-half years and has resided within the state or BCIS district in which he or she filed the naturalization application for at least three months.[216]

The burden is on the applicant to prove that he or she has lived in marital union for the requisite time period. To prove marital union, applicants must show that they actually reside with their U.S. citizen spouse.[217] A legal separation breaks the continuity requirement; the BCIS will evaluate on a case-by-case basis an informal separation that suggests the possibility of marital disunity. There are two exceptions to the marital union requirements. First, if the applicant and spouse live apart because of circum-

214. *Id.* § 1439(e). If the service was not continuous, however, the person must allege and prove in the application for naturalization that he or she is of good moral character, attached to the principles of the constitution, and favorably disposed toward the good order and happiness of the United States. *Id.*

215. *Id.* § 1430(a) (Supp. 2002).

216. *Id.*

217. 8 C.F.R. § 319.1(b)(1) (2002).

stances beyond their control, such as military service, the separation will not preclude naturalization under this category.[218] Second, if the applicant and spouse live apart because the applicant has been battered or subjected to extreme cruelty by their U.S. citizen spouse, the applicant need not show that he or she actually resided with the spouse in marital union.[219]

2. Spouses Employed Abroad

Another category that a spouse of a service member may use to speed the naturalization process applies to spouses of certain U.S. citizens employed abroad, including service members assigned overseas.[220] The spouse may be naturalized if he or she complies with the general naturalization requirements, except that no prior residence or specified period of physical presence within the United States or within a State or BCIS district is required.[221]

To qualify for naturalization under this category, the service member's spouse must be in the United States at the time of the naturalization and must declare before a BCIS officer an intent to reside in the United States immediately upon termination of the military spouse's overseas assignment.[222] Moreover, the applicant must establish that he or she will depart to join the military spouse within thirty to forty-five days after the date of naturalization.[223] If the military is paying for the spouse to travel overseas, the applicant must submit a DD Form 1278, Certificate of Overseas Assignment to Support Application to File Petition for Naturalization[224] that has been completed within ninety days of the departure date

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218. *Id.* § 319.1(b)(2)(ii).

219. 8 U.S.C. § 1430(a).

220. *Id.* § 1430(b). The U.S. citizen spouse must be "regularly stationed abroad" meaning that the citizen spouse must be outside the United States for a period of not less than one year pursuant to orders. 8 C.F.R. § 319.2(a)(1). This category also applies to spouses of U.S. citizens who are employed by the U.S. government, an American institution of research, or American firm or corporation engaged in the development of foreign trade and commerce of the United States, or of a public international organization in which the United States participates by treaty or statute, or is authorized to perform the ministerial or priestly functions of a religious denomination having an organization within the United States, or is engaged solely as a missionary. *Id.*

221. 8 U.S.C. § 1430(b) (2000).

222. *Id.*

223. 8 C.F.R. § 319.2(b)(1) (2002).

224. U.S. Dep't of Defense, Form 1278, Certificate of Overseas Assignment to Support Application to File Petition for Naturalization (May 2000).

showing authorization for concurrent travel.[225] If the spouse is not authorized concurrent travel, the spouse must submit a copy of the service member's travel orders, a letter from the service member's commander stating that he or she does not object to the applicant residing with the service member at his or her duty location, and evidence of transportation arrangements to the duty location.[226]

Applications filed under this category are eligible for expeditious action. Ordinarily, the BCIS will adjudicate naturalization applications in chronological order by date of receipt. A spouse applying for naturalization as a spouse of a U.S. citizen residing abroad, however, may request that the application be expedited to enable the spouse to acquire U.S. citizenship before traveling overseas to join a citizen spouse. The alien must request that the application be expedited by submitting an Expedite Authorization Worksheet with the naturalization application.[227]

3. Surviving Spouses of U.S. Citizen Service Members

A third special category for spouses of U.S. citizens that may apply to legal assistance clients is for surviving spouses of U.S. citizens who died during a period of honorable service on active duty in the U.S. Armed Forces. The surviving spouse must comply with all general requirements for naturalization, except that no prior residence or specific physical presence in the United States, or in a State or BCIS district is required.[228] As in the above general category for spouses of U.S. citizens, the surviving spouse must have been living in marital union with the service member at the time of his or her death.[229] Additionally, the surviving spouse remains eligible for naturalization even if he or she remarries.[230]

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225. 8 C.F.R. § 319.7(b)(1).

