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Immigration Law Newsletter

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Immigration Benefits for U.S. Soldiers and Spouses

U.S. law provides for benefits for lawful permanent residents who serve honorably in the U.S. armed forces. Generally, the benefits concern the length of time that a person must have continuously resided in the United States before applying for citizenship.

Normally, a lawful permanent resident must have resided in the United States continuously for 5 years before that person can apply for citizenship. If the permanent resident is married to a U.S. citizen, that person will only be required to have lived continuously in the United States with the U.S. citizen spouse for 3 years. In both instances, the permanent resident must also have lived in his or her U.S. Citizenship and Immigration Service (USCIS) district for 3 months.

Active Duty and Recently Discharged Service Members

Members of the U.S. armed forces who served honorably for one year or more are not (Continued on Page 3)

New Countries Added to the Visa Waiver Program

On October 17, 2008, the White House announced that 7 new countries would be included in the Visa Waiver Program: South Korea, the Czech Republic, Estonia, Hungary, Latvia, Lithuania and Slovakia.

The Visa Waiver Program allows nationals of certain countries to travel to the United States without applying for a visa. A person who travels pursuant to the Visa Waiver program will be permitted to stay in the United States for up to 90 days, with no extensions.

Beginning in mid-November, nationals from these countries will join nationals from Andorra, Austria, Australia, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom in being able to travel temporarily to the United States without first applying for a visa. ■

U.S. to Require Electronic Registration of Visa Waiver Travelers

Starting in January of 2009, nationals from countries that participate in the Visa Waiver Program who plan to travel to the United States without a visa will be required to register through an on-line program called the Electronic System for Travel Authorization (ESTA). Nationals from Visa Waiver Program countries will still be permitted to come to the United States without a visa and stay for 90 days. However, such nationals will need to re-register with ESTA every two years.

ESTA was created to provide an additional layer of security for travelers taking advantage of the Visa Waiver Program. U.S. Customs and Border Protection claims that ESTA will allow the United States to determine whether the traveler is eligible to use the Visa Waiver Program, and whether that person poses a security risk to the United States.

Individuals who wish to stay longer than 90 days will still need to apply for a visa. ■

Congressional Update



Soldiers, Military Families and Foreign Nationals Assisting the U.S. Missions in Iraq and Afghanistan Benefit from 110th Congress' Immigration Reforms

Applications for Citizenship from U.S. Military Personnel to be Processed Faster

In October of 2008, the President signed the Military Citizenship Processing Act, which requires the U.S. Citizenship and Immigration Service (USCIS) to process and issue a decision on applications for citizenship from current or former U.S. military personnel within 6 months of filing. The law also provides for the expedited treatment of citizenship applications for the surviving dependents of deceased U.S. military personnel. If USCIS fails to act in this time frame, it must provide an explanation, and set a new target date for the decision.

Congressional Actions Eases Ability of Spouses and Children of U.S. Soldiers to Maintain Permanent Residency and Become U.S. Citizens

U.S. law provides for special benefits for the lawful permanent resident (LPR) spouses and children of members of the U.S. armed forces, which makes it easier to maintain LPR status, and to apply for naturalization sooner.

Normally, if an LPR resides overseas for an extended period of time, U.S. law views that as an abandonment of LPR status. Thus, an LPR cannot have spent more than 180 days in a row outside of the United States. This would create a problem for LPR spouses and children of members of the armed forces who are stationed overseas. If the LPR spouse or children choose to reside with the soldier while stationed overseas, they could lose LPR status.

In 2008, however, Congress passed a measure to remedy this situation. Under current U.S. law, LPR spouses and children who reside with a member of the armed forces while stationed overseas may be readmitted to the United States without losing LPR status.

The law passed in 2008 also provided that the time spent overseas while residing with a member of the armed forces would be counted as U.S. residence for the purpose of naturalization. Normally, in order to apply for citizenship, the LPR must show that he or she resided in the United States continuously for a certain period of time. This meant that the LPR spouses and children who resided with a member of the armed forces stationed overseas would have to wait for some time after the soldier's overseas tour of duty was over before applying for citizenship. The 2008 law remedied this situation.

Afghanis and Iraqis Working with U.S. Armed Forces or the U.S. Government May Receive Special Immigration Benefits

Congress passed laws in 2007 and 2008 to provide for greater immigration benefits for nationals of Afghanistan and Iraq who assist the U.S. military mission, or who provide services to the U.S. Government.

