

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

KUSUMA NIO, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:17-cv-00998-ESH-RMM
)	
UNITED STATES DEPARTMENT)	
OF HOMELAND SECURITY, <i>et al.</i> ,)	
)	
Defendants.)	

ERRATA TO PLAINTIFFS’ MEMORANDUM (DKT. 154)

Plaintiffs respectfully submit this Errata to Plaintiffs’ Memorandum in Response to the Court’s June 4, 2018 Order (Dkt. 154). Plaintiffs’ Memorandum, with the following correction, is attached:

Page	Change From	Change To
2	<i>In re United States</i> , 138 S. Ct. 371, 372 (2017)	<i>In re United States</i> , 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting on request for stay)

June 11, 2018

Respectfully submitted,

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PLAINTIFFS' MEMORANDUM IN RESPONSE
TO THE COURT'S JUNE 4, 2018 ORDER

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Pursuant to the Court's June 4, 2018 Order (Dkt. 150), Plaintiffs submit this Memorandum addressing the issues identified in the Order.

I. THE COMPLETENESS OF THE ADMINISTRATIVE RECORD

A. Documents Related to Plaintiffs' MSSD/NSD Claim

One of Plaintiffs' claims in this action challenges the lawfulness of USCIS's July 7, 2017 policy ("July 7 Policy"), which, according to Defendants, in part, suspends or prevents adjudication of class member naturalization applications pending DoD's completion of Military Service Suitability Determinations ("MSSD") and/or National Security Determinations ("NSD"). Notwithstanding the Court having granted Defendants another opportunity to designate documents relating to the MSSD/NSD aspect of the July 7 Policy as part of the administrative record (Dkt. 135), Defendants designated none. Plaintiffs, however, have identified the following documents that should be part of the administrative record or otherwise properly considered by the Court in connection with Plaintiffs' MSSD/NSD claim:

- Ex. 1: DOD Instruction No. 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction* (Dkt. 119-21);
- Ex. 2: DOD Instruction No. 1332.14, *Enlisted Administrative Separations*;
- Ex. 3: U.S. Army Human Resources Command, *The Soldier's Guide to Citizenship Application*, April 2017 (Kirwa, Dkt. 22-7);
- Ex. 4: August 30, 2006 Memorandum, *Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (Dkt. 39-1);
- Ex. 5: Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (Dkt. 39-2);
- Ex. 6: Arendt Declaration, dated April 3, 2018, ¶ 2 (Dkt. 128-2);
- Ex. 7: Miller Declaration, dated July 7, 2017, ¶¶ 10-11 (Dkt. 19-7);
- Ex. 8: Defendants' Responses to the Court's August 24, 2017 Order, ¶ 1 (Dkt. 39);
- Ex. 9: MAVNI FY18 Policy Flow (Accession NSD) (Dkt. 119-20);

Ex. 10: MAVNI/LPR FY17 Policy Flow;

Ex. 11: MAVNI Policy Flow FY16.

Most of these documents already have been submitted or referenced in these proceedings. And each of these items falls within one or more of the grounds for supplementation of the record. *See* Plaintiffs' Motion Regarding Defendants' Certified Administrative Record for the July 7 Policy at 3-5 (Dkt. 133); *In re United States*, 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting on request for stay) (“[J]udicial review cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record.”).

Among other things, the documents support Plaintiffs' contentions that DoD's standards for MSSD/NSD determinations are unrelated and irrelevant to USCIS's statutorily-limited standards for adjudicating naturalization applications. The documents demonstrate that, when enacting the July 7 Policy as a response to this litigation, USCIS either failed to understand what MSSD/NSD adjudications entailed or failed to properly consider the role such adjudications would have on class member naturalizations, including the extra delays they would impose on what should be an expedited process. In either case, the supplementation of the record is appropriate.¹

It bears emphasis here that, in response to Plaintiffs' claims that USCIS's practice of waiting for the MSSD/NSD was a new policy, not encompassed within the July 7 Policy (*see e.g.* Dkt. 119 at 33-36), Defendants have insisted that the MSSD/NSD requirement was part of the July 7 Policy all along (*see e.g.*, Dkt. 128 at 13-19). As such, it is incumbent upon Defendants to identify the MSSD/NSD documents considered by USCIS. Yet, nothing in the administrative record

¹ As the Court noted during the hearing on April 11, 2018, to the extent a document is relevant to Plaintiffs' argument, it can go in appendices, whether or not the agency decision-maker considered it. *See* April 11, 2018, Tr. 144:8-24.

designated by Defendants contains any reference to MSSD/NSDs – including the July 7 Policy itself and the July 3, 2017 Briefing Memo (USCIS CAR 7) (“Briefing Memo”). In particular, and given the proven adverse impact on class member naturalization application processing attributable to USCIS’s practice of waiting weeks and months following the completion of the background checks themselves, and even following completion of the DoD CAF adjudications (at which the enhanced background information is assessed/adjudicated), for the separate MSSD/NSD adjudications, USCIS should have considered the process, standards, and timelines for MSSD/NSD adjudications when it enacted the July 7 Policy.² As a legal matter, this information is relevant to, among other things, whether Defendants considered the relevant factors, had a reasonable justification for the policy, and properly weighed the harms and benefits of the policy.

B. Newly-Revealed Documents and Information

Following the April 11, 2018 hearing at which the redactions in the Briefing Memo briefly were discussed, Defendants waived previously-asserted privileges and produced all but two of the previously-redacted passages in that document. *See* Dkt. 148; Dkt. 151. In doing so, Plaintiffs became privy for the first time to information in this key administrative record document. Given the content of the previously-redacted information, particularly under the heading of Deferred Action (which is how this Court referred to the material on April 11, 2018), the Deferred Action memo dated November 23, 2016 (Ex. 12), as well as documents evidencing USCIS’s interpretation of that memo, resulting in USCIS’s refusal to extend Deferred Action protections and work authorization to DTP MAVNIs, should be considered.

² While Mr. Renaud’s “lack-of-control” argument (Dkt. 128-1 ¶ 16 n. 3) was proven wrong with respect to the redundant FBI checks, it is something that USCIS should have considered with respect to any *adjudications*, including the MSSD/NSD, being done by DoD.

In addition, through Mr. Renaud's most recent declaration relating to the Briefing Memo (Dkt. 146-1), USCIS for the first time disclosed that this Memo served as advice from USCIS to "department decision makers to facilitate or assist development of DHS's final position on relevant issues" (*Id.* at ¶ 6). Previously, USCIS had identified Mr. Renaud – a USCIS Assistant Director – as the decision-maker for the July 7 Policy. USCIS CAR 1, Renaud Decl. ¶ 2. Now, Defendants have identified DHS as the decision-maker. Accordingly, Plaintiffs request that all documents considered by the DHS decision-makers be included in the administrative record, including DHS's response to the Briefing Memo and, as described, "DHS's final position on relevant issues."³

C. Documents Relating to the Named Plaintiffs' Individual Claims

Defendants should include in the administrative record the following documents pertaining to the named Plaintiffs: (1) MSSD/NSD files; (2) Army service records; and (3) USCIS files including, but not limited to, complete naturalization application files and any related notes, information provided by DoD to USCIS related to these individuals, and the file and any related notes concerning Plaintiff Hong's Deferred Action request and denial.

In addition to serving as class representatives, the named Plaintiffs have asserted individual claims on their own behalf in this action. The actual naturalization adjudication delays and conditions experienced by these soldiers are relevant to, and will better inform, the claims at issue here. There is little question that if one MAVNI soldier had commenced an action challenging Defendants' actions under the Administrative Procedure Act (*i.e.*, the same claims brought here), the administrative record would include that soldier's USCIS naturalization application file, as well as the Army records of her service and MSSD/NSD. The fact that there are multiple named

³ Because Defendants have not produced the Deferred Action interpretation/application documents or DHS's response to the Briefing Memo, Plaintiffs were not able to attach these.

plaintiffs here does not change the analysis. Those same records should be included in the administrative record for each of them.

D. The USCIS May 17, 2018 Guidance

Defendants should include in the administrative record USCIS's May 17, 2018 guidance regarding the July 7 Policy. Defendants first revealed the existence of this guidance in their May 31, 2018 email to chambers in response to Magistrate Judge Meriweather's May 22 Minute Order directing that Defendants "confer with USCIS about drafting an email or other communication from the field directorate to the field offices that reinforces the July 7th Policy and reiterates that the processing of naturalization applications, including scheduling naturalization interviews for MAVNIs, should not be delayed."⁴ Specifically, in the May 31 email to Judge Meriweather, Defendants stated that "USCIS does not believe additional guidance on this topic is needed, as USCIS has very recently issued guidance to field offices consistent with the Magistrate's order." According to Defendants, the May 17 memorandum provides comprehensive guidance about military naturalization adjudication procedures, instructs USCIS officers on the procedures for interviewing, adjudicating, and naturalizing MAVNI soldiers, and specifically addresses USCIS's requirements for enhanced DoD background checks and MSSD/NSD determinations.

The May 17 guidance should be included, as it purports to reflect, among other things, Defendants' "comprehensive" understanding and explanation of the July 7 Policy. This is

⁴ Defendants withheld the existence of this guidance from this Court, including at a May 21 hearing with Judge Meriweather. Unfortunately, Defendants still have not taken steps to address the problems identified by the Court in its April 12, 2017 Order (Dkt. 135), but instead seem to be reinforcing the poor practices resulting in the post-MSSD delay identified by the Court. Today, class members who have passed Top Secret security clearance checks and more are waiting *longer* for naturalization *following* their "clearance" than they would have faced for the entire naturalization process, start to finish, including all of USCIS's background checks, prior to implementation of the July 7 Policy and the other MAVNI holds.

particularly so because Defendants have designated for inclusion in the administrative record several post-July 7, 2017 documents specifically on the grounds that they explain the July 7 Policy, including a July 27, 2017 email from Claudia F. Young (USCIS CAR at 4-6) and the March 5, 2018 Declaration of Mr. Renaud (USCIS CAR at 1-3). Defendants should not be permitted to include in the record self-serving post-July 7, 2017 explanatory guidance for purposes of judicial review, while at the same time withholding the actual explanatory guidance being sent to the field. Similarly, Defendants should be compelled to include in the agency record any other guidance to the field that explains, countermands, amends, or modifies the relevant aspects of the July 7 Policy.

II. BRIEFING REGARDING SUMMARY JUDGMENT

As this Court already ordered, the briefing schedule for summary judgment should await the resolution of the outstanding administrative record issues. Dkt. 124 (“briefing . . . is **SUSPENDED** until the final administrative record is determined”). The administrative record with respect to all the claims, including individually-named Plaintiff’s claims, is not yet finalized. Accordingly, and in consideration of other issues, Plaintiffs respectfully submit that it is premature to move forward with briefing on Defendants’ summary judgment motion.⁵

III. NIO CLASS MEMBERS REACHING THE 3-YEAR TIMEOUT LIMIT FOR DTP

At the April 11, 2018 hearing, the Court noted that class members would be “up against the 3-year deadline very soon.” April 11, 2018, Tr. 33:24-25; 124:19-24. Defendants responded

⁵ In this response, Plaintiffs address only the issues identified by the Court in its June 4 Order, including the question of the completeness of the administrative record. Plaintiffs reserve the right (in opposition to summary judgment or otherwise) to present evidence and seek discovery, as appropriate, for their claims that are not limited solely to review of the administrative record, such as Plaintiffs’ claims under 5 U.S.C. § 706(1) (*e.g.*, evidence bearing on the so-called *TRAC* factors) and Plaintiffs’ constitutional claims. Just by way of example, with regard to their due process claims, Plaintiffs reserve the right to brief their entitlement to discovery on the process that Defendants provide to soldiers to challenge unsuitable MSSD/NSD determinations and USCIS naturalization determinations based on the same.

that they were “not aware of anybody that is at the 3-year mark or close to it of timing out right now” *Id.* 34:8-10. However, Defendants’ reporting reveals that Defendants are aware of class members who are beyond the 3-year mark already and many more who will reach that point much sooner than Defendants represented. Moreover, the problem is not limited to the class members currently identified in the reporting. Other class members not identified in the Defendants’ class list also must be considered, as they may be facing the 3-year mark issue as well. In addition, some of the *Kirwa* class members (as they transition to the *Nio* class) may already or soon will be beyond the 3-year mark and therefore, they too must be considered.

In an email dated May 21, 2018, Plaintiffs raised this issue with Defendants. Defendants proposed no solution and instead stated that they “do not believe this will ripen into an actual problem,” and that the Army “can extend the DTP time period so that time-out should not happen.”⁶ Yet, Defendants’ response to Plaintiffs indicated that a number of class members beyond the 3-year mark *already have been discharged from the Army.*⁷ Defendants’ failure to act on the timeout rule, by itself, renders USCIS’s July 7 Policy unreasonable, arbitrary, and capricious. DoD will not complete enhanced background checks or MSSD/NSD determinations on soldiers who are discharged from the service. Accordingly, USCIS’s policy of waiting for such non-existent determinations to occur, or otherwise to account for such circumstances, is *per se* unlawful.

⁶ In their latest report (Dkt. 153), without explanation, Defendants appear to have changed certain enlistment dates and dropped certain class members. Regardless of these unexplained changes, it is apparent that many class members face the 3-year rule issues.

⁷ In addition, the risk that class members beyond the 3-year rule may face deportation is a real one. *See* <https://www.stripes.com/foreign-born-recruit-faces-deportation-despite-assurances-by-mattis-1.531062> (news article on DEP MAVNI facing deportation).

IV. OTHER CLASS-WIDE ISSUES RELATING TO DISCHARGED MAVNIS

Plaintiffs address several other class-wide issues relating to MAVNI soldiers who are discharged prior to attending BCT. The first issue is whether these soldiers are eligible to naturalize under 8 U.S.C. § 1440 if they are separated from service with so-called “entry level” or “uncharacterized” discharges. As a matter of law, such soldiers remain eligible for naturalization.

Section 1440(a) provides:

[a]ny person who, while an alien or a noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve . . . during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, **if separated from such service, was separated under honorable conditions**, may be naturalized as provided in this section

8 U.S.C § 1440(a) (emphasis added). Thus, any Selected Reserve soldier eligible for naturalization as a result of his or her service during a period of armed conflict remains eligible for naturalization after separation from service, so long as the soldier is separated “under honorable conditions.”

The law clearly specifies that the service of a reserve soldier is deemed to be “under honorable conditions” unless there is a specific finding by a court-martial or other convened board of commissioned officers that the soldier’s service is other than honorable:

A member of a reserve component who is separated for cause, except under section 12684 of this title [irrelevant here], **is entitled to a discharge under honorable conditions** unless—

- (1) the member is discharged under conditions other than honorable under an approved sentence of a court-martial or under the approved findings of a board of officers convened by an authority designated by the Secretary concerned or
- (2) the member consents to a discharge under conditions other than honorable with a waiver of proceedings of a court-martial or a board.

10 U.S.C. § 12685. As a consequence, in the absence of a specific “other than honorable” finding by a court-martial or other board of officers, any class member discharged purportedly by reason

of unsatisfactory background check results must be separated “under honorable conditions” as a matter of law, irrespective of the label attached to the discharge by DoD or the Army. The statute is clear and controlling on this issue.

DoD’s own regulations confirm this point. For example, DoD Instruction No. 1332.14 directs that, “[i]n accordance with section 12685,” an uncharacterized entry-level separation of a reserve service member shall be “under honorable conditions.” Ex. 2 at 33. Furthermore, the DoD Instruction makes clear that, for any administrative matters that require characterization of service as honorable or general (such as future benefits or naturalization eligibility, for example), an uncharacterized entry-level separation must be treated as such a separation. *Id.* at 32 (“With respect to administrative matters outside this instruction that require a characterization as honorable or general, an entry-level separation will be treated as the required characterization.”). Navy regulations are to the same effect. *See* 32 C.F.R. § 724.109(a)(4)(ii) (“With respect to administrative matters outside the administrative separation system that require a characterization of service as Honorable or General, an Entry Level Separation shall be treated as the required characterization. An Entry Level Separation for a member of a Reserve component separated from the Delayed Entry Program is under honorable conditions.”).

Accordingly, USCIS has no lawful basis to refuse adjudication of, or to deny, class member naturalization applications due to “entry level” or “uncharacterized” discharges by the Army.⁸

A second class-wide issue relating to the discharge of class members, which arose after the Court’s June 4 Order, is Defendants’ new practice of not forwarding MSSD results to USCIS for

⁸ For the same reasons, there is no merit in USCIS’s contention that it may delay adjudication of MAVNI applications pending completion of DoD’s MSSDs because such determinations could result in the soldier’s discharge. As demonstrated above, discharge in these circumstances does not affect the soldier’s eligibility for naturalization under Section 1440(a).

soldiers who purportedly have been found “unsuitable.” Instead, DoD is processing such soldiers only for discharge. In particular, in their recent reports to the Court, Defendants have indicated that several soldiers have been found “unsuitable” without providing the corresponding date on which USCIS was notified of MSSD completion. *See* Dkt. 145; Dkt. 153. When Plaintiffs inquired about this inconsistency as to one of the soldiers, Defendants responded as follows: “With regards to [name redacted], there is no MSSD. The individual was determined to be unsuitable for military service. He is in the process of being discharged from the military.”

Yet, the MSSD is the “Military Service Suitability Determination.” If a soldier “was determined to be unsuitable for military service,” then, by definition, there must have been an MSSD. Now, however, Defendants apparently are taking the position that if the determination is “unsuitable,” “no MSSD” has been made, so that no MSSD completion need be reported to USCIS for naturalization purposes. Instead, such soldiers will be processed only for discharge.

Plaintiffs ask that the Court consider these issues that MAVNIs are facing.⁹

⁹ As the Court did not instruct Plaintiffs to address in this submission the “situation of the 20 MAVNIs referenced in ECF No. 145 who naturalized before DOD uploaded their MSSD to the shared portal,” Plaintiffs will reserve their statements regarding this issue until after Defendants provide the Court-ordered explanation on June 14, 2018.

Respectfully submitted,

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EXHIBIT 1



Department of Defense INSTRUCTION

NUMBER 1304.26

March 23, 2015

Incorporating Change 2, April 11, 2017

USD(P&R)

SUBJECT: Qualification Standards for Enlistment, Appointment, and Induction

References: See Enclosure 1

1. PURPOSE. In accordance with the authority in DoD Directive 5124.02 (Reference (a)), this instruction:

- a. Reissues DoD Instruction (DoDI) 1304.26 (Reference (b)).
- b. Updates established policies and responsibilities for basic entrance qualification standards for enlistment, appointment, and induction into the Military Services and delegates the authority to specify certain standards to the Secretaries of the Military Departments.
- c. Establishes the standards for age, aptitude, citizenship, dependents, education, medical, character/conduct, physical fitness, and other disqualifying conditions, which are cause for non-qualification for military service. Other standards may be prescribed in the event of national emergency.
- d. Sets standards designed to ensure that individuals under consideration for enlistment, appointment, or induction are able to perform military duties successfully, and to select those who are the most trainable and adaptable to Service life.

2. APPLICABILITY. This instruction applies to:

- a. OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this instruction as the "DoD Components").
- b. Applicants for initial enlistment into the Military Services Regular and Reserve Components.
- c. Applicants for appointment as commissioned or warrant officers in the Regular and Reserve Components.

DoDI 1304.26, March 23, 2015

d. Applicants for reenlistment following release from active duty into subsequent Regular or Reserve Components (including the Army National Guard of the United States and the Air National Guard of the United States) after a period of more than 6 months has elapsed since discharge.

e. Applicants for contracting into the Reserve Officer Training Corps (ROTC), and all other Military Services special officer personnel procurement programs, including the Military Service Academies.

f. All individuals being inducted into the Military Services.

3. POLICY. It is DoD policy to:

a. Use common entrance qualification standards for enlistment, appointment, and induction into the Military Services.

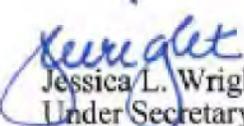
b. Avoid inconsistencies and inequities based on ethnicity, gender, race, religion, or sexual orientation in the application of these standards by the Military Services.

c. Judge the suitability of individuals to serve in the Military Services on the basis of their adaptability, potential to perform, and conduct.

4. RESPONSIBILITIES. See Enclosure 2.

5. RELEASABILITY. **Cleared for public release**. This instruction is available on ~~the Internet from~~ the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

6. EFFECTIVE DATE. This instruction is effective March 23, 2015.


Jessica L. Wright
Under Secretary of Defense for
Personnel and Readiness.

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1. References
2. Responsibilities
3. Enlistment, Appointment, and Induction Criteria
4. Enlistment Waivers

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ENCLOSURE 1

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- (a) DoD Directive 5124.02, "Under Secretary of Defense for Personnel and Readiness (USD(P&R))," June 23, 2008
- (b) DoD Instruction 1304.26, "Qualification Standards for Enlistment, Appointment, and Induction," September 20, 2005, as amended (hereby cancelled)
- (c) Title 10, United States Code
- (d) Section 313 of Title 32, United States Code
- (e) Title 8, United States Code
- (f) DoD Instruction 1145.01, "Qualitative Distribution of Military Manpower," December 12, 2013, as amended
- (g) DoD Instruction 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," April 28, 2010, as amended
- (h) DoD Instruction 1308.3, "DoD Physical Fitness and Body Fat Programs Procedures," November 5, 2002
- (i) Executive Order 12968
- (j) DoD Instruction 1010.01, "Military Personnel Drug Abuse Testing Program (MPDATP)," September 13, 2012
- (k) DoD Instruction 1010.16, "Technical Procedures for the Military Personnel Drug Abuse Testing Program (MPDATP)," October 10, 2012
- (l) Section 922 of Title 18, United States Code

DoDI 1304.26, March 23, 2015

ENCLOSURE 2

RESPONSIBILITIES

1. ASSISTANT SECRETARY OF DEFENSE FOR *MANPOWER AND* RESERVE AFFAIRS (ASD(*M&RA*)). Under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), the ASD(*M&RA*) acts as an advisor to the USD(P&R) on the Reserve enlistment and appointment standards.

2. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS (ASD(HA)). Under the authority, direction, and control of the USD(P&R), the ASD(HA) acts as an advisor to the USD(P&R) on the medical requirements of the standards in Enclosure 3 of this instruction.

3. ASSISTANT SECRETARY OF DEFENSE FOR READINESS AND FORCE MANAGEMENT (ASD(R&FM)). Under the authority, direction, and control of the USD(P&R), the ASD(R&FM):

a. Acts as an advisor to the USD(P&R) on the height and weight requirements of the standards in Enclosure 3 of this instruction.

b. Ensures the U.S. Military Entrance Processing Command assists the Military Services in implementing the standards in Enclosure 3 of this instruction.

4. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments:

a. Oversee conformance with this instruction.

b. Recommend suggested changes to this instruction to the USD(P&R) as necessary.

c. Establish other Service-specific standards as necessary to implement this instruction.

d. Review all standards on an annual basis.

e. Establish procedures to grant waivers, accomplish reviews, and require individuals to meet the appropriate standards or be granted an exception pursuant to section 504(a) of Title 10, United States Code (U.S.C.) (Reference (c)).

f. Request approval from the USD(P&R) for generalized exceptions to these standards as permitted by law.

DoDI 1304.26, March 23, 2015

g. Use the standards in Enclosure 3 of this instruction to determine the entrance qualifications for all individuals being enlisted, appointed, or inducted into any component of the Military Services.

ENCLOSURE 3

ENLISTMENT, APPOINTMENT, AND INDUCTION CRITERIA

1. GENERAL ELIGIBILITY CRITERIA

a. Entrance Considerations. Accession of qualified individuals will be a priority when processing applicants for the Military Services.

b. Eligibility Determination. Eligibility will be determined by the applicant's ability to meet all requirements of this instruction, to include obtaining waivers. Applicants will not be enlisted, appointed, or inducted unless all requirements of this instruction are met.

2. BASIC ELIGIBILITY CRITERIA

a. Age

(1) To be eligible for Regular enlistment, the minimum age for enlistment is 17 years and the maximum age is 42 years in accordance with section 505 of Reference (c). The maximum age for a prior service enlistee is determined by adding the individual's years of prior service to age 42. The Secretary concerned will establish enlistment age standards for the Reserve Components in accordance with section 12102 of Reference (c).

(2) Age limitations for appointment as a commissioned or warrant officer normally depend on the Military Service concerned. In accordance with section 532 of Reference (c), most persons appointed as commissioned officers must be able to complete 20 years of active commissioned service before their 62nd birthday to receive a Regular commission.

(3) In accordance with section 12201 of Reference (c), a person will be at least 18 years of age for appointment as a Reserve Officer. The maximum age qualification for initial appointment as a Reserve Officer will not be less than 47 years of age for individuals in a health profession specialty designated by the Secretary concerned as a specialty critically needed in wartime.

(4) In accordance with section 313 of Title 32, U.S.C. (Reference (d)), to be eligible for original enlistment in the National Guard, a person must be at least 17 years of age and under 45, or under 64 years of age and a former member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps. To be eligible for reenlistment, a person must be under 64 years of age.

(5) In accordance with section 313 of Reference (d), to be eligible for appointment as an officer of the National Guard, a person must be at least 18 years of age and under 64 years of age.

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b. Citizenship

(1) To be eligible for Regular or Reserve enlistment, an individual must meet one of the conditions outlined in section 504(b) of Reference (c); however, the Secretary concerned may authorize the enlistment of a person not described in this section if the Secretary determines that such enlistment is vital to the national interest.

(2) To be eligible for appointment as a commissioned officer (other than as a commissioned warrant officer) in the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps, the individual must be a citizen of the United States as outlined in section 532 of Reference (c). The Secretary of Defense (or the Secretary of Homeland Security for the Coast Guard, when not operating as a Service under the Navy) may waive the requirement of U.S. citizenship with respect to a person who has been lawfully admitted to the United States for permanent residence, or for a United States national otherwise eligible for appointment as a cadet or midshipman in accordance with section 2107(a) of Reference (c), when the Secretary determines that the national security so requires, but only for an original appointment in a grade below the grade of major or lieutenant commander.

(3) To be eligible for appointment as a Reserve Officer in an armed force, the individual must be a citizen of the United States or lawfully admitted to the United States for permanent residence in accordance with section 1101 et seq of Title 8, U.S.C. (Reference (e) (also known as the “Immigration and Nationality Act”)), or have previously served in the Military Services or in the National Security Training Corps as outlined under section 12201 of Reference (c).

(4) To be eligible for enlistment in the National Guard, a person must meet one of the conditions in section 504(b) of Reference (c); however, the Secretary concerned may authorize the enlistment of a person not described in this section if the Secretary determines that such enlistment is vital to the national interest.

(5) To become an officer of the Army National Guard of the United States or the Air National Guard of the United States, the individual must first be appointed to, and be federally recognized in, the same grade in the Army National Guard or the Air National Guard. In accordance with 12201 of Reference (c), the individual must be a citizen of the United States or lawfully admitted to the United States for permanent residence in accordance with 1101 et seq of Reference (e), or have previously served in Military Service or in the National Security Training Corps.

c. Education

(1) Possession of a high school diploma is desirable, although not mandatory, for enlistment in any component of the Military Services. Section 520 of Reference (c) states that a person who is not a high school graduate may not be accepted for enlistment in the Military Services unless the score of that person on the Armed Forces Qualification Test (AFQT) is at or above the thirty-first percentile. Section 520 also states that a person may not be denied enlistment in the Military Services solely because he or she does not have a high school diploma if his or her enlistment is needed to meet established strength requirements.

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(2) Bearers of alternative credential (e.g., General Educational Development Certificates and certificates of attendance) and non-graduates may be assigned lower enlistment priority based on first-term attrition rates for those credentials. DoDI 1145.01 (Reference (f)) identifies the authority for establishing the qualitative distribution objectives for accessions.

(3) Educational requirements for appointment as a commissioned or warrant officer are determined by each Military Service. Section 12205 of Reference (c) establishes education requirements for certain Reserve appointments. Generally, and unless excepted under section 12205 of Reference (c), a baccalaureate degree is required for appointment above the grade of first lieutenant in the Army, Air Force, and Marine Corps Reserves or lieutenant junior grade in the Navy Reserve, or to be federally recognized in a grade above the grade of first lieutenant as a member of the Army National Guard or Air National Guard. In addition, special occupations (e.g., physician or chaplain) may require additional vocational credentials as determined by the Secretary concerned.

d. Aptitude

(1) Overall aptitude requirements for enlistment and induction are based on applicant scores on the AFQT derived from the Armed Services Vocational Aptitude Battery. Applicant scores are grouped into percentile categories. Persons who score in AFQT Category V (percentiles 1-9) are ineligible to enlist. In accordance with section 520 of Reference (c), the number of persons who enlist in any Armed Force during any fiscal year (i.e., accession cohort) who score in AFQT Category IV (percentiles 10-30) may not exceed 20 percent of the total number of persons enlisted by Service. Reference (f) identifies the authority for establishing the qualitative distribution objectives for accessions.

(2) For officers and warrant officers, no single test or instrument is used as an aptitude requirement for appointment.

e. Medical

(1) In accordance with DoDI 6130.03 (Reference (g)), the pre-accession screening process will be structured to identify any medical condition, including mental health, that disqualifies an applicant for military service.

(2) Individuals who fail to meet established medical standards, as defined in Reference (g), may be considered for a medical waiver. Each Service's waiver authority for medical conditions will make a determination based on all available information regarding the issue or condition. Waiver requirements are outlined in Enclosure 4 of this instruction.

f. Physical Fitness

(1) In accordance with DoDI 1308.3 (Reference (h)), all individuals must meet the pre-accession height and weight standards as prescribed in Table 1 of the Reference (h).

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(2) The Military Services may have additional physical fitness screening requirements.

g. Dependency Status

(1) The Military Services may not enlist married individuals with more than two dependents under the age of 18 or unmarried individuals with custody of any dependents under the age of 18; however, the Secretary concerned may grant a waiver for particularly promising entrants. Waiver requirements are outlined in Enclosure 4 of this instruction.

