IMMIGRATION ISSUES
JB LANGLEY-EUSTIS LAW CENTER

Active Duty Immigrants

In 2004, President Bush signed an order allowing all active-duty immigrants serving as of Sept. 11, 2001, to apply for U.S. citizenship without waiting the usual three years, and without having to be physically present in the States in order to apply. Now, immigrants serving in the Army, Navy, Marine Corps, Air Force, Coast Guard, parts of the National Guard and Selected Reserve of the Ready Reserve may be eligible to apply for citizenship if they can 1) Demonstrate good moral character/have no criminal record, 2) can speak English, 3) can demonstrate knowledge of U.S. government and history, and take an oath of allegiance to the U.S. Constitution. The applicant must also have served honorably during one year of conflict, have a green card, or have been present in the U.S. at time of enlistment. The application must be filed within six months of discharge.

Naturalization while on Active Duty

Just as failure to abide by the Selective Service laws can result in a denial of future benefits, performing military service can produce benefits. People who have served for a total of three years in the US military and who, if no longer in the military, were honorably discharged, are exempted from standard residency requirements if the naturalization application is filed while still in the military or within six months of discharge. (**INA §328; 8 US.C. §1439; 8 C.F.R. §328).** Legal Permanent Resident ("LPR") status is required. If the application for naturalization is filed more than six months after discharge, the applicant may count his honorable service time occurring within five years of filing for naturalization as complying with the five years physical residence requirement for naturalization.

An applicant for naturalization must file Form N-426 (Certificate of Naval or Military Service) and Form N-400. If filed during service, the application must be filed in the Nebraska Military Service Center, regardless of the applicant's residence.

Immigrants who served on active duty during previous wars and other military conflicts are also exempt from the residency requirements, and may be naturalized regardless of their age. Permanent residents who died while serving in the US military are eligible for posthumous naturalization if the application is filed no more than two years after their death.

Overseas Marriages to Foreign Nationals – Applying for an Immigrant Visa

Every nation regulates the number and type of immigrants who cross its borders. The US military cannot grant alien servicemembers or their family members either citizenship or lawful permanent resident (LPR) status. Military regulations may govern marriages to foreign nationals while stationed overseas. These require that all members planning to marry a foreign national submit an application for permission to marry and require waiting periods. As part of the application process, the alien spouse will receive a medical screening and a background investigation. If the couple plans to return to the US, having the spouse become an LPR can prevent certain difficulties such as obtaining authorization from INS to work legally in the US.

A valid marriage to a US citizen is the key requirement for a spouse to attain LPR status. INS will scrutinize the marriage by examining such factors as the length of time the couple knew each other, how many times they had seen each other prior to marrying, whether the marriage has been consummated, and whether the couple presently resides or has ever resided together. Separation alone will not automatically negate the validity of the marriage for immigration purposes. However, the couple must still be married in order to receive any immigration benefits.

How to Become a US Citizen

Most alien military members or dependents achieve LPR status through sponsorship by a family member. Alien military members who are "immediate relatives" (such as being married to a US citizen) go to the head of the line in obtaining immigrant visas and LPR status. Once they convince the INS that an immediate relative relationship exists, no waiting time is required before they apply for a visa and LPR status. Alien military members and their family who are not immediate relatives but instead fall into one of the "preference" categories have significant waiting periods before they can apply for a visa and LPR status. There are four major paths to US citizenship:

- Citizenship Through Birth in the US or its Possessions or Territories
- Citizenship At Birth Through US Citizen Parents
- Citizenship Subsequent to Birth Through Naturalization of One or Both Alien Parents
- Citizenship Through Naturalization

Filing naturalization papers with INS is necessary if a person is not automatically a citizen by reason of birth in the US or its possessions or territories, being born to US citizen parents, or having alien parents who naturalize before that person turns age 18. The form for filing for naturalization is the Form N-400, Application for Naturalization. After the Form N-400 is filed and processed (including a criminal history and background check), the applicant will appear before an INS examiner to establish qualification for naturalization. Applicants must pass oral examinations on the English language and American government. If an alien is found eligible for naturalization, the alien takes an oath of allegiance to the US at a naturalization ceremony. Before a person can file for naturalization, he or she must have first been an LPR for a specified period of time, normally five years. The various ways to become an LPR are discussed below.