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Immigration Benefits for Soldiers

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required to have lived continuously in the United States or in a USCIS district for any period of time. Thus, a permanent resident who joins the military and serves honorably can apply for citizenship faster. However, the application must be filed while the permanent resident is in active duty, or within six months of an honorable discharge.

If the service member has served less than one year, or files the naturalization application more than six months after an honorable discharge, that member is still required to have lived continuously in the United States for 5 years, and in the USCIS district for 3 months. However, time spent overseas in active duty will count towards the continuous residency requirement.



Soldiers Who Served During Periods of Armed Conflict

U.S. law also does not require the permanent resident to have lived continuously in the United States if that permanent resident has served in the U.S. armed forces during certain periods of armed conflict. Those periods of armed conflict are: World War I, World War II (9/1/36-12/31/46); the Korean Conflict (6/25/50-7/1/55); the Vietnam War (2/28/61-10/5/78); the Persian Gulf War (8/2/90-4/11/91); and the current War Against Terrorism (9/11/01-present).

Spouses of Soldiers Who Died While in Active Duty

If the permanent resident was married to a member of the U.S. armed forces who died during a period of active duty, U.S. law does not require the permanent resident to have lived continuously in the United States before applying for citizenship.

Posthumous Citizenship

If a member of the U.S. armed forces dies while in a period of active duty, an application for citizenship can be made after death.

Special Procedures

The U.S. Government does not charge military personnel filing fees. Also, the U.S. Government will make the naturalization process available to U.S. military personnel stationed overseas at U.S. embassies and consulates, and, if practical, at U.S. military installations abroad.■

Congressional Update

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In 2007, Congress authorized certain Afghani and Iraqi translators and interpreters who have been working for the U.S. armed forces or Federal agencies in Afghanistan or Iraq to apply for special immigrant status. Up to 500 applicants per year can be granted such status, and apply for adjustment of status to permanent residence once in the United States.

In 2008, Congress authorized special immigrant status for certain Iraqis who have been employed by or on behalf of the U.S. Government.■

Litigation Update



Questioning by a Plain Clothes Officer Not Considered a Seizure Pursuant to the Fourth Amendment

The U.S. Court of Appeals for the Second Circuit recently held in the case of *Pinto-Montoya v. Mukasey* (Docket No. 05-6541-ag, August 26, 2008), that evidence obtained when immigration officers questioned two Latino brothers about their immigration status should not be excluded from their deportation proceedings.

The two brothers arrived at JFK Airport on a flight from Los Angeles in 2001. The former Immigration and Naturalization Service identified this flight as one that was frequently used by aliens who had been smuggled into the United States illegally. Immigration officials in plain clothes approached the brothers and asked if they were in the country legally. The brothers answered that they were not. As a result, the brothers were detained, and placed in deportation proceedings.

The brothers challenged their orders of removal claiming that they were subject to an illegal search and seizure based entirely on their race. According to the brothers, their statements concerning their immigration status should have been excluded.

U.S. criminal law provides that evidence gained because of a violation of the Fourth Amendment prohibition on unreasonable searches and seizures can be excluded at trial. However, immigration violations are not criminal violations. Therefore, the Supreme Court has held that the exclusionary rule does not automatically apply to immigration proceedings.

However, in a case called *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), some of the Justices of the Supreme Court expressed the view that the exclusionary rule may apply if there was evidence of wide-spread violations of the Fourth Amendment by immigration officials, or if the conduct by immigration officials was so egregious that it would violate notions of fundamental fairness and undermine the reliability of the evidence. The Second Circuit adopted this approach, and stated in the case of *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006), that a seizure would be particularly egregious if the immigration officials stopped the person based entirely on race.

In *Pinto-Montoya*, the Second Circuit held that the rule from the *Almeida-Amaral* case did not apply because the initial contact between the two brothers and the immigration officials was not a seizure. The Second Circuit noted that the immigration officers were in plain clothes, were not wearing badges, and did not identify themselves as Government agents. Under these circumstances, the Second Circuit concluded that for all that the two brothers knew, the plain clothes agents could have simply been civilians. Therefore, their liberty to walk away was not restrained. ■