(2) The Military Services will specify the circumstances under which individuals who have dependents may become commissioned officers or warrant officers; variations in policy may be affected by the commissioning source (e.g., Service Academies, ROTC, or Officer Candidate School).

h. Character/Conduct. The underlying purpose of these enlistment, appointment, and induction standards is to minimize entrance of persons who are likely to become disciplinary cases, security risks, or who are likely to disrupt good order, morale, and discipline. The Military Services are responsible for the defense of the Nation and should not be viewed as a source of rehabilitation for those who have not subscribed to the legal and moral standards of society at-large. As a minimum, an applicant will be considered ineligible if he or she:

(1) Is under any form of judicial restraint (bond, probation, imprisonment, or parole).

(2) Has a significant criminal record. Section 504 of Reference (c) prohibits any person who has been convicted of a felony from being enlisted in any of the Military Services; however, section 504 authorizes a waiver in meritorious cases. Except as limited by paragraph (3), below, persons convicted of felonies may request a waiver to permit their enlistment. The waiver procedure is not automatic, and approval is based on each individual case. Waiver requirements are outlined in Enclosure 4 of this instruction.

(3) Has a State or federal conviction, or a finding of guilty in a juvenile adjudication, for a felony crime of rape, sexual abuse, sexual assault, incest, any other sexual offense, or when the disposition requires the person to register as a sex offender. In these cases, the enlistment, appointment, or induction will be prohibited and no waivers are allowed.

(4) Has been previously separated from the Military Services under conditions other than honorable or for the good of the Military Service concerned.

(5) Has exhibited antisocial behavior or other traits of character that may render the applicant unfit for service.

(6) Receives an unfavorable final determination by the DoD Consolidated Adjudication Facility on a completed National Agency Check with Law and Credit (NACLC) or higher-level investigation, which is adjudicated to the National Security Standards in accordance with Executive Order 12968, Reference (i), during the accession process.

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(a) An applicant may be accessed (including shipping him or her to training or a first duty assignment) provided that a NACLIC or higher-level investigation was submitted and accepted by the investigative service provider (Office of Personnel Management (OPM)) and an advanced fingerprint was conducted, and OPM did not identify any disqualifying background information.

(b) If NACLIC adjudication is not completed until after accession, any additional disqualifying information identified during the adjudication should be transmitted to the appropriate personnel or human resource offices, as determined by the Services, for appropriate action.

i. Drugs and Alcohol. A current or history of alcohol dependence, drug dependence, alcohol abuse, or other drug abuse is incompatible with military life and does not meet military standards in accordance with Reference (g). Pursuant to DoDI 1010.01 (Reference (j)), the pre-accession screening process is structured to identify individuals with a history of drug (including pharmaceutical medications, illegal drugs and other substances of abuse) and alcohol abuse.

(1) Drug use (to include illegal drugs, other illicit substances, and pharmaceutical medications), drug abuse, and alcohol abuse may be self-admitted by an applicant, discovered during the medical screening process, or identified by the drug and alcohol test (DAT), which is administered at the Military Entrance Processing Stations (MEPS) or other approved military processing facility.

(2) Current or history of alcohol dependence, drug dependence, alcohol abuse, or other drug abuse may be a medically disqualifying condition based on the standards in accordance with Reference (g). The MEPS Chief Medical Officer or equivalent, when the physical is not performed at MEPS, will make that determination based on all of the information available on a case-by-case basis. These instances will be treated as a medical disqualification and handled in accordance with the guidance provided in paragraphs 2e(1) through 2e(2) of this enclosure.

(3) Individuals who test positive for illegal drugs on the DAT, which is administered as part of the accession physical, will be disqualified. A waiver may be requested. Waiver requirements are outlined in Enclosure 4 of this instruction.

(4) Service qualification standards regarding drugs and alcohol may be more restrictive.

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ENCLOSURE 4

ENLISTMENT WAIVERS

1. WAIVER REQUIREMENTS. In accomplishing whole person reviews of enlistment eligibility, the following categories and combinations of categories would require a favorable waiver determination by the Secretary of the Military Department concerned for the applicant to be considered qualified.

a. Medical Waiver. A medical waiver is required for enlistment qualification of an applicant who has or may have had a disqualifying medical condition in accordance with Reference (g).

b. Dependent Waiver. A dependent waiver is required when an applicant is married with more than two dependents under the age of 18 or when an applicant is unmarried and has custody of any dependents under the age of 18.

c. Conduct Waiver. In processing conduct waiver requests, the Military Services may require information about the “who, what, when, where, and why” of the offense in question; and letters of recommendation from responsible community leaders, such as school officials, clergy, and law enforcement officials, attesting to the applicant’s character or suitability for enlistment. Waivers are not authorized for cases noted in Enclosure 3, paragraph 2.h(3).

(1) A Conduct Waiver is required when the final finding of the courts or other adjudicating authority is a conviction or other adverse adjudication of:

(a) One “major misconduct” offense, or;

(b) Two “misconduct” offenses, or;

(c) A pattern of misconduct.

(1) One “misconduct” offense and four “non-traffic” offenses.

(2) Five or more “non-traffic” offenses.

(2) Use the Table of this enclosure to determine the appropriate level of offense and applicable code. See section 2 of this enclosure for additional guidance.

d. Drug Waiver. A drug waiver is required when an applicant or enlistee is confirmed positive for the presence of drugs at the time of the original or subsequent physical examination (i.e., tests positive on the DAT at a MEPS or equivalent facility). Drug waivers for these applicants may be considered and granted or rejected only after the disqualification period established in section 6 of Enclosure 7 of DoDI 1010.16 (Reference (k)) ends.

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2. CLASSIFYING CONDUCT OFFENSES. The procedures that will be used in the classifying and coding of all conduct offenses are:

a. Initial Classification. Align the offense that is the subject of adverse adjudication with an offense from the Table of this enclosure. **As an exception**, any offense classified as a felony under State or federal jurisdiction will be treated as a major misconduct offense for DoD purposes regardless of where similar charges are listed.

b. Non-Similar Offenses. If unable to find a similar charge, the Military Services will:

(1) Treat the offense as a major misconduct offense if the adjudicating authority can impose a maximum period of confinement that exceeds 1 year.

(2) Treat the offense as a misconduct offense if the adjudicating authority can impose a maximum period of confinement that exceeds 6 months but is not more than 1 year.

(3) Treat all other offenses as either other non-traffic offenses or traffic offenses, depending on the nature of the offense.

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Table. Conduct Waiver Codes

TRAFFIC OFFENSES	
OFFENSE CODE	OFFENSE TITLE
100	Bicycle ordinance violation.
101	Blocking or retarding traffic.
102	Contempt of court for minor traffic offenses.
103	Crossing yellow line; driving left of center.
104	Disobeying traffic lights, signs, or signals.
105	Driving on shoulder.
106	Driving uninsured vehicle.
107	Driving with blocked vision and/or tinted window.
108	Driving with expired plates or without plates.
109	Driving with suspended or revoked license.
110	Driving without license.
111	Driving without registration or with improper registration.
112	Driving wrong way on one-way street.
113	Failure to appear for traffic violations.
114	Failure to comply with officer's directive.
115	Failure to have vehicle under control.
116	Failure to signal.
117	Failure to stop or yield to pedestrian.
118	Failure to submit report after accident.
119	Failure to yield right-of-way.
120	Faulty equipment such as defective exhaust, horn, lights, mirror, muffler, signal device, steering device, tail pipe, or windshield wipers.
121	Following too closely.
122	Hitchhiking.
123	Improper backing such as backing into intersection or highway, backing on expressway, or backing over crosswalk.
124	Improper blowing of horn.
125	Improper passing such as passing on right, passing in no-passing zone, passing stopped school bus, or passing pedestrian in crosswalk.
126	Improper turn.
127	Invalid or unofficial inspection sticker or failure to display inspection sticker.
128	Jaywalking.
129	Leaving key in ignition.
130	Leaving scene of accident (when not considered hit and run).
131	License plates improperly displayed or not displayed.
132	Operating overloaded vehicle.
133	Racing, dragging, or contest for speed.
134	Reckless, careless, or imprudent driving (considered a traffic offense when the fine is less than \$300 and there is no confinement). Court costs are not part of a fine.
135	Reserved for future use.
136	Seat belt and/or child restraint violation.
137	Skateboard, roller skate, or inline skate violation.
138	Speeding.
139	Spilling load on highway.
140	Spinning wheels, improper start, zigzagging, or weaving in traffic.
141	Violation of noise control ordinance.
142	Other traffic offenses not specifically listed.
143	Reserved for future use.
144	Reserved for future use.

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Table. Conduct Waiver Codes, continued

NON-TRAFFIC OFFENSES	
OFFENSE CODE	OFFENSE TITLE
200	Altered driver's license or identification.
201	Assault (simple assault with fine or restitution of \$500 or less and no confinement).
202	Carrying concealed weapon (other than firearm); possession of brass knuckles.
203	Check, worthless, making or uttering, with intent to defraud or deceive (less than \$500).
204	Committing a nuisance.
205	Conspiring to commit misdemeanor.
206	Curfew violation.
207	Damaging road signs.
208	Discharging firearm through carelessness or within municipal limits.
209	Disobeying summons; failure to appear (other than traffic).
210	Disorderly conduct; creating disturbance; boisterous conduct.
211	Disturbing the peace.
212	Drinking alcoholic beverages on public transportation.
213	Drunk in public.
214	Dumping refuse near highway.
215	Failure to appear, contempt of court (all offenses except felony proceedings).
216	Failure to appear, contempt of court (felony proceedings).
217	Failure to stop and render aid after accident.
218	Fare and/or toll evasion.
219	Harassment, menacing, or stalking.
220	Illegal betting or gambling; operating illegal handbook, raffle, lottery, or punchboard; cockfighting.
221	Indecent exposure.
222	Indecent, insulting, or obscene language communicated directly or by telephone to another person.
223	Jumping turnstile (to include those States that adjudicate jumping a turnstile as petty larceny).
224	Juvenile adjudications such as beyond parental control, incorrigible, runaway, truant, or wayward.
225	Killing a domestic animal.
226	Littering.
227	Loitering.
228	Malicious mischief (fine or restitution of \$500 or less and no confinement).
229	Pandering.
230	Poaching.
231	Purchase, possession, or consumption of alcoholic beverages or tobacco products by minor.
232	Removing property from public grounds.
233	Removing property under lien.
234	Robbing an orchard.
235	Shooting from highway.
236	Throwing glass or other material in roadway.
237	Trespass (non-criminal or simple).
238	Unlawful assembly.
239	Unlawful manufacture, sale, possession, or consumption of liquor in public place.
240	Unlawful use of long-distance telephone calling card.
241	Using or wearing unlawful emblem and/or identification.
242	Vagrancy.
243	Vandalism (fine or restitution of \$500 or less and no confinement).
244	Violation of fireworks laws.
245	Violation of fish and game laws.
246	Violation of leash laws.
247	Violation of probation.
248	Other non-traffic offenses not specifically listed.
249	Reserved for future use.

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Table. Conduct Waiver Codes, continued

MISCONDUCT OFFENSES	
OFFENSE CODE	OFFENSE TITLE
300	Aggravated assault, fighting, or battery (more than \$500 fine or restitution or confinement).
301	Carrying of weapon on school grounds (other than firearm).
302	Concealment of or failure to report a felony.
303	Contributing to delinquency of minor.
304	Crimes against the family (non-payment of court-ordered child support and/or alimony).
305	Criminal mischief (more than \$500 fine or restitution or confinement).
306	Criminal trespass.
307	Desecration of grave.
308	Domestic battery and/or violence not considered covered by section 922 of Title 18, U.S.C. (Reference (I)), referred to in this issuance as the "Lautenberg Amendment."
309	Driving while drugged or intoxicated; driving while ability impaired; permitting driving under the influence.
310	Illegal or fraudulent use of a credit card or bank card (value less than \$500).
311	Larceny or conversion (value less than \$500).
312	Leaving scene of an accident or hit and run.
313	Looting.
314	Mailbox destruction.
315	Mailing of obscene or indecent matter (including e-mail).
316	Possession of marijuana or drug paraphernalia.
317	Prostitution or solicitation for prostitution.
318	Reckless, careless, or imprudent driving (considered a misdemeanor when the fine is \$300 or more or when confinement is imposed; otherwise, considered a minor traffic offense).
319	Reckless endangerment.
320	Resisting arrest or eluding police.
321	Selling or leasing weapons.
322	Stolen property, knowingly receiving (value less than \$500).
323	Throwing rocks on a highway; throwing missiles at sporting events; throwing objects at vehicles.
324	Unauthorized use or taking of a vehicle or conveyance from family member; joy riding.
325	Unlawful carrying of firearms or carrying concealed firearm.
326	Unlawful entry.
327	Use of telephone, Internet, or other electronic means to abuse, annoy, harass, threaten, or torment another.
328	Vandalism (more than \$500 fine or restitution or confinement).
329	Willfully discharging firearm so as to endanger life; shooting in public.
330	Other misconduct offenses not specifically listed.
331	Reserved for future use.
332	Reserved for future use.

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Table. Conduct Waiver Codes, continued

MAJOR MISCONDUCT OFFENSES	
OFFENSE CODE	OFFENSE TITLE
400	Aggravated assault; assault with dangerous weapon; maiming.
401	Arson.
402	Attempt to commit a felony.
403	Breaking and entering with intent to commit a felony.
404	Bribery.
405	Burglary.
406	Carjacking.
407	Carnal knowledge of a child.
408	Carrying of weapon on school grounds (firearm).
409	Check, worthless, making or uttering, with intent to defraud or deceive (over \$500).
410	Child abuse.
411	Child pornography.
412	Conspiring to commit a felony.
413	Criminal libel.
414	Domestic battery and/or violence as defined in the Lautenberg Amendment. (Waiver not authorized if applicant was convicted of this offense.)
415	Embezzlement.
416	Extortion.
417	Forgery, knowingly uttering or passing forged instrument (except for altered identification cards).
418	Grand larceny or larceny (value of \$500 or more).
419	Grand theft auto.
420	Hate crimes.
421	Illegal and/or fraudulent use of a credit card, bank card, or automated card (value of \$500 or more).
422	Indecent acts or liberties with a child; molestation.
423	Indecent assault.
424	Kidnapping or abduction.
425	Mail matter; abstracting, destroying, obstructing, opening, secreting, stealing, or taking (not including the destruction of mailboxes).
426	Manslaughter.
427	Murder.
428	Narcotics or habit-forming drugs, wrongful possession or use (not including marijuana).
429	Negligent or vehicular homicide.
430	Perjury or subornation of perjury.
431	Possession or intent to use materials in a manner to make a bomb or explosive device to cause bodily harm or destruction of property.
432	Public record; altering, concealing, destroying, mutilating, obligation, or removing.
433	Rape, sexual abuse, sexual assault, criminal sexual abuse, incest, or other sex crimes. (See Section 2.h.(3) of Enclosure 3 of this instruction; waivers for these offenses are not authorized.)
434	Riot.
435	Robbery (including armed).
436	Sale, distribution, or trafficking of cannabis (marijuana) or any other controlled substance (including intent).
437	Sodomy (only when it is nonconsensual or involves a minor).
438	Stolen property, knowingly received (value of \$500 or more).
439	Terrorist threats (including bomb threats).
440	Violation of civil rights.
441	Other major misconduct offenses not specifically listed.
442	Reserved for future use.
443	Reserved for future use.

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

AFQT	Armed Forces Qualification Test
ASD(HA)	Assistant Secretary of Defense for Health Affairs
ASD(M&RA)	Assistant Secretary of Defense for <i>Manpower and</i> Reserve Affairs
ASD(R&FM)	Assistant Secretary of Defense for Readiness and Force Management
DAT	drug and alcohol test
DoDI	DoD instruction
MEPS	Military Entrance Processing Station
NACLC	National Agency Check with Law and Credit
OPM	Office of Personnel Management
ROTC	Reserve Officer Training Corps
U.S.C.	United States Code
USD(P&R)	Under Secretary of Defense for Personnel and Readiness

PART II. DEFINITIONS

Unless otherwise noted, these terms and their definitions are for the purposes of this instruction.

adjudicating authority. Any government official who is empowered to make findings or determinations concerning an alleged criminal offense (adult and juvenile) and establish responsibility for commission of the offense. Examples include judges, courts, magistrates, prosecutors, hearing officers, military commanders (for Article 15 actions pursuant to chapter 47 of Reference (c), suspension of dependent privileges, or similar actions), probation officers, juvenile referees, and parole officers or boards.

adverse adjudication (adult or juvenile)

A finding, decision, sentence, or judgment by an adjudicating authority, against an individual, that was other than unconditionally dropped or dismissed or the individual was

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acquitted is considered adverse adjudication. If the adjudicating authority places a condition or restraint that leads to dismissal, drops the charges, acquits, or the records are later expunged, or the charge is dismissed after a certain period of time, the adjudication is still considered adverse. A suspension of sentence, not processed, or a dismissal after compliance with imposed conditions is also adverse adjudication. This includes fines and forfeiture of bond in lieu of trial.

A conviction for violating any federal law (including chapter 47 of Reference (c)), or any State or municipal law or ordinance, is considered an adverse adjudication. For example, a shoplifter is reprimanded and required by the on-scene police officer, store security guard, or manager to pay for the item before leaving the store but is not charged, not found guilty, or is not convicted. In this situation, there is no adverse adjudication because no legal proceedings occurred and no adjudicating authority was involved.

conviction. The act of finding a person guilty of a crime, offense, or other violation of the law by an adjudicating authority.

dependent

A spouse of an applicant for enlistment.

An unmarried adopted child or an unmarried step-child under the age of 18 living with the applicant.

An unmarried biological child of the applicant under the age of 18.

Any person living with the applicant who is, by law or in fact, dependent upon the applicant for support, or who is not living with the applicant and is dependent upon the applicant for over one-half of his or her support.

Reserve Components. Includes the Army National Guard of the United States, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard of the United States, the Air Force Reserve, and the Coast Guard Reserve.

restitution. Any compensation in time, labor, or money for the adverse effects of an offense as a result of agreements from judicial or prosecutorial involvement. For example, an individual is adversely adjudicated for vandalism and is ordered by the adjudicating authority to replace or repair the damaged property.

service review. A formal review of condition(s) or event(s) that, based on Service-specific standards, may make an applicant for enlistment ineligible to serve. Once a Service review is complete, the Service may grant an exception to policy to allow an individual to serve. These standards are subject to change at the discretion of the Service.

waiver. A formal request to consider the suitability for service of an applicant who because of inappropriate conduct, dependency status, current or past medical conditions, or drug use may not be qualified to serve. Upon the completion of a thorough examination using a “whole

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person” review, the applicant may be granted a waiver. The applicant must have displayed sufficient mitigating circumstances that clearly justify waiver consideration. The Secretaries of the Military Departments may delegate the final approval authority for all waivers.

EXHIBIT 2



Department of Defense INSTRUCTION

NUMBER 1332.14

January 27, 2014

Incorporating Change 3, Effective March 22, 2018

USD(P&R)

SUBJECT: Enlisted Administrative Separations

References: See Enclosure 1

1. PURPOSE. This instruction:

- a. Reissues DoD Instruction (DoDI) 1332.14 (Reference (a)), in accordance with the authority in DoD Directive (DoDD) 5124.02 (Reference (b)).
- b. Establishes DoD policy, assigns responsibilities, and provides procedures governing administrative separation of enlisted Service members from the Military Services.
- c. Implements sections 518, 572(a)(2), and 578 of Public Law 112-239 (Reference (c)).

2. APPLICABILITY. This instruction applies:

- a. To OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (referred to collectively in this instruction as the "DoD Components"). The term "Military Services," as used in this instruction refers to the Army, the Navy, the Air Force, and the Marine Corps.
- b. Only to administrative separation proceedings initiated on or after the effective date of this instruction unless the Secretary of the Military Department concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.

3. POLICY. It is DoD policy that:

- a. The readiness of the Military Services be preserved by maintaining high standards of performance, conduct, and discipline. Separation promotes the readiness of the Military Services by providing an orderly means to:

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(1) Evaluate the suitability of persons to serve in the enlisted ranks of the Military Services based on their ability to meet required performance, conduct, and disciplinary standards.

(2) Maintain standards of performance, conduct, and discipline through characterization of service in a system that emphasizes the importance of honorable service.

(3) Achieve authorized force levels and grade distributions.

(4) Provide an orderly means of discharge for enlisted personnel.

b. Separations are used to strengthen the concept that military service is a unique calling, different from that of a civilian occupation. The acquisition of military status, whether through enlistment or induction, involves an individual's commitment to the United States, their Military Service, fellow citizens, and fellow Service members.

c. Organizing, training, and equipping newly accessed enlisted Service members represent a substantial investment. Separation of enlisted Service members prior to completion of their obligated service periods results in a significant loss of investment and generates a requirement for increased accessions.

d. DoD will provide enlisted Service members with the training, motivation, and professional leadership to enable them to meet required standards of performance, conduct, and discipline.

(1) Reasonable efforts should be made by the chain of command to identify enlisted Service members who exhibit the likelihood for early separation and improve their chances for retention through counseling, retraining, and rehabilitation.

(2) Enlisted Service members who do not demonstrate the commitment or potential for further service should be separated.

e. Motivated enlisted Service members may be discharged or released from active service before expiration of their obligated service to further their education at a college, university, or vocational or technical school when it is determined that discharge or release is appropriate. Enclosure 6 of this instruction contains procedures for enlisted Service member separations on the basis of school enrollment.

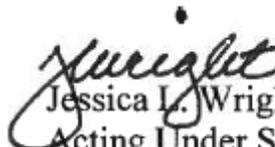
4. RESPONSIBILITIES. See Enclosure 2.

5. PROCEDURES. See Enclosures 3-6.

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6. **RELEASABILITY.** **Cleared for public release.** This Instruction is available on ~~the Internet~~ from the DoD Issuances Website at <http://www.dtic.mil/whs/directives> <http://www.esd.whs.mil/DD>.

7. **EFFECTIVE DATE.** This instruction is effective January 27, 2014.


Jessica L. Wright
Acting Under Secretary of Defense for
Personnel and Readiness

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1. References
2. Responsibilities
3. Reasons for Separation
4. Guidelines on Separation and Characterization
5. Procedures for Separation
6. Procedures for Early Release of Enlisted Military Personnel for College, Vocational, or Technical School Enrollment

Glossary

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- (a) DoD Instruction 1332.14, "Enlisted Administrative Separations," August 28, 2008, as amended (hereby cancelled)
- (b) DoD Directive 5124.02, "Under Secretary of Defense for Personnel and Readiness (USD(P&R))," June 23, 2008
- (c) Public Law 112-239, "National Defense Authorization Act for Fiscal Year 2013," January 2, 2013
- ~~(d) DoD Instruction 1205.05, "Transfer of Service Members Between Reserve and Regular Components of the Military Services," March 30, 2012~~
- (d) DoD Instruction 1300.04, "Inter-Service Transfer of Commissioned Officers," July 25, 2017*
- (e) DoD Directive 1344.10, "Political Activities by Members of the Armed Forces," February 19, 2008
- (f) DoD Instruction 1300.06, "Conscientious Objectors," ~~May 31, 2007~~ *July 12, 2017*
- (g) DoD Instruction 1315.15, "Special Separation Policies for Survivorship," ~~January 5, 2007,~~ *as amended May 19, 2017*
- (h) Title 10, United States Code
- (i) DoD Instruction 6490.04, "Mental Health Evaluations of Members of the Military Services," March 4, 2013
- (j) Committee on Nomenclature and Statistics, American Psychiatric Association, "Diagnostic and Statistical Manual of Mental Disorders," current edition
- (k) DoD Instruction 1332.18, "Disability Evaluation System (DES)," August 5, 2014
- (l) DoD Instruction 1215.13, "Reserve Component (RC) Member Participation Policy," May 5, 2015
- (m) Manual for Courts-Martial, United States, 2012
- (n) DoD Instruction 5200.02, "DoD Personnel Security Program (PSP)," March 21, 2014, as amended
- (o) DoD Directive 1308.1, "DoD Physical Fitness and Body Fat Program," June 30, 2004
- (p) DoD Instruction 1336.01, "Certificate of Release or Discharge from Active Duty (DD Form 214/5 Series)," August 20, 2009, as amended
- (q) DoD Instruction 1010.01, "Military Personnel Drug Abuse Testing Program (MPDATP)," September 13, 2012, *as amended*
- (r) DoD Instruction 1332.28, "Discharge Review Board (DRB) Procedures and Standards," April 4, 2004
- (s) Section 5303 of Title 38, United States Code
- (t) DoD Directive 6495.01, "Sexual Assault Prevention and Response (SAPR) Program," January 23, 2012, as amended
- (u) DoD Instruction 6495.02, "Sexual Assault Prevention and Response (SAPR) Program Procedures," March 28, 2013, as amended
- (v) Section 528 of Public Law 115-91*
- ~~(w)~~ *(v)* DoD Instruction 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," January 4, 2006

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(~~w~~x) DoD Instruction 1332.35, "Transition Assistance Program (TAP) for Military Personnel,"
February 29, 2016

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ENCLOSURE 2

RESPONSIBILITIES

1. ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS (ASD(M&RA)). The ASD(M&RA), under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)):

- a. Develops, maintains, and oversees procedural instructions for enlisted administrative separations.
- b. May establish, and delegate authority to establish, appropriate separation reporting requirements.

2. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments:

- a. Develop and maintain Service policies, standards, and procedures in accordance with this instruction to provide clear guidance and ensure uniform implementation of enlisted separation policy to the extent practicable for an administrative process based on command discretion.

- b. Ensure that enlisted Service member separation policies, standards, and procedures are applied consistently; fact-finding inquiries are conducted properly; abuses of authority do not occur; and failure to follow the provisions contained in this instruction results in appropriate corrective action.

- c. Establish processing time goals for the types of administrative separations authorized by this instruction.

- d. Prescribe appropriate internal procedures for periodically informing enlisted Service members about separation policies, and ensure they are provided separation information, as described in the procedures of this instruction, during the separation process.

- e. Ensure compliance with pre-separation health assessment requirements in accordance with the law as described in the procedures of this instruction.

- f. Prescribe internal procedures to ensure enlisted Service members who are convicted of a covered sexual offense and are not punitively discharged are processed for administrative separation in accordance with section 572(a)(2) of Reference (c), as described in the procedures of this instruction.

- g. Prescribe internal procedures to permit the review of a recommendation to involuntarily separate an enlisted Service member who made an unrestricted report of sexual assault in accordance with 578 of Reference (c), as described in the procedures of this instruction.

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ENCLOSURE 3

REASONS FOR SEPARATION

1. EXPIRATION OF SERVICE OBLIGATION

a. Basis. An enlisted Service member may be separated upon expiration of enlistment or fulfillment of service obligation. This includes separation authorized by the Secretary concerned when the enlisted Service member is within 30 days of the date of expiration of term of service and is serving outside the continental United States (OCONUS) in a location other than the member's jurisdiction of domicile.

b. Characterization or Description. Honorable, unless the separation is under one of the following circumstances:

(1) An entry-level separation is required under subparagraph 3c(1) of Enclosure 4.

(2) Characterization of service as general (under honorable conditions) is warranted in accordance with section 3 of Enclosure 4 on the basis of numerical scores accumulated in a formal, Service-wide rating system that evaluates conduct and performance on a regular basis.

(3) Another characterization is warranted upon discharge from the Individual Ready Reserve (IRR) in accordance with section 5 of Enclosure 5.

2. SELECTED CHANGES IN SERVICE OBLIGATIONS

a. Basis. An enlisted Service member may be separated for the following reasons:

(1) General demobilization or reduction in authorized strength.

(2) Early separation of personnel under a program established by the Secretary concerned. A copy of the document authorizing such program will be forwarded to the Office of the ASD(M&RA) at least 45 days prior to the desired date of announcement of an involuntary separation board or program.

(3) Acceptance of an active duty commission or appointment, or acceptance into a program leading to such commission or appointment in any branch of the Military Services.

(4) Immediate enlistment or reenlistment.

(5) Inter-Service transfer of inactive reserves in accordance with DoDI ~~1205.05~~ *1300.04* (Reference (d)).

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b. Characterization or Description. Honorable, unless the separation is under one of the following circumstances:

(1) An entry-level separation is required in accordance with section 3 of Enclosure 4.

(2) Characterization of service as general (under honorable conditions) is warranted in accordance with section 3 of Enclosure 4 on the basis of numerical scores accumulated in a formal, Service-wide rating system that evaluates conduct and performance on a regular basis.

(3) Another characterization is warranted upon discharge from the IRR in accordance with section 5 of Enclosure 5.

3. CONVENIENCE OF THE GOVERNMENT

a. Basis. An enlisted Service member may be separated for convenience of the U.S. Government for these reasons:

(1) Early Release to Further Education. An enlisted Service member may be separated to attend a college, university, vocational school, or technical school under guidelines outlined in Enclosure 6.

(2) Early Release to Accept Public Office. An enlisted Service member may be separated to accept public office only under circumstances authorized by the Military Department concerned and in accordance with DoDD 1344.10 (Reference (e)).

(3) Dependency or Hardship. Undue hardship does not necessarily exist solely because of altered present or expected income, family separation, or other inconveniences normally incident to military service. Upon request of the enlisted Service member and concurrence of the separation authority, separation may be directed when genuine dependency or undue hardship exists under these circumstances:

(a) The hardship or dependency is not temporary.

(b) Conditions have arisen or have been aggravated to an excessive degree since entry into military service, and the enlisted Service member has made every reasonable effort to remedy the situation.

(c) The administrative separation will eliminate or materially alleviate the condition.

(d) There are no other means of alleviation reasonably available.

(4) Pregnancy or Childbirth. A female enlisted Service member may be separated on the basis of pregnancy or childbirth upon her request, unless retention is determined to be in the best interests of the Service in accordance with section 1 of Enclosure 4 and guidance established by the DoD Military Department concerned.

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(5) Parenthood. An enlisted Service member may be separated by reason of parenthood under the guidance set forth in section 1 of Enclosure 4 if, as a result thereof, it is determined that the enlisted Service member is unable to satisfactorily perform his or her duties or is unavailable for worldwide assignment or deployment. Prior to involuntary separation under this provision, the notification procedure in section 2 of Enclosure 5 will be used. Separation processing may not be initiated until the enlisted Service member has been formally counseled concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

(6) Conscientious Objection. An enlisted Service member may be separated if authorized in accordance with DoDI 1300.06 (Reference (f)).

(7) Surviving Family Member. An enlisted Service member may be separated if authorized in accordance with DoDI 1315.15 (Reference (g)).

