

TJAGLCS Practice Note

Faculty, The Judge Advocate General's Legal Center & School

Administrative and Civil Law Note

Noncitizen Servicemembers: Do They Really Have to Die to Become U.S. Citizens?

Lieutenant Colonel Jeffrey P. Sexton

*Why did Jose have to die for America in order to truly belong?*¹

- Nora Mosquera

*There is something terribly wrong with our immigration policies if it takes death on the battlefield in order to earn citizenship.*²

- Cardinal Roger Mahoney

*It's like, "You're not good enough to be a full member of this society until you die."*³

- Nestor Rodriguez

*"If I get killed, my family would get a green card."*⁴

- Sergeant Rico Rodriguez

To be eligible to enlist in the U.S. Armed Forces, a person must either be a citizen of the United States, a lawful permanent resident of the United States, a national of the United States, or a citizen of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau.⁵ Many Americans may be surprised to learn that roughly 35,000 noncitizen servicemembers serve in the military at any given time,⁶ and hundreds of them have died on the battlefields of Afghanistan and Iraq.⁷ Although no tribute can replace their loss, it is commendable that the Nation has granted posthumous citizenship to over 100 servicemembers killed during the Global War on Terror (GWOT).⁸ Posthumous citizenship not only bestows inimitable honor upon the fallen servicemember, but also generates special immigration and naturalization opportunities for the deceased's direct family members, such as immediate eligibility for permanent resident and citizenship processing.⁹

¹ See Helen O'Neill, Assoc. Press, *Kin Torn by Citizenship for Fallen*, MILITARY.COM, Mar 24, 2008, <http://www.military.com/NewsContents/0,13319,164547,00.html> (quoting Nora Mosquera, foster mother of Lance Corporal Jose Gutierrez, who was killed in action in Iraq).

² See *id.* (quoting Cardinal Roger Mahoney, Letter from Cardinal Roger Mahoney, Archbishop of Los Angeles, to President Bush (Apr. 2003)).

³ Michael Riley, *Citizen Soldiers: Immigrants' Sacrifices Honored Posthumously; Some Families Are Pained by Calls for Border Crackdowns as Loved Ones Are Dying for Their Adopted Country*, DENVER POST, May 30, 2005 (quoting Nestor Rodriguez, Sociologist, Univ. of Houston).

⁴ STOP LOSS (MTV Films 2008) (quoting the character Sergeant Rico Rodriguez).

⁵ 10 U.S.C. § 504(b) (2000). A lawful permanent resident is defined as a person who has been "lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." 8 U.S.C. § 1101(a)(20). 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). The term "national" is more specifically defined in 8 U.S.C. § 1408 as, generally, "a person born an outlying possession of the United States . . ." *Id.* § 1408(1). The term "outlying possessions of the United States" means American Samoa and Swains Island. *Id.* § 1101(a)(29). Citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau are eligible for enlistment in the U.S. Armed Forces pursuant to Department of Defense Instruction 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction*, which cites the Compact of Free Association between the Federated States of Micronesia and the United States, the Compact of Free Association between the Republic of the Marshall Islands and the United States, and the Compact of Free Association Between Palau and the United States. U.S. DEP'T OF DEFENSE, INSTR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION para. E2.2.2.1 (20 Sept. 2005) [hereinafter DODI 1304.26].

⁶ ANITA HATTIANGADI ET AL., NON-CITIZENS IN TODAY'S MILITARY, CTR. FOR NAVAL ANALYSES (FINAL REPORT), Apr. 2005, available at <http://www.cna.org/news/releases/researchbriefs.aspx?fromsearch=1>.

⁷ U.S. Citizenship & Immigration Servs., Fact Sheet: Naturalization through Military Service (May 16, 2008) [hereinafter Fact Sheet], <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a?vgnnextoid=b821a9c210149110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

⁸ *Id.*

⁹ 8 U.S.C. § 1430(d) (stating that a surviving spouse, child or parent of a citizen servicemember (including a servicemember who was granted posthumous citizenship) may be naturalized without having to meet residency requirements, if the servicemember died during a period of honorable active duty service).

But what do we make of the quotes that opened this practice note? Do noncitizen servicemembers really have to die to become United States citizens? Must they die in combat in order to prove they are “good enough” and now “truly belong”? Is a servicemember’s death on the battlefield the only avenue of citizenship for the grieving family members? This article will address the answer to these questions with an emphatic “No.” Despite the belief of some,¹⁰ statutory authority already exists for most noncitizen servicemembers to become United States citizens well before they are exposed to combat. The challenge for all the Armed Services is to ensure that all noncitizen servicemembers are aware of, and are afforded the opportunity to take advantage of, fast-track citizenship opportunities early on in military service.

