



Immigration Impacts on Marines Who are Non-Citizens or Naturalized Citizens and Separated or Discharged with a DD/BCD/OTH

Purpose. This Practice Advisory sets forth actions and reporting requirements when a service member, who is either a non-citizen or a naturalized citizen, is being discharged with a dishonorable discharge (DD), bad conduct discharge (BCD), or separated under other than honorable conditions (OTH). Pretrial agreements with Marines who are non-citizens or naturalized citizens are also discussed.

Background. A Marine's immigration status may be affected upon report of an adverse discharge through revocation of naturalization or denial of citizenship. The U.S. Citizenship and Immigration Services (USCIS) may deny an application for citizenship when the applicant fails to demonstrate "good moral character" (GMC). While the USCIS normally determines whether an applicant has met the GMC requirement on a case-by-case basis, certain criminal conduct (i.e. common law aggravated felonies) automatically precludes an applicant from establishing GMC, and may make the applicant subject to removal proceedings. Other criminal conduct, when reviewed on a case-by-case basis, may also lead to a determination that an applicant lacks GMC.¹

Due to the impact certain criminal convictions may have on immigration matters, the Supreme Court, in *Padilla v. Kentucky*, 559 U.S. 356 (U.S. 2010), held that criminal defendants have a Sixth Amendment right to effective assistance of counsel regarding potential adverse citizenship or immigration consequences as a result of a criminal conviction before they plead guilty.

Under the Immigration and Nationality Act (INA), codified in Title 8 U.S.C., service in the Armed Forces of the United States is one way a non-citizen may become a naturalized citizen. While many non-citizens of the U.S. must wait three to five years before applying for U.S. citizenship, there are two ways that servicemembers may apply for expedited citizenship: (1) through honorable military service for one year during peacetime and, (2) through honorable military service for any period of time during Presidentially-declared hostilities. To retain citizenship, however, they must serve honorably for an aggregate of five years. If they are separated from the military under other than honorable conditions (DD/BCD/OTH) before they have honorably served for an aggregate of five years, the U.S. Citizenship and Immigration Services (USCIS) may initiate the process to revoke their naturalization by referring the case to the Department of Justice (DOJ). See 8 U.S.C. §§ 1439(f) and 1440(c).

¹ The USCIS Policy Manual, contains a full discussion of the various types of conduct that may adversely affect immigration and citizenship status. <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12.html>

The USCIS relies on the military to report cases in which service members who are non-citizens or naturalized citizens are discharged or separated with a DD, BCD, or OTH. The USCIS evaluates whether the conduct warrants disapproving his or her citizenship application or referring the case to DOJ for revocation of naturalization. 8 U.S.C. §§ 1439(f) and 1440(c)

Required Actions

Defense Counsel. Defense counsel must determine whether a client is a non-citizen or a naturalized citizen. If a client falls into either of these categories, he or she must be advised of the possible adverse immigration or naturalization consequences of a DD, BCD, or OTH before entering a pretrial agreement or plea. Enclosure (1) provides the DSO's current *Padilla* advice form.

Trial Counsel. When aware that an accused is either a non-citizen or a naturalized citizen, Trial Counsel must ensure pretrial agreements contain a *Padilla* provision and that the military judge discusses this provision with the accused during the guilty plea inquiry.

Staff Judge Advocates. The MARCORSEPMAN currently requires commanders only to report cases involving "naturalized" citizen Marines who are separated or discharged with a DD, BCD, or OTH. This provision will be updated to require commanders also to report cases involving "non-citizen" Marines whose misconduct results in a DD/BCD/OTH. (*MCO 1900.16 (MARCORSEPMAN), para. 1103*)

SJA's must ensure that commanders forward the report, in a format similar to that provided in enclosure (2), to the Staff Judge Advocate to the Commandant (SJA to CMC) – Legal Assistance Branch (JLA) as soon as practicable after conclusion of the court marital Convening Authority's (CA's) Action or Administrative Separation Authority's Action. The report must include, as appropriate, copies of the Report of the Results of Trial and the CA's Action or Administrative Separation Authority's Action, DD 214, and any information in the Marine's service record with respect to naturalization. In a military justice case, the SJA to CMC will hold the report until final action is taken in the case, at which time the report will be sent to the USCIS.