226. *Id.* 319.7(b)(2).

227. *See* Memorandum, Immigration and Naturalization Policy No. 70, subject: Processing Expedited Naturalization Applications (August 23, 2000), *available at* http://sja.hqmc.usmc.mil/jal/Practice%20Areas/Immigration/Expedited%20Nat%20Apps.pdf.

228. 8 U.S.C. § 1430(d) (2002).

229. *See infra* pt. V.C.1. (discussing the definition of living in "marital union").

230. 8 C.F.R. § 319.3(b).

D. Special Categories for Children of U.S. Citizens

Congress also has made eligible for U.S. citizenship special classes of children of U.S. citizens who are born outside the United States and who do not attain U.S. citizenship at birth.[231] These children are eligible to automatically become citizens upon approval of their applications for certificates of citizenship.[232] These classes of children are discussed, below.

1. Children Born Outside of and Residing in the United States

If a service member has a child born outside the United States who is not eligible for U.S. citizenship at birth, the child still may automatically become a citizen of the United States when at least one parent is a U.S. citizen, either by birth or naturalization, if the child is under the age of eighteen, and the child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.[233] This class applies to an adopted child of a U.S. citizen parent, as well.[234]

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231. *See infra* pt. II.A. (discussing children born outside the United States who automatically become U.S. citizens at their birth).

232. A U.S. citizen parent or legal guardian must submit the application for a citizenship certificate for their biological children. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form N-600, Application for Certificate of Citizenship (Dec. 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/n-600.htm. A U.S. citizen adoptive parent or legal guardian must submit the application for citizenship certificate for their adoptive children. U.S. Dep't of Justice, Immigration and Naturalization Service, Form N-643, Application for Certificate of Citizenship in Behalf of An Adopted Child (Dec. 2001). 8 C.F.R. §§ 320.3(a), 322.3(a); *see also id.* §§ 320.3(b), 322.3(b) (discussing additional documents that must be submitted with the application).

233. 8 U.S.C. § 1431 (Supp. 2002). In the case of a child of divorced or legally separated parents, the BCIS will find a U.S. citizen parent to have legal custody where there has been an award of primary care, control, and maintenance of a child to a parent by a court or other appropriate government entity. The BCIS considers a U.S. citizen parent who has been awarded "joint custody," to have legal custody of the child. 8 C.F.R. § 320.1(2).

234. An adopted child is one who has been adopted pursuant to a full, final and complete adoption. In the case of an orphan adoption, the adoptive parents must have seen and observed the child in person prior to or during the foreign adoption proceedings. *Id.* § 322.1.

2. Children Born in and Residing Outside the United States

If a U.S. citizen service member is stationed overseas and adopts a child, the child is eligible for U.S. citizenship, even if he or she resides abroad with the service member. The child must be under eighteen years of age, reside outside the United States in the legal and physical custody of the citizen parent, and be temporarily present in the United States pursuant to a lawful admission. Furthermore, the service member parent must show that he or she was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years, or that the service member parent has a parent who has been physically present in the United States or outlying possessions for periods totaling not less than five years, at least two of which were after reaching the age of fourteen.[235]

E. Naturalization Procedures

1. General Procedures

To begin the naturalization process, a lawful permanent resident must file a Form N-400, Application for Naturalization,[236] with the BCIS office having jurisdiction over the applicant's residence at the time of filing the application.[237] Applicants who are in the military but do not qualify for naturalization because of service during specified periods of hostility or because of three years of military service may file in the State or BCIS District where the service member is physically present for at least three months immediately preceding filing the application; the location of the residence of the service member's spouse and/or minor child(ren); or the service member's home of record.[238] The applicant must also provide evi-

235. 8 U.S.C. § 1433(a) (Supp. 2002); *see supra* note 233 (discussing the term "legal custody" in the case of separated or divorced parents).

236. U.S. Department of Justice, Immigration and Naturalization, Form N-400, Application for Naturalization (May 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/n-400.htm.

237. 8 C.F.R. § 316.3.