Immediate Naturalization Authority

The starting point regarding servicemember citizenship issues is 8 U.S.C. § 1440, which authorizes the naturalization of noncitizen servicemembers who have served honorably in an active-duty status during a designated period of military hostilities.¹¹ The statute specifically waives the traditional residency and time-in-service requirements normally required of servicemembers and opens the door for *immediate* naturalization processing.¹² The key to eligibility is whether the servicemember has served during a “designated period of military hostilities.” The statute expressly designates the conflicts of World War I, World War II, the Korean War, and the Vietnam War as qualifying periods of military hostilities, and further authorizes the President to designate other periods of hostilities for purposes of naturalization eligibility.¹³ Regarding the GWOT, in July 2002, President Bush signed Executive Order 13,269, declaring the period beginning on 11 September 2001 as a qualifying period under the statute.¹⁴ Until President Bush or a successor President rescinds the executive order, *any* current noncitizen servicemember,¹⁵ whether a member of the active or reserve components, is immediately eligible to apply for naturalization as long as he or she has served honorably for just one day on active duty.¹⁶ Accordingly, assertions that a noncitizen servicemember *must* die in order to gain citizenship are without merit and there is no reason why new servicemembers cannot begin the expedited naturalization process soon after entering the military. If a qualified noncitizen servicemember does not seek citizenship prior to being killed in combat, it is not because of a lack of authority or right to do so.

It is important to emphasize that the opportunity for immediate naturalization processing is not *automatic*, meaning that it does not just magically happen without any effort from the servicemember. The servicemember, with help from the chain of command, unit personnel sections, and Judge Advocate legal assistance personnel, must kick-start the process by submitting a naturalization application packet to the U.S. Citizenship and Immigration Service (USCIS). Although there are a number of steps required to submit a good packet, such as completing an application form,¹⁷ obtaining certification from the unit that the servicemember has served honorably, and ensuring that a good set of fingerprints are available (enlistment fingerprints are sufficient),¹⁸ the application process is more streamlined and less expensive than for nonmilitary persons.¹⁹

¹⁰ The opening quotes to this article reflect a view held by many Americans that posthumous citizenship is the only route to citizenship for noncitizen servicemembers.

¹¹ 8 U.S.C. § 1440.

¹² During peacetime where there is no “designated period of military hostilities,” servicemembers must normally serve honorably for one year in the military before being eligible to apply for naturalization. *Id.* § 1439(a). Prior to 2004, the time in service requirement was three years. The National Defense Authorization Act for Fiscal Year 2004, tit. XVII, § 1701(a) reduced the time in service requirement from three years to one year. In comparison, persons not in the military must generally meet a five year residency requirement. 8 U.S.C. § 1427(a).

¹³ 8 U.S.C. § 1440(a).

¹⁴ Exec. Order No. 13,269, 67 C.F.R. § 45,287 (2002).

¹⁵ As well as any former servicemember who served honorably on active duty since 11 September 2001. *See* 8 U.S.C. § 1440(a).

¹⁶ The statute authorizes revocation of citizenship if the servicemember is separated from the service under other than honorable conditions before the servicemember has served honorably for a period or periods aggregating five years. *See id.* § 1440(c).

¹⁷ U.S. Citizenship and Immigration Servs., N-400, Application for Naturalization (Oct. 15, 2007), *available at* <http://www.uscis.gov/files/form/N-400.pdf>.

¹⁸ U.S. ARMY HUMAN RES. COMMAND, THE SOLDIER’S GUIDE TO CITIZENSHIP (July 2007), *available at* https://www.hrc.army.mil/site/Active/TAGD/A_soldiers_guide_to_citizenship.htm (providing the framework for citizenship packets and customer assistance). Since 1 October 2004, servicemembers have not been charged a fee for filing the application or for the issuance of a certificate of naturalization upon being granted citizenship. 8 U.S.C. § 1439(b).