(8) Conditions and Circumstances not Constituting a Physical Disability

(a) The Secretary concerned may authorize separation on the basis of conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty.

1. Separation processing will not be initiated until the enlisted Service member has been formally counseled on his or her deficiencies and has been given an opportunity to correct those deficiencies.

2. Separation processing will not be initiated until the enlisted Service member has been counseled in writing that the condition does not qualify as a disability.

(b) The Secretary concerned may not authorize involuntary administrative separation based on a determination that the member is unsuitable for deployment or worldwide assignment because of a medical condition if a physical evaluation board has determined the member to be fit for duty for the same medical condition, unless the administrative separation is approved by the Secretary of Defense. If the Secretary concerned has reason to believe the medical condition considered by the physical evaluation board renders the member unsuitable for continued military service, the Secretary concerned may direct the physical evaluation board to reevaluate the member.

1. If, based on reevaluation by a physical evaluation board, a member is determined to be unfit to perform the duties of the member's office, grade, rank, or rating, the member may be retired or separated for physical disability consistent with chapter 61 of Title 10, United States Code (U.S.C.) (Reference (h)).

2. A fit for duty finding by a physical evaluation board does not automatically entitle a Service member to reenlist upon completion of his or her current period of required active service. However, a Service member may not be denied reenlistment on the basis of the same condition for which a physical evaluation board found the member fit for duty.

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(c) Separation on the basis of personality disorder, or other mental disorder not constituting a physical disability, is only authorized only if:

1. A diagnosis by an authorized mental health provider as defined in DoDI 6490.04 (Reference (i)) utilizing the Diagnostic and Statistical Manual of Mental Disorders (Reference (j)) and, in accordance with procedures established by the Military Department concerned, concludes that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired.

a. The onset of personality disorder is frequently manifested in the early adult years and may reflect an inability to adapt to the military environment as opposed to an inability to perform the requirements of specific jobs or tasks or both.

b. Observed behavior of specific deficiencies should be documented in appropriate counseling or personnel records. Documentation will include history from supervisors, peers, and others, as necessary to establish that the behavior is persistent, interferes with assignment to or performance of duty, and has continued after the enlisted Service member was counseled and afforded an opportunity to overcome the deficiencies.

2. The enlisted Service member has been formally counseled in writing on deficiencies as reflected in appropriate counseling or personnel records and has been afforded an opportunity to overcome those deficiencies.

3. The enlisted Service member has been counseled in writing on the diagnosis of a personality disorder, or other mental disorder not constituting a physical disability.

4. For enlisted Service members who have served or are currently serving in imminent danger pay areas, a diagnosis of personality disorder or other mental disorder not constituting a physical disability will:

a. Be corroborated by a peer or higher-level mental health professional.

b. Be endorsed by the Surgeon General of the Military Department concerned.

c. Address post-traumatic stress disorder (PTSD) and other mental illness comorbidity. Unless found fit for duty by the disability evaluation system, a separation for personality disorder, or other mental disorder not constituting a physical disability, is not authorized if service-related PTSD is also diagnosed.

(d) Separation for personality disorder, or other mental disorder not constituting a physical disability, is not appropriate nor should it be pursued when separation is warranted on the basis of unsatisfactory performance or misconduct. In such circumstances, the enlisted Service member should not be separated under this paragraph regardless of the existence of a personality disorder.

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(e) Nothing in paragraph 3a(8) of this enclosure precludes separation of an enlisted Service member who has a personality disorder or other condition or circumstance not constituting a physical disability under any other basis set forth in section 3 of this enclosure or for any other reason authorized by this instruction.

(f) Prior to involuntary separation under this provision, the notification procedure in section 2 of Enclosure 5 will be used. Documentation must include evidence that the Service member is unable to function effectively because of a personality disorder, or other mental disorder not constituting a physical disability.

(g) The reasons designated by the Secretary concerned will be separately reported.

(9) Additional Grounds. The Secretary concerned may provide additional grounds for separation for the convenience of the U.S. Government. A copy of the document authorizing such grounds will be forwarded to the ASD(M&RA) at least 45 days prior to the desired date of announcement of an involuntary separation board or program.

b. Characterization or Description. Honorable, unless the separation is under one of the following circumstances:

(1) An entry-level separation is required in accordance with paragraph 3c of Enclosure 4.

(2) The characterization of service is general (under honorable conditions) as warranted in accordance with paragraph 3b(2) of Enclosure 4.

c. Procedures. Procedural requirements may be established by the Secretary concerned, subject to procedures established in paragraph 3c of Enclosure 4. Prior to characterization of service as general (under honorable conditions), the Service member will be notified of the specific factors in the service record that warrant such a characterization, and the notification procedure in section 2 of Enclosure 5 will be used. However, such notice and procedure are not required when characterization of service as general (under honorable conditions) is based upon numerical scores accumulated in a formal, Service-wide rating system that evaluates conduct and performance on a regular basis.

4. DISABILITY

a. Basis. An enlisted Service member may be separated or retired for disability under the provisions of chapter 61 of Reference (h).

b. Characterization or Description. Honorable, unless:

(1) An entry-level separation is required in accordance with section 3 of Enclosure 4; or

(2) Characterization of service as general (under honorable conditions) is warranted in accordance with section 3 of Enclosure 4.

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c. Procedures. The Military Departments may establish procedural requirements for separation or retirement due to physical disability consistent with chapter 61 of Reference (h) and DoDI 1332.18 (Reference (k)). If separation is recommended, these requirements apply prior to characterization of service as general (under honorable conditions):

(1) The enlisted Service member will be notified of the specific factors in the service record that warrant such a characterization, and the notification procedure in section 2 of Enclosure 5 will be used.

(2) Such notice and procedure are not required when characterization of service as general (under honorable conditions) is warranted based on numerical scores accumulated in a formal, Service-wide rating system that evaluates conduct and performance on a regular basis.

5. DEFECTIVE ENLISTMENTS AND INDUCTIONS

a. Minority

(1) Basis. An enlisted Service member will be separated on the basis of being a minor at the time of enlistment, induction, or extension of enlistment under the guidance set forth in section 1 of Enclosure 4 and this subparagraph.

(a) Under Age 17. If an enlisted Service member is under the age of 17, the enlistment of the enlisted Service member is void, and the Service member will be separated.

(b) Age 17. An enlisted Service member will be separated in accordance with section 1170 of Reference (h), except when the enlisted Service member is retained for the purpose of trial by court-martial, in these circumstances:

1. There is evidence satisfactory to the Secretary concerned that the enlisted Service member is under 18 years of age.

2. The enlisted Service member enlisted without the written consent of his or her parent or guardian.

3. An application for the enlisted Service member's separation is submitted to the Secretary concerned by the parent or guardian within 90 days of the Service member's enlistment.

(2) Description of Separation. A Service member separated under subparagraph 5a(1)(a) of this enclosure will receive an order of release from the custody and control of the Military Services by reason of void enlistment or induction. The separation of an enlisted Service member under subparagraph 5a(1)(b) of this enclosure will be described as an entry-level separation.

(3) Procedure. The notification procedure in section 2 of Enclosure 5 will be used.

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b. Erroneous

(1) Basis. An enlisted Service member may be separated on the basis of an erroneous enlistment, induction, or extension of enlistment under the guidance set forth in section 1 of Enclosure 4. An enlistment, induction, or extension of enlistment is erroneous if:

(a) It would not have occurred had the relevant facts been known by the U.S. Government or had appropriate directives been followed.

(b) It was not the result of fraudulent conduct on the part of the enlisted Service member (see paragraph 5d of this enclosure).

(c) The defect is unchanged in material respects.

(2) Characterization or Description. Honorable, unless an entry-level separation or an order of release from the custody and control of the Military Services is required (by reason of void enlistment or induction) in accordance with section 3 of Enclosure 4.

(3) Procedure

(a) If the command recommends that the individual continue military service, the initiation of separation processing is not required in these circumstances:

1. The defect is no longer present; or

2. A waiver is obtained from the appropriate authority.

(b) If separation processing is initiated, the notification procedure (see section 2 of Enclosure 5) will be used.

c. Defective Enlistment Agreements

(1) Basis. A defective enlistment agreement exists in these circumstances:

(a) As a result of a material misrepresentation by recruiting personnel, upon which the Service member reasonably relied. For example, the Service member was induced to enlist with a commitment for which the Service member was not qualified;

(b) The Service member received a written enlistment commitment from recruiting personnel for which the enlisted Service member was qualified, but which cannot be fulfilled by the Military Service; or

(c) The enlistment was involuntary. See section 802 of Reference (h).

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(2) Characterization or Description. Honorable, unless an entry-level separation or an order of release from the custody and control of the Military Services (by reason of void enlistment) is required in accordance with section 3 of Enclosure 4.

(3) Procedures. This provision does not bar appropriate disciplinary action or other administrative separation proceedings regardless of when the defect is raised. Separation is appropriate under this provision only in these circumstances:

(a) The enlisted Service member did not knowingly participate in creation of the defective enlistment.

(b) The enlisted Service member brings the defect to the attention of appropriate authorities within 30 days after the defect is discovered or reasonably should have been discovered by the Service member.

(c) The enlisted Service member requests separation instead of other authorized corrective action.

(d) The request otherwise meets such criteria as may be established by the Secretary concerned.

d. Fraudulent Entry Into the Military Services

(1) Basis. An enlisted Service member may be separated in accordance with section 1 of Enclosure 4 on the basis of procurement of a fraudulent enlistment, induction, or period of military service through any deliberate material misrepresentation, omission, or concealment that, if known at the time of enlistment, induction, or entry into a period of military service, might have resulted in rejection.

(2) Characterization or Description. Characterization of service or description of separation will be in accordance with section 3 of Enclosure 4. If the fraud involves concealment of a prior separation in which service was not characterized as honorable, characterization normally will be under other than honorable conditions.

(3) Procedures. The notification procedure in section 2 of Enclosure 5 will be used except as follows:

(a) Characterization of service under other than honorable conditions may not be issued unless the administrative board procedure in section 3 of Enclosure 5 is used.

(b) When the sole reason for separation is fraudulent entry, suspension of separation (see section 2 of Enclosure 4) is not authorized. When there are approved reasons for separation in addition to fraudulent entry, suspension of separation is authorized only in these circumstances:

1. A waiver of the fraudulent entry is approved.

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2. The suspension pertains to reasons for separation other than the fraudulent entry.

(c) If the command recommends that the enlisted Service member be retained in military service, the initiation of separation processing is unnecessary in these circumstances:

1. The defect is no longer present; or
2. A waiver is obtained from appropriate authority.

e. Separation from the Delayed Entry Program

(1) Basis. A person who is in the Delayed Entry Program may be separated because of ineligibility for enlistment under standards prescribed by the Secretary concerned or upon his or her request when authorized by the Secretary concerned.

(2) Description of Separation. Entry-level separation.

(3) Procedure. The person will be notified of the proposed separation and the reasons for it.

a. The notice will be delivered personally or sent by registered or certified mail, return receipt requested, or by an equivalent form of notice if such service is not available by the U.S. mail at an address outside the United States. If the person fails to acknowledge receipt of notice, the individual who mails the notification will prepare a Sworn Affidavit of Service by Mail (see DoDI 1215.13 (Reference (1))) that will be inserted in the file along with Postal Service (PS) Form 3800, "U.S. Postal Service Certified Mail Receipt."

b. The person will be given an opportunity to submit to the separation authority a rebuttal statement by a specified date that is not less than 30 days from the date of delivery.

6. ENTRY-LEVEL PERFORMANCE AND CONDUCT

a. Basis

(1) An enlisted Service member may be separated while in entry-level status (see section 5 of this enclosure) when it is determined under the guidance in section 1 of Enclosure 4 that the enlisted Service member is unqualified for further military service by reason of unsatisfactory performance, conduct, or both. Evidence of an enlisted Service member being unqualified may include lack of capability, lack of reasonable effort, failure to adapt to the military environment, or minor disciplinary infractions.

(2) When separation of an enlisted Service member in entry-level status is warranted by unsatisfactory performance, minor disciplinary infractions, or both, the enlisted Service member normally should be processed for entry-level separation. However, entry-level status does not

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preclude separation under another basis for separation authorized by this issuance when such separation is warranted by the circumstances of the case.

b. Counseling and Rehabilitation. Counseling and rehabilitation requirements are important aspects of this reason for separation. Separation processing may not be initiated until the enlisted Service member has been formally counseled concerning those deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. An enlisted Service member should not be separated when this is the sole reason unless appropriate efforts at rehabilitation have been made under standards prescribed by the Secretary concerned.

c. Description of Separation. Entry-level separation.

d. Procedures. The notification procedure in section 2 of Enclosure 5 will be used.

7. UNSATISFACTORY PERFORMANCE

a. Basis. An enlisted Service member may be separated when it is determined under the guidance in section 1 of Enclosure 4 that the enlisted Service member is unqualified for further military service by reason of unsatisfactory performance. This reason will not be used if the enlisted Service member is in entry-level status (see section 5 of this enclosure).

b. Counseling and Rehabilitation. Counseling and rehabilitation requirements are of particular importance to this reason for separation. Separation processing may not be initiated until the enlisted Service member has been formally counseled concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. An enlisted Service member should not be separated when unsatisfactory performance is the sole reason unless appropriate efforts at rehabilitation have been made in accordance with standards prescribed by the Secretary concerned.

c. Characterization or Description. The service will be characterized as honorable or general (under honorable conditions) in accordance with section 3 of Enclosure 4.

d. Procedures. The notification procedure (section 2 of Enclosure 5) will be used.

8. DRUG ABUSE REHABILITATION FAILURE

a. Basis

(1) An enlisted Service member who has been referred to a rehabilitation program for personal drug abuse may be separated for failure through inability or refusal to participate in, cooperate in, or successfully complete such a program in these circumstances:

(a) There is a lack of potential for continued military service; or

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(b) Long-term rehabilitation is determined necessary and the enlisted Service member is transferred to a civilian medical facility for rehabilitation.

(2) Nothing in this provision precludes separation of an enlisted Service member who has been referred to such a program under any other provision of this instruction.

(3) Drug abuse rehabilitation failures will be reported separately from alcohol abuse rehabilitation failures. If separation is based on both, the primary basis will be used for reporting requirements.

(4) An enlisted Service member's voluntary submission to a DoD treatment and rehabilitation program and voluntarily disclosed evidence of prior personal drug use by the Service member as part of a course of treatment in such a program may not be used against the Service member on the issue of characterization as specified in accordance with subparagraph 3b(3)(f) of Enclosure 4.

b. Characterization or Description. When an enlisted Service member is separated under this provision, characterization of service as honorable or general (under honorable conditions) is authorized except when an entry-level separation is required in accordance with section 3 of Enclosure 4. The relationship between voluntary submission for treatment and the evidence that may be considered on the issue of characterization is set forth in subparagraph 3b(3)(f) of Enclosure 4. The relationship between mandatory urinalysis and the evidence that may be considered on the issue of characterization is in subparagraph 3b(3)(g) of Enclosure 4.

c. Procedures. The notification procedures in section 2 of Enclosure 5 will be used.

9. ALCOHOL ABUSE REHABILITATION FAILURE

a. Basis

(1) An enlisted Service member who has been referred to a program of rehabilitation for alcohol abuse may be separated for failure through inability or refusal to participate in, cooperate in, or successfully complete such a program in these circumstances:

(a) There is a lack of potential for continued military service; or
(b) Long-term rehabilitation is determined necessary and the enlisted Service member is transferred to a civilian medical facility for rehabilitation.

(2) Nothing in this provision precludes separation of an enlisted Service member who has been referred to such a program under any other provision of this instruction.

(3) Alcohol abuse rehabilitation failures will be reported separately from drug abuse rehabilitation failures. If separation is based on both, the primary basis will be used for reporting purposes.

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b. Characterization or Description. When an enlisted Service member is separated under this provision, characterization of service as honorable or general (under honorable conditions) is authorized except when an entry-level separation is required in accordance with section 3 of Enclosure 4.

c. Procedures. The notification procedures in section 2 of Enclosure 5 will be used.

10. MISCONDUCT

a. Basis. An enlisted Service member may be separated for misconduct when it is determined under the guidance set forth in section 1 of Enclosure 4 that the enlisted Service member is unqualified for further military service by reason of one or more of the following circumstances:

(1) Minor Disciplinary Infractions. A pattern of misconduct consisting solely of minor disciplinary infractions. If separation of an enlisted Service member in entry-level status is warranted solely by reason of minor disciplinary infractions, the action should be processed under entry-level performance and conduct (see section 6 of this enclosure).

(2) A Pattern of Misconduct. A pattern of misconduct consisting of:

- (a) Discreditable involvement with civil or military authorities; or
- (b) Conduct prejudicial to good order and discipline.

(3) Commission of a Serious Offense. Commission of a serious military or civilian offense if a punitive discharge would be authorized for the same or a closely related offense in accordance with the Manual for Courts-Martial (Reference (m)).

(4) Civilian Conviction

(a) Conviction by civilian authorities or action taken that is tantamount to a finding of guilty, including similar adjudications in juvenile proceedings, and if these conditions are present:

1. A punitive discharge would be authorized for the same or a closely related offense in accordance with Reference (m); or

2. The sentence by civilian authorities includes confinement for 6 months or more without regard to suspension or probation.

(b) Separation processing may be initiated whether or not an enlisted Service member has filed an appeal of a civilian conviction or has stated an intention to do so. Execution of an approved separation should be withheld pending outcome of the appeal or until the time for appeal has passed, but the enlisted Service member may be separated before final action on the

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appeal upon request of the enlisted Service member or upon direction of the Secretary concerned.

b. Counseling and Rehabilitation. Separation processing for minor disciplinary infractions or a pattern of misconduct (see subparagraphs 10a(2)(a) and 10a(2)(b) of this enclosure) may not be initiated until the enlisted Service member has been formally counseled concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. If the sole basis of separation is commission of a serious offense (see subparagraph 10a(3) of this enclosure), or a civilian conviction (see subparagraph 10a(4)(a) of this enclosure), the counseling and rehabilitation requirements are not applicable.

c. Characterization or Description. Characterization of service will normally be under other than honorable conditions, but characterization as general (under honorable conditions) may be warranted under the guidelines in section 3 of Enclosure 4. For respondents who have completed entry-level status, characterization of service as honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate. In such cases, separations for misconduct with an honorable characterization will be approved by a commander exercising general court-martial jurisdiction or higher authority as specified by the Secretary concerned.

(1) As an exception, the Secretary concerned may authorize general court-martial convening authorities to delegate authority to special court-martial convening authorities to approve separations with service characterized as honorable. This delegation may be done when the sole evidence of misconduct is command-directed urinalysis results that cannot be used for characterization of service, or when an administrative discharge board has recommended separation with an honorable discharge.

(2) When characterization of service under other than honorable conditions is not warranted for an enlisted Service member in entry-level status in accordance with section 3 of Enclosure 4, the separation will be described as an entry-level separation.

d. Procedures. The administrative board procedure in section 3 of Enclosure 5 will be used. However, use of the notification procedure in section 2 of Enclosure 5 is authorized if characterization of service under other than honorable conditions is not warranted in accordance with section 3 of Enclosure 4.

11. SEPARATION IN LIEU OF TRIAL BY COURT-MARTIAL

a. Basis. Upon request by the enlisted Service member, the enlisted Service member may be separated in lieu of trial by court-martial if charges have been preferred with respect to an offense for which a punitive discharge is authorized, and it is determined that the enlisted Service member is unqualified for further military service under the guidance set forth in section 1 of Enclosure 4. This provision may not be used when Rule for Court-Martial 1003(d) of Reference

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(m) provides the sole basis for a punitive discharge unless the charges have been referred to a court-martial empowered to adjudge a punitive discharge.

b. Characterization or Description. Characterization of service normally will be under other than honorable conditions, but characterization as general (under honorable conditions) may be warranted under the guidelines in section 3 of Enclosure 4. For respondents who have completed entry-level status, characterization of service as honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate. When characterization of service under other than honorable conditions is not warranted for an enlisted Service member in entry-level status in accordance with section 3 of Enclosure 4, the separation will be described as an entry-level separation.

c. Procedures

(1) The request for discharge must be submitted in writing and signed by the enlisted Service member.

(2) The enlisted Service member will be afforded an opportunity to consult with counsel qualified under section 827(b) of Reference (h). These counsel qualifications are also in Article 27(b) of The Uniform Code of Military Justice (UCMJ) (Appendix 2 of Reference (m)). If the enlisted Service member refuses to consult with legal counsel, counsel will prepare a statement to this effect, which will be attached to the file to document that the enlisted Service member has waived the right to consult with counsel.

(3) Except when the enlisted Service member has waived the right to counsel, the request will be signed by counsel.

(4) In the written request, the enlisted Service member will state that he or she understands:

(a) The elements of the offense or offenses charged.

(b) That characterization of service under other than honorable conditions is authorized.

(c) The adverse nature of such a characterization and possible consequences thereof.

(5) The Secretary concerned will also require that one or both of these matters be included in the request:

(a) An acknowledgment of guilt of one or more of the offenses or any lesser included offenses for which a punitive discharge is authorized; or

(b) A summary of the evidence or list of documents (or copies thereof) provided to the enlisted Service member pertaining to the offenses for which a punitive discharge is authorized.

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(6) The separation authority will be a commander exercising general court-martial jurisdiction or higher authority as specified by the Secretary concerned. As an exception, the Secretary concerned may authorize general court-martial convening authorities to delegate authority to the special court-martial convening authorities to approve requests for discharge in the case of enlisted Service members who:

- (a) Have been absent without leave for more than 30 days.
- (b) Have been dropped from the rolls of their units as absent in desertion.
- (c) Have been returned to military control.
- (d) Are assigned to a regional personnel control and/or separation processing facility.
- (e) Are charged only with being absent without leave for more than 30 days.

(7) Statements by the enlisted Service member or the enlisted Service member's counsel submitted in connection with a request under this subsection are not admissible against the enlisted Service member in a court-martial except as authorized under Military Rule of Evidence 410 of Reference (m).

12. SECURITY

a. Basis. When retention is clearly inconsistent with the interest of national security, an enlisted Service member may be separated by reason of security and under conditions and procedures prescribed in DoDI 5200.02 (Reference (n)).

b. Characterization or Description. Characterization of service or description of separation will be in accordance with section 3 of Enclosure 4.

c. Procedures. The procedures established by the Military Departments will be consistent with the procedures contained in this instruction insofar as practicable.

13. UNSATISFACTORY PARTICIPATION IN THE READY RESERVE

a. Basis. An enlisted Service member may be separated for unsatisfactory participation in the Ready Reserve under criteria established by the Secretary concerned in accordance with Reference (k).

b. Characterization or Description. Characterization of service or description of separation will be in accordance with section 3 of Enclosure 4 of this instruction and Reference (l).

c. Procedures. The administrative board procedure (section 3 of Enclosure 5) will be used, except that the notification procedure (section 2 of Enclosure 5) may be used if characterization

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of service under other than honorable conditions is not warranted in accordance with section 3 of Enclosure 4.

14. SECRETARIAL PLENARY AUTHORITY

a. Basis. Notwithstanding any limitation on separations provided in this instruction, the Secretary concerned may direct the separation of any enlisted Service member prior to expiration of term of service after determining it to be in the best interest of the Service.

b. Characterization or Description. Honorable or general (under honorable conditions) as warranted in accordance with section 3 of Enclosure 4 unless an entry-level separation is required in accordance with section 3 of Enclosure 4.

c. Procedures. The notification procedure in section 2 of Enclosure 5 will be used, except for subparagraph 2a(7) of Enclosure 5, regarding the procedure for requesting an administrative board, which is not applicable.

15. REASONS ESTABLISHED BY THE MILITARY DEPARTMENTS

a. Basis. The Military Departments may establish additional reasons for separation for circumstances not otherwise provided for in this instruction to meet their specific requirements, subject to approval by the ASD(M&RA).

b. Counseling and Rehabilitation. Separation processing may not be initiated until the enlisted Service member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. An exception to these requirements may be granted when the Military Department concerned provides in its implementing document that counseling and rehabilitation requirements are not applicable for the specific reason for separation.

c. Characterization or Description. Characterization of service or description of separation will be in accordance with section 3 of Enclosure 4.

d. Procedures. The procedures established by the Military Departments will be consistent with the procedures contained in this instruction insofar as practicable.

16. WEIGHT CONTROL FAILURE

a. Basis. An enlisted Service member may be separated for failure to meet the weight control standards established in accordance with DoDD 1308.1 (Reference (o)) when it is determined that the enlisted Service member is unqualified for further military service and meets both of the following conditions:

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(1) The enlisted Service member is not medically diagnosed with a medical condition that precludes or interferes with weight control. Enlisted Service members with a medically diagnosed condition that precludes or interferes with weight control may be separated either through medical channels, if appropriate, or under the guidance in section 4 of this enclosure.

(2) The enlisted Service member fails to meet weight control standards, and the sole reason for separation is failure to meet the weight control standard.

b. Counseling and Rehabilitation. Separation processing may not be initiated until the enlisted Service member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

c. Characterization or Description. Honorable, unless characterization of service as general under honorable conditions is warranted in accordance with section 3 of Enclosure 4 on the basis of numerical scores accumulated in a formal, Service-wide rating system that evaluated conduct and performance on a regular basis, or when an entry-level separation is required in accordance with section 6 of this enclosure.

d. Procedures. The notification procedure in section 3 of Enclosure 5 will be used.

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ENCLOSURE 4

GUIDELINES ON SEPARATION AND CHARACTERIZATION

1. SEPARATION

a. Scope. This general guidance applies when referenced in Enclosure 3. Further guidance is set forth under the specific reasons for separation in Enclosure 3.

b. Guidance

(1) A substantial investment is made in the training of individuals enlisted or inducted into the Military Services. Thus, reasonable efforts at rehabilitation should be made prior to initiating separation proceedings for Service members who do not conform to required standards.

(2) Unless separation is mandatory, the potential for rehabilitation and further useful military service will be considered by the separation authority and, where applicable, the administrative board. If separation is warranted despite the potential for rehabilitation, consideration should be given to suspension of the separation, if authorized.

(3) Counseling and rehabilitation efforts are a prerequisite to initiation of separation proceedings only insofar as expressly set forth under specific requirements for separation in Enclosure 3. An alleged or established inadequacy in previous rehabilitative efforts does not provide a legal bar to separation.

(4) These factors may be considered on the issue of retention or separation, depending on the circumstances of the case:

(a) The seriousness of the circumstances forming the basis for initiation of separation proceedings, the effect of the enlisted Service member's continued retention on military discipline, good order, and morale.

(b) The likelihood of continuation or recurrence of the circumstances forming the basis for initiation of separation proceedings.

(c) The likelihood that the enlisted Service member will be a disruptive or undesirable influence in present or future duty assignments.

(d) The ability of the enlisted Service member to perform duties effectively in the present and in the future, including potential for advancement or leadership.

(e) The enlisted Service member's rehabilitative potential.

(f) The enlisted Service member's entire military record.

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1. This may include:

- a. Past contributions to the Military Service, assignments, awards and decorations, evaluation ratings, and letters of commendation.
- b. Letters of reprimand or admonition, counseling records, records of nonjudicial punishment, records of conviction by court-martial and records of involvement with civilian authorities.
- c. Any other matter deemed relevant by the board, or the separation authority, based on the specialized training, duties, and experience of persons entrusted by this instruction with recommendations and decisions on the issue of separation or retention.

2. This guidance applies to consideration of matters under subparagraph 1b(4)(f)1 of this enclosure:

a. Adverse matters from a prior enlistment or period of military service, such as records of nonjudicial punishment and conviction by court-martial, may be considered only when such records would have a direct and strong probative value in determining whether separation is appropriate. The use of such records will ordinarily be limited to those cases involving patterns of conduct manifested over an extended period of time.

b. Isolated incidents and events that are remote in time normally have little probative value in determining whether administrative separation should be effected.

c. Limitations on Separation Actions. A Service member may not be separated on the basis of:

(1) Conduct that has been the subject of judicial proceedings resulting in acquittal or action having the effect thereof except:

(a) When such action is based on a judicial determination not going to the guilt or innocence of the respondent;

(b) When the judicial proceeding was conducted in a State or foreign court and the separation is approved by the Secretary concerned; or

(c) When the acquittal from the judicial proceedings was based on a finding of not guilty only by reason of lack of mental responsibility. Enlisted Service members in this category normally will be separated under Secretarial plenary authority (see section 15 of Enclosure 3) unless separation for disability (see section 4 of Enclosure 3) is appropriate.

(2) Conduct that has been the subject of a prior administrative board action in which the Board entered an approved finding that the evidence did not sustain the factual allegations

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concerning the conduct, except when the conduct is the subject of a rehearing ordered on the basis of fraud or collusion; or

(3) Conduct that has been the subject of an administrative separation proceeding resulting in a final determination by a separation authority that the enlisted Service member should be retained, except:

(a) When there is subsequent conduct or performance forming the basis, in whole or in part, for a new proceeding;

(b) When there is new or newly discovered evidence that was not reasonably available at the time of the prior proceeding; or

(c) When the conduct is the subject of a rehearing ordered on the basis of fraud or collusion.

2. SUSPENSION OF SEPARATION

a. Suspension

(1) Unless prohibited by this instruction, a separation may be suspended for a specified period of not more than 12 months by the separation authority or higher authority if the circumstances of the case indicate a reasonable likelihood of rehabilitation.

(2) During the period of suspension, the enlisted Service member will be afforded an opportunity to meet appropriate conduct, disciplinary, and performance standards.

(3) Unless sooner vacated or remitted, execution of the approved separation will be remitted upon completion of the probationary period, upon termination of the enlisted Service member's enlistment or period of obligated service, or upon decision of the separation authority that the goal of rehabilitation has been achieved.

b. Action During the Period of Suspension

(1) During the period of suspension, if there are further grounds for separation under Enclosure 3, one or more of these actions may be taken:

(a) Disciplinary action;

(b) New administrative action; or

(c) Vacation of the suspension accompanied by execution of the separation if the enlisted Service member engages in conduct similar to that for which separation was approved

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(but suspended) or otherwise fails to meet appropriate standards of conduct and duty performance.

(2) Prior to vacation of a suspension, the enlisted Service member will be notified in writing of the basis for the action and will be afforded the opportunity to consult with counsel, as provided in subparagraph 2a(6) of Enclosure 5, and to submit a statement in writing to the separation authority.

