

# CHANGES TO THE EXPEDITED NATURALIZATION PROCESS FOR MILITARY SERVICE MEMBERS

*October 2017 Department of Defense Policies Impacting Lawful Permanent Residents and Other Non-U.S. Citizens Serving in the Military*



## I. Introduction

Federal law provides certain members of the U.S. Armed Forces the opportunity for expedited citizenship. Expedited citizenship for military service members waives the continuous residence and physical presence requirements for naturalization, as well as the N-400 filing fee. Two sections of the Immigration and Naturalization Act (INA) govern naturalization of lawful permanent residents (LPRs) and other immigrants serving in the Armed Forces.<sup>1</sup> Under INA § 328, which applies during periods of peacetime, LPRs can apply for naturalization after one year of military service.<sup>2</sup> Under INA § 329 and implementing regulations, LPRs and other noncitizens who served honorably during a designated period of hostilities can apply for naturalization once the U.S. Department of Defense (DoD) certifies the member's service as honorable.<sup>3</sup>

<sup>1</sup> See INA § 328 pertaining to LPRs during peacetime and INA § 329 pertaining to LPRs and other noncitizens during designated periods of hostility. From November 2008 to October 2016, when the Military Accessions Vital to the National Interest (MAVNI) program was in effect, MAVNI allowed non-citizen recruits (including legal non-immigrants, refugees, asylees, and DACA recipients on a case-by-case basis) with critically needed medical and strategic language skills who agreed to eight years of military service to apply for citizenship when they began basic training. This program allowed MAVNI soldiers to expedite the citizenship process under similar requirements as LPRs who enlisted in the Armed Forces. Additionally, spouses and children of U.S. citizen members of the U.S. Armed Forces may be eligible for expedited or overseas naturalization under INA §§ 319(b), (d), and (e). The October 2017 DoD policy changes are silent on the requirements regarding expedited naturalization for spouses and children. Therefore, we believe the requirements outlined in INA § 319 are unaffected as they do not require a certification of an N-426 (Request for Certification of Military or Naval Service).

<sup>2</sup> INA § 328 requires an individual to be an LPR to apply for naturalization. Under INA § 328, LPRs applying for expedited citizenship must be over 18-years-old, demonstrate knowledge of English and U.S. civics, meet the requirements for good moral character, and take the naturalization oath.

<sup>3</sup> INA § 329 does not require an individual to be an LPR to apply for naturalization, thereby permitting non-citizen service members to apply for naturalization. Under INA § 329, the standard requirements of being 18 years old, not having an outstanding order of deportation or removal entered against the applicant, residing and being physically present in the U.S. are not applicable to applicants who have served in the U.S. Armed Forces during these periods. Applicants under INA § 329 still must be able to establish good moral character for at least one year prior to filing for naturalization, pass the English and civics exams, and support the U.S. Constitution for one-year before applying for naturalization. See 8 CFR § 329.2 and 8 CFR § 329.4 for eligibility and application requirements.

The U.S. has been in a designated period of hostility since September 11, 2001.<sup>4</sup> Since then, over 100,000 service members have naturalized through expedited citizenship. Approximately 5,000 LPRs enlist in the U.S. military each year.<sup>5</sup>

For service members to qualify for expedited citizenship under INA § 329, the DoD must certify the military service as honorable by completing U.S. Citizenship and Immigration Services (USCIS) Form N-426 (Request for Certification of Military or Naval Service). The service member must then submit Form N-426 and USCIS Form N-400 (Application for Naturalization) to USCIS, which processes the application. Form N-426 is available at <https://www.uscis.gov/n-426>.

On October 13, 2017, the DoD implemented two key policy changes to the expedited naturalization process for military service members.<sup>6</sup> The policy changes are:

1. **Background Screenings:** Foreign nationals, including LPRs, who enlist in active, reserve, or guard service of the military must now complete their background screening requirements, and receive a favorable background screening (Military Service Suitability Determination (MSSD)) **before attending basic training.**<sup>7</sup> Before October 13, 2017, eligible noncitizens who enlisted in the military were allowed to start their basic training as long as their background screening requirements were initiated. This screening process can take a year or more as there is currently a backlog of more than 700,000 cases.<sup>8</sup> The effect of this change is that noncitizens who join the military may be stuck in an extended background check process that prevents them from attending basic training, deploying overseas and applying for citizenship.
2. **Completion of at least 180 days of active duty before receiving certifications of honorable service:** Foreign nationals, including LPRs, entering service must now complete at least 180 consecutive days of active duty service to be eligible to apply for U.S. citizenship, or at least one year of satisfactory service in the Selected Reserve, with certain exemptions. The Secretary of the applicable Military Department must characterize the member's service as honorable. Prior to this change, applicants for expedited naturalization could receive a certification of honorable service (USCIS Form N-426) – a required initial step in the application process – after one day of service.
  - The Secretary of the applicable Military Department must now also sign the Form N-426 before an applicant can file a naturalization application. There is, however, no current procedure in place to obtain this signature.<sup>9</sup> (Prior to this change, active duty applicants could submit the