238. *Id.* § 316.5(b)(1).

dence of lawful permanent residence in the United States and submit three photographs with the application, as well as be fingerprinted.[239]

After the application is filed, the BCIS will conduct an investigation of the applicant. At a minimum, the BCIS reviews pertinent records and conducts both a police department check and a neighborhood investigation where the applicant resided and was employed for at least five years preceding the application.[240] An examiner also must personally interview the applicant. [241] During the interview, the examiner questions the applicant under oath on the application for naturalization and keeps notes of the examination for the record.[242] The examiner has the authority to subpoena witnesses and documentary evidence to assist the examiner in deciding whether to approve the application.[243] The BCIS examiner must make the decision to grant or deny the application within one hundred and twenty days after the examination.[244]

If the application is approved, the BCIS will notify the applicant of the time and place that he or she is required to take the oath of allegiance in a public ceremony.[245] Generally, the applicant takes the oath before a designated BCIS official or immigration judge, but may elect to have the oath administered by a court.[246] Federal regulation requires that the applicant take the oath in the United States.[247] Because of the perceived inequities in requiring a service member deployed overseas to travel to the United States simply to take the oath of allegiance before becoming a naturalized citizen, Congress passed legislation in late 2003 to provide relief. The NDAA for FY 2004, section 1701(d) requires the Secretaries

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239. *Id.* § 316.4.

240. 8 U.S.C. § 1446 (2000), *as implemented by* 8 C.F.R. § 335.1.

241. 8 U.S.C. § 1446(b), *as implemented by* 8 C.F.R. § 335.2(a). The BCIS officer schedules the interview after receiving a response from the Federal Bureau of Investigation that a full background check of the applicant has been completed. *Id.* § 335.2(b). The BCIS will consider the application to be abandoned and will administratively close the application without making a decision if the applicant fails to appear for the examination and does not request that it be rescheduled within thirty days. The applicant may request to reopen an administratively closed application within one year from the date the application was closed. If the applicant does not request that the application be reopened within one year, the BCIS will consider the application abandoned and will dismiss the application without further notice. 8 C.F.R. § 335.6.

242. *Id*. § 335.2(b). At a minimum, the notes must include a record of the test given to the applicant on English literacy and basic knowledge of history and government of the United States. *Id.*

243. *Id.* § 3352.(d).

244. *Id.* § 336.2(a).

of Homeland Security, Department of State, and the Department of Defense to ensure that all "applications, interviews, filings, oaths, ceremonies . . . relating to naturalization of [service members] are available at United States embassies, consulates, and as practicable, United States military installations overseas."[248] Legal assistance attorneys overseas, however, need to ensure that their nonmilitary clients understand that they will

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245. 8 U.S.C. § 1448(a) (Supp. 2002). The BCIS may waive the taking of the oath by a person that they determine is uanable to understand its meaning, including children and those with a physical or develomental disability or mental impairment. *Id*. The oath is as follows:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereinty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constituion and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

8 C.F.R. § 337.1(a). When the applicant, by reason of religious training or belief or for other reasons of good conscience, cannot take the oath prescribed with the words "on oath" and "so help me God" included, the words "and solemnly affirm" are substituted for the words "on oath," the words "so help me God" are deleted, and the oath is taken in modified form. *Id.* § 337.1(b). Additionally, an applicant who has an hereditary title or any of the orders of nobility in any foreign state must publicly renounce the title or order of nobility. *Id.* § 337.1(d). Moreover, any person who can show by clear and convincing evidence that he or she is opposed to the bearing of arms or any type of service in the U.S. Armed Forces by reason of religious training and belief may take a modified oath. 8 U.S.C. § 1448(a).

246. 8 U.S.C. § 1421. Courts eligible to adminster oaths include a district court of the United States or any court of record in a state having a seal, a clerk, and jurisdiction in which the amount in controversy is unlimited. *Id.* § 1421(b)(5). In some jurisdictions, a court may have exercised its statutory right to have exclusive authority to administer oaths of allegiance during the forty-five day period beginning on the date the BCIS certifies to the court that an applicant is eligible for naturalization. *Id.* § 1421(b)(1)(B), (b)(3)(A).

247. 8 C.F.R. § 337.1(a).

248. NDAA for FY 2004, *supra* note 2. Note that the law also requires the Secretary of Defense to prescribe a policy that facilitates service members naturalization procedures, to include giving service members a high priority for granting emergency leave and transportation on aircraft of or chartered by, the Armed Forces. *Id.* § 1701(e).

have to return to the United States to take the oath of allegience and, thus, complete their naturalization process.

