




**U.S. Immigration
and Customs
Enforcement**

SEP -3 2004

MEMORANDUM FOR All Field Office Directors

FROM Victor X. Cerda 
Acting Director

SUBJECT Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service

This memorandum amends the current Immigration and Customs Enforcement (ICE) policy requiring Headquarters authorization to issue a Notice to Appear (NTA) in the case of a current or prior member of the United States Military. It also provides guidance regarding the exercise of prosecutorial discretion in the issuance and service of a NTA, a Final Administrative Removal Order (Administrative Order), or a Reinstatement of a Final Removal Order (Reinstatement) upon the alien with service in the United States Military. This includes service in the United States Army, Air Force, Navy, Marine Corps, Coast Guard, or National Guard, as well as service in the Philippine Scouts during World War II.

The former Immigration and Naturalization Service (INS) previously recognized that military service should be considered in determining whether or not to issue and serve an NTA upon an alien who was discharged from one of the military branches. INS Interim Enforcement Procedures, dated June 5, 1997, titled "Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing and Removal" state in Section V, Subsection D (8): "Current or former members of Armed Forces. A Notice to Appear shall not be issued against any current or former member of the armed forces without prior approval from the regional director. Also, such an alien must also be advised, prior to the issuance of the Notice to Appear, of any discretionary relief which may be available." The abolition of the INS and its regional offices makes it appropriate to revisit the procedures for the issuance of NTAs, Administrative Orders, and Reinstatements in cases involving aliens who are current or former members of the U.S. armed forces.

Within the Office of Detention and Removal, the authority to approve issuance of an NTA, Administrative Order, or Reinstatement in these cases will now rest with the Field Office Director (FOD) in each field office. This decision will, at a minimum, take into consideration the circumstances in each case as identified below, and requires a memorandum from the FOD to the

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A-file with a brief overview of the facts considered. This memorandum shall specifically authorize issuance of the NTA, Administrative Order, or Reinstatement.

Prior to making a decision to issue an NTA, a thorough review to determine eligibility for United States Citizenship under sections 328 and 329 of the Immigration and Nationality Act (INA) must be completed in these cases because those sections contain special naturalization provisions for members of the military and, under certain circumstances, an order of removal does not preclude their naturalization. Accordingly, FODs should not initiate removal proceedings against aliens who are eligible for naturalization under sections 328 or 329 of the INA, notwithstanding an order of removal.¹

In cases involving military service where the alien is not eligible for naturalization under sections 328 or 329 of the INA, the issuing official should consider the alien's overall criminal history, as well as any evidence of rehabilitation, family and financial ties to the United States, employment history, health, community service, specifics of military service, and other relevant factors. When looking at military service, the FOD should consider factors relating to that service, such as duty status (active or reserve), assignment to a war zone, number of years of service, and decorations awarded. Additionally, when analyzing the criminal history in the case, crimes involving violence, aggravated felonies, drug trafficking, or crimes against children are to be viewed as a threat to public safety and normally the positive factors of any military service will not deter the issuance of an NTA. An honorable discharge by no means serves to bar an alien from being placed in removal proceedings.

The decision not to issue an NTA, Administrative Order, or Reinstatement is an exercise of prosecutorial discretion; as such it does not convey any right upon the alien or his or her representative. There is no application to submit, nor any explanation owed to the alien as to why a decision was made to issue an NTA, Administrative Order, or Reinstatement regardless of military service. There is no right to review the decision to initiate proceedings before any administrative appeal unit, an immigration judge, nor the federal courts. The officer interviewing the alien should, as much as possible, put the responsibility on the alien to substantiate their military service, decorations won, length of service, etc.

Officers charged with processing aliens for NTAs, Administrative Orders, or Reinstatements should be periodically reminded to inquire about military service during such processing in all cases where such service may be a possibility. If an alien's prior military service record does not come to the attention of ICE until after issuance of the NTA, Administrative Order, or Reinstatement, appropriate action should be taken to comply with this guidance, to include exercising discretion by terminating any issued NTA.

¹ All aliens eligible for naturalization under section 329 of the INA can be naturalized notwithstanding an order of removal. In contrast, not all aliens eligible for naturalization under section 328 of the INA can be naturalized notwithstanding an order of removal. Under section 328 of the INA, only those aliens who are serving in the armed forces and who, prior to filing the application, appear before a representative from U.S. Citizenship and Immigration Services, may be naturalized notwithstanding an order of removal.

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In cases in which an alien is still on active duty when DRO seeks to serve an NTA, Administrative Order, or Reinstatement, FODs should consider the implications of placing an active duty alien into proceedings. While ICE policy does not preclude the placement of an alien on active duty into proceedings, factors regarding successful service of the NTA, Administrative Order, or Reinstatement should be considered prior to authorization of the NTA for service. Such factors may include: (1) whether coordination with the enforcement arm or administration of that branch of the service in which the alien is serving is possible; (2) whether the alien is likely to abscond if he/she is discharged prior to being placed in proceedings; and (3) whether service of the NTA, Administrative Order, or Reinstatement can be coordinated so that the alien can be served immediately upon discharge. Whenever possible, the alien should be served upon being discharged.

This policy provides some, but not all, of the factors to consider when deciding whether or not to exercise prosecutorial discretion in the issuance of an NTA, Administrative Order, or Reinstatement against an alien who has served in the United States military. In all cases, the factors considered and the decision made in each specific case must be entered into a memorandum to file (with a copy placed in the alien's A-file) and in (b)(7)(E). The memorandum to file will be referenced on the Form I-213, *Record of Deportable/Inadmissible Alien* that is completed for the case. As in all cases, the FOD should seek assistance from the Office of the Chief Counsel as necessary.

Any questions regarding this memorandum can be directed to (b)(6),(b)(7)(C), at 202-514-(b)(6),(b)(7)(C)