<sup>4</sup> To qualify for expedited citizenship under INA § 329, members of the U.S. Armed Forces must serve honorably during a period of hostilities designated by the President by Executive Order. President George W. Bush designated the “war against terror” as such a period beginning September 11, 2001. See Executive Order 13269 (July 3, 2002); see also USCIS Policy Manual, Vol. 12, Part I, Ch. 3, § A, available at: <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter3.html>.

<sup>5</sup> USCIS, Naturalization Through Military Service: Fact Sheet, <https://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet> (last updated Jun. 12, 2017).

<sup>6</sup> For more details, please see the DoD memoranda implementing these policy changes, available at <https://www.defense.gov/Portals/1/Documents/pubs/Naturalization-Honorable-Service-Certification.pdf>; <https://www.defense.gov/Portals/1/Documents/pubs/Service-Suitability-Determinations-For-Foreign-Nationals.pdf>.

<sup>7</sup> The complete October 13, 2017 DoD memorandum that outlines the MSSD for LPRs is available here:

<https://www.defense.gov/Portals/1/Documents/pubs/Service-Suitability-Determinations-For-Foreign-Nationals.pdf>.

<sup>8</sup> U.S. Department of Defense, “DoD Announces Policies Affecting Foreign Nationals Entering Military,” Oct. 13, 2017, available at: <https://www.defense.gov/News/Article/Article/1342430/dod-announces-policies-affecting-foreign-nationals-entering-military/>.

<sup>9</sup> *Military Naturalizations Halted*, Cascadia Cross-Border Law, 2017, <http://www.cascadia.com/2017/10/military-naturalizations-halted/>.

- form to their commanding officer, local service record holder, or qualified certifying officer to complete the form.<sup>10</sup>)
- This change applies not only to service members seeking N-426 certification after October 13, 2017, but also to those who received certification *before* October 13, 2017. In particular, DoD may recall and decertify N-426 certificates that were issued to service personnel who do not have final security clearance. For LPRs who have completed all background screening and suitability requirements, the relevant branch of the Armed Forces must determine whether the service member served in a manner and for a period of time that is honorable.

*Because of these changes, it may now be faster for LPRs seeking citizenship to remain civilians when applying for naturalization.* The DoD changes effectively and indefinitely halt the expedited naturalization program for military personnel and halt all military naturalizations for LPRs currently serving as members of the U.S. Armed Forces (Army, Navy, Air Force, Marine Corps, Coast Guard, and their Reserve Components, including the National Guard) due to the length of the background check process. Enlistment in the Armed Forces may now delay an application for one or several years (the estimated time for DoD to follow these new policies), rather than speed up the naturalization process. An LPR who enlists in the military will not be able to naturalize as a civilian by simply filing an N-400 because LPRs cannot naturalize while DoD background checks are pending. In sum, currently it may be advisable for a potential naturalization applicant who is nearing five years of permanent resident status (three if married to a U.S. citizen) to apply for citizenship as a civilian before enlisting in the military, as it may take less time to finish the N-400 process than the current “expedited” military naturalization process.

## II. How will changes to the background screening requirements affect LPRs seeking to enlist in the military?

All LPRs who enlist with a branch of the U.S. Armed Forces must now complete their background screening requirements and receive a favorable background screening (or MSSD) before attending basic training. These requirements could take up to a year or more to complete, thereby extending the amount of waiting time before an LPR can attend basic training, serve in active duty, and naturalize. The DoD states that the background screening requirements for LPRs are the same as those for U.S. citizens.<sup>11</sup>

Special policy for those seeking to enlist in the Marine Corps: In response to the new DoD policies, the U.S. Marine Corps initiated a policy temporarily blocking all LPRs from enlisting in the U.S. Marine Corps. This is a more stringent stance than the DoD policy changes that only *delay* LPRs who enlisted in the military from shipping out to basic training while they wait for background checks to clear. The directive prevents LPRs that seek to join the U.S. Marine Corps from even starting the background check process.<sup>12</sup>

<sup>10</sup> U.S. Navy Guide to Naturalization Applications Based upon Qualifying Military Service (8 U.S.C. 1439 and 1440), [http://www.jag.navy.mil/legal\\_services/documents/Navy%20Immigration%20Guide.pdf](http://www.jag.navy.mil/legal_services/documents/Navy%20Immigration%20Guide.pdf). Prior to the October 2017 changes, those who *formerly* served in the military could submit an uncertified Form N-426 along with an approved record of service. The DoD memoranda implementing the October 2017 changes only refers to “Service Members,” and it is unclear whether the new policies could affect veterans’ ability to obtain a certified N-426, (last updated: Nov. 7, 2017).