Enclosures: (1) Defense Advice to Non-Citizen and Naturalized Citizen Accused
(2) Adverse Discharge Report Template - Immigration

Links: INA <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/act.html>
USCIS Policy Manual, Vol. 12, Ch. 7 <http://www.uscis.gov/policymanual/Updates/20130107-Comprehensive%20Citizenship%20and%20Naturalization%20Policy%20Guidance.pdf#>

Points of Contact: General immigration and naturalization questions should be directed to Ms. Mary Hostetter, Head, Legal Assistance Branch (JLA) at mary.hostetter@usmc.mil or (703) 692-7442. Military Justice policy questions should be directed to LtCol Angela Wissman, Head, Policy and Legislation Branch (JMJ), at angela.wissman@usmc.mil or (703)693-9005; Maj Ben Robles, Deputy Head, JMJ, at Benjamin.robles@usmc.mil or (703)614-1513, and Maj Mark D. Sameit, OIC, Trial Counsel Assistance Program (TCAP), at mark.sameit@usmc.mil or (703)693-8955. Questions concerning the Marine Corps Defense Services Organization should be directed to Colonel Steve Newman, Chief Defense Counsel of the Marine Corps, at Stephen.newman@usmc.mil or (703) 604-0728.

**ADVICE TO NON-CITIZEN AND NATURALIZED-CITIZEN ACCUSED
REGARDING RISK OF DEPORTATION**

On March 31, 2010, the Supreme Court of the United States issued a landmark decision in *Padilla v. Kentucky*, holding that criminal defense lawyers must advise their clients about immigration consequences of pending criminal charges, including potential unintended consequences of pleading guilty.

As prescribed by the Supreme Court in *Padilla v. Kentucky*, my detailed defense counsel has notified me of the following prior to any entry of pleas in my court-martial case:

1. During an initial interview with my detailed defense counsel, I fully disclosed my U.S. citizenship/immigration status, namely that I am _____ or am **not** _____ a U.S. citizen.

a. If a citizen, I am a naturalized citizen: YES: _____ or NO _____

b. If a naturalized citizen, the date of naturalization: _____

c. For naturalized citizen accused: Title 8 U.S.C. § 1439 provides special benefits to non-citizens who have served honorably for one year in the military. I have been informed that 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. Consequently, I am advised that it is important to consider the expiration of my term of service, and also understand it may be in my best interest to avoid the issuance of an other than honorable discharge.

2. As a non-citizen of the United States of America (a.k.a. lawful permanent resident (LPR)), I have been advised by my detailed defense counsel that deportation may be a potential consequence of a finding of guilty and/or sentencing in my present court-martial.

3. I further understand that my risk of deportation could range from highly probable to not at all, depending on the nature of any adjudged offense(s), including the severity of the actual or potential punishment (see "aggravated felonies," Appendix A).

4. Based on an investigation and analysis by my detailed defense counsel, I have been provided an assessment regarding the risk of deportation and/or other immigration consequences as a possible collateral result of any court-martial conviction, including plea and sentencing alternatives.

a. I have also been advised that any adjudged conviction and sentencing may impact the risk of deportation or other immigration consequences regardless of whether I plead guilty or not guilty.

b. Adjudications and convictions at summary courts-martial, as well as findings of guilty at UCMJ Article 15, proceedings, are not considered criminal convictions under immigration law.

c. I further understand that the military services, including the United States Marine Corps, do not control initiation of deportation proceedings or other immigration consequences; that the Department of Defense (DoD) mandates

that each service's law enforcement organizations report the "criminal history data" of service members to the Criminal Justice Information Services (CJIS), Division of the Federal Bureau of Investigation (FBI); so that the CJIS can include the information in its National Crime Information Center (NCIC) criminal history databases; that the federal agency delegated the responsibility to administer programs under this act is the United States Citizenship and Immigration Service (USCIS), also known as the Bureau of Citizenship and Immigration Services (BCIS), including adjustment of immigration status / deportation.

d. I further understand that given that the BCIS acts as an independent federal agency, there exists some uncertainty and unpredictability as to the actual risk of deportation or other related immigration consequences based on the outcome of a court-martial. Also, determining which convictions qualify as bases for deportation can be challenging. Therefore, any advice by my detailed defense counsel is based on his or her best judgment in view of the facts and circumstances currently available.

5. I have reviewed Appendix A and fully discussed with detailed defense counsel the potential collateral consequences of my pending court-martial as it relates to deportation and other immigration consequences.

