A Soldier's Road to U.S. Citizenship—Is a Conviction a Speed Bump or a Stop Sign?

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Citizenship obtained through naturalization is not a second-class citizenship . . . . [I]t carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government.[1]

Introduction

"Sir, what happens to my citizenship if I am convicted?"[2] Without doubt, all legal assistance attorneys and defense counsel will come into contact with immigrant service members during their client services tenure. While this client contact might not deal with the issue of how a criminal conviction will impact their chances of becoming a naturalized U.S. citizen, the sheer number of immigrants[3] in the armed forces makes this type of contact a likely reality for the client-service practitioner.[4]

The purpose of this article is to provide the legal assistance or defense counsel practitioner with information to answer common questions that might arise from a Soldier who is facing a court-martial or administrative separation for misconduct and who is naturalized or who is not yet naturalized but hopes to become a naturalized U.S. citizen. In addition, this article provides contextual material on congressional immigration policy as it pertains to non-citizen service members and Department of Defense (DOD) and Department of the Army (DA) policy.

Since 1862, naturalization[5] laws have recognized the contributions of aliens[6] who served in the U.S. Army.[7] Under the 1862 statute, the benefits were available only to those with service in the "armies" of the United States, a term deemed not to include the Marine Corps[8] or the Navy.[9] Subsequent legislation, however, and judicial interpretation remedied this issue and included members of other branches of the armed forces.[10] Citizenship by naturalization is a privilege to be given, qualified, or withheld as Congress may determine, and an individual may claim it as a right only upon compliance with terms Congress imposes.[11]

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1. Osborn v. Bank of the United States, 22 U.S. 738, 827 (1824).

2. This question came from a then recently naturalized U.S. citizen who was originally from Nigeria and on trial at a general court-martial in Hanau, Germany, in 2003, for rape and other offenses. Like any good defense counsel who doesn't know the answer to his client's question, I replied, "I'll get back to you on that during the break." *See* United States v. Ayeni (Hanau, Germany 2003) (unpublished) (on file with author).

3. *See* Appendix. As of April 2003, statistics provided by the Department of Defense's (DOD) Manpower Data Center to the Migration Policy Institute show 35,211 naturalized citizens and 33,615 non-citizens on active duty in the U.S. Armed Forces. Cumulatively this number represents approximately five percent of the total active force. Migration Policy Institute, DOD's Manpower Data Center, 1 July 2003, *at* http://www.migrationpolicy.org/news/Foreign-Born%20Armed%20Forces%20Data.pdf.

4. While this article focuses on the results of a criminal conviction on naturalization, an article outlining the immigration and naturalization process was recently written by Lieutenant Colonel Pamela Stahl, *The Legal Assistance Attorney's Guide to Immigration and Naturalization*, 177 MIL. L. REV. 1 (2003). *See also* The Immigrant Legal Resource Center, *Naturalization: A Guide for Legal Practitioners and Other Community Advocates*, *available at* http://www.ilrc.org/ccp/A%20Guide%20for%20Legal%20Practitioners%20and%20Other%20Community%20Advocates.pdf (last visited June 15, 2004) (providing a comprehensive guide to the immigration and naturalization process); U.S. Citizenship and Immigration Services, *Naturalization Information for Military Personnel*, *at* http://uscis.gov/graphics/services/natz/MilitaryBrochurev7.pdf (last visited June 15, 2004) [hereinafter U.S. Citizenship and Immigration Services] (providing a naturalization guide for military personnel).

5. 8 U.S.C. § 1101(a)(23) (2000). The term naturalization means the conferring of nationality of a state upon a person after birth, by any means whatsoever. *Id.*

6. *Id.* § 1101(a)(3). The term alien means any person not a citizen or national of the United States. *Id.* A national is a person owing permanent allegiance to the United States. *Id.* § 1101(a)(21).

7. Act of July 17, 1862, 12 Stat. 594.

8. *In re* Bailey, F. Cas. No. 728 (1872).

9. *In re* Chamavas, 21 N.Y.S. 104 (1892).

10. U.S. Citizen & Immigration Services, *INS Interpretations 328.1(a), available at* http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-54258?f=templates&fn=document-frame.htm#slb-interp (last visited May 25, 2004) [hereinafter INS Interpretations 328.1(a)].

11. United States v. Macintosh, 283 U.S. 605, 615 (1931); Fong Yue Ting v. United States, 149 U.S. 698, 707-08 (1893).

The U.S. Supreme Court defines naturalization as the "act of adopting a foreigner, and clothing him with the privileges of a native citizen."[12] While the naturalized citizen does enjoy her newly acquired citizenship to the same extent as a native born citizen, she will never become President.[13] The Constitution contemplates that there will be two sources of citizenship and two only—birth and naturalization.[14]

The body of statutory immigration law is commonly referred to as the Immigration and Nationality Act (INA).[15] The federal agency delegated the responsibility to administer programs under this act is the United States Citizenship and Immigration Service (USCIS), also known at the Bureau of Citizenship and Immigration Services (BCIS). This bureau of the Department Homeland Security (DHS) was formerly known as the Immigration and Naturalization Service, a component of the Department of Justice (DOJ), until the federal government reorganized after the 11 September 2001 terrorist attacks.[16] The BCIS administers services such as immigrant and nonimmigrant sponsorship; adjustment of status; work authorization and other permits; naturalization of qualified applicants for U.S. citizenship; and asylum or refugee processing.

Immigration Policy and the Armed Forces

United States immigration policy makes special allowances for immigrant service members who wish to become citizens through naturalization.[17] To be eligible to enlist, a service member must first be "lawfully admitted for permanent residence."[18] Statutory provisions for the Army[19] and Air Force[20] specifically state that to be eligible for enlistment, an individual must be a citizen or a lawful permanent resident. While no such statutory limiting language exists for the Navy or Marine Corps, the same requirements are applied to those services by regulation.[21] The requirement for enlistment into any Armed Forces Reserve component is the same as for the active component.[22] In the case of officers, federal law requires that a Regular officer of any service be a citizen;[23] a Reserve component officer may be a citizen or a lawful permanent resident.[24] National Guard (NG) officers must be citizens.[25] Moreover, active or reserve service in any branch of the Armed Forces is recognized for purposes of the INA.[26] Service in the NG is recognized under the INA, but only for periods of time during which the service member is activated for federal service.[27]

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12. Boyd v. Nebraska *ex. rel*. Thayer, 143 U.S. 135, 162 (1892).