<sup>11</sup> DoD Announces Policies Affecting Foreign Nationals Entering Military, DoD News, Oct. 13, 2017, <https://www.defense.gov/News/Article/Article/1342430/dod-announces-policies-affecting-foreign-nationals-entering-military/>.

<sup>12</sup> Correspondence with Margaret Stock of Cascadia Cross Border Law Group LLC, Jan. 31, 2018, on file with the National Immigration Forum.

This specific directive by the U.S. Marine Corps that prevents enlistment of “any foreign national” contravenes federal law that states that LPRs may enlist in “any armed force” (10 U.S.C. § 504(b)(1)(B)).

### III. How does the increased service requirement impact LPRs currently serving in the military?

As of October 13, 2017, LPRs must complete at least 180 consecutive days of active-duty service to receive a certification of honorable service from the military (USCIS Form N-426), which LPRs in the military need to apply for expedited U.S. citizenship. Previously, LPRs were eligible to receive a certification of honorable service after completing at least one day of active duty service. DoD states that the new policy aligns the requirement of honorable service for LPRs to the requirement for U.S. citizens.<sup>13</sup>

In addition, the Secretary of the branch of the Armed Forces in which the LPR is serving must certify the applicant’s honorable service and sign the N-426. There currently is no process to obtain the Service Secretary’s signature for the N-426. Alternatively, the Secretary may designate that authority to a commissioned officer serving in the pay grade of O-6 or higher (usually a U.S. Army, Marine Corps and Air Force Colonel or a Navy and Coast Guard Captain, or higher). But it is unclear when the Secretary will delegate that authority.

### IV. How will the policy changes impact LPRs in the Reserve Components of the U.S. Armed Forces?

Under the new policies, LPRs in Selected Reserve of the Ready Reserve must complete all applicable screening and suitability requirements (including the 180 consecutive days of active duty), or at least one year of satisfactory service as a member of the Selected Reserve, to be eligible to apply for U.S. citizenship. Previously, LPRs in the Selected Reserve were eligible to naturalize after completing one day of satisfactory service as a member of the Selected Reserve.

Immediately after the DoD issued its new policies, the U.S. Army issued a [directive](#) blocking all LPRs from enlisting in the U.S. Army Reserve and the National Guard (both are reserve components of the U.S. Armed Forces).<sup>14</sup> On November 2, 2017, the U.S. Army created a delayed entry program for prospective reservists, thereby permitting LPRs to once again enlist in the U.S. Army Reserve and the National Guard.<sup>15</sup> The delayed entry program for prospective reservists will require LPRs to complete their background screening requirements before they are able to start their basic training, which may delay their training for at least a year.

<sup>13</sup> DoD Announces Policies Affecting Foreign Nationals Entering Military, DoD News, Oct. 13, 2017, <https://www.defense.gov/News/Article/Article/1342430/dod-announces-policies-affecting-foreign-nationals-entering-military/>. U.S. citizens cannot obtain a certificate for honorable service until after 180 days, whereas the previous policy allowed LPRs seeking to naturalize the ability to obtain a certificate for honorable service after one day of active duty service.

<sup>14</sup> Green card holders cannot enlist in the Army Reserve “for the time being,” Army confirms, Mic.com, Oct. 18, 2017, <https://mic.com/articles/185297/exclusive-army-bans-green-card-holders-from-enlisting-a-move-that-may-break-federal-law#.ZxNKi4dA9>.

<sup>15</sup> Green Card Holders Can Join the Army Reserve Again-After a Wait, Army Times, Dec. 27, 2017, <https://www.armytimes.com/news/your-army/2017/12/27/green-card-holders-can-join-the-army-reserve-again-after-a-wait/>.