(a) The respondent will be provided a reasonable period of time, not less than 2 working days, to act on the notice.

(b) If the respondent identifies specific legal issues for consideration by the separation authority, the matter will be reviewed by a judge advocate or civilian lawyer employed by the U.S. Government before final action by the separation authority.

3. CHARACTERIZATION OF SERVICE OR DESCRIPTION OF SEPARATION

a. Types of Characterization or Description

(1) At separation, these types of characterization of service or description of separation are authorized under this instruction:

(a) Separation with characterization of service as honorable, general (under honorable conditions), or under other than honorable conditions.

(b) Entry-level separation.

(c) Order of release from the custody and control of the Military Services by reason of void enlistment or induction.

(d) Separation by being dropped from the rolls of the Military Service.

(2) Any of the types of separation listed may be used in appropriate circumstances unless a limitation is set forth in this enclosure or in Enclosure 3, which explains reasons for separation.

b. Characterization of Service

(1) General Considerations

(a) Characterization at separation will be based upon the quality of the Service member's service, including the reason for separation and guidance in subparagraph 3b(2) of this enclosure, subject to the limitations set forth under various reasons for separation in Enclosure 3. The quality of service will be determined in accordance with standards of acceptable personal conduct and performance of duty for military personnel. These standards are found in Reference

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(m), directives and regulations issued by the Department of Defense and the DoD Military Departments, and the time-honored customs and traditions of military service.

(b) The quality of service of an enlisted Service member on active duty or active duty for training is adversely affected by conduct that is of a nature to bring discredit on the Military Services or is prejudicial to good order and discipline, regardless of whether UCMJ jurisdiction is exercised. Characterization may be based on conduct in the civilian community, and the burden is on the respondent to demonstrate that such conduct did not adversely affect the respondent's service.

(c) The reasons for separation, including the specific circumstances that form the basis for the separation, will be considered on the issue of characterization. In general, characterization will be based on a pattern of behavior rather than an isolated incident. There are circumstances, however, in which the conduct or performance of duty reflected by a single incident provides the basis for characterization.

(d) Due consideration will be given to the enlisted Service member's age, length of service, grade, aptitude, physical and mental condition, and the standards of acceptable conduct and performance of duty.

(2) Types of Characterization

(a) Honorable. The honorable characterization is appropriate when the quality of the enlisted Service member's service generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate. In the case of an honorable discharge, a DD Form 256, "Discharge Certificate, Honorable," will be awarded and a notation will be made on the appropriate copies of the DD Form 214/5 "Certificate of Release or Discharge from Active Duty (DD Form 214/5 Series)," in accordance with DoDI 1336.01 (Reference (p)).

(b) General (Under Honorable Conditions). If an enlisted Service member's service has been honest and faithful, it is appropriate to characterize that service as general (under honorable conditions). Characterization of service as general (under honorable conditions) is warranted when the positive aspects of the enlisted Service member's conduct or performance of duty outweigh negative aspects of the enlisted Service member's conduct or performance of duty as documented in their service record.

(c) Under Other Than Honorable Conditions

1. This characterization may be issued:

a. When the reason for separation is based on a pattern of behavior that constitutes a significant departure from the conduct expected of enlisted Service members of the Military Services.

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b. When the reason for separation is based on one or more acts or omissions that constitute a significant departure from the conduct expected of enlisted Service members of the Military Services. Examples of factors that may be considered include the use of force or violence to produce serious bodily injury or death; abuse of a special position of trust; disregard by a superior of customary superior-subordinate relationships; acts or omissions that endanger the security of the United States or the health and welfare of other Service members of the Military Services; and deliberate acts or omissions that seriously endanger the health and safety of other persons.

2. This characterization is authorized only if the Service member has been afforded the opportunity to request an administrative board action, except as provided in section 11 of Enclosure 3 regarding separation in lieu of trial by court-martial.

(3) Limitations on Characterization. Except as otherwise provided in section 3 of this enclosure, characterization will be determined solely by the enlisted Service member's military record during the current enlistment or period of service to which the separation pertains, plus any extensions thereof prescribed by law or regulation or effected with the consent of the enlisted Service member.

(a) Prior service activities, including records of conviction by court-martial, records of absence without leave, or commission of other offenses for which punishment was not imposed will not be considered on the issue of characterization. To the extent that such matters are considered on the issue of retention or separation (see paragraph 1b of this enclosure), the record of proceedings may reflect express direction that such information will not be considered on the issue of characterization.

(b) Pre-service activities may not be considered on the issue of characterization except in a proceeding concerning fraudulent entry into military service (see subparagraph 5.d. of Enclosure 3) and evidence of pre-service misrepresentations about matters that would have precluded, postponed, or otherwise affected the enlisted Service member's eligibility for enlistment or induction.

(c) The limitations in subparagraph 1c of this enclosure as to matters that may be considered on the issue of separation are applicable to matters that may be considered on the issue of characterization.

(d) When the sole basis for separation is a serious offense that resulted in a conviction by a court-martial authorized to impose a punitive discharge, and a punitive discharge was not imposed, the enlisted Service member's service may not be characterized under other than honorable conditions unless such characterization is approved by the Secretary concerned.

(e) Conduct in the civilian community of an enlisted Service member of a Reserve Component who is not on active duty or active duty for training may form the basis for characterization under other than honorable conditions only if such conduct directly affects the performance of the enlisted Service member's military duties. Such conduct may form the basis

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of characterization as general (under honorable conditions) only if such conduct has an adverse impact on the overall effectiveness of the service, including military morale and efficiency.

(f) A Service member's voluntary submission to a DoD treatment and rehabilitation program and voluntarily disclosed evidence of prior personal drug use by the enlisted Service member as part of a course of treatment in such a program may not be used against the enlisted Service member on the issue of characterization. This limitation does not apply to:

1. The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been introduced first by the Service member.

2. Taking action based on independently derived evidence, including evidence of continued drug abuse after initial entry into a treatment and rehabilitation program.

(g) The results of mandatory urinalysis may be used on the issue of characterization except as provided in DoDI 1010.01 (Reference (q)).

c. Uncharacterized Separation

(1) Entry-Level Separation

(a) A separation will be described as an entry-level separation if separation processing is initiated while an enlisted Service member is in entry-level status, except when:

1. Characterization under other than honorable conditions is authorized under the reason for separation (Enclosure 3) and is warranted by the circumstances of the case; or

2. The Secretary concerned, on a case-by-case basis, determines that characterization of service as honorable is clearly warranted by the presence of unusual military duty. The characterization is authorized when the Service member is separated under Enclosure 3 by reason of selected changes in service obligation (see section 2 of Enclosure 3), convenience of the U.S. Government (see section 3 of Enclosure 3), disability (see section 4 of Enclosure 3), secretarial plenary authority (see section 14 of Enclosure 3), or an approved reason established by the Military Department (see section 15 of Enclosure 3).

(b) In time of mobilization or in other appropriate circumstances, the ASD(M&RA) may authorize the Secretary concerned to delegate the authority in subparagraph 3c(1)(a)2 of this enclosure (concerning the honorable characterization) to a general court-martial convening authority with respect to Service members serving in operational units.

(c) With respect to administrative matters outside this instruction that require a characterization as honorable or general, an entry-level separation will be treated as the required characterization. This provision does not apply to administrative matters that expressly require

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different treatment of an entry-level separation except as provided in subparagraph 3c(1)(d) of this enclosure.

(d) In accordance with section 12685 of Reference (h), an entry-level separation of a Service member of a Reserve Component for cause, except under section 12684 of Reference (h), will be “under honorable conditions.”

(2) Void Enlistments or Inductions. Under void enlistments or inductions, an enlisted Service member will not receive a discharge, characterization of service at separation, or an entry-level separation, except when a constructive enlistment arises and such action is required under subparagraph 3c(2)(c) of this enclosure. If characterization or an entry-level separation is not required, the separation will be described as an order of release from custody or control of the Military Services.

(a) An enlistment is void:

1. If it was effected without the voluntary consent of a person who has the capacity to understand the significance of enlisting in the Military Services, including enlistment of a person who is intoxicated or insane at the time of enlistment, in accordance with section 504 of Reference (h) and Article 2(b) in Appendix 2 of Reference (m).

2. If the person is under 17 years of age (section 505 of Reference (h)).

3. If the person is a deserter from another Military Service in accordance with section 504 of Reference (h).

(b) Although an enlistment may be void at its inception, a constructive enlistment will arise in the case of a person serving with a Military Service who:

1. Submitted voluntarily to military authority.

2. Met the mental competency and minimum age qualifications of sections 504 and 505 of Reference (h) at the time of voluntary submission to military authority.

3. Received military pay or allowances.

4. Performed military duties.

(c) If an enlistment that is void at its inception is followed by a constructive enlistment within the same term of service, characterization of service or description of separation will be in accordance with subparagraph 3b or subparagraph 3c(1) of this enclosure, as appropriate.

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1. If the enlistment was void by reason of desertion from another Military Service, the enlisted Service member will be separated by an order of release from the custody and control of the Service regardless of any subsequent constructive enlistment.

2. The occurrence of such a subsequent constructive enlistment does not preclude the Military Departments, in appropriate cases, from either retaining the enlisted Service member or separating the enlisted Service member in accordance with section 5 of Enclosure 3, on the basis of the circumstances that initiated the original void enlistment or upon any other basis for separation provided in this issuance.

(3) Dropping from the Rolls. An enlisted Service member may be dropped from the rolls of the Service when such action is authorized by the Military Department concerned and a characterization of service or other description of separation is not authorized or warranted.

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ENCLOSURE 5

PROCEDURES FOR SEPARATION

1. SCOPE

a. The supplementary procedures in this enclosure are applicable only when required under a specific reason for separation as set forth in Enclosure 3.

b. When an enlisted Service member is processed on the basis of multiple reasons for separation, these guidelines apply to procedural requirements (including procedural limitations on characterization of service or description of separation):

(1) The requirements for each reason will be applied to the extent practicable.

(2) If a reason for separation set forth in the notice of proposed action requires processing under the administrative board procedure, the entire matter will be processed in accordance with section 3 of this enclosure.

(3) If more than one reason for separation is approved, the guidance on characterization that provides the greatest latitude will apply.

(4) When there is any other clear conflict between a specific requirement applicable to one reason and a general requirement applicable to another reason, the specific requirement will be applied.

(5) If a conflict in separation procedures cannot be resolved by applying the guidance in subparagraphs 1b(1) through 1b(4) of this enclosure, the procedure deemed by the separation authority to be most favorable to the respondent will be used.

2. NOTIFICATION PROCEDURE

a. Notice. If the notification procedure is initiated under Enclosure 3, the respondent will be notified in writing of:

(1) The basis of the proposed separation, including the circumstances upon which the action is based and a reference to the applicable provisions of the Military Department's implementing regulation.

(2) Whether the proposed separation could result in discharge, release from active duty to a Reserve Component, transfer from the Selected Reserve to the IRR, release from custody or control of the Military Services, or other form of separation.

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(3) The least favorable characterization of service or description of separation authorized for the proposed separation.

(4) The right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation. Classified documents may be summarized.

(5) The respondent's right to submit statements.

(6) The respondent's right to consult with counsel qualified pursuant to Appendix 2, Article 27(b), of Reference (m). Non-lawyer counsel may be appointed when the respondent is deployed aboard a vessel or in similar circumstances of distance from sufficient judge advocate resources as determined under standards and procedures specified by the Secretary concerned. The respondent may also consult with civilian counsel retained at the Service member's own expense.

(7) If the respondent has 6 or more years of total active and reserve military service, the right to request an administrative board action (see section 3 of this enclosure).

(8) The right to waive subparagraphs 2a(4), 2a(5), 2a(6), or 2a(7) of this enclosure after being afforded a reasonable opportunity to consult with counsel and advised that failure to respond will constitute a waiver of the right.

b. Additional Notice Requirements

(1) If separation processing is initiated on the basis of more than one reason in accordance with Enclosure 3, the requirements of subparagraph 2a(1) of this enclosure apply to all proposed reasons for separation.

(2) If the respondent is in civil confinement, absent without leave, or in a Reserve Component not on active duty, the relevant notification procedures in paragraphs 4, 5, or 6 of this enclosure apply.

(3) Additional notification requirements in sections 3 and 4 of Enclosure 3 apply when characterization of service as general (under honorable conditions) is authorized and the enlisted Service member is processed for separation by reason of convenience of the U.S. Government or disability.

c. Response. The respondent will be provided a reasonable period of time, but not less than 2 working days, to act on the notice. An extension may be granted upon a timely showing of good cause by the respondent. The decision of the respondent on each of the rights set forth in subparagraphs 2a(4) through 2a(8) of this enclosure, and applicable provisions referenced in section 2 of this enclosure, will be recorded and signed by the respondent and counsel, subject to the following limitations:

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(1) If notice by mail is authorized in accordance with sections 4, 5, or 6 of this enclosure, and the respondent fails to acknowledge receipt or submit a timely reply, that fact will constitute a waiver of rights and will be documented.

(2) If the respondent declines to respond as to the selection of rights, such declination will constitute a waiver of rights and will be documented. If the respondent indicates that one or more of the rights will be exercised, the selection of rights will be documented.

d. Separation Authority

(1) The separation authority for actions initiated under the notification procedure will be a special court-martial convening authority or higher authority.

(a) Subject to approval by the ASD(M&RA), the Secretary concerned may authorize a commanding officer in grade O-5 or above, or a commanding officer in the grade of O-4 who is on an approved list for promotion to O-5 and who is assigned to command a unit authorized a commanding officer in the grade of O-5 or above, with a judge advocate or other legal advisor available to the command, to act as a separation authority for a specified reason for separation.

(b) If the case was initiated under the administrative board procedure and the respondent waived the right to a hearing in accordance with subparagraph 3d of this enclosure, the separation authority will be an official designated under subparagraph 3f of this enclosure.

(2) The action of the separation authority will be recorded.

(3) The separation authority will determine whether there is sufficient evidence to verify the allegations set forth in the notification of the basis for separation. If an allegation is not supported by a preponderance of the evidence, it may not be used as a basis for separation.

(4) If there is a sufficient factual basis for separation, the separation authority will determine whether separation is warranted under the guidance in sections 1 and 2 of Enclosure 4. On the basis of that guidance, the separation authority will direct one of these actions:

(a) Retention.

(b) Separation for a specific reason in accordance with Enclosure 3.

(c) Suspended separation, in accordance with the guidance in paragraph 2d of this enclosure.

(5) If the separation authority directs separation or suspended separation on the basis of more than one reason in accordance with Enclosure 3, the separation authority will designate the most appropriate basis as the primary reason for reporting purposes.

(6) If separation or a suspended separation is directed, the separation authority will assign a characterization or description in accordance with section 3 of Enclosure 4.

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(7) Except when characterization under other than honorable conditions is directed or the enlisted Service member is separated on the basis of a void enlistment or induction, the Secretary concerned may authorize the separation authority or higher authority to make a recommendation or determination as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total military service obligation. This option applies in cases involving separation from active duty or from the Selected Reserve. Section 5 of this enclosure is applicable if such action is approved.

3. ADMINISTRATIVE BOARD PROCEDURE

a. Notice. If an administrative board is required, the respondent will be notified in writing of:

(1) The basis of the proposed separation, including the circumstances upon which the action is based and reference to the applicable provisions of the Military Department's implementing regulation.

(2) Whether the proposed separation could result in discharge, release from active duty to a Reserve Component, transfer from the Selected Reserve to the IRR, release from the custody or control of the Military Services, or other form of separation.

(3) The least favorable characterization of service or description of separation authorized for the proposed separation.

(4) The respondent's right to consult with counsel as prescribed in subparagraph 2a(6) of this enclosure. A non-lawyer counsel may not represent a respondent before an administrative board unless:

(a) The respondent expressly declines appointment of counsel qualified under Appendix 2, Article 27(b), of Reference (m) and requests a specific non-lawyer counsel; or

(b) The separation authority assigns non-lawyer counsel as assistant counsel.

(5) The right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation. Classified documents may be summarized.

(6) The respondent's right to request a hearing before an administrative board.

(7) The respondent's right to present written statements instead of board proceedings.

(8) The respondent's right to representation at the administrative board either by military counsel appointed by the convening authority or by military counsel of the respondent's own

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choice, if counsel of choice is determined to be reasonably available under regulations of the Secretary concerned, but not both.

(9) The right to representation at the administrative board by civilian counsel at the respondent's own expense.

(10) The right to waive the rights in subparagraphs 3a(4) through 3a(9) of this enclosure.

(11) That failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of the rights in subparagraphs 3a(4) through 3a(9) of this enclosure.

(12) Failure to appear without good cause at a hearing constitutes waiver of the right to be present at the hearing.

b. Additional Notice Requirements

(1) If separation processing is initiated on the basis of more than one reason under Enclosure 3, the requirements of subparagraph 3a(1) of this enclosure apply to all proposed reasons for separation.

(2) If the respondent is in civil confinement, absent without leave, or in a Reserve Component not on active duty, the relevant notification procedures in sections 4, 5, or 6 of this enclosure apply.

(3) Additional notification requirements in sections 3 and 4 of Enclosure 3 apply when characterization of service as general (under honorable conditions) is authorized and the enlisted Service member is processed for separation by reason of convenience of the U.S. Government or disability.

c. Response. The respondent will be provided a reasonable period of time, but not less than 2 working days, to act on the notice. An extension may be granted upon a timely showing of good cause by the respondent. The decision of the respondent on each of the rights set forth in subparagraphs 3a(4) through 3a(9) of this enclosure, and applicable provisions referenced in paragraph 2 of this enclosure, will be recorded and signed by the respondent and counsel, subject to these limitations:

(1) If notice by mail is authorized in accordance with sections 4, 5, or 6 of this enclosure and the respondent fails to acknowledge receipt or submit a timely reply, that fact will constitute a waiver of rights and will be documented.

(2) If the respondent declines to respond as to the selection of rights, such declination will constitute a waiver of rights and will be documented. If the respondent indicates that one or more of the rights will be exercised, the selection of rights will be documented.

d. Waiver

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(1) If the right to a hearing before an administrative board is waived, the case will be processed in accordance with subparagraph 2d of this enclosure regarding notification procedures. The separation authority in such cases will be an official designated in accordance with subparagraph 3f of this enclosure.

(2) When authorized by the Secretary concerned, a respondent entitled to an administrative board hearing may exercise a conditional waiver after a reasonable opportunity to consult with counsel, in accordance with subparagraph 3a(4) of this enclosure. A conditional waiver is a statement initiated by a respondent waiving the right to a board proceeding contingent upon receiving a characterization of service or description of separation higher than the least favorable characterization or description authorized for the basis of separation set forth in the notice to the respondent.

e. Hearing Procedure. If a respondent requests a hearing before an administrative board, these procedures are applicable:

(1) Composition

(a) The convening authority will appoint to the administrative board at least three experienced commissioned, warrant, or noncommissioned officers. Enlisted personnel appointed to the board will be in grade E-7 or above and will be senior to the respondent. At least one member of the board will be serving in the grade of O-4 or higher, and a majority will be commissioned or warrant officers. The senior member will be the president of the board. The convening authority may also appoint a non-voting recorder to the board. A non-voting legal advisor may be appointed to assist the board if authorized by the Secretary concerned.

(b) If the respondent is an enlisted member of a Reserve Component, the board will include at least one Reserve officer as a voting member. Additionally, all board members will be commissioned officers if an “under other than honorable conditions” characterization from the Reserve Component is authorized to be issued. Voting board members will be senior to the respondent’s reserve grade.

(c) The convening authority will ensure that the opportunity to serve on administrative boards is given to women and minorities. However, the mere appointment or failure to appoint a member of such a group to the board does not provide a basis for challenging the proceeding.

(d) The respondent may challenge a voting member of the board or the legal advisor, if any, for cause only.

(2) Presiding Officer. The president will preside and rule finally on all matters of procedure and evidence, but the rulings of the president may be overruled by a majority of the board. If appointed, the legal advisor will rule finally on all matters of evidence and challenges except challenges to himself or herself.

(3) Witnesses

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(a) The respondent may request the attendance of witnesses in accordance with the implementing instructions of the Military Department concerned.

(b) In accordance with such instructions, the respondent may submit a written request for temporary duty or invitational travel orders for witnesses. Such a request will contain:

1. A synopsis of the testimony that the witness is expected to give.
2. An explanation of the relevance of such testimony to the issues of separation or characterization.
3. An explanation as to why written or recorded testimony would not be sufficient to provide for a fair determination of the issues of separation and characterization.

(c) The convening authority may authorize expenditure of funds for production of witnesses only if the presiding officer (after consultation with a judge advocate) or the legal advisor (if appointed) determines that:

1. The testimony of a witness is not cumulative.
2. The personal appearance of the witness is essential to a fair determination on the issues of separation and characterization.
3. Written or recorded testimony will not adequately accomplish the same objective.
4. The need for live testimony is substantial, material, and necessary for a proper disposition of the case.
5. The significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. Factors to be considered in relation to the balancing test include, but are not limited to, the cost of producing the witness; the timing of the request for production of the witness; the potential delay in the proceeding that may be caused by producing the witness; or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(d) If the convening authority determines that the personal testimony of a witness is required, the hearing will be postponed or continued if necessary to permit the attendance of the witness.

(e) The hearing will be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness if a witness requested by the respondent is unavailable:

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1. When the presiding officer or the legal officer (if appointed) determines that the personal testimony of the witness is not required;

2. When the commanding officer of a military witness determines that military necessity precludes the witness' attendance at the hearing; or

3. When a civilian witness declines to attend the hearing.

(f) Subparagraph 3e(3) of this enclosure does not authorize a federal employee to decline to appear as a witness if directed to do so in accordance with applicable procedures of the employing agency.

(4) Record of Proceedings. In cases where the board recommends separation, the record of the proceedings will be kept in summarized form unless a verbatim record is required by the Secretary concerned. In cases where the board recommends retention, a record of the proceedings is optional unless required by the Secretary concerned. However, a summarized or verbatim record will be prepared in any case where the board recommends retention and the separation authority elects to forward the matter to the Secretary concerned in accordance with subparagraph 3f(4)(b)2 of this enclosure. The board reporter will retain all materials necessary to prepare a transcript should the separation authority elect to forward the case to the Secretary. In all cases, the findings and recommendations of the board will be in verbatim form.

(5) Presentation of Evidence. The rules of evidence for courts-martial and other judicial proceedings are not applicable before an administrative board. However, reasonable restrictions will be observed concerning relevancy and competency of evidence.

(6) Rights of the Respondent

(a) The respondent may testify in his or her own behalf, subject to the provisions of Appendix 2, Article 31(a), of Reference (m).

(b) At any time during the proceedings, the respondent or counsel may submit written or recorded matter for consideration by the board.

(c) The respondent or counsel may call witnesses in his or her behalf.

(d) The respondent or counsel may question any witness who appears before the board.

(e) The respondent or counsel may present argument prior to the board convening in closed session for deliberation on findings and recommendations.

(7) Findings and Recommendations

(a) The board will determine its findings and recommendations in closed sessions. Only voting members of the board will be present.

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(b) The board will determine whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence. If more than one reason was contained in the notice, there will be a separate determination for each reason.

(c) The board will make recommendations on:

1. Retention or Separation. The board will recommend retention or separation in accordance with the guidance in section 1 of Enclosure 4.

2. Suspension of Separation. If the board recommends separation, it may recommend that the separation be suspended in accordance with section 2 of Enclosure 4, but the recommendation of the board as to suspension is not binding on the separation authority.

3. Characterization of Service or Description of Separation. If separation or suspended separation is recommended, the board will recommend a characterization of service, or description of separation, as authorized in Enclosure 3 in accordance with the guidance in section 3 of Enclosure 4.

4. Transfer to the Ready Reserve. Except when the board has recommended characterization of service under other than honorable conditions, the Secretary concerned may authorize the board to make a recommendation as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total military service obligation. This option applies to cases involving separation from active duty or from the Selected Reserve. Section 5 of this enclosure is applicable if the action is approved.

f. Separation Authority

(1) The separation authority for actions initiated under the administrative board procedure will be a general court-martial convening authority or higher authority. The Secretary concerned may also authorize a commanding officer in grade O-7 or above with a judge advocate or other legal advisor available to his command to act as a separation authority in specified circumstances.

(a) When an administrative board recommends characterization of service as honorable or general (under honorable conditions), the separation authority may be exercised by an officer designated in accordance with subparagraph 2d of this enclosure.

(b) When the case has been initiated under the notification procedure and the hearing is a result of a request in accordance with subparagraph 2a(7) of this enclosure, the separation authority will be as designated in subparagraph 2d of this enclosure.

(2) In every case in which characterization of service under other than honorable conditions is recommended, the record of the board's proceedings will be reviewed by a judge advocate or civilian attorney employed by the Military Department concerned prior to action by the separation authority. Such review is not required when another characterization is

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recommended unless the respondent identifies specific legal issues for consideration by the separation authority.

(3) The respondent will be provided with a copy of the board's findings and recommendations.

(4) The separation authority will take action in accordance with this subparagraph, the requirements in Enclosure 3 with respect to the reason for separation, and the guidance in Enclosure 4 on separation and characterization.

(a) If the separation authority approves the recommendations of the board on the issue of separation, characterization, or both, this constitutes approval of the board's findings and recommendations in accordance with subparagraph 3e(7) of this enclosure unless the separation authority expressly modifies such findings or recommendations.

(b) If the board recommends retention, the separation authority may take one of these actions:

1. Approve the recommendation.

2. Forward the matter to the Secretary concerned with a recommendation for separation based upon the circumstances of the case. In such a case, the Secretary may direct retention or separation. If the Secretary approves separation, the characterization of service or description of separation will be honorable, general (under honorable conditions), or an entry-level separation in accordance with the guidance in section 3 of Enclosure 4.

(c) If the board recommends separation, the separation authority may:

1. Approve the board's recommendations;

2. Approve the board's recommendations, but modify the recommendations by, when appropriate, approving the separation but suspending execution as provided in section 2 of Enclosure 4; changing the character of service or description of separation to a more favorable characterization or description; or changing the board's recommendation, if any, concerning transfer to the IRR.

3. Disapprove the board's recommendations and retain the respondent.

4. If the separation authority approves the board's findings and recommendations in whole or in part with respect to more than one reason in accordance with Enclosure 3, the separation authority will designate the most appropriate basis as the primary reason for reporting purposes.

5. If the separation authority finds legal prejudice to a substantial right of the respondent or determines that the findings of the board have been obtained by fraud or collusion, the case may be referred to a new board. No member of the new board will have served on a

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prior board that considered the case. The separation authority may not approve findings and recommendations less favorable to the respondent than those rendered by the previous board unless the separation authority finds that fraud or collusion in the previous board is attributable to the respondent or an individual acting on the respondent's behalf.

4. ADDITIONAL PROVISIONS CONCERNING ENLISTED SERVICE MEMBERS CONFINED BY CIVIL AUTHORITIES

a. If proceedings under this enclosure have been initiated against a respondent confined by civil authorities, the case may be processed in the absence of the respondent. Paragraph 3a of this enclosure is not applicable except insofar as such rights can be exercised by counsel on behalf of the respondent.

b. These requirements apply:

(1) The notice will contain the matter set forth in paragraphs 2a or 3a of this enclosure regarding notice in the notification procedure or administrative board procedure, as appropriate. The notice will be delivered personally to the respondent or sent by registered mail or certified mail, return receipt requested (or by an equivalent form of notice if such service is not available for delivery by U.S. mail at an address outside the United States). If the respondent refuses to acknowledge receipt of notice, the individual who mails the notification will prepare a sworn affidavit of Service by mail (see Reference (1)), which will be inserted in the respondent's official military personnel file together with PS Form 3800.

(2) If delivered personally, receipt will be acknowledged in writing by the respondent. If the respondent does not acknowledge receipt, the notice will be sent by mail as provided in subparagraph 4b(1) of this enclosure.

(3) The notice will state that the action has been suspended until a specific date (not less than 30 days from the date of delivery) in order to give the respondent the opportunity to exercise the rights set forth in the notice. If respondent does not reply by that date, the separation authority will take appropriate action in accordance with paragraph 2d of this enclosure.

(4) The name and address of the military counsel appointed for consultation will be specified in the notice.

(5) If the case involves entitlement to an administrative board, the respondent will be notified that the board will proceed in the respondent's absence and that the case may be presented on the respondent's behalf by counsel for the respondent.

5. ADDITIONAL REQUIREMENTS FOR CERTAIN ENLISTED SERVICE MEMBERS OF RESERVE COMPONENTS

a. Service Members of Reserve Components not on Active Duty

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(1) If proceedings have been initiated against an enlisted Service member of a Reserve Component not on active duty, the case may be processed in the absence of the enlisted Service member in these circumstances:

(a) At the request of the enlisted Service member;

(b) If the enlisted Service member does not respond to the notice of proceedings on or before the suspense date provided therein; or

(c) If the enlisted Service member fails to appear at a hearing as provided in subparagraph 3a(12) of this enclosure.

(2) The notice will contain the matters set forth in paragraphs 2a or 3a of this enclosure, as appropriate.

(3) If the action involves a transfer to the IRR under circumstances in which the procedures in this enclosure are applicable, the enlisted Service member will be notified that the character of service upon transfer to the IRR will also constitute the character of service upon discharge at the completion of the military service obligation unless specified conditions established by the Secretary concerned are met.

b. Transfer to the IRR. Upon transfer to the IRR, the enlisted Service member will be notified of:

(1) The character of service upon transfer from active duty or the Selected Reserve to the IRR and that the character of service upon completion of the military service obligation will be the same unless specified conditions established by the Secretary concerned are met.

(2) The date upon which the military service obligation will expire.

(3) The date by which the enlisted Service member must submit evidence of satisfactory completion of the specified conditions.

c. Notification of Admin Board. If the enlisted Service member submits evidence of completion of the specified conditions but the Military Department proposes to issue a discharge other than an honorable discharge, the notification procedure will be used. An administrative board is not required at this point notwithstanding the enlisted Service member's years of service.

d. Service Expiration. If the enlisted Service member does not submit such information on or before the date specified in the notice, no further proceedings are required. The character of discharge at the completion of the military service obligation will be the same as the character of service upon transfer from active duty or the Selected Reserve to the IRR.

e. Notice to Member. These requirements apply to the notices required by paragraphs 5a and 5b of this enclosure.