13. U.S. Const. art. II, § 1.

> No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen years a resident within the United States.

Id.

14. *Id*. amend. XIV, § 1.

15. The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-1557 (1982)).

16. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2297. On 1 March 2003, the BCIS began to administer the nation's immigration laws as a bureau of the DHS. *See id.*

17. 8 U.S.C. § 1255 (LEXIS 2004).

18. *Id*. § 1101(a). "Lawfully admitted for permanent residence" applies to individuals who have been accorded the privilege of residing permanently in the United States, as an immigrant, under immigration laws. For purposes of this article, and the discussion that follows, it is important to recognize that most immigrant service members must be lawful permanent residents before they are allowed to enlist. Only those residing in "geographic territory of the United States" are not required to obtain this status before enlisting. *See infra* note 73.

19. 10 U.S.C. § 3253.

20. *Id.* § 8253.

21. 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).

22. 10 U.S.C. § 12102(b). "No person may be enlisted as a Reserve unless (1) he is a citizen of the United States or (2) has been admitted to the United States for permanent residence under the Immigration and Nationality Act . . . ." *Id.*

23. *Id.* § 532.

24. *Id.* § 12201.

25. 32 U.S.C. § 313.

26. 8 C.F.R. § 328.1(1) (LEXIS 2004).

There are two primary INA provisions that service members may take advantage of in their pursuit to become naturalized. The first provision permits expedited processing of naturalization applications for service members who have served honorably for a one-year period.[28] The second provision applies to service members who have served during presidentially specified periods of hostilities.[29] In a widely publicized use of 8 U.S.C. § 1440, President Bush on 3 July 2002, signed an executive order, Expedited Naturalization of Aliens and Noncitizen Nationals Serving in an Active-Duty Status During the War on Terrorism, which expedited the naturalization of those immigrants on active duty beginning on or after 11 September 2001, as part of the war against terrorism.[30]

A lesser-known provision of the INA permits granting posthumous citizenship to service members who die while on active duty. This provision was used to confer citizenship on two Marines killed early in Operation Iraqi Freedom.[31] Under a separate provision enacted after 11 September 2001, if a service member citizen is married to a lawful permanent resident at the time of the service member's death, then his spouse would be eligible for expeditious naturalization, with the residency and physical presence requirements waived.[32] Additionally, derivative benefits now flow to family members of those granted posthumous citizenship.[33] Effective 1 October 2004, non-citizen service members applying for naturalization under 8 U.S.C. § 1439 or 8 U.S.C. § 1440 will be exempted from paying the otherwise applicable federally-mandated fee.[34] This provision will save service members $320 when filing their Form N-400,

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27. *Id.* § 328.1(2).

28. 8 U.S.C. § 1439; 8 C.F.R. § 328.

29. 8 U.S.C. § 1440; 8 C.F.R. § 329.

30. Exec. Order No. 13,269, 67 Fed. Reg. 45,287 (July 8, 2002). The order states:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 329 of the Immigration and Nationality Act (8 U.S.C. 1440) (the "Act"), and solely in order to provide expedited naturalization for aliens and noncitizen nationals serving in an active-duty status in the Armed Forces of the United States during the period of the war against terrorists of global reach, it is hereby ordered as follows: For the purpose of determining qualification for the exception from the usual requirements for naturalization, I designate as a period in which the Armed Forces of the United States were engaged in armed conflict with a hostile foreign force the period beginning on September 11, 2001. Such period will be deemed to terminate on a date designated by future Executive Order. Those persons serving honorably in active-duty status in the Armed Forces of the United States, during the period beginning on September 11, 2001, and terminating on the date to be so designated, are eligible for naturalization in accordance with the statutory exception to the naturalization requirements, as provided in section 329 of the Act. Nothing contained in this order is intended to affect, nor does it affect, any other power, right, or obligation of the United States, its agencies, officers, employees, or any other person under Federal law or the law of nations.

Id.

31. 8 U.S.C. § 1440-1. Lance Corporal Jose Gutierrez, twenty-two years old, Lomita, California, and Corporal Jose A. Garibay, twenty-one years old, Costa Mesa, California, were killed in action on 21 March and 23 March 2003, respectively. Lance Corporal Gutierrez was a citizen of Guatemala, and Corporal Garibay was a citizen of Mexico. Chelsea J. Carter, *Posthumous Citizenship Granted to Marines*, Associated Press Online, Apr. 2, 2003, at 1, *available at* http://pqasb.pqarchiver.com/ap/599374791.html?did=599374791&FMT=ABS&FMTS=FT&date=Apr+3%2C+2003&author=CHELSEA+J.+CARTER&desc=Posthumous+citizenship+granted +to+two+Marines+killed+in+Iraq. Under § 1440-1(d), once posthumous citizenship is granted, the "Director [of the BCIS] shall send to the next-of-kin of the person who is granted citizenship, a suitable document which states that the United States considers the person to have been a citizen of the United States at the time of the person's death." 8 U.S.C. § 1440-1(d).

32. *Id.* § 1430(d).

> Any person who is the surviving spouse, child, or parent of a United States citizen, whose citizen spouse, parent, or child dies during a period of honorable service in an active duty status in the Armed Forces of the United States and who, in the case of a surviving spouse, was living in marital union with the citizen spouse at the time of his death, may be naturalized upon compliance with all the requirements of this title except that no prior residence or specified physical presence within the United States, or within a State or a district of the Service in the United States shall be required.

Id.

33. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703, 117 Stat. 1392, 1691 (2003).

34. 8 U.S.C. §§ 1439-1440; § 1701, 117 Stat. at 1691. This provision states:

> [N]otwithstanding any other provision of law, no fee shall be charged or collected from the applicant for filing the application, or for the issuance of a certificate of naturalization upon being granted citizenship, and no clerk of any State court shall charge or collect any fee for such services unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected.