Once the oath is taken, the applicant is deemed a U.S. citizen and the BCIS issues a Form N-550, Certificate of Naturalization.[249] If the applicant fails to appear without good cause for more than one oath administration ceremony, they will be presumed to have abandoned the intent to be naturalized.[250]

If the application is denied, the applicant has thirty days to request a rehearing.[251] The BCIS must schedule the rehearing before another immigration officer within 180 days from the date the applicant filed the appeal. The hearing officer reviews the application for naturalization and any administrative record created as part of the original examination, examines the applicant, and may receive new evidence or take additional testimony. The officer must then either affirm the findings and determination of the original examination officer or redetermine the original decision in whole or in part.[252] If the application is again denied, the applicant may request a *de novo* review in the U.S. District Court having jurisdiction over the applicant's place of residence within 120 days of the final determination.[253]

2. Special Naturalization Procedures for Service Members

In 1999, the DOD and the INS entered into an agreement to expedite the administrative handling of service members' citizenship applications. The agreement requires DOD, through the military services, to provide assistance to applicants in preparing and submitting their applications.[254] To be eligible for the expedited processing, service members must apply

249. *Id*. § 338.1(a).

250. *Id.* § 337.10.

251. 8 U.S.C. § 1447(a), *as implemented by* 8 C.F.R. §§ 316.14(b), 336.2(a). The examiner must forward a written notice of denial explaining the facts and applicable law upon which the denial was based. *Id.* § 336.1(b).

252. *Id.* § 336.2(b).

253. *Id.* §§ 336.9(b), 336.9(c).

254. *See* Memorandum of Understanding Between the DOD, The Dep't of Transportation and the INS on the Processing of United States Citizenship Applications for DOD Military Service Members and U.S. Coast Guard Member, § I (on file with author) [hereinafter Agreement].

for naturalization based on one year of military service or have served during a designated period of military hostility.[255]

Each of the Services has implemented their own procedures for processing these naturalization applications.[256] In the Army, the Directorate of Military Personnel Management (DMPM), G1, manages the citizenship application process and the Personnel Service Support Division (PSSD), U.S. Total Army Human Resources Command (HRC), monitors the application process and resolves problems. At the installation level, the Personnel Services Battalions (PSB) and Military Personnel Divisions (MPD) are supposed to assist soldiers with their applications and coordinate with HRC when necessary.[257] In practice, however, many service members visit legal assistance offices for help in filing their applications. In the Air Force, the Military Personnel Flight (MPF) Customer Service Element assists airmen with their citizenship applications.[258] The Navy's Legal Assistance Division, Office of the Judge Advocate General (OJAG-Code 16), has oversight of the program. Under the Navy policy, commanding officers must appoint a command representative with responsibility for providing assistance to sailors.[259] Finally, the Marine Corps has designated the Legal Assistance Branch, Judge Advocate Division, Headquarters, U.S. Marine Corps (Code JAL) as the representative on Marine Corps naturalization issues; the local Marine Corps Legal Assistance Office is the primary source of assistance for Marines who want to submit citizenship applications.[260]

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255. *Id.* § IV.

256. *See* U.S. HRC, THE SOLDIER'S GUIDE TO CITIZENSHIP APPLICATION (2001), *available at* http://www.perscom.army.mil/tagd/pssd/ins.htm [hereinafter ARMY GUIDE]; U.S. Dep't of Air Force, The Air Force Guide to Citizenship Application (2002), *available at* http://www.afpc.randolph.af.mil/mpf/mpfworkcenters/customerservice/bcis/AF%20BCIS%20GUIDE-APRIL%202003.doc [hereinafter Air Force Guide]; U.S. Navy Guide to Naturalization Applications Based Upon Qualifying Military Service, *available at* http://www.jag.navy.mil/documents/code16Navy%20Immigration%20Guide3.doc [hereinafter Navy Guide]; U.S. DEP'T OF NAVY, U.S. MARINE CORPS LEGAL ASSISTANCE GUIDE TO NATURALIZATION APPLICATIONS BASED UPON QUALIFYING MILITARY SERVICE (n.d.), *available at* http://sja.hqmc.usmc.mil/PUBS/P5800/14%20Legal_Assistance.doc (fig. 14.1) [hereinafter MARINE CORPS GUIDE].

257. *See* ARMY GUIDE, *supra* note 256, introduction.

258. *See* Air Force Guide, *supra* note 256, introduction.