Accused:

Date

Detailed Defense Counsel

Date

Under the Immigration and Nationality Act (INA), immigration law has two major classifications of crimes which can serve as bases for deportation: those crimes involving “moral turpitude”¹ and those crimes considered to be “aggravated felonies.” Unlike moral turpitude offenses, “aggravated felony” convictions result in mandatory detention at an immigration holding facility with no opportunity to apply for bond and no opportunity to apply for relief from removal proceedings should an order of deportation be issued by the immigration court. In addition to the two major classifications mentioned above, the INA has separate provisions making convictions for specific types of offenses such as those involving controlled substances, domestic violence, firearms, and alien smuggling potential bases for deportation.²

APPENDIX A		
8 USC §1101(a)(43): “aggravated felonies”^{3, 4}		UCMJ Article(s)
(A)	murder, rape, or sexual abuse of a minor;	118, 119, 119a, 120, 125
(B)	illicit trafficking in a controlled, including a drug trafficking crime[;]	112a ²
(C)	illicit trafficking in firearms or destructive devices or in explosive materials[;]	
(D)	an offense relating to laundering of monetary instruments or engaging in monetary transactions in property derived from specific unlawful activity if the amount of the funds exceeded \$ 10,000;	103
(E)	an offense relating to explosive materials or firearms offenses)[;]	126
(F)	certain crimes of violence for which the term of imprisonment [is] at least one year;	90, 91, 93, 124, 128
(G)	a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year;	103, 108, 109, 121, 122, 129, 130, 132, 134-¶64, 134(¶67),134(¶106)
(H)	an offense relating to the demand for or receipt of ransom;	134(¶92)
(I)	an offense relating to child pornography;	92, 134
(J)	an offense relating to racketeer influenced corrupt organizations or gambling offenses, for which a sentence of one year imprisonment or more may be imposed;	127, 134(¶84)
(K)	an offense that relates to the owning, controlling, managing, or supervising of a prostitution business[;]	134(¶97)
(L)	certain national security offenses relating to classified information, sabotage, treason, or disclosing identity of agents[;]	104, 106, 106a
(M)	an offense involving fraud, deceit or tax evasion in which the loss to the victim or victims exceeds \$ 10,000;	123
(N)	an offense relating to alien smuggling into the United States[;]	

APPENDIX A

8 USC §1101(a)(43): "aggravated felonies"^{3, 4}		UCMJ Article(s)
(O)	an offense relating to wrongful reentry into the United States[;]	
(P)	certain [counterfeiting] offenses for which the term of imprisonment is at least 12 months;	
(Q)	an offense relating to a failure to appear by a defendant for service of sentence if the <u>underlying offense</u> is punishable by imprisonment for a term of 5 years or more;	95, 96
(R)	an offense relating to trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;	
(S)	an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;	107, 131, 134(¶66),134(¶96), 134(¶98)
(T)	an offense relating to a failure to appear before a court [for] a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and	95, 96
(U)	an attempt or conspiracy to commit an offense described in this paragraph.	80, 81

¹Because there is no statutory definition of a crime of "moral turpitude," a practitioner must turn to case law for a conceptual definition. The Bureau of Immigration Appeals (BIA) has held that a crime involving moral turpitude is an offense that "shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."

² What can also be significant is that an individual who admits, but is not convicted, of having violated any law or regulation of the United States relating to a controlled substance as defined in section 102 of the Controlled Substances Act is "inadmissible" into the United States or its territories. Consequently, an LPR service member who admits to smoking marijuana at a UCMJ Article 15 proceeding or during an administrative separation board hearing, for example, may find that he or she will not be readmitted into the United States following a period of leave or vacation outside of the territorial limits of the United States.

(See Consequences of a Court-Martial Conviction for United States Service Members Who Are Not United States Citizens, Maj. R.D. Belliss, USMC, 51 NAVAL L. REV. 53 (2005)).

³The term applies to an offense described whether in violation of Federal or State law, including the Uniform Code of Military Justice (UCMJ), and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.

⁴Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of the statute referenced above.



UNITED STATES MARINE CORPS

Insert Letterhead

IN REPLY REFER TO:

From: Commanding Officer, (unit address)
To: Staff Judge Advocate to the Commandant (JLA), Headquarters
Marine Corps, 3000 Marine Corps Pentagon, Rm 4D558, Washington
DC 20350-3000

Subj: REPORT OF ACTION TAKEN THAT MAY ADVERSELY AFFECT THE IMMIGRATION
OR CITIZENSHIP STATUS OF _____
(Name/Rank)

Ref: (a) MCO 1900.16 MARCORSEPMAN
(b) 8 U.S.C. §§ 1439 and 1440

Encl: (1) Results of Trial or Administrative Separation Authority's
Action
(2) DD 214
(3) Immigration/Naturalization Material from SRB

1. Pursuant to references (a) and (b), the enclosures are forwarded
to report action taken against _____ (Name/Rank) that may
adversely affect his/her immigration or citizenship status.

2. This Marine is:

- a. a non-citizen or naturalized citizen
- b. who received a DD or BCD or OTH
- c. as a result of a court martial or an administrative discharge

3. The enclosures provide material pertinent to this case.

4. Point of contact at this office is _____ who may be
reached at _____ or email _____.

//s//