Id.

application for naturalization,[35] and also the $50 fingerprinting fee.[36]

While the purpose of this article is to focus primarily on the ramifications of a criminal conviction upon an immigrant service member's naturalization aspirations, it is important to discuss the two main statutory provisions commonly used by service members to become citizens. This is because under both 8 U.S.C. § 1439 and 8 U.S.C. § 1440, service members who naturalize but later receive an other than honorable discharge[37] before completing five years of honorable military service stand to have their citizenship revoked. This fact alone could affect how counsel choose to advise a client facing a separation board since an other than honorable discharge may be awarded at such a board. Both statutes commonly used by military members to naturalize will now be addressed, in-turn, as well as Army administrative policies as they pertain to immigrant Soldiers and the effect of a possible separation from the service on their naturalization.

Persons with One Year of Service in the Armed Forces of the United States[38]

Title 8 U.S.C. § 1439 provides special benefits to non-citizens who have served honorably for one year in the military. The statute applies to service members who serve in war or peacetime.[39] The service need not be active duty, but may be a combination of active and reserve service[40] or simply reserve service.[41] Military policy is that non-citizen service members be given every opportunity to be retained in the service to allow them to complete the requisite one year of service to be eligible for naturalization under 8 U.S.C. § 1439.[42] Once separated from the military, the service member must have been discharged under honorable conditions,[43] to include an honorable[44] or general discharge certificate.[45] The service member must be a lawful permanent resident at the time of applying for naturalization under this provision.[46] A certified copy of an honorable service discharge is conclusive evidence of the nature of one's service.[47]

The service member may obtain the benefits of naturalization under this provision, if he requests them, while he is still

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35. 8 C.F.R. § 103.7(b)(1) (LEXIS 2004); U.S. Dep't. of Justice, Immigration, & Naturalization Service, OMP No. 115-0009, Form N-400, Application for Naturalization (July 23, 2002).

36. 8 C.F.R. § 103.7(b)(1).

37. *See infra* notes 54 and 66 and accompanying text. U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations para. 3-7c (19 Dec. 2003) [hereinafter AR 635-200]. "A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or in lieu of trial by court martial . . . ." *Id.*

38. 8 U.S.C. § 1439. The one-year service period may be continuous or discontinuous as long as the aggregate total is one year. *Id.*

39. Jung v. Barber, 184 F.2d 491, 492 (9th Cir. 1950).

40. U.S. Citizenship & Immigration Services, *INS Interpretations 328.1(b)(4), available at* http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-54258?f=templates&fn=document-frame.htm#slb-interp (last visited May 25, 2004).

41. 8 C.F.R. § 328.1 (LEXIS 2004).

42. 8 U.S.C. § 1439; 32 C.F.R. § 94.4(a)(4).

> Caution shall be exercised to ensure that an alien's affiliation with the Armed Forces of the United States, whether on active duty or on inactive duty in a reserve status, is not terminated even for a few days short of the [ ] statutory period, since failure to comply with the exact [ ] requirement [ ] will automatically preclude a favorable determination by the [Citizenship and Immigration Service] on any petition for naturalization based on an alien's military service.

32 C.F.R. § 94.4(a)(4).

43. 8 C.F.R. § 328.1. Under this provision, "[h]onorable service means only that military service which is designated as honorable service by the executive department under which the applicant performed that military service. Any service that is designated to be other than honorable will not qualify under this section." *Id.*

44. AR 635-200, *supra* note 37, para. 3-7a. An honorable discharge "is a separation with honor. The honorable characterization is appropriate when the quality of the soldier's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate." *Id.*

45. *Id.* para. 3-7b. A general discharge "is a separation from the Army under honorable conditions. When authorized, it is issued to a soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge." *Id.*

46. 8 C.F.R. § 328.2(c).

47. 8 U.S.C. § 1439(b)(3) (2000); *see* U.S. Citizenship and Immigration Services, *Operations Instructions, at* http://uscis.gov/graphics/lawsregs/INSTRUC.HTM (last visited June 15, 2004).

on active duty or in the reserve, or discharged from the service, but he must make the request no later than six months after separation from the military.[48] The requirement that the service member be a lawful permanent resident is not waived under this provision.[49] Further, the service member must be able to show that for five years before the date of application for naturalization, he or she has, and continues to be of good moral character, attached to the principles of the Constitution of the United States, and favorably disposed towards the good order and happiness of the United States.[50] The service member is presumed to satisfy the requirements listed in the preceding sentence during periods of honorable military service.[51]

Once the requirements are met, the service member is eligible to apply for the benefits of this statutory provision. The service member need not have a residence within a particular state and can file his application in any state, regardless of his actual residence.[52] The normally applicable five-year residency requirement and physical presence in the United States, with three months in a state do not apply either.[53]

Yet, a service member who naturalizes using this provision runs the risk that misconduct on his part resulting in an other than honorable discharge before completing five years of honorable service may result in his citizenship being revoked.[54] Consequently, when advising[55] a Soldier with misconduct issues, it is important to know the expiration of his term of service, and also to attempt to negotiate an outcome that prevents the possible issuance of an other than honorable discharge. If unable to avoid such an outcome, then counsel must inform the separating authority or convening authority of the collateral consequences of such a discharge on the Soldier-client. The next common provision that non-citizen service members use to obtain citizenship pertains to those with service during specific periods of hostilities.

Active Duty Service in the U.S. Armed Forces During Specified Periods of Hostilities[56]

This U.S. Code section provides special recognition and benefits to service members desiring to naturalize as a result of honorable service during periods of hostilities, as defined by the President. More benefits are available to service members using this statutory provision to naturalize than 8 U.S.C. § 1439.[57] To be eligible, the service member must establish that she served honorably,[58] while a noncitizen, during such period "as may be designated by the President in an Executive Order . . . ."[59]

Currently, service members on active duty are serving in such a period of hostilities under Executive Order 13,269, of 3 July 2002, which terminates only on the issuance of a future executive order ending this period of hostilities.[60] Following President Bush's executive order, the BCIS published updated implementing guidance, which directs eligible service members to file their application with the Lincoln, Nebraska service center.[61] The department to which the service member belonged determines whether the service was honorable and whether it was considered active duty.[62] A service member who

48. 8 U.S.C. § 1439(a).