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(1) Reasonable effort should be made to furnish copies of the notice to the enlisted Service member through personal contact by a representative of the command. In such a case, a written acknowledgment of the notice will be obtained.

(2) If the enlisted Service member cannot be contacted or refuses to acknowledge receipt of the notice, the notice will be sent by registered or certified mail, return receipt requested, (or by an equivalent form of notice if such service by U.S. mail is not available for delivery at an address outside the United States) to the most recent address furnished by the Service member as an address for receipt or forwarding of official mail. The individual who mails the notification will prepare a sworn affidavit of service by mail (see Reference (l)), which will be inserted in the respondent's official military personnel file together with PS Form 3800.

6. ADDITIONAL REQUIREMENTS FOR ENLISTED SERVICE MEMBERS BEYOND MILITARY CONTROL BY REASON OF UNAUTHORIZED ABSENCE

a. Determination of Applicability. If the general court-martial convening authority or higher authority determines that separation is otherwise appropriate in accordance with this instruction, an enlisted Service member may be separated without return to military control in one or more of these circumstances:

(1) Absence without authority after being sent notice of initiation of separation processing.

(2) When prosecution of an enlisted Service member who is absent without authority appears to be barred by the statute of limitations in accordance with section 843 of Reference (h) or Appendix 2, Article 43, of Reference (m).

(3) When an enlisted Service member who is an alien is absent without leave and appears to have gone to a foreign country where the United States has no authority to apprehend the Service member under a treaty or other agreement.

b. Notice. Prior to execution of the separation in accordance with subparagraphs 6a(1), 6a(2) or 6a(3) of this enclosure, the enlisted Service member will be notified of the imminent action by registered mail or certified mail, return receipt requested (or by an equivalent form of notice if such service by U.S. mail is not available for delivery at an address outside the United States) to the Service member's last known address or to the next of kin under regulations prescribed by the Military Department concerned.

(1) The notice will contain the matters set forth in paragraphs 2a or 3a of this enclosure, as appropriate, and will specify that the action has been suspended until a specific date (not less than 30 days from the date of mailing) in order to give the respondent the opportunity to return to military control.

(2) If the respondent does not return to military control by that date, the separation authority will take appropriate action in accordance with paragraph 2d of this enclosure.

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c. Service Members of Reserve Components. See section 12685 of Reference (h) with respect to a limitation on separation of Service members of Reserve Components.

7. ADDITIONAL REQUIREMENTS FOR ADMINISTRATIVE SEPARATION PROCESSING TIMELINES

a. The Secretaries of the Military Departments will establish a timeline designed to effect the efficient separation of enlisted Service members from their Military Service that is measured from the date of notification to the date of separation.

(1) Processing goals should not exceed 15 working days for the notification procedure (see section 2 of Enclosure 5) and 50 working days for the administrative board procedure (see section 3 of Enclosure 5).

(2) While goals of shorter processing times are encouraged, variations may be established for complex cases or cases in which the separation authority is not located on the same facility as the respondent.

(3) Separation processing timelines goals, and the procedures for monitoring effectiveness, will be set forth in the Military Departments' implementing documents.

b. Failure to process an administrative separation within the prescribed goals will not create a bar to separation or affect characterization.

8. ADDITIONAL REQUIREMENTS FOR INFORMING ENLISTED SERVICE MEMBERS ABOUT SEPARATION POLICY

a. The Secretaries of the Military Departments will prescribe procedures for periodically informing enlisted Service members about separation policy. This will include:

(1) Information on the types of separations and the basis for their issuance.

(2) The possible effects of various actions upon reenlistment, civilian employment; veterans' benefits; and related matters concerning denial of certain benefits to enlisted Service members who fail to complete at least 2 years of an original enlistment.

(3) The purpose and authority of the Discharge Review Board and the Board for Correction of Military/Naval Records, established pursuant to sections 1552 and 1553 of Reference (h), and DoDI 1332.28 (Reference (r)).

b. The periodic informing will take place at least each time certain provisions of the UCMJ are explained in accordance with Article 137 of the UCMJ (Appendix 2 of Reference (m)) and section 937 of Reference (h). The required information may be provided in the form of a written fact sheet or similar document.

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c. The requirement that the effects of the various types of separations be explained to enlisted Service members is a command responsibility, not a procedural entitlement. Failure on the part of an enlisted Service member to read or to understand such separation information will not create a bar to separation or affect characterization.

9. ADDITIONAL REQUIREMENTS FOR PRE-SEPARATION HEALTH ASSESSMENTS

a. The Military Department Secretary concerned will prescribe procedures to ensure compliance with statutory requirements in accordance with sections 1145 and 1177 of Reference (h) to conduct a health assessment sufficient to evaluate the health of enlisted Service members at the time of separation. This assessment should determine any existing medical condition incurred during active duty service, provide baseline information for future care, complete a member's military medical record, and provide a final opportunity before separation to document any health concerns, exposures, or risk factors associated with active duty service.

(1) To comply with section 1177 of Reference (h), an enlisted Service member must receive a medical examination to assess whether the effects of PTSD or traumatic brain injury (TBI) constitute matters in extenuation that relate to the basis for administrative separation if the member meets all of the following criteria:

(a) Is being administratively separated under a characterization that is not either Honorable or General (Under Honorable Conditions).

(b) Was deployed overseas to a contingency operation or was sexually assaulted during the previous 24 months.

(c) Is diagnosed by a physician, clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse as experiencing PTSD or TBI, or reasonably alleges the influence of PTSD or TBI based on deployed service to a contingency operation or sexual assault during the previous 24 months.

(d) Is not being separated pursuant to a sentence of a court-martial or other UCMJ proceeding (Appendix 2 of Reference (m)). Administrative separation in lieu of court-martial does not constitute a court-martial or other proceeding conducted pursuant to Appendix 2 of Reference (m), and therefore, compliance with Section 1177 of Reference (h) is required.

(2) To comply with section 518 of Reference (c), in a case involving PTSD, the medical examination required in subparagraph 9a(1) of this enclosure will be performed by a clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse. In a case involving TBI, the medical examination may be performed by a physician, clinical psychologist, psychiatrist, or other health-care professional, as appropriate.

b. An enlisted Service member receiving a medical examination in accordance with subparagraphs 9a(1) and 9a(2) of this enclosure will not be separated until the result of the medical examination has been reviewed by appropriate authorities responsible for evaluating, reviewing, and approving the separation case, as determined by the Secretary concerned.

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10. ADDITIONAL COUNSELING REQUIRED FOR A DISCHARGE UNDER OTHER THAN HONORABLE CONDITIONS RESULTING FROM A CONTINUOUS, UNAUTHORIZED ABSENCE OF 180 DAYS OR MORE

a. Specific counseling is required regarding section 5303 of Title 38, U.S.C. (Reference (s)), which states that a discharge under other than honorable conditions resulting from a period of continuous, unauthorized absence of 180 days or more is a conditional bar to benefits administered by the Department of Veterans Affairs, notwithstanding any action by a Discharge Review Board.

b. Failure on the part of the enlisted Service member to read or to understand such explanation does not create a bar to separation or affect characterization.

11. ADDITIONAL REQUIREMENTS FOR INVOLUNTARY ADMINISTRATIVE SEPARATION OF ENLISTED SERVICE MEMBERS WHO MADE AN UNRESTRICTED REPORT OF SEXUAL ASSAULT

a. An enlisted Service member who made an unrestricted report of sexual assault and who is recommended for involuntary separation from the Military Services within 1 year of final disposition of his or her sexual assault case may request a general or flag officer (G/FO) review of the circumstances of and grounds for the involuntary separation.

(1) A qualified Service member must submit his or her written request to the first G/FO in the separation authority's chain of command prior to the separation authority approving the member's final separation action.

(2) Requests submitted after final separation action is complete will not be acted upon for G/FO review, but the separated Service member may apply to the appropriate Service Discharge Review Board or Board of Correction of Military/Naval Records for consideration.

(3) A qualified member who submits a timely request may not be separated until the G/FO conducting the review concurs with the circumstances of and the grounds for the involuntary separation.

b. DoDD 6495.01 (Reference (t)) and DoDI 6495.02 (Reference (u)) contain comprehensive DoD policy and procedures on sexual assault prevention and response.

12. ADDITIONAL REQUIREMENT TO PROCESS FOR ADMINISTRATIVE SEPARATION ENLISTED SERVICE MEMBERS CONVICTED OF CERTAIN SEXUAL OFFENSES

a. An enlisted Service member whose conviction for rape, sexual assault, forcible sodomy, or an attempt to commit one of those offenses is final, and who is not punitively discharged in

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connection with such conviction, will be processed for administrative separation for misconduct in accordance with subparagraph 10a(3) of Enclosure 3 of this instruction.

(1) Any separation decision will be based on the full facts of the case, and due process will be provided to the enlisted Service member.

(2) The requirement in paragraph 12a of this enclosure will not be interpreted to limit or alter the authority of the Secretary of the Military Department concerned to process members of the Military Services for administrative separation for other offenses or under other provisions of law.

b. References (t) and (u) contain comprehensive DoD policy and procedures on sexual assault prevention and response.

13. ADDITIONAL REQUIREMENT FOR MEMBERS RECEIVING AN OTHER THAN HONORABLE CHARACTERIZATION OF SERVICE.

a. In accordance with Section 528 of Public Law 115-91 (Reference (v)), the Secretary concerned will ensure that Service members being separated with an other than honorable discharge be informed, in writing, that they may petition the Veterans Benefits Administration of the Department of Veterans Affairs for certain benefits under the laws administered by the Secretary of Veterans Affairs, despite the characterization of the member's service.

b. Notification will be provided to a Service member in conjunction with the notification of the separation or as soon thereafter as practicable.

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ENCLOSURE 6

PROCEDURES FOR EARLY RELEASE OF ENLISTED MILITARY PERSONNEL FOR COLLEGE, VOCATIONAL, OR TECHNICAL SCHOOL ENROLLMENT

1. RESPONSIBILITY

a. The Military Services may permit enlisted personnel to further their education at a college, university, vocational or technical school by approving a discharge or release from active service prior to expiration of obligated service. This provides encouragement and support to enlisted personnel who seek to further their education resulting in more useful and productive citizens transitioning from military service back to the civilian workforce.

b. The provisions of this enclosure cover all military enlisted personnel with the exception of:

(1) Reservists ordered to active duty for training as provided in section 12103 of Reference (h) and reservists ordered to active duty due to unsatisfactory participation in reserve assignment, as provided in section 12303 of Reference (h).

(2) Aliens seeking to qualify for citizenship by completion of 3 years active duty military service unless they are to be transferred to inactive duty in a Reserve Component, as provided in DoDI 5500.14 (Reference (~~w~~)).

2. PROCEDURES

a. General

(1) Implementation of this enclosure will apply to applicants who meet the criteria of subparagraph 2b(1) of this enclosure under these circumstances:

(a) Enlisted personnel, including aliens transferred to inactive duty in a Reserve Component as outlined in Reference (~~w~~), who would be unduly penalized in the pursuit of their education if required to remain in service until expiration of their term of enlistment or induction, may be released early, subject to meeting all of the criteria shown in paragraph 2b of this enclosure.

(b) Separation date will be at the convenience of the U.S. Government, but will normally not be later than 10 days prior to the class starting date and in no event will be earlier than 30 days prior to such starting date.

(2) Prior to separation, personnel being separated under this instruction will be counseled in accordance with DoDI 1332.35 (Reference (~~w~~x)).

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b. Criteria

(1) If the provisions of this enclosure are implemented by a Military Department, the following criteria should be used in making determinations governing the early release of enlisted personnel:

(a) In general, personnel who will have a Reserve Component obligation upon separation will not be released under this program until they have completed a minimum of 21 months active duty on their current term of obligated service.

(b) The individual's service is not critical to the mission of the assigned organization.

(c) The latest acceptable class starting date is within the last 3 months of remaining service.

(d) Applicants must:

1. Furnish documentary evidence when applying for separation that they have been accepted for enrollment, commencing with a specific school term, in a full-time resident course of instruction at a recognized institution of higher education, leading to an associate, baccalaureate, or higher degree. A recognized institution is one that:

a. Is listed in the Education Directory for Post-secondary Education published yearly by the National Center for Education Statistics of the Department of Education, (available through the U.S. Government Printing Office, Washington, DC 20402); or

b. Has been determined by the United States Department of Education to be eligible for such listing.

2. Present documentary evidence when applying for separation that they have been accepted for enrollment, commencing with a specific school term, in a full-time resident course of instruction, of no less than 3 months, at a recognized vocational or technical school. A recognized school is one that is approved by the cognizant State Board for Vocational Education, or is accredited by a nationally recognized accrediting agency or association listed by the U. S. Department of Education.

(e) The applicant must demonstrate his or her ability and willingness to make the required payment of an entrance fee, if any, if he or she has not already done so.

(f) Clearly establish that the specific school term for which he or she seeks release is academically the most opportune time to begin or resume education and that delay of enrollment until normal expiration of service would cause undue handicap.

(2) The Secretaries of the Military Departments may approve applications not fully meeting the criteria established in paragraph 2b of this enclosure in exceptional cases.

GLOSSARYPART I. ABBREVIATIONS AND ACRONYMS

ASD(M&RA)	Assistant Secretary of Defense for Manpower and Reserve Affairs
DoDD	Department of Defense directive
DoDI	Department of Defense instruction
G/FO	general or flag officer
IRR	Individual Ready Reserve
OCONUS	outside the continental United States
PS	Postal Service
PTSD	post-traumatic stress disorder
TBI	traumatic brain injury
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code
USD(P&R)	Under Secretary of Defense for Personnel and Readiness

PART II. DEFINITIONS

These terms and their definitions are for the purpose of this instruction.

alien. Any person not a citizen or national of the United States.

commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that, under pertinent official directives, is recognized as a “command.”

convening authority

The separation authority; or

A commanding officer who has been authorized by the Secretary concerned to process a case, except for final action, and who otherwise has the qualifications to act as a separation authority.

discharge. Complete severance from all military status gained through enlistment or induction.

domicile. Legal residence.

dropped from the rolls. A type of release from Military Service that may be used to separate enlisted Service members who are away without official leave for 30 days or more and reported as a deserter or enlisted Service members who are confined by civilian authorities for at least 6 months. (See subparagraph 3c(3) of Enclosure 4).

enlisted Service member. A member of a Military Service serving in an enlisted grade of E-1 through E-9.

entry-level status. Upon enlistment, a Service member qualifies for entry-level status during:

The first 180 days of continuous active military service; or

The first 180 days of continuous active service after a service break of more than 92 days of active service. A Service member of a Reserve Component who is not on active duty or who is serving under a call or order to active duty for 180 days or less begins entry-level status upon enlistment in a Reserve Component. Entry-level status for such a Service member of a Reserve Component terminates:

One hundred eighty days after beginning training if the Service member is ordered to active duty for training for one continuous period of 180 days or more; or

Ninety days after the beginning of the second period of active duty training if the Service member is ordered to active duty for training under a program that splits the training into two or more separate periods of active duty. For the purposes of characterization of service or description of separation, the Service member's status is determined by the date of notification as to the initiation of separation proceedings.

military record. An individual's overall performance while a member of a Military Service, including personal conduct and performance of duty.

release from active duty. Termination of active duty status and transfer to a Reserve Component not on active duty, including transfer to the IRR.

respondent. An enlisted Service member who has been notified that action has been initiated to separate him or her from active duty military service.

separation. A general term that includes discharge, release from active duty, release from custody and control of the Military Services, transfer to the IRR, and similar changes in active or Reserve status.

separation authority. An official authorized by the Secretary concerned to take final action with respect to a specified type of separation.

Service member. An enlisted, warrant officer or commissioned officer member of a U.S. Military Service.

sexual assault. Defined in Reference (u).

sexual offense. Rape, sexual assault, forcible sodomy, or an attempt to commit one or more of these offenses.

vacation of suspension. When suspension of an enlisted Service member's administrative separation is terminated because the enlisted Service member failed to fulfill the terms of the suspension and execution of the enlisted Service member's administrative separation proceeds.

EXHIBIT 3

THE SOLDIER'S GUIDE TO CITIZENSHIP APPLICATION

United States Army Human Resources Command

The Adjutant General Directorate

Field Services Division

April 2017 (Destroy All Previous Editions)

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Introduction

The Department of Defense has partnered with the U.S. Citizenship and Immigration Services (USCIS) to assist non-citizen military personnel with their citizenship applications. The goal is to streamline and expedite the handling of their applications.

The Department of the Army has directed its Battalion (BN) and Brigade Combat Team (BCT) S-1s, Military Personnel Divisions (MPD), and Military Personnel Offices (MILPO) to assist Soldiers with their applications for citizenship and to coordinate with the U.S. Army Human Resources Command (USAHRC) as necessary to facilitate the process.

This guide explains the procedures for Soldiers to apply for citizenship under the military facilitated program and the responsibilities of the BN or BCT S-1s, MPDs, and MILPOs to assist them. For additional information, Soldiers should visit the USCIS website: <http://www.uscis.gov/>.

Applicability

This Guide was designed to assist Active Army, Army Reserve, and Army National Guard Soldiers who meet the criteria for citizenship based on qualifying military service. This Guide also helps Soldiers who choose to apply based on their permanent resident status; however, the applications of these Soldiers will not be processed as quickly as those who apply based on qualifying military service.

Although some information in this Guide may be helpful to Soldiers' family members, applications for citizenship submitted by the Soldiers' family members are not part of the Soldier Citizenship Application Program. Soldiers' family members who need assistance with applying for citizenship may consult their local Army Community Services (ACS) Center or Legal Assistance Office. Non-citizen family members of Soldiers may also consult these two websites for helpful information: <http://www.uscis.gov/> or <http://www.hrc.army.mil>.

Eligibility Requirements

Table T1 on the next page summarizes the differences in naturalization eligibility requirements between those who apply based on permanent resident status and those who apply based on qualifying military service. Following the table are descriptions of terms that explain the primary prerequisites for naturalization. If you still have questions about your eligibility, you should consult an immigrant assistance organization or USCIS.

Step 6. Collect the Necessary Documents.

You will need to include copies of several documents with your application. Use the checklist at Appendix A to make sure you include the right documents. Send an English translation with any document that is not already in English. The translation must include a statement from the translator that he or she is competent to translate and that the translation is correct. In some instances, the checklist directs you to send original documents. If you must send an original document to CIS, remember to make and keep a copy for your records. If filing under Category A or B, skip to Step 8.

Step 7. Bring your Completed Application to the BN or BCT S-1, MPD, or MILPO.

The BN or BCT S-1, MPD, or MILPO will review the documentation for accuracy and completeness. When the Soldier brings in the completed Application for Citizenship (Form N-400) with the required forms/documentation, the BN or BCT S-1, MPD, or MILPO will review them to ensure that the forms are filled out correctly and that all required documents are included (see checklist at Appendix B).

The BN or BCT S-1, MPD, or MILPO must verify the application, service data and then complete Part 5 through Part 8 of the Form N-426, dated 4 August 2015. Previous editions are not accepted.

It is essential for the BN or BCT S-1, MPD, or MILPO to certify that the character of the Soldier's service is "honorable". As a general rule, a Soldier is considered to be serving honorably unless a decision has been made, either by the Soldier's commander or a court martial, to discharge him/her under less than honorable conditions.

In the rare cases where the character of a Soldier's service is questionable, ONLY the Soldier's commander can decide this issue, and the sole criterion for the decision is: If the Soldier were being discharged today, based on his/her record, what type of discharge would the Soldier receive? If Honorable or General or Under Honorable Conditions, the character of service on the N-426 will read "honorable". If Under Less than Honorable Conditions, the N-426 character of service item will NOT read "honorable".

If this item is left blank, CIS will insist that this form be redone correctly.

For Army Reserve and Army National Guard Soldiers, it is essential that all periods of service be clearly annotated and that each period of service be specified as either Active or Inactive service.

For Army National Guard Soldiers, it is especially critical to show the legal authority (e.g., Title 10 or Title 32, US Code) for each period of Active Duty service as shown on the "Authority" line of the orders that called the individual Soldier to active duty.

For Army National Guard Soldiers who have no Active Duty service under Title 10, US Code, since 11 September 2001, it is essential that all time served in a National Guard drilling unit since 11 September 2001 be clearly specified as service in the Selected Reserve of the Ready Reserve.

The BN or BCT S-1, MPD, or MILPO will authenticate the Soldier's service data, and after the information is validated, sign and apply the official seal previously provided to CIS to the N-426.

Step 8. Mail the Application Packet to CIS.

The application packets for all Soldiers filing under Category C must be mailed to the special address for military personnel at the Nebraska Service Center listed here. It is better for the Soldier if the servicing BN or BCT S-1, MPD, or MILPO actually does the mailing of the citizenship application packet to the Nebraska Service Center. The interview may be scheduled at a CIS location selected by the Soldier. It is essential that the cover memorandum described in Appendix E be placed on top of the application packet inside the envelope.

US Citizenship and Immigration Services
Nebraska Service Center
PO Box 87426
Lincoln, NE 68501-7426

If the Soldier is currently located overseas or is scheduled to depart to an overseas location (either on a permanent change of station (PCS) move or a deployment) and wants the interview scheduled for the first opportunity in the overseas area:

> The Soldier should fill out and include in the application packet the CIS Request for Overseas Processing form in Appendix I. Inclusion of this completed form will enable CIS to move the Soldier's file to the correct overseas location as soon as feasible after it has been prepared for interview.

> The servicing BN/BCT S-1, MPD, or MILPO should send an e-mail message to the appropriate overseas CIS office after the Soldier's citizenship application

APPENDIX B

**Battalion (BN) or Brigade Combat Team (BCT) S-1, Military Personnel Division (MPD), or Military Personnel Office (MILPO)
Checklist for Naturalization Application**

	Yes	No	N/A
Is the Form N-400 filled out completely?			
Is the appropriate block in Part 2 of the N-400 checked?			
If the applicant answered "yes" to one or more questions in Part 10 of the N-400, is an explanation on a separate sheet attached?			
Has the applicant signed the N-400 in Part 11?			
Is a filled out, signed, and dated Authorization for USCIS Usage of Military Fingerprints form attached (Category C only)?			
Is the Form N-426 attached (Category C only)?			
Is the N-426 filled out completely (Category C only)?			
Has the BN or BCT S-1, MPD, or MILPO obtained the information required to complete sections 11 and 12 of the N-426?			
Has the BN or BCT S-1, MPD, or MILPO verified the service dates and character of service on the N-426?			
Has the back of the N-426 been signed by the BN or BCT S-1, MPD, or MILPO and stamped with the official seal (i.e., the seal used to authenticate PCS/TDY orders)?			
Has the soldier included a check for the application fee in the correct amount (Categories A and B only)?			
Has the soldier included other necessary documents, such as marriage certificates, divorce certificates, etc.?			

	Yes	No	N/A
Has the BN or BCT S-1, MPD, or MILPO included a cover sheet indicating the BN or BCT S-1, MPD, or MILPO POC and commercial phone number and email address, and for Category C applicants, where the applicant would like to be interviewed (see format at Appendix E)?			

EXHIBIT 4



INTELLIGENCE

**UNDER SECRETARY OF DEFENSE
5000 DEFENSE PENTAGON
WASHINGTON, DC 20301-5000**

AUG 30 2006

**MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
GENERAL COUNSEL OF THE DEPARTMENT
OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT
OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES**

**Subject: Implementation of Adjudicative Guidelines for Determining Eligibility
For Access to Classified Information (December 29, 2005)**

This memorandum directs the implementation of the attached revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005), as modified, effective September 1, 2006.

The revised Guidelines supersede the memorandum issued by the former Assistant Secretary of Defense for Command, Control, Communications, and Intelligence dated August 16, 2000, Subject: Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline.

The attachment incorporates the provisions of the "Smith Amendment," Section 986 of Title 10 of the United States Code, as amended. The Smith Amendment provides authority to grant an exception to the prohibition concerning persons convicted of a crime, sentenced to a term exceeding one year, and incarcerated for not less than one year, or who have been discharged or dismissed from the Armed Forces under dishonorable conditions. An exception to the Smith Amendment for the persons described above is only authorized by a designated waiver authority in meritorious cases where mitigating factors exist that are consistent with the mitigating factors described in the attached Adjudicative Guidelines.



The waiver authority formerly held by the Secretary of Defense is now delegated to the Director, Washington Headquarters Services (WHS) or designee, for its employees and those entities serviced by WHS; the Director, Defense Intelligence Agency (DIA) or designee, for its employees and those entities serviced by DIA; the Director, National Security Agency (NSA) or designee, for its employees and those entities serviced by NSA; the Director, Defense Office of Hearings and Appeals (DOHA) or designee, for an officer or employee of a DoD contractor serviced by DOHA; and the Secretaries of the Military Departments or designee. Waiver authority may not be further delegated to a member of the Component Personnel Security Appeal Board or the DOHA Security Clearance Appeal Board.

The revised Guidelines apply to all adjudications and other determinations made under the Department of Defense Directive (DoDD) 5220.6, January 2, 1992, Defense Industrial Personnel Security Clearance Review Program, and the DoD Personnel Security Program, DoD 5200.2-R, January 1, 1987. They replace the present guidelines published in Enclosure Two to DoDD 5220.6 and Appendix Eight to DoD 5200.2-R. Military Department and Defense Agency regulations should be revised in accordance with this memorandum.

The revised Guidelines apply to all adjudications and other determinations in which a Statement of Reasons has not been issued by September 1, 2006. All adjudications and other determinations in which a Statement of Reasons has been issued prior to September 1, 2006 will be made under the current Guidelines.


Stephen A. Cambone

Attachment:
As stated

August 2006

Adjudicative Guidelines for Determining Eligibility For Access to Classified Information

1. *Introduction.* The following adjudicative guidelines are established for all U.S. government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees, and other individuals who require access to classified information. They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information and special access programs, and are to be used by government departments and agencies in all final clearance determinations. Government departments and agencies may also choose to apply these guidelines to analogous situations regarding persons being considered for access to other types of protected information.

Decisions regarding eligibility for access to classified information take into account factors that could cause a conflict of interest and place a person in the position of having to choose between his or her commitments to the United States, including the commitment to protect classified information, and any other compelling loyalty. Access decisions also take into account a person's reliability, trustworthiness and ability to protect classified information. No coercive policing could replace the self-discipline and integrity of the person entrusted with the nation's secrets as the most effective means of protecting them. When a person's life history shows evidence of unreliability or untrustworthiness, questions arise whether the person can be relied on and trusted to exercise the responsibility necessary for working in a secure environment where protecting classified information is paramount.

2. The Adjudicative Process.

(a) The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudication process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

- (1) the nature, extent, and seriousness of the conduct;

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- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence;

(b) Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.

(c) The ability to develop specific thresholds for action under these guidelines is limited by the nature and complexity of human behavior. The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person.

- (1) GUIDELINE A: Allegiance to the United States;
- (2) GUIDELINE B: Foreign Influence
- (3) GUIDELINE C: Foreign Preference;
- (4) GUIDELINE D: Sexual Behavior;
- (5) GUIDELINE E: Personal Conduct;
- (6) GUIDELINE F: Financial Considerations;
- (7) GUIDELINE G: Alcohol Consumption;
- (8) GUIDELINE H: Drug Involvement;
- (9) GUIDELINE I: Psychological Conditions;
- (10) GUIDELINE J: Criminal Conduct;
- (11) GUIDELINE K: Handling Protected Information;

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(12) GUIDELINE L: Outside Activities;

(13) GUIDELINE M: Use of Information Technology Systems

(d) Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. Notwithstanding the whole-person concept, pursuit of further investigation may be terminated by an appropriate adjudicative agency in the face of reliable, significant, disqualifying, adverse information.

(e) When information of security concern becomes known about an individual who is currently eligible for access to classified information, the adjudicator should consider whether the person:

- (1) voluntarily reported the information;
- (2) was truthful and complete in responding to questions;
- (3) sought assistance and followed professional guidance, where appropriate;
- (4) resolved or appears likely to favorably resolve the security concern;
- (5) has demonstrated positive changes in behavior and employment;
- (6) should have his or her access temporarily suspended pending final adjudication of the information.

(f) If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access.

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GUIDELINE A: ALLEGIANCE TO THE UNITED STATES

3. *The Concern.* An individual must be of unquestioned allegiance to the United States. The willingness to safeguard classified information is in doubt if there is any reason to suspect an individual's allegiance to the United States.
4. *Conditions that could raise a security concern and may be disqualifying include:*
- (a) involvement in, support of, training to commit, or advocacy of any act of sabotage, espionage, treason, terrorism, or sedition against the United States of America;
 - (b) association or sympathy with persons who are attempting to commit, or who are committing, any of the above acts;
 - (c) association or sympathy with persons or organizations that advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means, in an effort to:
 - (1) overthrow or influence the government of the United States or any state or local government;
 - (2) prevent Federal, state, or local government personnel from performing their official duties;
 - (3) gain retribution for perceived wrongs caused by the Federal, state, or local government;
 - (4) prevent others from exercising their rights under the Constitution or laws of the United States or of any state.
5. *Conditions that could mitigate security concerns include:*
- (a) the individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these;
 - (b) the individual's involvement was only with the lawful or humanitarian aspects of such an organization;
 - (c) involvement in the above activities occurred for only a short period of time and was attributable to curiosity or academic interest;
 - (d) the involvement or association with such activities occurred under such unusual circumstances, or so much time has elapsed, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or loyalty.

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GUIDELINE B: FOREIGN INFLUENCE

6. *The Concern.* Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

7. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;
- (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;
- (c) counterintelligence information, that may be classified, indicates that the individual's access to protected information may involve unacceptable risk to national security;
- (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;
- (e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation;
- (f) failure to report, when required, association with a foreign national;
- (g) unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service;
- (h) indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion;

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(i) conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

8. *Conditions that could mitigate security concerns include:*

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country;

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

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GUIDELINE C: FOREIGN PREFERENCE

9. *The Concern.* When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

10. *Conditions that could raise a security concern and may be disqualifying include:*

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

- (1) possession of a current foreign passport;
- (2) military service or a willingness to bear arms for a foreign country;
- (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
- (4) residence in a foreign country to meet citizenship requirements;
- (5) using foreign citizenship to protect financial or business interests in another country;
- (6) seeking or holding political office in a foreign country;
- (7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest;

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

11. *Conditions that could mitigate security concerns include:*

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

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- (c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;
- (d) use of a foreign passport is approved by the cognizant security authority.
- (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated;
- (f) the vote in a foreign election was encouraged by the United States Government.