## V. Are there exceptions to the 180-days service requirement?

Yes. Service members who serve in a location designated as a combat zone, a qualified hazardous duty area, or an area where service in the area has been designated to be in direct support of a combat zone, and which also qualifies the member for hostile fire or imminent danger pay will be eligible to apply for U.S. citizenship after completing at least one day of active duty service. For instance, individuals serving in Afghanistan and Iraq (including the airspace above) would qualify for this exception to the 180-day service requirement.<sup>16</sup>

## VI. What will happen to LPRs in the military who already applied for U.S. citizenship?

If a service member submitted a naturalization application with an N-426 certification issued before October 13, 2017, and the service member has not completed all applicable background screening and suitability requirements, the new policies will halt the processing of the service member's N-400 application for naturalization. The new policy will:

- Recall and decertify the N-426 if USCIS did not yet adjudicate the naturalization application; and
- Recall and decertify the N-426 even if USCIS adjudicated and approved the naturalization application, if the applicant has not yet naturalized.

Once the service member's background screening and suitability requirements are completed, the service member is responsible for submitting a *new* Form N-426 in support of his or her application for naturalization.

As mentioned above, for LPRs who have completed all background screening and suitability requirements, the relevant branch of the Armed Forces must determine whether the member has served in a manner and for a period of time that permits an informed decision that the member has served honorably. If so, under the new DoD policies the relevant branch of the Armed Forces would certify the N-426.

## VII. How are MAVNI enlistees affected by these DoD policy changes?

The DoD policy changes will not affect MAVNI enlistees because the MAVNI program was suspended in October 2016. No one has been able to enlist in MAVNI since that time.

For those MAVNI enlistees with pending naturalization applications as of the release of the October 2017 DoD policies, the federal district court case *Kirwa v. U.S. Department of Defense* applies.<sup>17</sup> On October 26, 2017, a federal district court judge issued a preliminary injunction that limits the effect of the new DoD policies on MAVNI enlistees. In *Kirwa*, the district court ordered DoD to continue to verify naturalization applicants' military or naval service by issuing N-426 forms to foreign-born individuals who enlisted in the U.S. Army Reserve under MAVNI prior to October 13, 2017.<sup>18</sup>

The plaintiffs in the MAVNI federal class action litigation have put together a website with guidance for service members who have served or are serving in the Selected Reserve of the Ready Reserve, who enlisted through

<sup>16</sup> Combat Zones Approved for Tax Benefits, <https://www.irs.gov/newsroom/combat-zones>, (last updated: August 3, 2017); but see *Reyes v. INS*, 910 F.2d 611, 613 (9th Cir. 1990) ("the government concedes that section 329(a) does not give the President the power to limit authorization for naturalization to individuals who served in specific geographical locations").

<sup>17</sup> *Kirwa v. U.S. Dept. of Def.*, No. 17-1793 (ESH), 2017 WL 4862763 (D.D.C. Oct. 25, 2017), [Memorandum Opinion](#).

<sup>18</sup> *U.S. Judge Bars Pentagon from Blocking Citizenship Applications by Immigrant Recruits*, Washington Post, Oct. 26, 2017: [https://www.washingtonpost.com/local/public-safety/u-s-judge-bars-pentagon-from-blocking-citizenship-applications-by-immigrant-recruits/2017/10/26/475630e2-ba74-11e7-a908-a3470754bbb9\\_story.html?utm\\_term=.a7cc42974432](https://www.washingtonpost.com/local/public-safety/u-s-judge-bars-pentagon-from-blocking-citizenship-applications-by-immigrant-recruits/2017/10/26/475630e2-ba74-11e7-a908-a3470754bbb9_story.html?utm_term=.a7cc42974432).

the MAVNI program, and who have not yet become a naturalized U.S. citizen. That website is available here: <http://dcfederalcourtmavniclasslitigation.org/>.

Although the decision in *Kirwa* examined DoD's new policy regarding N-426 forms only as it applied to MAVNI enlistees serving in the Army's Selected Reserve of the Ready Reserve, the underlying reasoning could also apply to other immigrants seeking to naturalize. The district court found that DoD "offered no reasoned explanation" for the policy change suggesting that DoD's decision was "arbitrary and capricious" in violation of the Administrative Procedure Act (APA).<sup>19</sup> Furthermore, the court found that the new policy was "impermissibly retroactive." Both rationales equally apply to the adoption of the new policy as it pertains to all immigrants seeking to naturalize, but a court has not yet been asked to consider that question.

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<sup>19</sup> *Kirwa*, *supra* note 18 at 26.

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**San Francisco**  
1663 Mission Street, Suite 602  
San Francisco, CA 94103  
t: 415.255.9499 f: 415.255.9792

**Washington D.C.**  
1016 16th Street, NW, Suite 100  
Washington, DC 20036  
t: 202.777.8999 f: 202.293.2849

[www.ilrc.org](http://www.ilrc.org)

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