49. 8 C.F.R. § 328.2(c) (LEXIS 2004).

50. *Id.* § 328.2(d).

51. *Id.* § 328.2(d)(1).

52. 8 U.S.C. § 1439(b)(1); 8 C.F.R. § 328.3.

53. 8 U.S.C. § 1439(a). Applicants for naturalization who cannot take advantage of the military-related statutory provisions must, for example, establish residence in the United Stated for five-years *and* be physically present in the United States. The applicant must also live in the district or state where he will apply for three months before applying. *Id.*

54. *Id.* § 1439(f).

55. As a practice pointer, should defense counsel have an administrative separation board at which the non-citizen service member is facing an other than honorable discharge characterization, it is imperative that counsel inform the service member, fact-finder, and commander of the collateral consequences of such a discharge. Further, counsel should be structuring the case for the best chance of appeal to the service member's discharge review board or board of corrections for military records under 8 U.S.C. § 1553 and 8 U.S.C. § 1552, respectively. *Id.* §§ 1552-1553.

56. *Id.* § 1440; 8 C.F.R. § 329.

57. Many service members will now be eligible under both 8 U.S.C. § 1439 and 8 U.S.C. § 1440, though their application may only be filed under one provision. 8 U.S.C. §§ 1439-1440.

58. *Id.* § 1440(a); 8 C.F.R. § 329.2(b).

59. 8 C.F.R. § 329.2(a).

60. Exec. Order No. 13269, 67 Fed. Reg. 45287 (July 8, 2002).

has had his citizenship revoked may not use this provision of law to apply for naturalization again based upon the same period of service.[63] Individuals who have been separated from the service based on their nationality, conscientious objector status, or who refused to wear the uniform are barred from applying for naturalization under this statutory provision.[64]

Service members granted citizenship under this expedited provision also bear the risk that future misconduct in subsequent enlistments could jeopardize their naturalization status. For example, a Soldier naturalized under the War on Terror Executive Order[65] who commits misconduct before completing five years of honorable service that results in a characterization of service of less than honorable, could be placing himself at risk of revocation of his U.S. citizenship status.[66] When revocation is predicated on this statutory provision, and no automatic statutory grounds for revocation are involved, it is permissive rather than mandatory that a court revoke the naturalization, and the court may[67] or may not[68] do so.

For the service member that meets these qualifications, she may be naturalized regardless of age.[69] If there is an outstanding deportation order or proceeding that would otherwise preclude naturalization, it will not apply.[70] The naturalization restrictions against citizens of nations with which the United States might be at war, pursuant to 8 U.S.C. § 1442, do not apply to an individual under this statutory provision.[71] The normal requirements of five years residence and physical presence in the United States do not apply.[72] If at the time the individual joins the military, she was in the "geographic territory of the United States," then she is exempt from the requirement of first having attained lawful permanent resident status.[73]

The time period that a service member must show good moral character, and attachment to the principles of the Constitution of the United States, and a favorable disposition towards the good order and happiness of the United States, is reduced from five years to one year before the date of the naturalization application.[74] If the service member is no longer on active duty, she can file her naturalization application in any BCIS office, regardless of her place of residence, at any time after separation.[75]

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61. Memorandum, U.S. Dep't. of Justice, Immigration & Naturalization Service, to Regional Directors, District Directors, Officers-in-Charge, Senior Service Directors, subject: Implementation of Executive Order 13269 (July 17, 2002), *available at* http://uscis.gov/graphics/lawsregs/handbook/PolMem88_Pub.pdf.

62. 8 U.S.C. § 1440(a), (b)(4).

63. *Id.* § 1440(a). This provision prevents service members from using it a second time in cases in which their citizenship has previously been revoked. *Id.* § 1440(c).

64. 8 C.F.R. § 329.1(1)-(3).

65. *See supra* note 30.

66. 8 U.S.C. § 1440(c).

> Citizenship granted pursuant to this section may be revoked in accordance with section 340 [8 USCS § 1451] if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years. Such ground for revocation shall be in addition to any other provided by law, including the grounds described in section 340 [8 USCS § 1451]. The fact that the naturalized person was separated from the service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation. Any period or periods of service shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service.

Id.

67. U.S. v. Sommerfield, 211 F. Supp. 493 (E.D. Pa. 1962).

68. U.S. v. Meyer, 181 F. Supp. 787 (E.D. N.Y. 1960).

69. 8 U.S.C. § 1440(b)(1).

70. *Id.*

71. *Id.*

72. *Id.* § 1440(b)(2).

73. 8 C.F.R. § 329.2(c)(2) (LEXIS 2004). The geographic territory of the United States includes "the Canal Zone, American Samoa, Midway Island (prior to 21 August 1959), or Swain's Island, or in the ports, harbors, bays, enclosed sea areas, or the three-mile territorial sea along the coasts of these land areas." Conversely, 8 C.F.R. § 329.2(c)(1) makes clear that if the individual was not in the United States, Canal Zone, American Samoa, or Swain Islands at the time of enlistment, then she must subsequently gain lawful permanent resident status. *Id.*

74. *Id.* § 329.2(d).

Army Policy Regarding Noncitizen Soldiers

The client-service attorney should be aware of key provisions in Army regulations pertaining to non-citizen Soldiers when providing advice on naturalization matters. Non-citizen Soldiers should know that they must obtain U.S. citizenship by their eighth year of service in order to remain in the Army.[76] The Army enforces this requirement in its regulations by the inclusion of a non-waiverable condition to reenlistment.[77] These requirements are important for commanders and reenlistment personnel to know since a Soldier can be separated for fraudulent reenlistment[78] or defective reenlistment[79] based on his naturalization status. Soldiers, however, may request a twelve-month extension of their enlistment to complete the naturalization process under certain circumstances.[80]

Further, Army regulations prescribe procedures for notifying the BCIS in cases in which Soldiers are separated under other than honorable conditions.[81] This notice is currently[82] only required in the cases of Soldiers who were naturalized under 8 U.S.C. § 1440 for service during periods of hostilities.[83] The regulation places the onus on the commander to effectuate this notice to the BCIS.[84] Having established the pertinent naturalization background information, and possible administrative separation consequences, it is time to turn to the collateral consequences of a criminal conviction relative to a service member's hopes of becoming a U.S. citizen.