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GUIDELINE D: SEXUAL BEHAVIOR

12. *The Concern.* Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

13. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
- (d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

14. *Conditions that could mitigate security concerns include:*

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress.
- (d) the sexual behavior is strictly private, consensual, and discreet.

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GUIDELINE E: PERSONAL CONDUCT

15. *The Concern.* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation;
- (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

16. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;
- (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;
- (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but

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which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;
- (2) disruptive, violent, or other inappropriate behavior in the workplace;
- (3) a pattern of dishonesty or rule violations;
- (4) evidence of significant misuse of Government or other employer's time or resources;
- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;
- (f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment;
- (g) association with persons involved in criminal activity.

17. *Conditions that could mitigate security concerns include:*

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

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(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability;

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

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GUIDELINE F: FINANCIAL CONSIDERATIONS

18. *The Concern.* Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

19. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) inability or unwillingness to satisfy debts;
- (b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt.
- (c) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis;
- (f) financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern;
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;
- (h) unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income;
- (i) compulsive or addictive gambling as indicated by an unsuccessful attempt to stop gambling, "chasing losses" (i.e. increasing the bets or returning another day in an effort to get even), concealment of gambling losses, borrowing money to

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fund gambling or pay gambling debts, family conflict or other problems caused by gambling.

20. *Conditions that could mitigate security concerns include:*

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue;
- (f) the affluence resulted from a legal source of income.

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GUIDELINE G: ALCOHOL CONSUMPTION

21. *The Concern.* Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

22. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
- (e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;
- (f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program;
- (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

23. *Conditions that could mitigate security concerns include:*

- (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

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(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress;

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

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GUIDELINE H: DRUG INVOLVEMENT

24. *The Concern.* Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

25. *Conditions that could raise a security concern and may be disqualifying include:*

(a) any drug abuse (see above definition);¹

(b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) any illegal drug use after being granted a security clearance;

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

26. *Conditions that could mitigate security concerns include:*

¹ Under the provisions of 10 U.S.C. 986 any person who is an unlawful user of, or is addicted to, a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), may not be granted or have renewed their access to classified information.

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- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence;
 - (4) a signed statement of intent with automatic revocation of clearance for any violation;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

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GUIDELINE I: PSYCHOLOGICAL CONDITIONS

27. *The Concern.* Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline. No negative inference concerning the standards in this Guideline may be raised solely on the basis of seeking mental health counseling.

28. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) behavior that casts doubt on an individual's judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior;
- (b) an opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness;¹
- (c) the individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g., failure to take prescribed medication.

29. *Conditions that could mitigate security concerns include:*

- (a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;
- (b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;
- (c) recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's

¹ Under the provisions of 10 U.S.C. 986, and person who is mentally incompetent, as determined by a credentialed mental health professional approved by the Department of Defense, may not be granted or have renewed their access to classified information.

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previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

(d) the past emotional instability was a temporary condition (e.g., one caused by death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability;

(e) there is no indication of a current problem.

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GUIDELINE J: CRIMINAL CONDUCT

30. *The Concern.* Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

31. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;¹
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation;
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program;
- (f) *conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.*²

32. *Conditions that could mitigate security concerns include:*

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense;

¹ Under the provisions of 10 U.S.C. 986, a person who has received a dishonorable discharge or has been dismissed from the Armed Forces may not be granted or have renewed access to classified information. In a meritorious case, the Secretaries of the Military Departments or designee, or the Directors of WHS, DIA, NSA, DOHA or designee may authorize a waiver of this prohibition. Waiver authority may not be further delegated to a member of the Component Personnel Security Appeal Board or the DOHA Security Clearance Appeal Board.

² Under the above mentioned statute, a person who has been convicted in a Federal or State court, including courts martial, sentenced to imprisonment for a term exceeding one year and incarcerated for not less than one year, may not be granted or have renewed access to classified information. The same waiver provision also applies.

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(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement;

(e) potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee; or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver.

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GUIDELINE K: HANDLING PROTECTED INFORMATION

33. *The Concern.* Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

34. *Conditions that could raise a security concern and may be disqualifying include:*

(a) deliberate or negligent disclosure of classified or other protected information to unauthorized persons, including but not limited to personal or business contacts, to the media, or to persons present at seminars, meetings, or conferences;

(b) collecting or storing classified or other protected information at home or in any other unauthorized location;

(c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment including but not limited to any typewriter, word processor, or computer hardware, software, drive, system, gameboard, handheld, "palm" or pocket device or other adjunct equipment;

(d) inappropriate efforts to obtain or view classified or other protected information outside one's need to know;

(e) copying classified or other protected information in a manner designed to conceal or remove classification or other document control markings;

(f) viewing or downloading information from a secure system when the information is beyond the individual's need-to-know;

(g) any failure to comply with rules for the protection of classified or other sensitive information;

(h) negligence or lax security habits that persist despite counseling by management.

(i) failure to comply with rules or regulations that results in damage to the National Security, regardless of whether it was deliberate or negligent.

35. *Conditions that could mitigate security concerns include:*

(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and

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does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;

(c) the security violations were due to improper or inadequate training.

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GUIDELINE L: OUTSIDE ACTIVITIES

36. *The Concern.* Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

37. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) any employment or service, whether compensated or volunteer, with:
 - (1) the government of a foreign country;
 - (2) any foreign national, organization, or other entity;
 - (3) a representative of any foreign interest;
 - (4) any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology;
- (b) failure to report or fully disclose an outside activity when this is required.

38. *Conditions that could mitigate security concerns include:*

- (a) evaluation of the outside employment or activity by the appropriate security or counterintelligence office indicates that it does not pose a conflict with an individual's security responsibilities or with the national security interests of the United States;
- (b) the individual terminated the employment or discontinued the activity upon being notified that it was in conflict with his or her security responsibilities.

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GUIDELINE M: USE OF INFORMATION TECHNOLOGY SYSTEMS

39. *The Concern.* Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information.

Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

40. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) illegal or unauthorized entry into any information technology system or component thereof;
- (b) illegal or unauthorized modification, destruction, manipulation or denial of access to information, software, firmware, or hardware in an information technology system;
- (c) use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system;
- (d) downloading, storing, or transmitting classified information on or to any unauthorized software, hardware, or information technology system;
- (e) unauthorized use of a government or other information technology system;
- (f) introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system without authorization, when prohibited by rules, procedures, guidelines or regulations;
- (g) negligence or lax security habits in handling information technology that persist despite counseling by management;
- (h) any misuse of information technology, whether deliberate or negligent, that results in damage to the national security.

41. *Conditions that could mitigate security concerns include:*

- (a) so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

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(b) the misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available;

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

EXHIBIT 5

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SECURITY EXECUTIVE AGENT DIRECTIVE 4

NATIONAL SECURITY ADJUDICATIVE GUIDELINES

(EFFECTIVE: 08 JUNE 2017)

A. AUTHORITY: The National Security Act of 1947, as amended; Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), as amended; Executive Order (EO) 10450, Security Requirements for Government Employment, as amended; EO 12968, Access to Classified Information, as amended; EO 13467, Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information; EO 13549, Classified National Security Information Program for State, Local, Tribal and Private Sector Entities; Performance Accountability Council memorandum, Assignment of Functions Relating to Coverage of Contractor Employee Fitness in the Federal Investigative Standards, 6 December 2012; and other applicable provisions of law.

B. PURPOSE: This Security Executive Agent (SecEA) Directive establishes the single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The Guidelines reflected herein supersede all previously issued national security adjudicative criteria or guidelines.

C. APPLICABILITY: This Directive applies to any executive branch agency authorized or designated to conduct adjudications of covered individuals to determine eligibility for initial or continued access to classified national security information or eligibility to hold a sensitive position.

D. DEFINITIONS: As used in this Directive, the following terms have the meanings set forth below:

1. "Agency": Any "Executive agency" as defined in Section 105 of Title 5, United States Code (USC), including the "military departments," as defined in Section 102 of Title 5, USC and any other entity within the Executive Branch that comes into possession of classified information or has positions designated as sensitive.

2. "Authorized adjudicative agency": An agency authorized by law, executive order, or designation by the SecEA to determine eligibility for access to classified information in accordance with EO 12968, as amended, or eligibility to hold a sensitive position.

3. "Authorized investigative agency": An agency authorized by law, executive order, or designation by the SecEA to conduct a background investigation of individuals who are proposed for access to classified information or eligibility to hold a sensitive position or to

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ascertain whether such individuals continue to satisfy the criteria for retaining access to such information or eligibility to hold such positions.

4. “Classified national security information” or “classified information”: Information that has been determined pursuant to EO 13526 or any predecessor or successor order, or the Atomic Energy Act of 1954, as amended, to require protection against unauthorized disclosure.

5. “Covered individual”:

a. A person who performs work for or on behalf of the executive branch or who seeks to perform work for or on behalf of the executive branch, but does not include the President or (except to the extent otherwise directed by the President) employees of the President under 3 USC 105 or 107, the Vice President, or (except to the extent otherwise directed by the Vice President) employees of the Vice President under 3 USC 106 or annual legislative branch appropriations acts;

b. A person who performs work for or on behalf of a state, local, tribal, or private sector entity as defined in EO 13549 requiring eligibility for access to classified information;

c. A person working in or for the legislative or judicial branches requiring eligibility for access to classified information and the investigation or determination is conducted by the executive branch, but does not include members of Congress; Justices of the Supreme Court; and Federal judges appointed by the President.

d. Covered individuals are not limited to government employees and include all persons, not excluded under paragraphs (a), (b), or (c) of this definition, who require eligibility for access to classified information or eligibility to hold a sensitive position, including, but not limited to, contractors, subcontractors, licensees, certificate holders, grantees, experts, consultants, and government employees.

6. “Foreign Intelligence Entity”: Known or suspected foreign state or non-state organizations or persons that conduct intelligence activities to acquire U.S. information, block or impair U.S. intelligence collection, influence U.S. policy, or disrupt U.S. systems and programs. The term includes foreign intelligence and security services and international terrorists.

7. “National Security Eligibility”: Eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information.

8. “Sensitive Position”: Any position within or in support of an agency in which the occupant could bring about, by virtue of the nature of the position, a material adverse effect on the national security regardless of whether the occupant has access to classified information, and regardless of whether the occupant is an employee, military service member, or contractor.

E. POLICY:

1. The National Security Adjudicative Guidelines in Appendix A shall be used by all authorized adjudicative agencies when rendering a determination for initial or continued eligibility for access to classified information or initial or continued eligibility to hold a sensitive position.

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2. Appendix B sets forth statutory restrictions on agencies making certain eligibility determinations for access to classified information, as well as waiver and congressional reporting requirements. These amendments to the IRTPA are commonly referred to as the Bond Amendment. By definition, the risk to national security is equivalent for covered individuals with access to classified information and covered individuals occupying a sensitive position. Occupants of sensitive positions could bring about, by virtue of the nature of the position, a material adverse effect on the national security regardless of whether the occupant has access to classified information. Due to the equivalent adverse effect on the national security and to ensure uniformity, consistency, and reciprocity of national security background investigations and adjudications, the statutory restrictions imposed by the Bond Amendment are extended to apply to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. Authorized adjudicative agencies shall maintain a record of the number and type of meritorious waivers granted under Bond Amendment criteria, to include the rationale for each waiver, and shall report this data annually to the SecEA in advance of the annual report to Congress. Authorized adjudicative agencies will also maintain a record of all disqualifications due to Bond Amendment criteria.

3. Exceptions, as provided for in Appendix C, shall be used when a favorable adjudicative decision to grant initial or continued eligibility for access to classified information or to hold a sensitive position is made, despite failure to meet adjudicative or investigative standards.

4. Eligibility shall be determined by appropriately trained adjudicative personnel through the evaluation of all information bearing on an individual's loyalty and allegiance to the United States, including any information relevant to strength of character, honesty, discretion, sound judgment, reliability, ability to protect classified or sensitive information, and trustworthiness. Eligibility for access to classified information or eligibility to occupy a sensitive position shall only be granted when the evaluation of all such information demonstrates that such eligibility is clearly consistent with the interests of the United States; any doubt shall be resolved in favor of the national security.

5. All adjudicative determinations, including any associated exceptions, shall be recorded in either Scattered Castles, the Joint Personnel Adjudication System within the Department of Defense, or the Central Verification System database within U.S. Office of Personnel Management or successor databases, unless authorized by the SecEA to withhold information from the database for national security purposes.

6. When an adjudicative determination is made to deny or revoke eligibility for access to classified information or eligibility to hold a sensitive position, review proceedings, to the extent they are made available in EO 12968, as amended, Part 5, shall be afforded covered individuals at a minimum.

7. The agency with adjudicative authority remains responsible for the final determination.

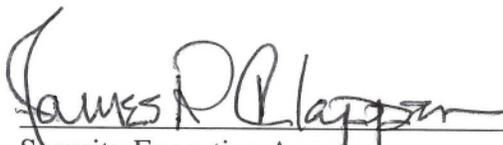
8. Agencies shall update internal policies and replace existing national security adjudicative criteria or guidelines with the guidelines in Appendix A no later than the effective date of this Directive.

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9. This Directive is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit, or trust responsibility substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

F. EFFECTIVE DATE: This Directive becomes effective 180 days after the date of signature.



Security Executive Agent



Date

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APPENDIX A

NATIONAL SECURITY ADJUDICATIVE GUIDELINES

FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION

OR ELIGIBILITY TO HOLD A SENSITIVE POSITION

1. Introduction.

(a) The following National Security Adjudicative Guidelines (“guidelines”) are established as the single common criteria for all U.S. Government civilian and military personnel, consultants, contractors, licensees, certificate holders or grantees and their employees, and other individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information (hereafter referred to as “national security eligibility”). These guidelines shall be used by all Executive Branch Agencies when rendering any final national security eligibility determination.

(b) National security eligibility determinations take into account a person’s stability, trustworthiness, reliability, discretion, character, honesty, and judgment. Individuals must be unquestionably loyal to the United States. No amount of oversight or security procedures can replace the self-discipline and integrity of an individual entrusted to protect the nation’s secrets or occupying a sensitive position. When a person’s life history shows evidence of unreliability or untrustworthiness, questions arise as to whether the individual can be relied upon and trusted to exercise the responsibility necessary for working in an environment where protecting the national security is paramount.

(c) The U.S. Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in making a national security eligibility determination. No negative inference concerning eligibility under these guidelines may be raised solely on the basis of mental health counseling. No adverse action concerning these guidelines may be taken solely on the basis of polygraph examination technical calls in the absence of adjudicatively significant information.

(d) In accordance with EO 12968, as amended, eligibility for covered individuals shall be granted only when facts and circumstances indicate that eligibility is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of national security.

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2. The Adjudicative Process.

(a) The adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept. All available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a national security eligibility determination.

(b) Each case must be judged on its own merits, and the final determination remains the responsibility of the authorized adjudicative agency. Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.

(c) The ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person.

- (1) GUIDELINE A: Allegiance to the United States
- (2) GUIDELINE B: Foreign Influence
- (3) GUIDELINE C: Foreign Preference
- (4) GUIDELINE D: Sexual Behavior
- (5) GUIDELINE E: Personal Conduct
- (6) GUIDELINE F: Financial Considerations
- (7) GUIDELINE G: Alcohol Consumption
- (8) GUIDELINE H: Drug Involvement and Substance Misuse
- (9) GUIDELINE I: Psychological Conditions
- (10) GUIDELINE J: Criminal Conduct
- (11) GUIDELINE K: Handling Protected Information
- (12) GUIDELINE L: Outside Activities
- (13) GUIDELINE M: Use of Information Technology

(d) In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

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(e) Although adverse information concerning a single criterion may not be sufficient for an unfavorable eligibility determination, the individual may be found ineligible if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or unstable behavior. However, a single criterion may be sufficient to make an unfavorable eligibility determination even in the absence of a recent occurrence or a recurring pattern. Notwithstanding the whole-person concept, pursuit of further investigation may be terminated by an appropriate adjudicative agency in the face of reliable, significant, disqualifying, adverse information.

(f) When information of security concern becomes known about an individual who is currently eligible for access to classified information or eligible to hold a sensitive position, the adjudicator should consider whether the individual:

- (1) voluntarily reported the information;
- (2) was truthful and complete in responding to questions;
- (3) sought assistance and followed professional guidance, where appropriate;
- (4) resolved or appears likely to favorably resolve the security concern;
- (5) has demonstrated positive changes in behavior; and
- (6) should have his or her national security eligibility suspended pending final adjudication of the information.

(g) If after evaluating information of security concern, the adjudicator decides the information is serious enough to warrant a recommendation of denial or revocation of the national security eligibility, but the specific risk to national security can be managed with appropriate mitigation measures, an adjudicator may recommend approval to grant initial or continued eligibility for access to classified information or to hold a sensitive position with an exception as defined in Appendix C.

(h) If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of denial or revocation of the national security eligibility, an adjudicator may recommend approval with a warning that future incidents of a similar nature or other incidents of adjudicative concern may result in revocation of national security eligibility.

(i) It must be noted that the adjudicative process is predicated upon individuals providing relevant information pertaining to their background and character for use in investigating and adjudicating their national security eligibility. Any incident of intentional material falsification or purposeful non-cooperation with security processing is of significant concern. Such conduct raises questions about an individual's judgment, reliability, and trustworthiness and may be predictive of their willingness or ability to protect the national security.

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GUIDELINES

GUIDELINE A: ALLEGIANCE TO THE UNITED STATES

3. *The Concern.* The willingness to safeguard classified or sensitive information is in doubt if there is any reason to suspect an individual's allegiance to the United States. There is no positive test for allegiance, but there are negative indicators. These include participation in or support for acts against the United States or placing the welfare or interests of another country above those of the United States. Finally, the failure to adhere to the laws of the United States may be relevant if the violation of law is harmful to stated U.S. interests. An individual who engages in acts against the United States or provides support or encouragement to those who do has already demonstrated willingness to compromise national security.

4. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) involvement in, support of, training to commit, or advocacy of any act of sabotage, espionage, treason, terrorism, or sedition against the United States;
- (b) association or sympathy with persons who are attempting to commit, or who are committing, any of the above acts; and
- (c) association or sympathy with persons or organizations that advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means, in an effort to:
 - (1) overthrow or influence the U.S. Government or any state or local government;
 - (2) prevent Federal, state, or local government personnel from performing their official duties;
 - (3) gain retribution for perceived wrongs caused by the Federal, state, or local government; and
 - (4) prevent others from exercising their rights under the Constitution or laws of the United States or of any state.

5. *Conditions that could mitigate security concerns include:*

- (a) the individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these;
- (b) the individual's involvement was humanitarian and permitted under U.S. law;
- (c) involvement in the above activities occurred for only a short period of time and was attributable to curiosity or academic interest; and

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(d) the involvement or association with such activities occurred under such unusual circumstances, or so much time has elapsed, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or allegiance.

GUIDELINE B: FOREIGN INFLUENCE

6. *The Concern.* Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

7. *Conditions that could raise a security concern and may be disqualifying include:*

(a) contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology;

(c) failure to report or fully disclose, when required, association with a foreign person, group, government, or country;

(d) counterintelligence information, whether classified or unclassified, that indicates the individual's access to classified information or eligibility for a sensitive position may involve unacceptable risk to national security;

(e) shared living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;

(f) substantial business, financial, or property interests in a foreign country, or in any foreign-owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest;

(g) unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence entity;

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(h) indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion; and

(i) conduct, especially while traveling or residing outside the U.S., that may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

8. *Conditions that could mitigate security concerns include:*

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the agency head or designee;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

GUIDELINE C: FOREIGN PREFERENCE

9. *The Concern.* When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may provide information or make decisions that are harmful to the interests of the United States. Foreign involvement raises concerns about an individual's judgment, reliability, and trustworthiness when it is in conflict with U.S. national interests or when the individual acts to conceal it. *By itself*, the fact that a U.S. citizen is also a citizen of another country is not disqualifying without an objective showing of such conflict or attempt at concealment. The same is true for a U.S. citizen's exercise of any right or privilege of foreign citizenship and any action to acquire or obtain recognition of a foreign citizenship.

10. *Conditions that could raise a security concern and may be disqualifying include:*

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- (a) applying for and/or acquiring citizenship in any other country;
- (b) failure to report, or fully disclose when required, to an appropriate security official, the possession of a passport or identity card issued by any country other than the United States;
- (c) failure to use a U.S. passport when entering or exiting the U.S.;
- (d) participation in foreign activities, including but not limited to:
 - (1) assuming or attempting to assume any type of employment, position, or political office in a foreign government or military organization; and
 - (2) otherwise acting to serve the interests of a foreign person, group, organization, or government in any way that conflicts with U.S. national security interests;
- (e) using foreign citizenship to protect financial or business interests in another country in violation of U.S. law; and
- (f) an act of expatriation from the United States such as declaration of intent to renounce U.S. citizenship, whether through words or actions.

11. *Conditions that could mitigate security concerns include:*

- (a) the foreign citizenship is not in conflict with U.S. national security interests;
- (b) dual citizenship is based solely on parental citizenship or birth in a foreign country, and there is no evidence of foreign preference;
- (c) the individual has expressed a willingness to renounce the foreign citizenship that is in conflict with U.S. national security interests;
- (d) the exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen;
- (e) the exercise of the entitlements or benefits of foreign citizenship do not present a national security concern;
- (f) the foreign preference, if detected, involves a foreign country, entity, or association that poses a low national security risk;
- (g) civil employment or military service was authorized under U.S. law, or the employment or service was otherwise consented to as required by U.S. law; and
- (h) any potentially disqualifying activity took place after receiving the approval by the agency head or designee.

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GUIDELINE D: SEXUAL BEHAVIOR

12. *The Concern.* Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

13. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

14. *Conditions that could mitigate security concerns include:*

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress;
- (d) the sexual behavior is strictly private, consensual, and discreet; and
- (e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

GUIDELINE E: PERSONAL CONDUCT

15. *The Concern.* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's

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reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

16. *Conditions that could raise a security concern and may be disqualifying include:*

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

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- (3) a pattern of dishonesty or rule violations; and
- (4) evidence of significant misuse of Government or other employer's time or resources;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

- (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;
- (2) while in another country, engaging in any activity that is illegal in that country;
- (3) while in another country, engaging in any activity that, while legal there, is illegal in the United States;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

17. *Conditions that could mitigate security concerns include:*

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

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(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

GUIDELINE F: FINANCIAL CONSIDERATIONS

18. *The Concern.* Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

19. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust;
- (e) consistent spending beyond one's means or frivolous or irresponsible spending, which may be indicated by excessive indebtedness, significant negative cash flow, a history of late payments or of non-payment, or other negative financial indicators;
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required;
- (g) unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that are inconsistent with known legal sources of income;
- (h) borrowing money or engaging in significant financial transactions to fund gambling or pay gambling debts; and
- (i) concealing gambling losses, family conflict, or other problems caused by gambling.

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20. *Conditions that could mitigate security concerns include:*

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue;
- (f) the affluence resulted from a legal source of income; and
- (g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

GUIDELINE G: ALCOHOL CONSUMPTION

21. *The Concern.* Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

22. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, drinking on the job, or jeopardizing the welfare and safety of others, regardless of whether the individual is diagnosed with alcohol use disorder;

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- (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;
- (d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder;
- (e) the failure to follow treatment advice once diagnosed;
- (f) alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder; and
- (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

23. *Conditions that could mitigate security concerns include:*

- (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;
- (b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;
- (c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and
- (d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

GUIDELINE H: DRUG INVOLVEMENT¹ AND SUBSTANCE MISUSE

24. *The Concern.* The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any

¹ Reference Appendix B of this document regarding statutory requirements contained in Public Law 110-118 (Bond Amendment) applicable to this guideline.

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“controlled substance” as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

25. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of substance use disorder;
- (e) failure to successfully complete a drug treatment program prescribed by a duly qualified medical or mental health professional;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

26. *Conditions that could mitigate security concerns include:*

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used; and
 - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

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(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

GUIDELINE I: PSYCHOLOGICAL CONDITIONS²

27. *The Concern.* Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline and an opinion, including prognosis, should be sought. No negative inference concerning the standards in this guideline may be raised solely on the basis of mental health counseling.

28. *Conditions that could raise a security concern and may be disqualifying include:*

(a) behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors;

(b) an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness;

(c) voluntary or involuntary inpatient hospitalization;

(d) failure to follow a prescribed treatment plan related to a diagnosed psychological/psychiatric condition that may impair judgment, stability, reliability, or trustworthiness, including, but not limited to, failure to take prescribed medication or failure to attend required counseling sessions; and

(e) pathological gambling, the associated behaviors of which may include unsuccessful attempts to stop gambling; gambling for increasingly higher stakes, usually in an attempt to cover losses; concealing gambling losses; borrowing or stealing money to fund gambling or pay gambling debts; and family conflict resulting from gambling.

29. *Conditions that could mitigate security concerns include:*

(a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

² Reference Appendix B of this document regarding statutory requirements contained in Public Law 110-118 (Bond Amendment) applicable to this guideline.

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- (b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;
- (c) recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;
- (d) the past psychological/psychiatric condition was temporary, the situation has been resolved, and the individual no longer shows indications of emotional instability;
- (e) there is no indication of a current problem.

GUIDELINE J: CRIMINAL CONDUCT³

30. *The Concern.* Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

31. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted;
- (c) individual is currently on parole or probation;
- (d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program; and
- (e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

32. *Conditions that could mitigate security concerns include:*

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

³Reference Appendix B of this document regarding statutory requirements contained in Public Law 110-118 (Bond Amendment) applicable to this guideline.

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(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

GUIDELINE K: HANDLING PROTECTED INFORMATION

33. *The Concern.* Deliberate or negligent failure to comply with rules and regulations for handling protected information—which includes classified and other sensitive government information, and proprietary information—raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

34. *Conditions that could raise a security concern and may be disqualifying include:*

(a) deliberate or negligent disclosure of protected information to unauthorized persons, including, but not limited to, personal or business contacts, the media, or persons present at seminars, meetings, or conferences;

(b) collecting or storing protected information in any unauthorized location;

(c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling protected information, including images, on any unauthorized equipment or medium;

(d) inappropriate efforts to obtain or view protected information outside one's need to know;

(e) copying or modifying protected information in an unauthorized manner designed to conceal or remove classification or other document control markings;

(f) viewing or downloading information from a secure system when the information is beyond the individual's need-to-know;

(g) any failure to comply with rules for the protection of classified or sensitive information;

(h) negligence or lax security practices that persist despite counseling by management; and

(i) failure to comply with rules or regulations that results in damage to the national security, regardless of whether it was deliberate or negligent.

35. *Conditions that could mitigate security concerns include:*

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- (a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;
- (c) the security violations were due to improper or inadequate training or unclear instructions; and
- (d) the violation was inadvertent, it was promptly reported, there is no evidence of compromise, and it does not suggest a pattern.

GUIDELINE L: OUTSIDE ACTIVITIES

36. *The Concern.* Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified or sensitive information.

37. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) any employment or service, whether compensated or volunteer, with:
 - (1) the government of a foreign country;
 - (2) any foreign national, organization, or other entity;
 - (3) a representative of any foreign interest; and
 - (4) any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology; and
- (b) failure to report or fully disclose an outside activity when this is required.

38. *Conditions that could mitigate security concerns include:*

- (a) evaluation of the outside employment or activity by the appropriate security or counterintelligence office indicates that it does not pose a conflict with an individual's security responsibilities or with the national security interests of the United States; and
- (b) the individual terminated the employment or discontinued the activity upon being notified that it was in conflict with his or her security responsibilities.

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GUIDELINE M: USE OF INFORMATION TECHNOLOGY

39. *The Concern.* Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

40. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) unauthorized entry into any information technology system;
- (b) unauthorized modification, destruction, or manipulation of, or denial of access to, an information technology system or any data in such a system;
- (c) use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system;
- (d) downloading, storing, or transmitting classified, sensitive, proprietary, or other protected information on or to any unauthorized information technology system;
- (e) unauthorized use of any information technology system;
- (f) introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system when prohibited by rules, procedures, guidelines, or regulations or when otherwise not authorized;
- (g) negligence or lax security practices in handling information technology that persists despite counseling by management; and
- (h) any misuse of information technology, whether deliberate or negligent, that results in damage to the national security.

41. *Conditions that could mitigate security concerns include:*

- (a) so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the misuse was minor and done solely in the interest of organizational efficiency and effectiveness;

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(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification to appropriate personnel; and

(d) the misuse was due to improper or inadequate training or unclear instructions.

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APPENDIX B

BOND AMENDMENT GUIDANCE

On 28 January 2008, Congress amended the IRTPA of 2004, adding statutory restrictions on certain eligibility determinations and establishing waiver and congressional reporting requirements. These modifications are collectively referred to as the “Bond Amendments” and were made effective on 1 January 2008.⁴ For the reasons identified in paragraph E.2 above, application of the Bond Amendment’s statutory restrictions will be applied to all adjudications covered under this Directive.

1. PROHIBITION: Heads of agencies are prohibited from granting or renewing national security eligibility for any covered individual who is an unlawful user of a controlled substance or is an addict as defined below. If an authorized adjudicative agency has a case pending review that involves an unlawful user of a controlled substance or an addict, the statutory prohibition must be applied and the individual will receive the agency’s established administrative review procedures. A meritorious waiver may not be authorized with reference to this prohibition. For purposes of this prohibition:

(a) an “addict” is any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare; or is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.

(b) a “controlled substance” means any “controlled substance” as defined in 21 USC 802.

2. DISQUALIFICATION: The Bond Amendment also contains disqualification provisions which apply only to those covered individuals seeking access to Sensitive Compartmented Information (SCI), Special Access Programs (SAP), or Restricted Data (RD). Heads of agencies may not grant or renew access to SCI, SAP, or RD to a covered individual who:

(a) has been convicted in any court of the U.S. of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year;

(b) has been discharged or dismissed from the Armed Forces under dishonorable conditions; or

(c) is determined to be mentally incompetent; an individual is “mentally incompetent” when he or she has been declared mentally incompetent as determined by competency proceedings conducted in a court or administrative agency with proper jurisdiction.