259. *See* Navy Guide, s*upra* note 256, introduction.

260. *See* MARINE CORPS GUIDE, *supra* note 256, para. 1.

Along with the application for naturalization, the service member must complete a Form G-325B, Biographical Information.[261] The applicable Service uses this form to complete a background check.[262] The service member must also complete a Form N-426, Request for Certification of Military or Naval Service[263] and submit it to the appropriate personnel center to authenticate the applicant's service data.[264] Additionally, the service member must be fingerprinted for purposes of the Federal Bureau of Investigation (FBI) background check. Through an agreement with the BCIS, the Services have the authority to schedule fingerprinting appointments at the servicing BCIS facilities through the Services' points of contact.[265] The service member must also forward other documents with the application for naturalization, as explained in each of the Service's guides.[266]

Once the documents are complete, the Service point of contact forwards the application packet to the Nebraska Service Center in Lincoln Nebraska, regardless of the service member's residency. The forwarding office must attach a letter stating where the service member wants to have the BCIS interview and where he or she wants to take the Oath of Allegiance.[267] Similar to other applicants for naturalization, a BCIS examiner

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261. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form G-325-B, Biographical Information (Sept. 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/g-325.htm.

262. In the Army, the PSB/MPD faxes the form to the Central Clearance Facility (CCF) at Fort Meade for processing. ARMY GUIDE, *supra* note 256, step 8. In the Air Force, the MPF faxes the form to HQ AFPC/DPSM for processing. Air Force Guide, *supra* note 256, Responsibilities. The Navy's Command Representative or service member mails the original form to the Office of the Judge Advocate General, Code 16, for processing. Navy Guide, *supra* note 256, para. 4.c. A Marine must submit the form to his or her Legal Assistance Attorney, who contacts the local Naval Criminal Investigative Service office to obtain the background report. MARINE CORPS GUIDE, *supra* note 256, para. 4.c.

263. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form N-426, Request for Certification of Military or Naval Service (Aug. 2000), *available at* http://www.immigration.gov/graphics/formsfee/forms/n-426.htm.

264. In the Army, the PSB/MPD verifies and authenticates the soldier's service data. ARMY GUIDE, *supra* note 256, at step 7. The Air Force's MPF completes the form. Air Force Guide, *supra* note 256, para. 3. The Navy's PSD/personnel office completes the form for sailors. Navy Guide, *supra* note 256, at 4.b. Marines submit their forms to their CONAD/ADMIN offices for completion. MARINE CORPS GUIDE, *supra* note 256, para. 4.b.

265. *See* Agreement, *supra* note 254, § V.B.4. For example, in the Army, the PSB makes the fingerprint appointment. ARMY GUIDE, *supra* note 256, para. step 4; *see supra* note 255 (listing specific service guides for fingerprint appointment authority).

266. *See supra* note 256.

267. *See* Agreement, *supra* note 254, § V.B.4.

will interview the service member and decide whether to approve the application for naturalization.

VII. Conclusion

There are many gates for a service member and his or her family to pass through on their way to becoming naturalized U.S. citizens. Legal assistance attorneys can assist service members who desire to become naturalized U.S. citizens by helping them understand the complicated rules and myriad forms involved in a naturalization application. Fortunately, for most service members, the process is simplified through an agreement between the BCIS and DOD that centralizes and expedites the process. Moreover, Congress has greatly assisted the naturalization process for service members by allowing many naturalization procedures to be accomplished overseas, to include taking the oath of allegiance.

Assisting a service member's alien spouse and children in becoming naturalized U.S. citizens may be even more challenging to legal assistance attorneys than helping the service member. While most service member clients have already immigrated to the United States and have become lawful permanent residents by the time they enter the U.S. military, alien spouses and their children are generally starting from the beginning—applying for a visa to immigrate to the United States. Consequently, the legal assistance attorney must understand not only the requirements for naturalization, but also how aliens immigrate to the United States and adjust their status to that of a lawful permanent resident.

Therefore, to properly advise their clients, legal assistance attorneys must be familiar with their specific Service guides for processing service member applications for naturalization, and Department of State and BCIS rules regarding immigration and naturalization, generally. In addition, they should maintain points of contact within their local BCIS office or U.S. consulate office, if stationed overseas, to obtain assistance when necessary in providing advice to clients who are traveling the long and complex road towards U.S. citizenship.