Effects of a Criminal Conviction[85] on the Naturalization Process

It is important to keep the naturalization requirements[86] discussed above in mind in order to understand the kind of conviction that will bar a service member from naturalizing. This article focuses on common aspects of criminally-related issues that may impact on a service member's ability to naturalize.

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75. *Id.* § 329.3.

76. U.S. Dep't of Army, Reg. 601-210, Regular Army and Army Reserve Enlistment Program para. 2-4a(5) (28 Feb. 1995) [hereinafter AR 601-210].

77. U.S. Dep't of Army, Reg. 601-280, Army Retention Program para. 3-8b (31 Mar. 1999) [hereinafter AR 601-280]. This provision states that a soldier who wishes to reenlist must be a lawful permanent resident. Soldiers who will have in excess of eight years of federal service at the expiration of the period, which they are seeking to reenlist, are disqualified from reenlistment. *Id.*

78. AR 635-200, *supra* note 37, para. 7-17. Under paragraph 7-19d, a separation for fraudulent enlistment can result in an other than honorable discharge, further effecting the soldier's chances of being naturalized. *Id.* para. 7-19d.

79. *Id.* para. 7-16a(2). Even in cases in which the soldier does not know of this reenlistment restriction, she can still be separated under paragraph 7-16a(2) for defective reenlistment. Paragraph 7-16j states that soldiers discharged for defective reenlistments will be awarded an honorable characterization of service discharge. *Id.* para. 7-16j.

80. AR 601-280, *supra* note 77, para. 4-9k.

> Aliens who will have in excess of 8 years of Federal Military Service at the expiration of the period for which they are seeking to reenlist will be permitted to extend their current enlistment for a period not to exceed 12 months, provided they have filed for citizenship and are awaiting a court date. Extensions will not be allowed to exceed the expected court date by more than 90 days. These soldiers must provide documentary evidence of their citizenship application status. Extensions will not exceed a total of 12 months without approval of HQDA (DAPE-MPE-PD). Soldiers from the Republic of the Marshall Islands and the Federated States of Micronesia may reenlist and pursue a career in the U.S. Army without being required to become U.S. citizens.

Id.

81. AR 635-200, *supra* note 37, paras. 1-37, 39.

82. *See supra* note 54. 8 U.S.C. § 1439(f) now provides for revocation of citizenship based on the issuance of an other than honorable discharge if issued before the service member completes five years of honorable service and mirrors 8 U.S.C. § 1440 in this regard. *Army Regulation 635-200* was written before the statutory addition of (f) and the practitioner should expect the regulation to be updated to require notice to the BCIS of other than honorable discharges issued to soldiers naturalized under 8 U.S.C. § 1439 and § 1440. 8 U.S.C. §§ 1439-1440 (2000); *see* AR 635-200, *supra* note 37.

83. AR 635-200, *supra* note 37, para. 1-38.

> The citizenship of soldiers of the United States Armed Forces who were naturalized through active duty service in the Armed Forces during designated periods of military hostilities (8 USC § 1440) may be revoked if such soldiers are later separated from the military service under other than honorable conditions. The Immigration and Naturalization Service, [DOJ], is responsible for initiating citizenship revocation proceedings in such cases.

Id.

84. *Id.* para. 1-39.

Statutory and Regulatory Bars to Proving Good Moral Character[87]

Under INA § 101(f), Congress has listed criminal offenses that form a statutory bar to a finding of good moral character when any eligible non-citizens, including non-citizen service members, apply for naturalization.[88] This list of offenses is not exhaustive.[89] An applicant for naturalization bears the burden of demonstrating that, during the statutorily prescribed period, he or she has been and continues to be a person of good moral character.[90] This includes the period between the examination and the administration of the oath of allegiance.[91]

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85. 8 U.S.C. § 1101(a) (48)(A).

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Id.

86. 8 C.F.R. § 316.2(a) (LEXIS 2004).

> General. Except as otherwise provided in this chapter, to be eligible for naturalization, an alien must establish that he or she:
> (1) Is at least 18 years of age;
> (2) Has been lawfully admitted as a permanent resident of the United States;
> (3) Has resided continuously within the United States, as defined under § 316.5, for a period of at least five years after having been lawfully admitted for permanent residence;
> (4) Has been physically present in the United States for at least 30 months of the five years preceding the date of filing the application;
> (5) Immediately preceding the filing of an application, or immediately preceding the examination on the application if the application was filed early pursuant to section 334(a) of the Act and the three month period falls within the required period of residence under section 316(a) or 319(a) of the Act, has resided, as defined under § 316.5, for at least three months in a State or Service district having jurisdiction over the applicant's actual place of residence, and in which the alien seeks to file the application;
> (6) Has resided continuously within the United States from the date of application for naturalization up to the time of admission to citizenship;
> (7) For all relevant time periods under this paragraph, has been and continues to be a person of good moral character, attached to the principles of the Constitution of the United States, and favorably disposed toward the good order and happiness of the United States; and
> (8) Is not a person described in Section 314 of the Act relating to deserters of the United States Armed Forces or those persons who departed from the United States to evade military service in the United States Armed Forces.
> (b) Burden of proof. The applicant shall bear the burden of establishing by a preponderance of the evidence that he or she meets all of the requirements for naturalization, including that the applicant was lawfully admitted as a permanent resident to the United States, in accordance with the immigration laws in effect at the time of the applicant's initial entry or any subsequent reentry.

Id.

87. While there is no statutory definition of "good moral character," Judge Learned Hand stated in *Posusta v. United States*, 285 F.2d 533, 535 (2d Cir. 1961), that it is a "test, incapable of exact definition; the best we can do is to improvise the response that the 'ordinary' man or woman would make, if the question were put whether the conduct was consistent with a 'good moral character.'" *Id.*

88. 8 U.S.C. § 1101(f) (2000). For the purposes of this Act—

> No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was--
>
> (1) a habitual drunkard;
>
> (2) [Repealed]
>
> (3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 212(a) of this Act [8 USCS § 1182(a)]; or subparagraphs (A) and (B) of section 212(a)(2) [8 USCS § 1182(a)(2)] and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;
>
> (4) one whose income is derived principally from illegal gambling activities;
>
> (5) one who has been convicted of two or more gambling offenses committed during such period;
>
> (6) one who has given false testimony for the purpose of obtaining any benefits under this Act;
>
> (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;
>
> (8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)).