The regular requirements for naturalization include:

1. Residency: There are 3 separate residency periods for naturalization. Preceding the date of filing for naturalization, the applicant must have 5 years continuous residence in the US after admission as an LPR and must have resided in the INS District in which his application has been filed for at least 3 months. Also, the applicant must maintain residence in the INS district in which the application is filed between the time of filing for naturalization and the date of naturalization. Residence time spent in any other immigration status before becoming an LPR does not count toward this time. An applicant may file an application to preserve residence on Form N-470 for absences of one year or more. The application must be filed before the applicant has been absent from the US for a continuous period of one year. An approval of the Form N-470 shall cover the spouse and unmarried sons and daughters of the applicant who are residing abroad as members of the applicants household during the period covered by the application. Moreover, if the LPR is planning to remain abroad for a continuous period in excess of one year, he or she must obtain a reentry permit, because the alien registration card is only valid for absences of up to one year. The reentry permit is entirely separate from the application to preserve residence for naturalization purposes.
2. Physical presence: In addition to residency, the LPR alien must have been physically present at least one-half of the five years in the US or its possessions or territories. Military personnel serving overseas on orders are considered to be constructively residing in and physically present in the US regardless of the duration of the absence. This exception is not applicable to dependents unless they file a Form N-470 with INS to preserve their continuity of residence for naturalization purposes. Absences of six months or more from the US may break the continuity of such residence.
3. Good moral character: The applicant must be of good moral character. Some form of punishment, penalty, or restriction at civilian criminal court for crimes involving moral turpitude ranging from shoplifting to murder may result in being barred from naturalization due to the good moral character requirement.

Certain crimes, called aggravated felonies, as defined in INA Section 101(a)(43), constitute a permanent bar to good moral character and thus may permanently prevent an alien from naturalization. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 expanded the definition of "conviction" to include a wider variety of criminal dispositions. Specifically, section 101(a)(48)(A) of the Immigration and Nationality Act states: "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 – a) 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 b) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed disabilities or mental impairment."

4. Fundamentals of American Government: The applicant must have knowledge of the history, principles, and form of government of the US.
5. Age: The alien must be 18 years or older. Absences of six months to less than one year may interrupt the continuous residence required for naturalization unless the alien rebuts the presumption that he has "abandoned" his residence in the US.
6. Tax Issues **Filing for nonresident status for tax purposes may cause LPR status to be questioned by INS.** An LPR looking forward to applying for citizenship should be counseled against filing as a nonresident for US tax purposes. LPR status may be lost ("abandoned") by actions such as claiming nonresident status for tax purposes.
7. Loyalty: The applicant must be "attached to the principles of the Constitution of the US, and well disposed to the good order and happiness of the US." Deserters from the Armed Forces and subversives are not eligible to naturalize; generally neither are aliens who have requested exemption or discharge from military duty because they are aliens. Conscientious objectors are not disqualified from naturalization.
8. English language: The applicant must demonstrate the ability to read, write, and speak English "in ordinary usage." Exceptions apply to aliens age 50 with over 20 years as LPRs and age 55 with over 15 years as LPRs. Exceptions may also apply to aliens with certain physical disabilities.