In fact, servicemembers have the additional advantage of submitting their application packets to a specially designated military processing service center in Lincoln, Nebraska, commonly called the Nebraska Service Center.²⁰ As a result, servicemembers have a central point of contact for their application packets to address unique service-related issues.²¹

Overseas Naturalization Authority

What about servicemembers who are deployed or otherwise assigned overseas and unavailable to take advantage of this streamlined application process? Although overseas duty may make the process more challenging, it does not make it impossible. Due to a recent and welcome change, the current law does not require the servicemember to complete an in-person interview and take the oath of allegiance on American soil. Through the National Defense Authorization Act of 2004, Congress directed the Secretary of Homeland Security, the Secretary of State, and the Secretary of Defense to ensure that the final steps to naturalization (e.g. applications, interviews, filings, oaths, ceremonies) be made available overseas.²² This is a remarkable benefit for noncitizen servicemembers serving overseas and has proved to be an enormous success. Since the initiation of overseas naturalization efforts in 2004, over 5000 servicemembers have taken the oath of citizenship overseas in locations such as Djibouti, Germany, Greece, Iceland, Italy, Japan, Kenya, Kosovo, Kuwait, South Korea, Spain, the United Kingdom, and even Iraq and Afghanistan.²³ If overseas duty was ever viewed as a detriment to the naturalization process, or used as an excuse to delay pursuing naturalization, it can no longer be said to be true.

Education and Assistance

As the opening quotes to this note attest, misperceptions still exist both inside and out of the military regarding citizenship opportunities for noncitizen servicemembers. This can be corrected in the military through persistent education and assistance efforts. The Judge Advocate community in particular can play a critical role in ensuring that all servicemembers are aware of naturalization opportunities.

Judge Advocates should incorporate immigration and naturalization information into routine legal assistance briefings at legal assistance offices, at the units, and at family readiness and other family support events. Judge Advocates should also encourage commanders to have their personnel sections make immigration and naturalization a regular point of emphasis.²⁴ Further, given the new opportunities for overseas naturalization processing, legal assistance Judge Advocates should include immigration and naturalization information in unit mobilization and deployment briefings, and be available during deployment to review application packets for legality and to conduct citizenship workshops when time and resources permit.²⁵ Servicemembers need to know that an imminent deployment does not preclude initiation of the naturalization application process and that expedited naturalization processing can continue even during mobilization and deployment.

¹⁹ Pursuant to 8 U.S.C. § 1439(b)(4), effective 1 October 2004, no fee shall be charged or collected from military applicants

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.

²⁰ Brochure: Naturalization for Military Personnel, U.S. Citizenship and Immigration Servs. (June 2006), available at <http://www.uscis.gov/files/article/MilitaryBrochurev7.pdf>.

²¹ Telephone Discussion with Leslie Lord, U.S. Army Human Res. Command Action Officer, in St. Louis, Mo. (Sept. 19, 2008).

²² National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, div. A, tit. XVII, § 1701, 117 Stat. 1539 (codified at 8 U.S.C.S. § 1443a (LexisNexis 2008)).

²³ Fact Sheet, *supra* note 7.

²⁴ In fact, the Department of Defense requires that each qualifying noncitizen servicemember be advised of the liberalized naturalization provisions of 8 U.S.C. § 1440 (naturalization during periods of military hostilities), and that basic training and orientation programs include naturalization advice and assistance to interested noncitizen servicemembers. U.S. DEP'T OF DEFENSE, INSTR. 5500.14, NATURALIZATION OF ALIENS SERVING IN THE ARMED FORCES OF THE UNITED STATES AND OF ALIEN SPOUSES AND/OR ALIEN ADOPTED CHILDREN OF MILITARY AND CIVILIAN PERSONNEL ORDERED OVERSEAS paras. E2.2.2, E2.2.2.1 (4 Jan. 2006).

²⁵ For a more detailed discussion of immigration and naturalization processing during deployments, see Major Marc Defreyne & First Lieutenant Darrell Baughn, *Immigration and Naturalization Issues in the Deployed Environment*, ARMY LAW., Oct. 2005, at 47.

Conclusion

Posthumous citizenship for Soldiers, Sailors, Airmen, Marines, and Coastguardsmen is a wonderful feature of American immigration and naturalization law. It reflects a conviction by the American people that noncitizen servicemembers who have shed their blood for the United States should receive the final, ultimate recognition of their selfless service, and that their families should be equally honored through greater immigration and naturalization opportunities. However, a Soldier need not die on the battlefield to become a U.S. citizen. Through statutes and executive orders, the opportunity for noncitizen servicemembers to naturalize during the GWOT exists *now*, regardless of combat status. Honorable *service* in an active duty status is the key, not an honorable *death*. Judge Advocate personnel must continually strive to educate and inform all servicemembers and their families concerning immediate naturalization opportunities. No servicemember should ever be under the mistaken impression that they are not “good enough” to be an American or will not “truly belong” unless they die on the battlefield.