Id.

89. *Id.* ("The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.").

90. 8 C.F.R. § 316.10(a).

The BCIS is not limited to reviewing the applicant's conduct during the five years immediately preceding the filing of the application. It may consider the applicant's conduct and acts at any time before that period, if the conduct of the applicant during the statutory period does not reflect that there has been reform of character from an earlier period or if the earlier conduct and acts appear relevant to a determination of the applicant's present moral character.[92] The immigration regulations list additional offenses and acts that will lead to a finding of a lack of good moral character.[93] Failure to pay one's taxes in the five years preceding an application might be raised by the Bureau as evidence of lack of good moral character.[94] It is clear that some of the listed offenses and acts are analogous to crimes found in the Uniform Code of Military Justice (UCMJ). Anyone convicted of an aggravated felony after 29 November 1990, is forever barred from showing the requisite good moral character and is subject to expedited removal as well.[95]

Commission of an aggravated felony will also bar an applicant from naturalization.[96] Aggravated felonies can result from what many consider relatively minor crimes.[97] Aggravated felonies include, but are not limited to, such offenses[98] as murder, rape, sexual abuse of a minor, drug or firearms trafficking, and crimes of violence carrying a sentence of one year.[99]

In some jurisdictions, driving under the influence of alcohol or controlled substances could be considered an aggravated felony. In cases arising in circuits where the federal court of appeals has not decided whether the offense of driving under the influence is a crime of violence under 18 U.S.C. § 16(b), an offense will be considered a crime of violence if committed recklessly and if there is a substantial risk that the offender may resort to the use of force to carry out the crime. If the circuit court has already ruled on the issue, then apply that law to cases arising in that jurisdiction.[100]

In determining whether a particular crime is an aggravated felony, federal law, not state law controls.[101] For state drug crimes, the BCIS will defer to federal circuit courts when determining whether a state drug conviction should be considered an aggravated felony.[102] Even crimes that are not statutorily defined as an aggravated felony can serve as a bar to naturalization if the crime is deemed to be a "crime of moral turpitude."[103]

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91. *Id.* § 316.10(a).

92. *Id.* § 316.10(a)(2).

93. *Id.* § 316.10(b). An applicant will be found to lack good moral character if she has been, among other offenses: convicted of murder at any time; convicted of an aggravated felony on or after 29 November 1990; committed one or more crimes involving moral turpitude; committed two or more offenses for which the she was convicted and the aggregate sentence actually imposed was five years or more; violated any law of the United States, any State, or any foreign country relating to a controlled substance, provided that the violation was not a single offense for simple possession of thirty grams or less of marijuana; is or was involved in prostitution or commercialized vice; has or is practicing polygamy; committed two or more gambling offenses; or is or was a habitual drunkard. *Id.* § 316.10(b)(1)-(2).

Unless the applicant establishes extenuating circumstances, the applicant shall be found to lack good moral character if, during the statutory period, the applicant: willfully failed or refused to support dependents; had an extramarital affair which tended to destroy an existing marriage; or committed unlawful acts that adversely reflect on the applicant's moral character, or was convicted or imprisoned for such acts, although the acts do not fall within the purview of § 316.10(b) (1) or (2). *Id.* § 316.10(b)(3).

94. El-Ali v. Carroll, 83 F.3d 414 (4th Cir. 1996); Gambino v. Pomeroy, 562 F. Supp. 974 (D.C. N.J. 1982).

95. 8 U.S.C. §§ 1227-1228. 8 U.S.C. § 1227 lists classes of deportable aliens, while 8 U.S.C. § 1228 provides for the expedited deportation of those convicted of an aggravated felony. *Id.*

96. *Id.* § 1101(a)(43).

97. *See* United States v. Pacheco, 225 F.3d 148 (2d Cir. 2000). In this case, the court determined that the defendant's misdemeanor conviction for theft of a ten-dollar video game and assaulting his wife, for which he received a one-year suspended sentence, was an "aggravated felony." *Id.* Consequently, when advising a non-citizen Soldier in such a case, the client service practitioner should consult current law in order to best advise the client on the potential results of any conviction or guilty plea.

98. Other offenses include the following: counterfeiting; prostitution; child pornography; theft or burglary for which the term of imprisonment is at least one year; fraud or deceit in which the loss to the victim(s) exceeds $10,000; and obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43).

99. The sentence provision refers to the possible penalty of at least one year in prison, as opposed to actual sentence served or imposed. Aquino-Encarnación v. INS, 296 F.3d 56 (1st Cir. 2002); Burr v. Edgar, 292 F.2d 593 (9th Cir. 1961).

100. *In re* Ramos, 23 I&N Dec. 336 (BIA 2002). Before this decision, the Board of Immigration Appeals almost had a *per se* rule that driving while intoxicated by alcohol or impaired by a controlled substance was an "aggravated felony." After four federal circuit courts disagreed, the Board issued the Ramos ruling. *See* United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001); Dalton v. Ashcroft, 257 F.3d 200, 207-08 (2d Cir. 2001); Bazan-Reyes v. INS, 256 F.3d 600, 611 (7th Cir. 2001); United States v. Chapa-Garza, 243 F.3d 921, 926 (5th Cir. 2001).

101. *See In re* Matter of Small, 23 I&N Dec. 448 (BIA 2002).

102. *See In re* Yanez-Garcia, 23 I&N Dec. 390 (BIA 2002).

There are certain acts, mostly connected to military service, that render a service member permanently ineligible to naturalize.[104] These acts include desertion from the armed forces during a time of war, which results in a conviction by a court-martial or other court.[105] Other acts are related to war-time drafts and are currently inapplicable.