Naturalizing Unmarried LPR Children

Although most children under age 18 will automatically be citizens if one parent is a US citizen or if their alien parents naturalize, don't forget naturalization for unmarried LPR children under age 18 of US citizens who don't qualify automatically to be citizens. INA §322; 8 US.C. §1433. For children who do not automatically become citizens by reason of being born to US citizen parents or alien parents who naturalize, the general rule is that unmarried LPR children under age 18 residing in the US and in the legal custody of at least one US citizen parent are eligible for naturalization without complying with any of the residence or physical presence requirements or the English language and knowledge of American Government requirements.
The US citizen parent files a Form N-600, Application for Certificate of Citizenship, on behalf of each eligible child. Eligible children include adopted children, if adopted by the citizen parent before age 16. Legal custody begins when it is awarded in a legal process via a court or other government entity, and may take place before or after the adoption takes place. An official document by a court or other government entity awarding custody is the only acceptable evidence of legal custody; an affidavit will not be acceptable. Special rules apply to illegitimate children; essentially, legitimization by a custodial US citizen father before age 16 will make the child eligible for naturalization. Court or governmental action is required for the father to legitimate a child before the child is eligible for naturalization. A US citizen father who "recognizes" the child as his, without complying with the requirements for legitimization in the applicable jurisdiction, cannot apply for naturalization on behalf of the child. If the US citizen parent applying for the illegitimate child is the mother, the child is eligible for naturalization without any further legal action to legitimate the

child.
You should disclose all convictions on the Form N-400 and at the INS naturalization interview because concealment of such convictions may also constitute lack of good moral character barring naturalization.

***Naturalization for Dependent Spouses of Servicemembers* (INA §319(a); 8 US.C.§ 1430(a); 8 C.F.R. §319.1)**

This applies to spouses married to US citizens. All the normal requirements for naturalization apply, including LPR status, except that the required period of residence is 3 years (instead of 5) and the required period of physical presence is 18 months (instead of 30). The US citizen spouse must have been a citizen throughout the same 3 years of residency for his or her spouse to qualify. The 2 years as a conditional resident count towards the 3 years. 8 C.F.R. §216.1. **Procedure**: File N-400 with the INS office where applicant resides.

Expeditious Naturalization for Dependent Spouses

(INA §319(b); 8 US.C. §1430(b); 8 C.F.R. §319.2) A spouse married to a US citizen, whether military or civilian, who is assigned overseas by the US government may qualify for expeditious processing of an application for naturalization. LPR status is still required; but all residency and physical presence requirements are waived. The overseas assignment must be one year or more. Marital unity is still a requirement. **Procedure:** Along with filing Form N-400, the spouse should obtain a completed Form DD 1278, "Certificate of Overseas Assignment to Support Application to File for Petition for Naturalization" from the member's unit if concurrent travel is authorized. If concurrent travel is not authorized, then the spouse must provide a copy of the orders, paid airline ticket to the overseas duty station, and a letter from the commanding officer stating that the military will permit the alien spouse to accompany the member at his or her own expense. Military members should be aware of an expeditious naturalization option for his or her LPR spouse. The expeditious naturalization option for spouses is not available once the overseas tour is over. An alien spouse is eligible for expeditious naturalization even if she is a conditional resident. 8 C.F.R. §216.1.

Expeditious Naturalization Based Upon The Death of an Active Duty Spouse (INA §319(d); 8 US.C. §1430(d); 8 C.F.R. § 319.3)

A surviving spouse and children of a US citizen, who died while on active duty, are eligible for naturalization. LPR status is still required; but all residency and physical presence requirements are waived. Marital unity is still a requirement. **Procedure**: Along with filing Form N-400, the surviving spouse should provide a cover letter describing the conditions of death, and also state that she is the surviving spouse of the deceased serviceman as evidenced by the enclosed copy of the death certificate and that she is an LPR as shown by a copy of both sides of his or her "green card." The surviving spouse must also file Form I-360 within two years of the service member spouse's death. Note: when filing Form I-360, check box M in Part 2 of the form and write "Public Law 108-136."

Other Resources

In addition, the United States Citizenship and Immigration Services website provides needed information and forms. Call 1-877-247-4645 for their Military Help Line. http://www.uscis.gov/portal/site/uscis

Note: The information in this handout is general in nature. It is not to be used as a substitute for legal advice from an attorney regarding individual situations.