3. WAIVER STANDARD AND PROCEDURES: When a disqualifier reflected in paragraph 2(a) – (c) above exists, the adjudicator will proceed with the adjudication using the appropriate

⁴ IRTPA of 2004 § 3002, 50 USC § 3343.

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mitigation conditions found in these adjudicative guidelines. If the adjudicator would have arrived at a favorable decision but for the Bond Amendment disqualification, a meritorious waiver may be appropriate.

(a) Meritorious waivers will be considered an “Exception” to the adjudicative guidelines and will be annotated as a “Waiver” in the adjudicative decision recorded in the appropriate databases listed in para. E.5. Adjudicators will provide a detailed justification for the meritorious waiver in the final adjudicative report.

(b) If, after applying the appropriate mitigating factors listed in these adjudicative guidelines, a meritorious waiver is not appropriate, the SCI, SAP, or RD access will be denied or revoked with a written explanation that cites the adjudicative guidelines applied and the Bond Amendment disqualifier. The authorized adjudicative agency’s established administrative review procedures shall be followed in all such cases.

(c) Each authorized adjudicative agency shall maintain a record of the number and type of meritorious waivers granted, to include the rationale for each waiver, and shall report this data annually to the SecEA in advance of the annual report to Congress. Authorized adjudicative agencies will also maintain a record of all disqualifications, broken down by type, due to Bond Amendment requirements.

4. Authorized adjudicative agencies often have no ability to predict whether the covered individual for whom national security eligibility determinations are being made will also require access to SCI, SAP, or RD. Accordingly, the following guidance applies to all national security adjudicative determinations:

(a) All adjudicators will determine whether any of the Bond Amendment disqualifiers in paragraphs 2(a) – (c) apply to the case being adjudicated.

(b) If a disqualifier exists, adjudicators shall annotate that fact in one of the databases identified in paragraph E.5 to ensure that any subsequent requests for access to SCI, SAP, or RD for the individual will undergo appropriate re-adjudication and waiver procedures in meritorious cases.

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APPENDIX C

EXCEPTIONS

Exceptions are an adjudicative decision to grant initial or continued eligibility for access to classified information or to hold a sensitive position despite failure to meet the full adjudicative or investigative standards. The authorized exceptions are defined below and supersede the definitions in Office of Management and Budget memorandum, *Reciprocal Recognition of Existing Personnel Security Clearances*, 14 November 2007.

- Waiver (W): Eligibility granted or continued despite the presence of substantial issue information that would normally preclude eligibility. Approval authorities may approve a waiver only when the benefit of initial or continued eligibility clearly outweighs any security concerns. A waiver may also require conditions for eligibility as described below.
- Condition (C): Eligibility granted or continued, despite the presence of issue information that can be partially but not completely mitigated, with the provision that additional security measures shall be required to mitigate the issue(s). Such measures include, but are not limited to, additional security monitoring, access restrictions, submission of periodic financial statements, or attendance at counseling sessions.
- Deviation (D): Eligibility granted or continued despite either a significant gap in coverage or scope of the investigation. "Significant gap" for this purpose means either complete lack of coverage for a period of six months or longer within the most recent five years investigated or the lack of one or more relevant investigative scope components (e.g., employment checks, financial review, or a subject interview) in its entirety.
- Out of Scope (O): Reinvestigation is overdue.

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EXHIBIT 6

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2
3 UNITED STATES DISTRICT COURT
4 FOR THE DISTRICT OF COLUMBIA

5 KUSAMA NIO, *et al.*,

6 Plaintiffs,

7
8 v.

9 UNITED STATES DEPARTMENT OF
10 HOMELAND SECURITY, *et al.*

11 Defendants.

No. 1:17-cv-00998 (ESH)

SUPPLEMENTAL
DECLARATION OF
CHRISTOPHER P. ARENDT IN
RESPONSE TO MARCH 9, 2018
ORDER OF THE COURT

12
13 Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

14 1. I AM THE SAME Christopher P. Arendt who, on February 28, 2018, provided a
15 declaration in response to the Court’s Minute Order of February 20, 2018 and on March 23,
16 2018, provided clarity to Judge Meriweather regarding processing times.

17 2. The Military Service Suitability Determination (MSSD)/Final Determination. Each
18 Service establishes its own standards for enlistment under the authority of Title 10 of the
19 United States Code. These standards (aptitude, education, physical fitness, moral character,
20 age, and citizenship) are based upon the needs of the Services and are designed to ensure
21 those individuals accepted are qualified for military duties. The underlying purpose of these
22 enlistment, appointment, and induction standards is to minimize entrance of persons who are
23 likely to become disciplinary cases, security risks, or who are likely to disrupt good order,
24 morale, and discipline. The MSSD and the National Security Determinations are required to
25 evaluate and mitigate risk for those individuals being accessed for Military Service, all of
26 which are designated National Security Positions. The MSSD recommendation, which

27 SUPPLEMENTAL DECLARATION OF CHRISTOPHER P. ARENDT
28 *Nio et al v. Dep’t of Homeland Security, et al.*, No. 1:17-cv-00998 (ESH)

1 comes from the Consolidated Adjudication Facility (CAF) and is not binding on the Military
2 Services, is a recommendation from the CAF based on whether there is any unmitigated
3 derogatory information or security concerns of which the military department should be
4 aware. The Service Secretary concerned has the authority in law for accessions and
5 enlistment, and as such, renders the final suitability determination, taking the CAF
6 recommendation into account. The Service Secretary, or his/her designee, has visibility on
7 all aspects of enlistment qualification requirements, to include the skills each prospective
8 member brings to the force, and is in the best position to weigh any known risk factors
9 against the need for that individual's skill set in military department concerned. The final
10 Service Secretary determination is just that: a final determination.

11 3. Process for communicating the MSSD to USCIS. Once the Military Service
12 completes its suitability determination, the result is shared with USCIS through a secure,
13 shared web-based portal. Members of the Army, Office of the Secretary of Defense, and
14 USCIS can upload documents to the portal and access documents on the portal for which
15 they have permission to view. When a MSSD document has been uploaded to the portal, the
16 Army and/or DOD notifies USCIS by email that new MSSD documents have been posted.
17 The documents are often posted in large batches and are not specific to members of the *Nio*
18 class. MSSDs for all non-U.S. citizen MAVNI Service members who may be eligible to
19 seek military naturalization are provided to USCIS, regardless of whether they have a
20 currently pending naturalization application.

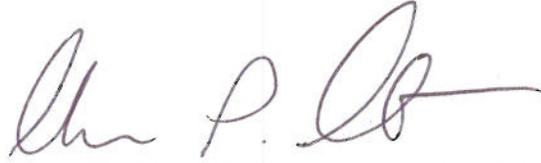
21 4. The Retention Policy for Non-Deployable Service Members. On February 14, 2018,
22 The Undersecretary of Defense for Personnel and Readiness signed a memorandum,
23 SUBJECT: DoD Retention Policy for Non-Deployable Service Members, which applies to
24 all Service members in the Department of Defense (attached). This memorandum is
25 intended to ensure that Service members who are not world-wide deployable for 12
26 consecutive months are considered for separation from the military. There are many grounds

1 in Service regulations that permit the separation of Service members, including, but not
2 limited to, hardship, defective or fraudulent enlistments, alcohol or drug abuse, discharge in
3 lieu of trial by court-martial, unsatisfactory performance, and failure to meet weight control
4 standards or meet physical fitness test requirements. Additionally, there are numerous
5 medical conditions that result in Service members being separated. The February 14, 2018
6 policy highlights that if a Service member has been non-deployable for more than 12
7 consecutive months, they must be "processed" for separation, not necessarily separated.
8 Those individuals accessed via the MAVNI Pilot Program ("MAVNI personnel") in the
9 Delayed Entry Program (DEP) are not "Service members" for this purpose (they are not
10 subject to the Uniform Code of Military Justice and do not receive pay or benefits),
11 therefore, this policy does not apply to them. Those MAVNI personnel in the Delayed
12 Training Program (DTP) are considered to be in "entry-level training" and similarly are not
13 subject to this requirement. This includes those MAVNI personnel who have already been to
14 basic training, but are awaiting completion of required security and suitability screening,
15 prior to follow on orders to military units. Irrespective, MAVNI personnel would not be
16 considered "non-deployable" within the meaning of the DOD retention policy for the reason
17 that they have not completed the enhanced security protocols/background check process.
18 They would, however, be subject to the policy, as would any other Service member.

19 5. Passports. It is not DOD policy or practice to request evidence of renunciation of foreign
20 citizenship as part of the military suitability determination. Though it is not policy to request
21 evidence of renunciation of foreign citizenship as part of a security clearance eligibility
22 determination, possessing a foreign passport could be considered a sign of foreign preference. This
23 preference could make someone ineligible for access to classified information. Therefore, DoD
24 does, at times, request such evidence as part of a security clearance eligibility determination. Non-
25 U.S. citizens, such as *Nio* class members, are not eligible to be considered for a security clearance
26 and are not required to provide evidence of renounced foreign citizenship. Because all DOD
27 personnel may not be fully familiar with the military suitability determination process, it is

1 conceivable that an individual's request for information about their suitability background check
2 could have been misinterpreted as a request for information about the security clearance eligibility
3 process and resulted in the Soldier receiving inapplicable information about the evidence required to
4 initiate a security clearance determination. However, such an error is not consistent with DOD
5 policy, and there are available military remedies for addressing individual concerns. Moreover, it is
6 not DOD policy or practice to request evidence of renunciation of foreign citizenship during the
7 personnel screening interview portion of the military suitability determination process. Most
8 MAVNI personnel in the DTP have already completed their screening interviews. (ECF, 93-4,
9 Exhibit 2.) To the best of my knowledge, none were required, and are clearly not required by DOD
10 policy, to destroy or surrender their non-U.S. passport/s as part of the interview. In the instructions
11 provided to MAVNI personnel prior to the interview, evidence of renunciation of non-U.S.
12 citizenship is listed among several documents to be provided, "if applicable." (Instructions to
13 MAVNI Personnel Prior to Arrival, para 3-2b, attached). Many of the documents on this list (i.e.,
14 naturalization certificate, Permanent Resident Card, and renunciation of citizenship) are not
15 applicable to MAVNI personnel in the DTP. Passports and travel documents are applicable.
16 MAVNI personnel are generally required to bring their non-U.S. passport/s to the interview and to
17 permit Army officials to make a photocopy in order to validate the document. The passport/s is
18 immediately returned after the photocopy is made. The Instructions direct MAVNI personnel to
19 contact their chain of command or superiors "to obtain answers to questions regarding required
20 documents." In response to reports of MAVNI personnel concerns about passport requirements, in
21 August 2017, U.S. Army Recruiting Command specifically advised its recruiters that MAVNI
22 personnel would not be required to destroy or surrender their passport/s as part of the interview
23 process. To restate, it is clearly not DOD policy that MAVNI personnel renounce their foreign
24 citizenship and relinquish their foreign passports.
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1 I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and
2 correct. Executed on April 3, 2018

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5 _____
CHRISTOPHER P. ARENDT

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EXHIBIT 7

The Honorable Ellen S. Huvelle

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, *et al.*,

Defendants.

No.: 1:17-cv-00998 (ESH)

**DECLARATION OF
STEPHANIE P. MILLER**

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am currently the Director, Accession Policy Directorate, in the Office of the Under Secretary of Defense for Personnel and Readiness (“USD (P&R)”), Department of Defense (DoD) in Washington, D.C. In this capacity, I have oversight for developing, reviewing, and analyzing policies, resource levels, and budgets for enlisted recruiting and officer-commissioning programs. My duties include oversight of the Military Accessions Vital to the National Interest (“MAVNI”) Pilot Program, as well as, policies and programs relating to the overall recruitment and accession of both officer and enlisted service members. Prior to assuming this position, I served as a Special Assistant to both Secretaries of Defense Chuck Hagel and Ashton Carter, where I served as a liaison to the Under Secretary of Defense for Personnel and Readiness, and for oversight of a broad spectrum of programs to include Military and Civilian Personnel Policy, Military Force Readiness, Defense Health Affairs, Reserve Affairs, Defense Sexual Assault Prevention and Response, and for Department of Defense (DoD) and Veteran Affairs interagency cooperation. Before joining the Office of the Secretary of Defense as a civilian, I served on

1 active duty for seven years in the United States Navy as a Surface Warfare Officer in support of
2 Operations Iraqi and Enduring Freedom.

3 2. I make this declaration in support of Defendant's Response to Plaintiff's Motion for a
4 Preliminary Injunction. This declaration sets forth that DoD is the Agency that certifies
5 honorable service via Form N-426, which is attached to an applicants' U.S. citizenship Form N-
6 400; that DoD has identified problems with the MAVNI pilot program with respect to, *inter alia*,
7 the background vetting of service members inducted into the military services via the MAVNI
8 pilot program; some general details with respect to an inter-agency conversation DoD had with
9 USCIS with respect to implementing a strategic pause to the MAVNI pilot program; and the
10 current status of the certification of Forms N-426.
11
12

13 Overview of the MAVNI Pilot Program

14 3. Any individual wishing to enlist in the armed forces must meet citizenship or residency
15 requirements. *See* 10 U.S.C. § 504(b).¹ However, 10 U.S.C. § 504(b)(2) provides the Secretary
16 of Defense and the Secretaries of the Military Departments the authority to enlist certain
17 individuals who do not meet citizenship and residency requirements when they determine that
18 such enlistment is "vital to the national interest." Pursuant to 8 U.S.C. § 1440, a person who is
19 not a Legal Permanent Resident ("LPR") who enlists in the armed forces "during any other period
20 which the President by Executive order shall designate as a period in which Armed Forces of the
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23
24 ¹ 10 U.S.C. § 504 is the statutory standard for enlistment in the Armed Forces. While this
25 statutory authority authorizes enlistments vital to the national interest, others eligible for
26 enlistment under this authority must be one of the following: a national of the United States; an
27 alien who is lawfully admitted for permanent residence; and a person described in section 341
28 of one the following compacts (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; or The Compact of Free Association between Palau
and the United States).

1 United States are or were engaged in military operations involving armed conflict with a hostile
2 foreign force” may apply to be naturalized as a citizen “whether or not he has been lawfully
3 admitted to the United States for permanent residence” without regard to age, period of residence
4 in the United States or length of military service. On July 3, 2002, the President determined, for
5 purposes of 8 U.S.C. § 1440, that the military is engaged in such armed conflict. Exec. Order
6 No. 13269, 67 Fed. Reg. 45,287 (July 3, 2002), *Expedited Naturalization of Aliens and*
7 *Noncitizen Nationals Serving in an Active Duty Status During the War on Terrorism*. This
8 Executive Order remains in effect.

9
10 4. Pursuant to this authority, in 2003, the Army launched the “09L Pilot Program.” Under
11 this program, LPRs could enlist in the military to become interpreters and translators. They could
12 then invoke the benefits of 8 U.S.C. § 1440 during the naturalization application process.
13 Subsequent to this program, the Secretary of Defense authorized the creation of the MAVNI pilot
14 program in 2008, which provided the Army, Navy, Marine Corps, and Air Force (collectively the
15 “Military Services”) authority through December 2009 to enlist noncitizen recruits who are
16 determined to be vital to the national interest. The program was designed to attract two types of
17 recruits: (1) health care professionals (“HCPs”) and (2) persons who possess critical foreign
18 language skills (“CFLs”), both of whom are necessary to sustain effective military operations.
19 The MAVNI pilot program was reinitiated in 2012, and extended in 2014, and 2016. Renewal
20 of the program has always remained dependent on periodic reviews and re-authorization by the
21 USD (P&R). To date, the Military Services have recruited more than 10,000 noncitizens under
22 the MAVNI Pilot Program.

23
24 5. The MAVNI program is not the only means by which non-citizens may join the military
25 and ultimately become naturalized citizens. While MAVNI is the only program that allows
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28

1 recruits who are not LPRs to enlist and gain a path to U.S. citizenship, LPRs can gain expedited
2 citizenship under the provisions of 8 U.S.C. § 1439. Under this statute, LPRs who have at least
3 one year of honorable service in the military may be naturalized without having to fulfill
4 continuous residency requirements. However, during a period of declared hostilities, procedures
5 for naturalization under 8 U.S.C. § 1440 take precedence over procedures for naturalization under
6 8 U.S.C. § 1439. Department of Defense Instruction (“DODI”) 5500.14, Naturalization of Aliens
7 Serving in the Armed Forces of the United States and of Alien Spouses and/or Alien Adopted
8 Children of Military and Civilian Personnel Ordered Overseas (Jan 4, 2006), at ¶ 4.1.5.

9
10 6. The USCIS Form N-426, Request for Certification of Military or Naval Service, is the
11 means by which DoD certifies whether an applicant for citizenship is serving honorably, and if
12 no longer serving, whether they were separated under honorable conditions. DoD and its Military
13 Departments are the only federal agencies who certify this military service.

14
15 7. From 2001 through September 2015, the U.S. Citizenship and Immigration Services has
16 naturalized a total of 109,321 members of the military. *See* U.S. Citizenship and Immigration
17 Services, “Naturalization Through Military Service: Fact Sheet,” *available at*
18 <https://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet>. As
19 noted above, only 10,000 of these persons were recruited under and are subject to the
20 requirements of the MAVNI Pilot Program at issue in this case.

21
22 8. Under the MAVNI Pilot Program, each Military Service has the discretion to determine
23 whether recruiting an individual applicant is vital to the national interest. HCP recruits must
24 possess skills to fill a critical shortfall in certain medical specialties, while CFL recruits must
25 possess capabilities in a specific language as well as an understanding of the associated cultural
26 background for that language. In addition, all MAVNI recruits must have a valid visa status for
27

1 at least two years immediately prior to the enlistment date, and must not have had any single
2 absence from the United States of more than 90 days during the two-year period immediately
3 preceding the date of enlistment. *See* Memorandum from Acting Under Secretary of Defense,
4 subject: Military Accessions Vital to the National Interest Pilot Program Extension (Sept. 30,
5 2016) (attached as Exhibit 1).

6
7 9. In addition to possessing skills eligible for accession under the MAVNI Pilot Program,
8 MAVNI applicants must meet the minimum enlistment standards applicable to all recruits, *e.g.*,
9 medical screening, physical fitness, and moral conduct/criminal activity screening. MAVNI
10 personnel must also undergo additional security checks, as described further below, before they
11 can be accessed into a Military Service. MAVNI personnel who successfully pass such screening
12 are allowed to enlist and, on receiving a certification of honorable service, may submit their
13 application for citizenship to the U.S. Citizenship and Immigration Service upon arrival at their
14 initial entry training (colloquially, “boot camp”), which typically lasts ten weeks and is where
15 recruits learn the basics of becoming a soldier. MAVNI recruits who are approved for citizenship
16 are then typically naturalized during the last week of initial entry training. Thus, a key benefit of
17 MAVNI is that it is the only program that allows recruits who are not LPRs to enlist and gain a
18 faster path to U.S. citizenship.²

21 Military-Service Determinations

22 10. All recruits that enlist in the military must undergo a “military-service determination”
23 (also called a “suitability-for-service determination”). *See* DODI 1304.26 *Qualification*
24 *Standards for Enlistment, Appointment, and Induction* (Mar. 23, 2015, Incorporating Change 2,
25

26 ² Normally, a non-citizen wishing to become a U.S. citizen must have five years of legal
27 permanent residency in the United States to apply. Non-citizens married to a U.S. citizen for at
28 least three years can apply after three years of residency.

1 April 11, 2017), at, ¶ E3.P2(h); *see also* Army Regulation (“Army Reg.”), *Active and Reserve*
2 *Components Enlistment Program*, 601-210 ¶ 4-2(e). By reviewing an applicant’s character and
3 conduct, the military seeks to “minimize entrance of persons who are likely to become
4 disciplinary cases, security risks, or who are likely to disrupt good order, morale, and discipline.”
5 *Id.* Generally, the military service standard “that must be applied in determining whether a person
6 is suitable under national security criteria for [military service] is that, based on all available
7 information, there is no reasonable basis for doubting the person’s loyalty to the Government of
8 the United States.” DoD 5200.2-R ¶ C2.1.3; *see* Army Reg. 380-67, *Personnel Security Program*
9 (Jan. 24, 2014) ¶ 2-3. This determination includes a review of the soldier’s “criminal history
10 (regardless of disposition) or questionable conduct character.” Army Reg. 601-210 ¶ 4-2(e)(1).
11 In the case of the MAVNI Pilot Program, due to counter-intelligence, security, and insider threat
12 concerns, an additional level of screening has been applied in order to compensate for the general
13 lack of information accessible by the Government in making a suitability decision, specifically
14 the MAVNI applicants’ extensive life and relationships outside of the United States.
15

16
17 11. In the scope of the normal recruiting program, a recruit may access into the military before
18 there is complete adjudication of suitability for service determination if no immediate
19 disqualifying information is found. *See* DODI 1304.26 ¶ E.3P2(h). However, in those cases,
20 “any additional disqualifying information during the adjudication should be transmitted to the
21 appropriate personnel or human resource offices . . . for appropriate action.” *Id.* For the MAVNI
22 Pilot Program, the DoD’s policy intention since 2008 was for vetting to be completed prior to
23 accessions due to the concerns noted above.
24
25

26 **Changes in Policy to the Investigative Requirements for MAVNI Personnel**

1 12. On August 10, 2010, the Deputy Secretary of Defense issued a Memorandum extending
2 the MAVNI Pilot Program through December 31, 2011, provided that “all MAVNI applicants are
3 subjected to a Single Scope Background Investigation [SSBI] and each Service established a
4 comprehensive counter-intelligence-focused security review and monitoring program for
5 MAVNI recruits.” *See* Aug. 10, 2010 Memorandum from Deputy Secretary of Defense, subject:
6 Two-Year Extension of Military Accessions Vital to National Interest (MAVNI) Pilot Program,
7 (Aug. 17, 2010) (attached as Exhibit 2). These measures also applied to MAVNI soldiers
8 accessioned prior to August 17, 2010.

9
10 13. This 2010 policy change was issued to address reports that standard background
11 investigations of MAVNI personnel were deficient in developing and resolving issues,
12 particularly issues of influence by or preference for foreign governments, persons, or
13 organizations. Consequently, with this policy change, investigators would have greater ability to
14 discover and provide relevant records to meet the investigative scope requirement to make a
15 security-clearance-eligibility determination. While the LPR population also presents this
16 challenge, it is to a much lesser degree because they have on average been in the United States
17 for a significantly greater amount of time than the MAVNI population.

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20 14. Additional security review requirements were added during the 2012 and 2016
21 authorizations of the program. On February 16, 2012 the Under Secretary of Defense for
22 Intelligence (“USD (I)”) issued a policy designed to strengthen the program and mitigate
23 evolving counter-intelligence, security, and insider threat concerns. *See* Memorandum from
24 Under Secretary of Defense for Intelligence, subject: Military Accessions Vital to the National
25 Interest (MAVNI) Program Security Reviews and Monitoring Programs (Feb. 16, 2012) (attached
26 as Exhibit 3). This policy added the requirement that all MAVNI applicants must undergo a SSBI
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1 as part of a suitability-for-military service determination and advised the Military Services that
2 they were responsible for establishing comprehensive counter-intelligence focused security
3 reviews and ongoing monitoring programs for the length of each MAVNI recruit's enlistment.
4 These measures were applied retroactively to soldiers who entered the Army under previous
5 pilots of the MAVNI Pilot Program. In addition to incorporating the security screening
6 provisions of the 2010 and 2012 reauthorizations of the MAVNI Pilot Program, the 2015
7 reauthorization of the program reinforced that MAVNI applicants be subjected to a counter-
8 intelligence monitoring program. *See* Memorandum from Principal Deputy Assistant Secretary
9 of Defense (Readiness and Force Management) to the Assistant Secretary of the Army, Navy, and
10 Air Force for Manpower and Reserve Affairs, (March 11, 2015) (attached as Exhibit 4). The
11 2016 reauthorization added the requirement that MAVNI recruits may be subject to an SSBI,
12 National Intelligence Agency Check, a counter-intelligence focused security review, and an
13 issue-oriented interview and/or issue-oriented polygraph, if needed to resolve any foreign
14 influence or foreign preference concerns. The results of these reviews were considered as part
15 of the military suitability determination and could result in an applicant's administrative
16 discharge from the Armed Forces under any administrative characterization of service, including
17 "other than honorable" conditions.
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21 15. However, subsequent reviews of the program determined that the screening outlined in
22 the 2010 through 2015 program reauthorizations was not being implemented adequately.
23 Through a review led by USD(P&R) and USD(I) from June through September 2016, it was
24 determined that some MAVNI enlistees had been permitted to enter the military without
25 completed background checks and that the Military Services did not adequately track MAVNI
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1 enlistees post-accession, both of which were required by the existing 2012 policy.³ As a result,
2 some MAVNIs with a positively adjudicated military-service determination were granted access
3 to classified information erroneously without an appropriately adjudicated determination that
4 they were eligible to receive national security information. The review also showed that some
5 MAVNI enlistees may have engaged in pre-accession criminal activity (e.g., the making and/or
6 possession of fraudulent student visas) and/or pose a significant counter-intelligence security
7 threat.

8
9 16. For example, the review uncovered that (1) a number of individuals accessed into the
10 military based on receiving fraudulent visas for universities that did not exist; (2) some MAVNI
11 recruits attended, and later falsified transcripts, from universities owned by a Foreign National
12 Security Agency, and a State Sponsored Intelligence Organization (notably, most of the university
13 classmates of one MAVNI recruit later worked for the same State Sponsored Intelligence
14 Organization); and (3) one MAVNI recruit who entered the United States on a student visa
15 professed support to 9/11 terrorists and said he would voluntarily help China in a crisis situation.
16 In addition, the review uncovered a case where a MAVNI applicant failed to list foreign contacts
17 from Eastern Europe and Russia, even though the recruit's father manages the military
18 department of a foreign factory and his brother-in-law worked for a foreign political party. In
19 DoD's judgment, these examples indicated that sufficient vetting of MAVNI personnel was not
20 occurring at the accessions stage, contrary to the goal of avoiding accessions of individuals who
21 could constitute potential counter-intelligence, security, or insider threats altogether. Separate
22
23
24

25
26 ³ Because of a backlog in conducting these investigations, in February 2013, the Undersecretary
27 of Defense for Intelligence authorized the Chief, Accessions Division, to "grant exceptions to
28 policy on a case-by case basis to ship MAVNI Future Soldiers to training who are not in receipt
of SSBI results, but who have received favorable NIAC results."

1 reviews conducted by representatives of the Department of Defense and Department of the Army
2 in May 2016 also found similar problems with the vetting of MAVNI personnel.

3 17. As referenced above, during the internal reviews of the MAVNI pilot program, DoD
4 identified a number of problems to include, among other matters, implementation and
5 administrative accounting, pre-accession criminal activity, and counter-intelligence and security
6 concerns. The concerns uncovered during the DoD's internal review of the MAVNI pilot
7 program led DoD to initiate a deliberate and critical examination of individuals being inducted
8 into the military departments via the MAVNI pilot program and to emphasize the need for more
9 robust background screening requirements.

10
11 18. On or around April of 2017, senior leaders from DoD's USD (P&R) informed USCIS
12 that it was concerned about the naturalization of individuals whose Office of Personnel
13 Management (OPM) background investigation and DoD counterintelligence security review has
14 not yet been completed. DOD and USCIS jointly determined that it was in the best interest of
15 the United States to ensure the naturalization decision of USCIS was informed by the outcome
16 of the completed OPM background investigation and the DoD counterintelligence security
17 review. Knowing that this review relied upon OPM and specific counterintelligence expertise
18 within DoD, and that failure of these background checks could lead to discharge from the military
19 and make an individual unable to meet the honorable service requirement that the N-426 certifies,
20 a strategic pause was prudent with respect to the MAVNI pilot program. As a result, DoD and
21 USCIS mutually agreed that USCIS would slow down the Form N-400 adjudications of the
22 MAVNI pilot program applicants.

23
24
25 19. Presently, DoD is not certifying any new MAVNI N-426s.
26
27
28

1 20. For a variety of reasons, some which remain classified, DoD is undertaking a review of
2 the entire MAVNI pilot program, its procedures, and the standards for certifying approximately
3 400 existing N-426s. I cannot estimate how long this process will take.

4 21. DoD has not revoked any previously-certified Forms N-426 for the named plaintiffs in
5 this lawsuit.
6

7
8 I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and
9 correct. Executed on July 7, 2017.
10

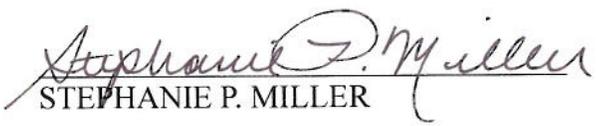
11 
12 STEPHANIE P. MILLER
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EXHIBIT 8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. KUSUMA NIO, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:17-00998-ESH
)	
United States Department of Homeland)	
Security, <i>et al.</i> ,)	
)	
Defendants.)	
)	

DEFENDANTS’ RESPONSES TO THE COURT’S AUGUST 24, 2017 ORDER

Pursuant to the Court’s August 24, 2017 Order (ECF No. 36), Defendants, United States Department of Homeland Security, *et al.*, file the following declarations and supporting documentation:

1. In response to Question 1(a) – “Are there any statutes, regulations or policies that define what constitutes ‘unmitigable derogatory information’?” – Defendants submit the August 30, 2006 Memorandum “Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005)” (Exhibit A), and “The National Security Adjudicative Guidelines,” which went into effect on June 8, 2017 (Exhibit B).
2. In response to Question 1(b) – “Is the status of the SSBI for the last plaintiff listed on attachment 4 to the Second Miller Decl. correct or is the information shown in the last two page of attachment 5 correct (*compare* ECF No. 25-2, at 186 (SSBI is complete) *with* ECF No. 25-2, at 215-16 (unredacted version))?” – Defendants submit the Declaration of Latrice

McSwain, Personnel Security Division Lead, Department of Defense Consolidated Adjudications Facility. Exhibit C.