Obtaining Criminal Records

Most automatic bars under 8 U.S.C. § 1101(f) involve criminal conduct.[106] In advising a client on the ramifications of any past criminal conduct, it is imperative to obtain accurate records. Obtaining records for criminal convictions occurring in some other country present their own logistical challenges, but obtaining criminal records for events occurring in the United States are relatively simple.

Recommend that the client contact the court where she appeared and request a copy of the record in her case, sometimes known as a "summary abstract" of the court's disposition. If any confusion remains, the client can contact the state's equivalent of the DOJ, or if a federal matter, the Federal Bureau of Investigation for a criminal record check.[107] If the client does have a conviction on her record that is not a statutory or automatic bar to showing good moral character, advise the client that she may want to postpone applying for naturalization in order to establish a subsequent track record of good moral character before actually applying to naturalize.

Advising the Client of the Collateral Consequences Upon A Conviction

Professional and competent practice dictates that a defense counsel advise his client on the possible negative repercussions[108] of a finding of guilty or guilty plea as it relates to the naturalization process.[109] Direct consequences are "consequences of the sentence [the judge] imposes," while collateral consequences are those "possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty."[110] Courts have determined that failure to provide such advice is not ineffective assistance of counsel.[111] When advising clients on the consequences of any criminal misconduct, courts have held that the failure to advise that removal from the country could result from a conviction following a guilty plea did not constitute ineffective assistance of counsel.[112] Conversely, wrongly advis-

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103. 8 C.F.R. § 316.10(b)(2)(i) (LEXIS 2004).

104. 8 U.S.C. § 1101(a)(19) (2000).

105. *Id.* § 1425 (LEXIS 2004).

106. *Id.* § 1101(f).

107. Federal Bureau of Investigation, *at* http://www.fbi.gov/ hq/cjisd/fprequest.html (last visited May 25, 2004) (providing instructions for requesting a copy of your client's criminal record). The current fee for processing the request is eighteen dollars. *Id.*

108. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 2-1 (1 May 1992). This paragraph, entitled "Advisor," requires the attorney to advise the client not only on the law in the case, but on other considerations as well. The comment to the rule states that in offering advice,

> A lawyer is not expected to give advice until asked by the client. Yet, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation.

Id.

109. United States v. Couto, 311 F.3d 179, 187-88 (2d Cir. 2002). The court stated:

> Moreover, recent Supreme Court authority supports this broader view of attorney responsibility as well. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 323 n.50, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001) ("Even if the defendant were not initially aware of [possible waiver of deportation under the Immigration and Nationality Act's prior] § 212(c), *competent defense counsel*, following the advice of numerous practice guides, would have advised him concerning the provision's importance." (emphasis added) (citing Amicus Br. For Nat'l Assoc. Criminal Defense Lawyers et al. at 6-8)); id. at 322 n.48 (noting that "the American Bar Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences'" (citing ABA Standards for Criminal Justice, 14-3.2 Comment, 75 (2d ed. 1982))).

Id. See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-8c (6 Sept. 2002). *Army Regulation 27-10* makes the ABA's Standards for Criminal Justice (current edition) applicable to counsel to the extent they are not inconsistent with the UCMJ, *Manual for Courts-Martial*, directives, regulations, or rules governing provision of legal services in the Army. *Id.*; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002) [hereinafter MCM].

110. Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1365-66 (4th Cir. 1973).

111. United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993); Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir. 1992); United States v. Del Rosario, 902 F.2d 55, 57-58 (D.C. Cir. 1990).

ing your client that he may not be removed from the United States upon conviction of an aggravated felony has been held to be ineffective assistance of counsel.[113]

A trial judge accepting a guilty plea must be certain that it is knowing and voluntary[114] in order to protect a criminal defendants' due process rights, and to ensure this, a court must advise the defendant of the direct consequences[115] of his guilty plea. If the consequence is collateral to the finding of guilt, however, a trial court is not required to advise the defendant.[116] Neither is a court required to advise the accused of the possibility that his offense might result in his removal as the result of his guilty plea. Case law indicates that deportation is a collateral rather than direct consequence of the guilty plea, negating any claim that the guilty plea was involuntary.[117] An ineffective assistance of counsel claim will not succeed for failure to advise a client on the negative ramifications to his immigration status as the result of a guilty plea or finding of guilt. The wise practitioner, however, will take the time to research and advise his client on the possible consequences of a conviction.

What Happens to Your Client if Found Guilty?

If your client is already naturalized at the time of her conviction, and has completed five years of honorable military service, then she will not be in jeopardy of losing her citizenship, unless it is discovered that she illegally procured the naturalization certificate through fraud, concealment of material facts, or willful misrepresentation, but if so, she will be subject to revocation of the naturalization.[118] As a naturalized citizen, she may only lose her citizenship in two ways: through denaturalization,[119] only applicable to naturalized citizens, or expatriation, which applies to all citizens.[120] On the other hand, as discussed above, if your client is in the military but not yet naturalized, a criminal conviction may serve as a statutory or automatic bar to naturalization.

Only through reference to statutory and case law will the legal service practitioner be able to provide appropriate guidance on the probable effect of a criminal conviction upon the service member's hopes of becoming a U.S. citizen. Finally, for "aggravated felonies" and criminal convictions reflecting an applicant's "moral turpitude," and therefore "good character," there is slight chance for post-conviction relief from the negative consequences. Typically, only when there has been a full and unconditional pardon will the bar to naturalization, and often removal, be waived.[121]

Conclusion

Immigration laws are complex and often changing. When dealing with a criminal conviction issue, as a matter of course, the legal practitioner will be required to consult statutes and case law in order to provide competent advice to the client. As discussed, even an other than honorable discharge at an administrative separation board may have a negative impact on the Soldier's chances of becoming a citizen.

Understanding the client's citizenship status and the effect of immigration laws is the key to providing the client with the knowledge he will need to make informed decisions. From legal research to obtaining copies of any relevant past criminal histories, such a case may be a time demanding endeavor. Though Congress has long recognized the benefit of military service by aliens through conferring "citizenship in exchange for satisfactory military service,"[122] Congress has also established procedures to bar or revoke naturalized citizenship. Currently, while immigration consequences are considered "collateral," some courts believe this area "deserves careful consideration"[123] since convictions for "aggravated felonies," for example, may automatically bar someone from naturalization.

112. United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988).

113. *Couto*, 311 F.3d at 187-88, 191.

114. Boykin v. Alabama, 395 U.S. 238, 243 (1969).

115. *Id*. at 244; *see also* FED. R. CRIM. P. 11; MCM, *supra* note 109, R.C.M. 910(c).

116. Hill v. Lockhart, 474 U.S. 52, 56 (1985).

117. United States v. Nagaro-Garbin, 653 F. Supp. 586 (E.D. Mich. 1987).

118. 8 U.S.C. § 1451(a) (2000).

119. *Id.* § 1451. Denaturalization is the judicial or administrative process of canceling an individual's naturalization certificate, and therefore, citizenship. *Id.*

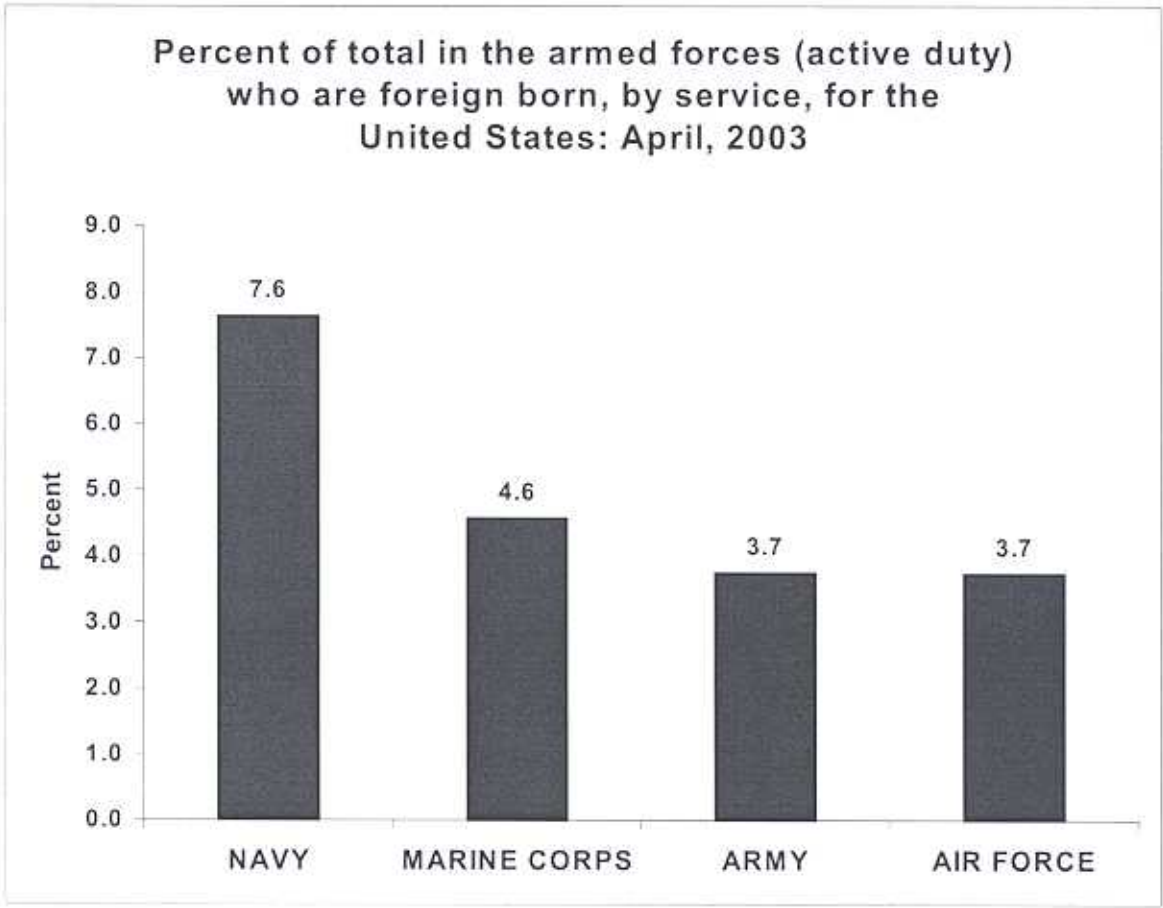
120. *Id.* § 1481. Expatriation has been defined as the "voluntary relinquishment of one's allegiance to the United States." *See* Vance v. Terrazas, 444 U.S. 252 (1980).

121. *Id.* § 1227(a)(2)(A)(v).

122. U.S. v. Meyer, 181 F. Supp. 787, 788 (E.D. N.Y. 1960).

123. United States v. Couto, 311 F.3d 179, 190 (2d Cir. 2002).

Wise counsel will fully research this ever-changing body of statutory and case law, and treat the client's case as seriously as if it were a criminal case. Only through diligent research and preparation will counsel be able to assist the client in fully navigating the intricacies of immigration law and its impact on our Soldiers' lives.



Fifteen countries with largest number of immigrants on active duty in the U.S. armed forces: April 2003

	Total		Naturalized citizen		Non-citizen	
Immigrant group	Number	Percent of total	Number	Percent of group	Number	Percent of group
TOTAL	68,826	100.0	35,211	51.2	33,615	48.8
Philippines	17,373	25.2	10,548	60.7	6,825	39.3
Mexico	6,994	10.2	2,618	37.4	4,376	62.6
Jamaica	4,091	5.9	1,818	44.4	2,273	55.6
Republic of Korea	2,227	3.2	1,560	70.0	667	30.0
Dominican Republic	2,031	3.0	833	41.0	1,198	59.0
Colombia	1,613	2.3	749	46.4	864	53.6
Trinidad and Tobago	1,488	2.2	672	45.2	816	54.8
El Salvador	1,473	2.1	519	35.2	954	64.8
Vietnam	1,446	2.1	986	68.2	460	31.8
Haiti	1,410	2.0	434	30.8	976	69.2
Germany	1,188	1.7	924	77.8	264	22.2
United Kingdom	1,089	1.6	758	69.6	331	30.4
Guyana	1,088	1.6	552	50.7	536	49.3
Peru	1,021	1.5	386	37.8	635	62.2
Panama	1,017	1.5	714	70.2	303	29.8