3. In response to Question 1(c) – “Does Pls.’ Hrg. Ex. 1 reflect the discharge of a MAVNI based on exceeding two years in DTP? If so, why wasn’t he or she covered by the July 27, 2017 DoD memorandum extending the allowable time in DTP from two to three years?” – Defendants submit the Declaration of Brian A. Thomas, Division Chief, Strategic Integration, Office of the Chief Army Reserve, and supporting documentation.¹ Exhibit D. Paragraph 4 explains that the MAVNI soldier at issue was discharged after two years. *Id.*, ¶ 4. In support of this statement, Defendants submit the enlistment contract of this MAVNI soldier, dated July 23, 2015. *See* Ex. D, Attachment 1, Enlistment/Reenlistment Document. Thus, this MAVNI soldier’s 24 month enlistment in the Delayed Training Program expired on July 23, 2017. *Id.* The day after this MAVNI soldier reached 24 months in the Delayed Training Program, the local command issued discharge orders and the discharge date was listed as August 1, 2017. *See* Ex. D, Attachment 2. This MAVNI soldier’s final discharge document was issued on August 4, 2017, and reflected a discharge of August 1, 2017. *See* Pls.’ Hrg. Ex. 1.
4. In response to Question 1(d) – “What is defendants’ response to Pls.’ Hrg. Ex. 2, the DoD’s August 17, 2017 memo re issuance of N-426s?” – Defendants also submit the Thomas Declaration. Ex. D. Paragraph 5 of the declaration discusses the reasoning behind the Army’s issuance of this memo. *See id.*, ¶ 5. The August 17, 2017 memorandum withholding the authority to certify Form N-426, Request for Certification of Military or Naval Service, of soldiers who have not attended Initial Entry Training, is consistent with Ms. Stephanie P. Miller’s declaration of July 7, 2017 (ECF 19-7, ¶¶ 19, 20), which states

¹ Unredacted copies of all unclassified documents will be submitted to the Court in chambers.

that currently, while the Department of Defense undertakes a review of the MAVNI program, “DoD is not [presently] certifying any new MAVNI N-426s.”²

5. In response to the classified documents requested by the Court in Question 2, Defendants have provided those documents to the Court. *See* ECF No. 38, Notice of Compliance.

² The Government is aware that some N-426 forms may have been certified in error after July 7, 2017, for soldiers who had not attended Initial Entry Training.

DATED: August 30, 2017

Respectfully submitted,

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Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation

COLIN A. KISOR
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s/ Sarah L. Vuong

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ATTORNEYS FOR DEFENDANTS

EXHIBIT 9

MAVNI FY18 Policy Flow (Accession NSD)

Issues:
 AUB Codes (MA/MI)
 How to apply 13 AGLs on
 Accession cases

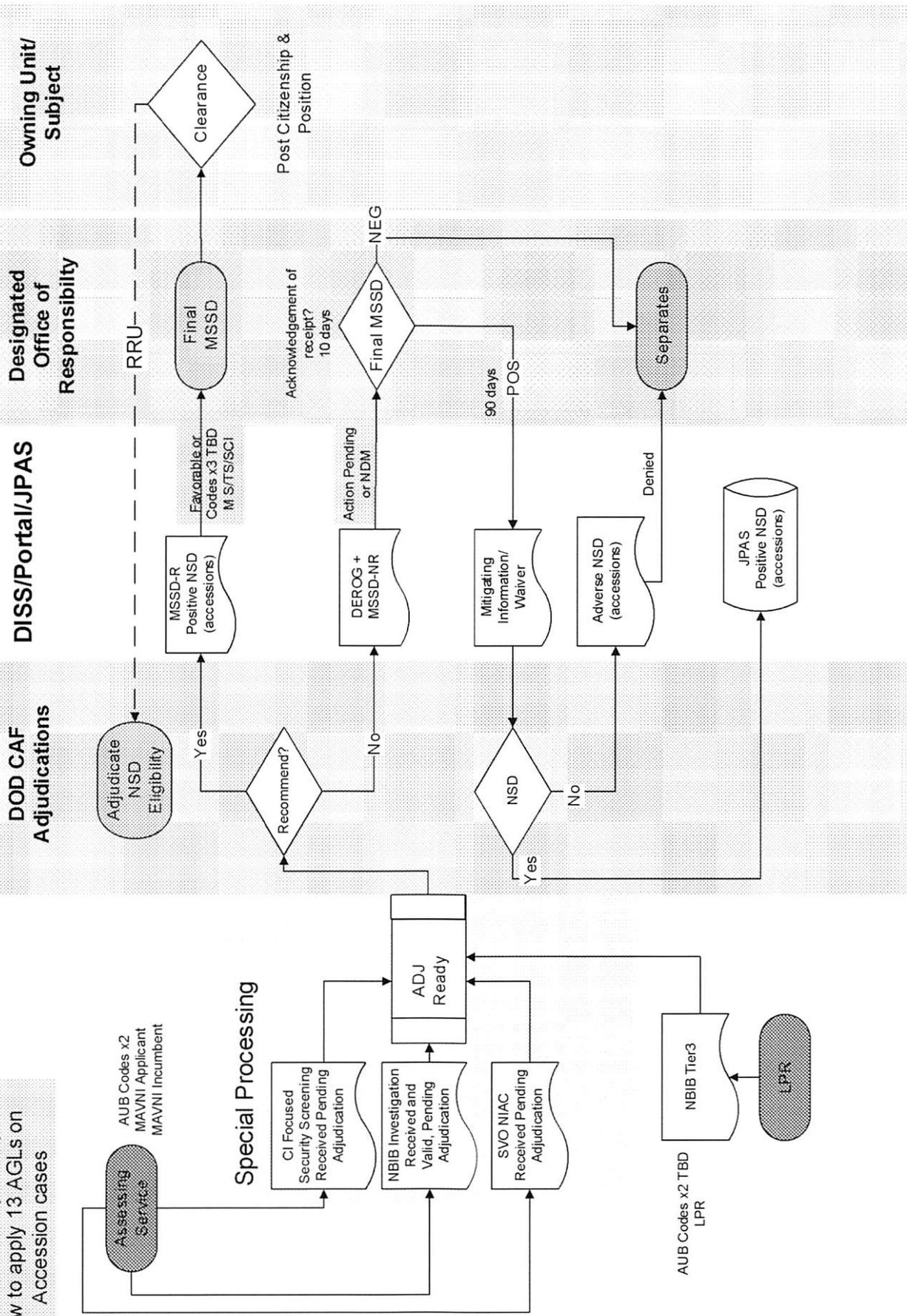
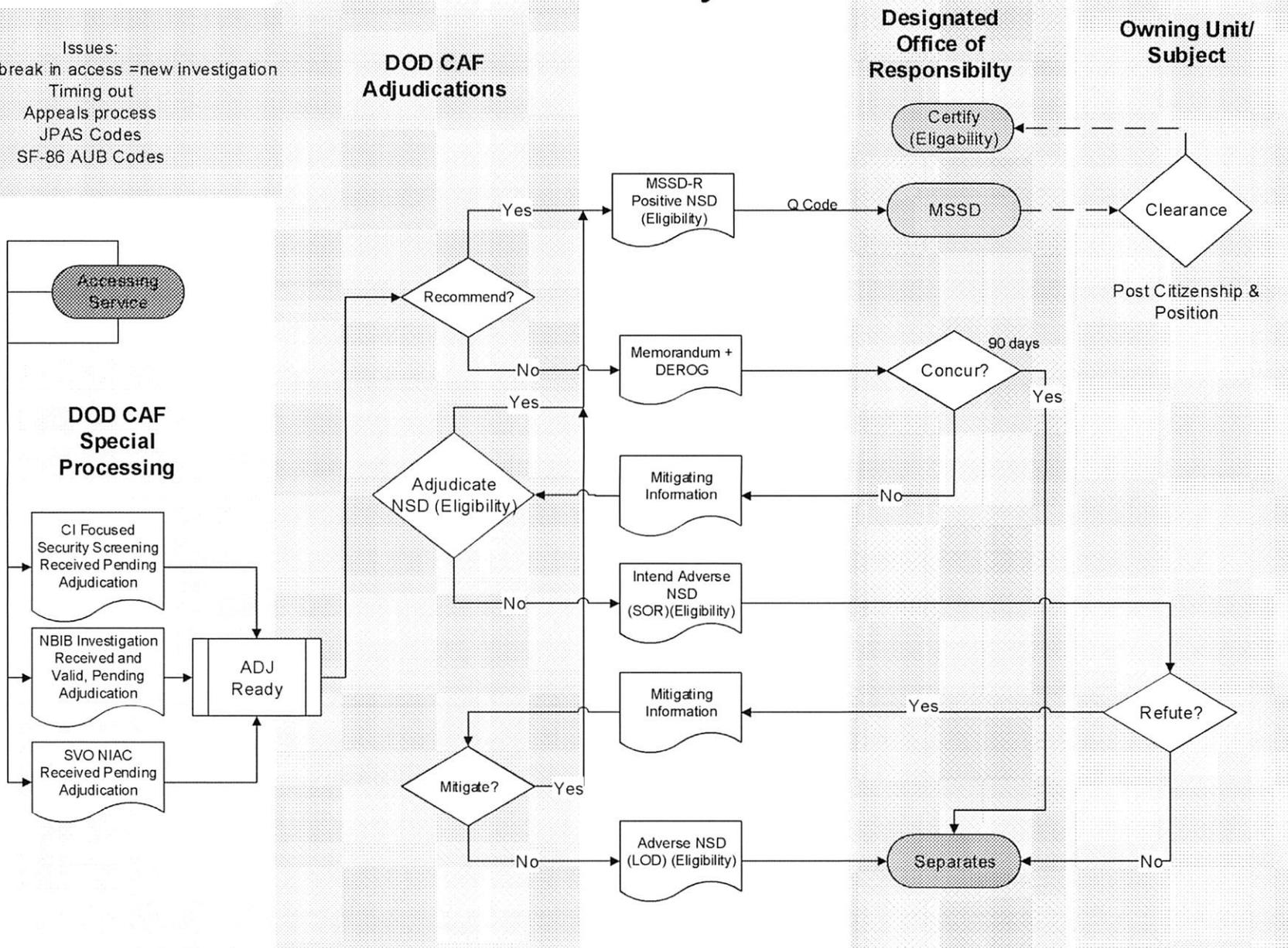


EXHIBIT 10

MAVNI/LPR FY17 Policy Flow 1 Bite

Issues:
 5200- 2 yrs break in access =new investigation
 Timing out
 Appeals process
 JPAS Codes
 SF-86 AUB Codes



MAVNI/LPR FY17 Policy Flow 2 Bites

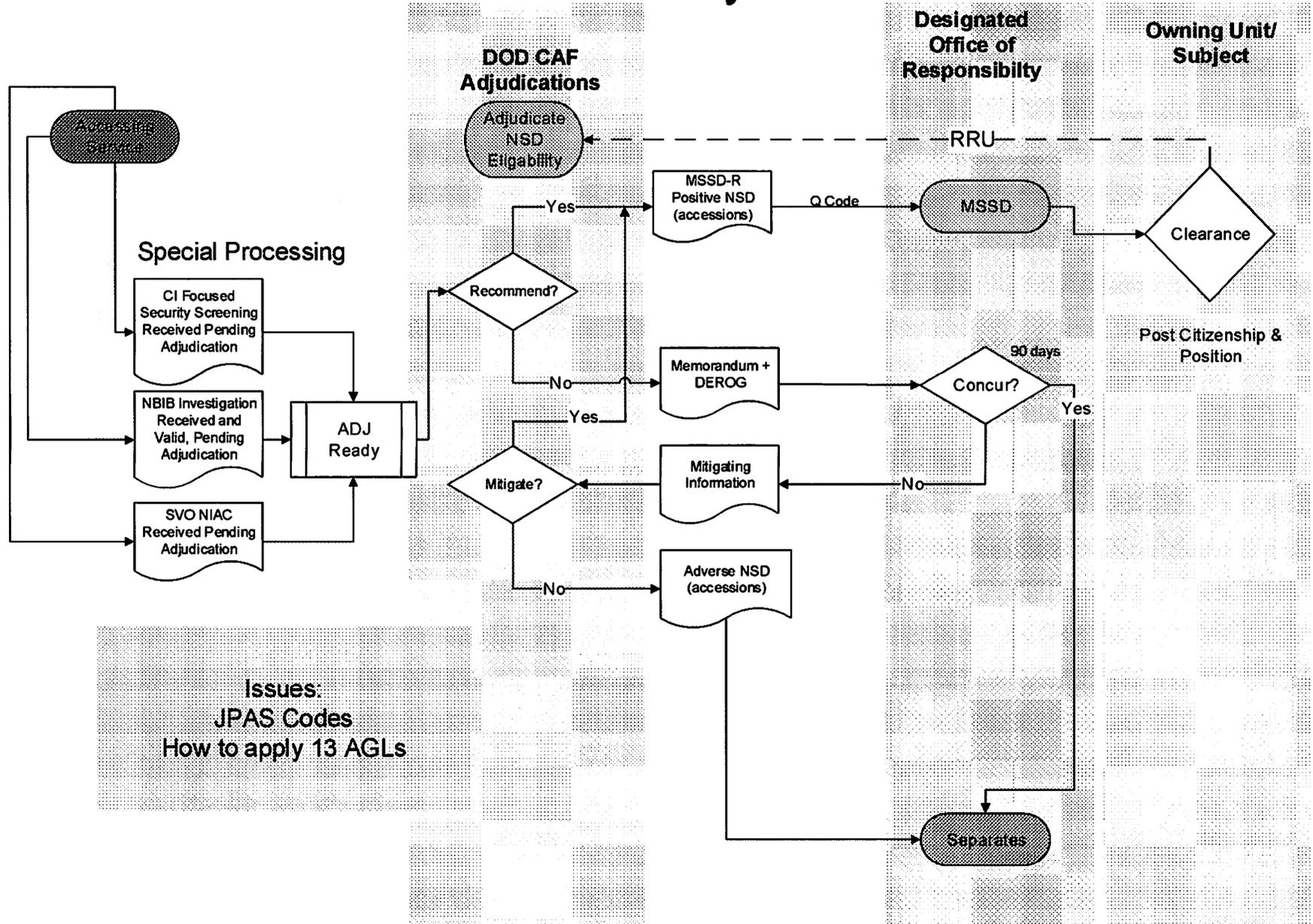


EXHIBIT 11

MAVNI Policy Flow FY16 Policy (Old Way)

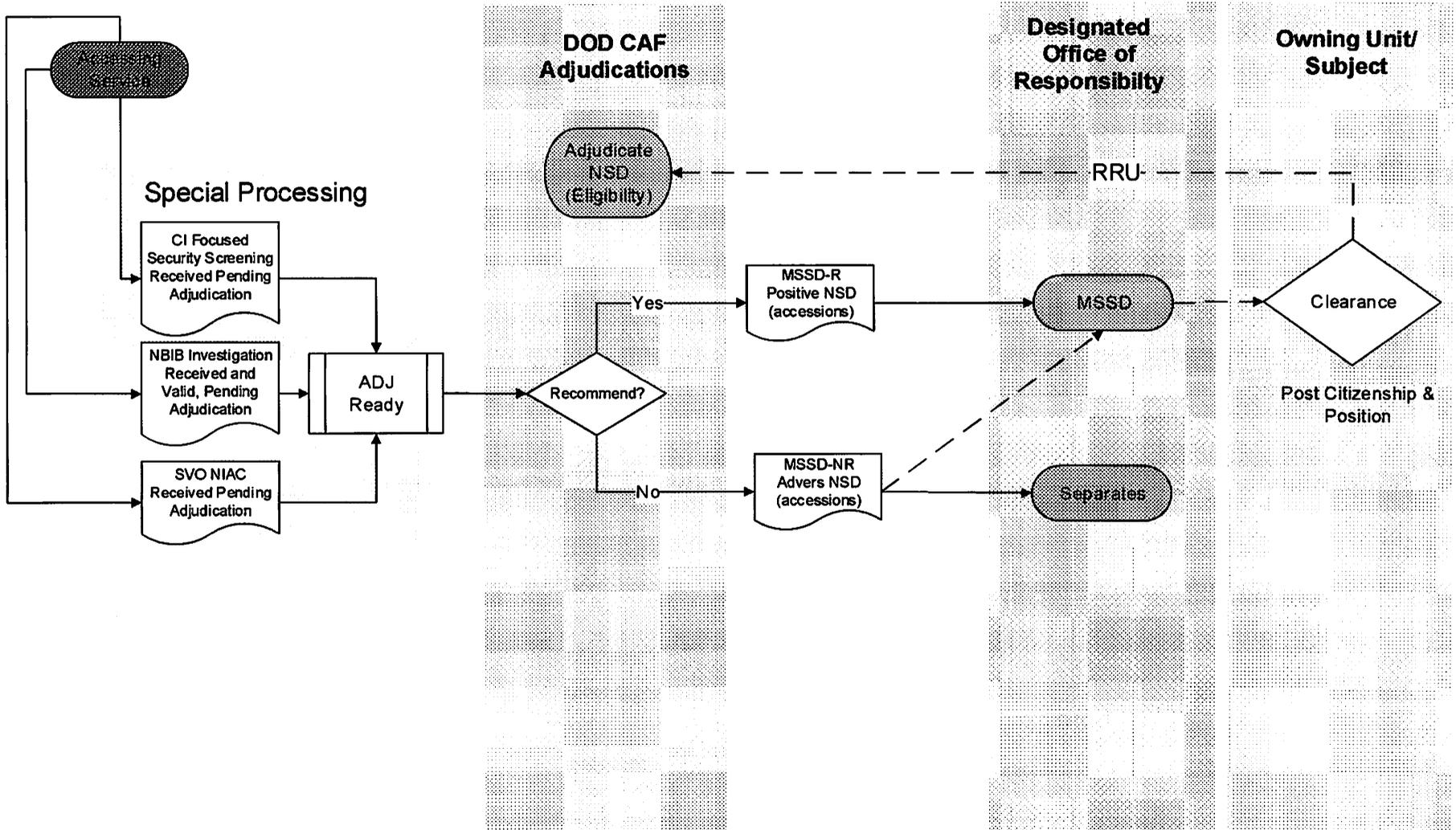


EXHIBIT 12

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000



U.S. Citizenship
and Immigration
Services

November 23, 2016

PM-602-0114

Policy Memorandum

SUBJECT: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees

Purpose

This policy memorandum (PM) clarifies and supplements guidance issued by U.S. Citizenship and Immigration Services (USCIS) in 2013 (“the 2013 PM”)¹ with respect to designated family members of certain military personnel and veterans. Specifically, this PM provides additional guidance on discretionary options for: (a) certain alien family members of individuals serving on active duty in the U.S. Armed Forces or in the Selected Reserve of the Ready Reserve; (b) certain alien family members of those who previously served on active duty or in the Selected Reserve of the Ready Reserve (whether living or deceased) and were not dishonorably discharged; and (c) enlistees in the Department of Defense (DoD) Delayed Entry Program (DEP). This PM amends Chapter 21.1(c) of the Adjudicator’s Field Manual (AFM) to:

- Clarify that individuals who previously served in the military include those who are now deceased but do not include those who were dishonorably discharged;
- Change all references to “children” to “sons and daughters”;
- Provide guidance on deferred action for certain nonimmigrant and other alien recruits (including enlistees in the Military Accessions Vital to the National Interest (MAVNI) program) whose authorized periods of stay expire during the enlistment process, including the time they are in the DEP;
- Provide guidance on deferred action for certain MAVNI and other DEP enlistees’ family members who are present in the United States without authorized periods of stay; and
- Provide guidance on deferred action for certain military family members who would be eligible for parole under the guidelines in the 2013 PM but for the fact that they have already been admitted.

¹ See USCIS Memorandum, *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act 212(a)(6)(A)(i)* (Nov. 15, 2013), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf.

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Page 2

Scope

This PM applies to all U.S. Citizenship and Immigration Services (USCIS) employees.

Authority

Immigration and Nationality Act (INA) §§ 103(a)(1), 103(a)(3), 212(d)(5)(A), 235(a), and 245(a), (c); 8 U.S.C. §§ 1103(a)(1), 1103(a)(3), 1182(d)(5)(A), 1225(a), and 1255(a), (c); 6 U.S.C. § 202(5).

Background

On November 15, 2013, pursuant to the authority conferred upon the Secretary of Homeland Security by INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A), USCIS issued a PM guiding the exercise of discretion with respect to applications for parole by designated family members of certain U.S. military personnel and veterans. On November 20, 2014, the Secretary directed USCIS to expand on these policies, including by issuing new policies on the use of both parole and deferred action for certain family members of military personnel, veterans, and DEP enlistees.² These new policies are intended to support the DoD in several ways, including by:

- Elaborating on general USCIS deferred action policies by identifying factors that are of particular relevance to discretionary determinations involving military personnel, veterans, DEP enlistees, and their families;
- Building on existing USCIS and DoD initiatives and policies designed to assist military personnel, veterans, DEP enlistees, and their families in navigating our immigration system;
- Facilitating military morale and readiness and supporting DoD recruitment policies by considering temporarily deferring the removal of certain military family members;
- Furthering the goal of the MAVNI program to recruit certain foreign nationals whose skills are considered vital to the national interest and critical to military services; and
- Ensuring consistent support for our military personnel and veterans who have served and sacrificed for our nation, and their families.

DoD Delayed Entry Program (DEP)

The DoD receives approximately 250,000 individuals into the all-volunteer force each year. To effectively sustain this large volunteer force, DoD uses the DEP to manage and predictably meet the accession requirements of the military services. Individuals who have no previous military experience and are seeking to enlist in the U.S. military must sign a contract by which they enter into the DEP for a period of up to 365 days while awaiting Basic Training. This waiting period allows DoD to better anticipate and meet the needs of the various service components. The DEP is a cornerstone of the U.S. military enlistment process.

Individuals who enlist in the military through the MAVNI program may also enter the DEP. The MAVNI program allows certain nonimmigrants and other aliens to enlist in the military to fill

² Secretary of Homeland Security Memorandum, *Families of U.S. Armed Forces Members and Enlistees* (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf.

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees

Page 3

positions requiring skills for which there are critical shortages of enlistees.³ The program is currently open to individuals with certain health care skills and individuals fluent in certain foreign languages.

Policy

I. Parole in Place for Families of Certain Military Personnel and Veterans

USCIS has authority to grant parole to noncitizen applicants for admission, including those residing in the United States (through “parole in place”),⁴ on a case-by-case basis for urgent humanitarian reasons or significant public benefit. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). The 2013 PM provides guidance on granting parole, on a discretionary case-by-case basis, for certain spouses, children, and parents of, among others, individuals who “previously” served on active duty or in the Selected Reserve of the Ready Reserve. This PM clarifies that such language in the 2013 PM is meant to include former designated military personnel (who were not dishonorably discharged) whether they are living or deceased. The close family members of such individuals, who served and sacrificed for our Nation, are deserving of consideration for a favorable exercise of discretion on a case-by-case basis in accordance with the 2013 PM. This is true regardless of whether the former military service members are living or deceased.

In addition, the 2013 PM contains multiple references to the “children” of current or former military personnel. Under the INA, the term “child” is limited to individuals who are unmarried and under the age of 21. *See* INA § 101(b)(1), 8 U.S.C. § 1101(b)(1). This PM seeks to expand on the provisions in the 2013 PM by replacing all references to “children” in the 2013 PM (and the corresponding provisions in the AFM) with the term “sons and daughters.” This change would further expand the provisions in the 2013 PM to the adult and married sons and daughters of covered military personnel and veterans. Because covered military personnel and veterans generally will be U.S. citizens or lawful permanent residents (or, in the case of MAVNI, soon-to-be U.S. citizens or lawful permanent residents), their sons and daughters will often be on paths to lawful permanent resident status and eventual citizenship. *See* INA § 203(a), 8 U.S.C. § 1153(a). Parole in place or deferred action would therefore serve as a temporary bridge for such sons and daughters while they apply for and await adjudication of their applications for lawful permanent resident status. Moreover, important family relationships continue to exist even after children turn 21 or marry. The same morale, deservedness, and preparedness rationales articulated in the 2013 PM with respect to military personnel and their children continue to apply when such children turn 21 or marry.

II. Deferred Action Requests by DEP Enlistees and the Families of Military Personnel, Veterans, and DEP Enlistees

As in all deferred action determinations, USCIS will make case-by-case, discretionary judgments based on the totality of the evidence. In doing so, USCIS will weigh and balance all relevant considerations, both positive and negative. Certain factors are of particular relevance to the exercise of that discretion when deferred action requests are submitted by DEP enlistees or by the family

³ The MAVNI program is authorized by 10 U.S.C. § 504(b)(2). For further details, see DoD Instruction 1304.26. “Qualifications for Enlistment, Appointment and Induction.” For information about the DoD MAVNI program, see the DoD MAVNI fact sheet, <http://www.defense.gov/news/mavni-fact-sheet.pdf>.

⁴ The parole authority is most frequently used to permit aliens who are outside the United States to come into U.S. territory, but aliens who are already physically present in the United States without having been admitted are also eligible for parole. *See* INA §§ 212(d)(5)(A), 235(a)(1). This latter use of parole is called “parole in place.”

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 4

members of military personnel, veterans, or DEP enlistees. Particularly strong positive factors specific to such requests include, but are not limited to:

- Being a DEP enlistee, including through the MAVNI program (even if the enlistee's authorized period of stay expires or terminates while in the DEP);
- Being the spouse, parent, son, or daughter of a MAVNI or other DEP enlistee (even if present in the United States without an authorized status); and
- Being an individual who would be eligible for parole under the 2013 PM, as clarified and amended by the present PM, but for the fact that such individual has already been admitted.

The presence of one or more of the preceding factors does not guarantee a grant of deferred action, which constitutes only a favorable exercise of immigration enforcement discretion, but may be considered a strong positive factor weighing in favor of granting deferred action as a matter of discretion. The ultimate decision rests on whether, based on the totality of the facts of the individual case, USCIS finds that the positive factors outweigh any negative factors that may be present and that a favorable exercise of enforcement discretion is warranted.

If an individual described in any of the three bullets above is approved for deferred action in the exercise of discretion, the period of deferred action should be authorized in two-year increments; USCIS may consider requests for renewal of deferred action as appropriate.

III. Petition for Alien Relative and Work Authorization

USCIS encourages applicants to continue on a path toward lawful permanent resident status whenever applicable. In cases where it is applicable, USCIS encourages the filing of a Form I-130, Petition for Alien Relative, or Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. In some cases where subsequent parole in place or a renewal of deferred action is requested, such filing may be required (see AFM 21.1(c)(3)(A) below). In addition, individuals who have obtained parole in place or deferred action are eligible to apply for work authorization for the period of parole or deferred action if they can demonstrate economic necessity.⁵

Implementation

The Adjudicator's Field Manual (AFM) Chapter 21.1, General Information About Relative Visa Petitions, is amended as follows.

1. Section 21.1(c) is revised by:

- Redesignating current section "(c)" as subsection "(1)";
- Inserting new section "(c)" heading "Special Parole and Deferred Action Considerations.";
- Inserting, at the beginning of section (c):

On November 15, 2013, USCIS, pursuant to the authority conferred upon the Secretary of Homeland Security by INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A), issued a Policy Memorandum guiding the exercise of discretion with respect to applications for parole by

⁵ See 8 CFR 274a.12(c)(11), (14). See [Form I-765, Application for Employment Authorization](#).

designated family members of U.S. military personnel and veterans. On November 20, 2014, the Secretary directed USCIS to issue new policies on the use of both parole in place and deferred action for certain family members of certain military personnel, veterans, and individuals who are seeking to enlist in the U.S. military. See Secretary of Homeland Security Memorandum, “Families of U.S. Armed Forces Members and Enlistees” (Nov. 20, 2014),

http://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf

These new policies support the Department of Defense (DoD) in several ways, including by:

- Elaborating on general USCIS deferred action policies by identifying factors that are of particular relevance to discretionary determinations involving military personnel, veterans, and their families;
- Building on existing USCIS and DoD initiatives and policies designed to assist military members, veterans, and their families in navigating our complex immigration system;
- Facilitating military morale and readiness and supporting DoD recruitment policies by considering temporarily deferring the removal of certain military family members;
- Furthering the goal of the Military Accessions Vital to the National Interest (MAVNI) program to recruit certain foreign nationals whose skills are considered vital to the national interest and critical to military services; and
- Ensuring consistent support for our military personnel and veterans, who have served and sacrificed for our nation, and their families.

For guidance on parole in place for certain family members of military personnel and veterans, see AFM Chapter 21.1(c)(1). For guidance on deferred action for certain enlistees and certain family members of military personnel and veterans, see AFM Chapter 21.1(c)(2).

- Revising new subsection 21.1(c)(1) by:
 - Striking “Spouses, Children and Parents” and inserting “Spouses, Parents, Sons, and Daughters” in the heading;
 - Striking “spouse, child or parent” and inserting “spouse, parent, son, or daughter” in the sentence that begins with “The fact that the individual”;
 - Inserting “(whether still living or deceased)” in the following places: in the heading, after the word “who”; and in the bullet point that begins with “Evidence that the alien’s family member”, after the word “who”;
 - Inserting “on active duty” in the following places: in the heading, after the word “served”; in the sentence that begins with “The fact that the individual”, after the

word “served”; and in the bullet point that begins with “Evidence that the alien’s family member”, after the word “served”;

- Inserting “and Were Not Dishonorably Discharged” at the end of the heading;
- Inserting “(if the former service member was not dishonorably discharged and either is living or died while the family member was residing in the United States)” in the sentence that begins with “The fact that the individual”, after the second instance of the word “Ready Reserve”;
- Inserting “(this may include proof of filing a petition in certain cases – see AFM 21.1(c)(3) below);” at the end of the bullet point that begins with “Evidence of the family relationship”;
- Inserting “(in the case of family members of veterans (whether still living or deceased), the service member must not have received a dishonorable discharge upon separation from the military)” after “(DD Form 1173)” in the bullet point that begins with “Evidence that the alien’s family member”;
- Inserting “In the case of surviving family members, proof of residence in the United States at the time of the service member’s death;” in a new bullet point after the bullet point that begins with “Evidence that the alien’s family member”; and
- Inserting the following new paragraphs after the bullet points: “Individuals who have obtained parole in place are eligible to apply for work authorization for the period of parole if they can demonstrate economic necessity. See 8 CFR 274a.12(c)(11), (14). See Form I-765, Application for Employment Authorization.

Parole in place may be granted only to individuals who are present without admission and are therefore applicants for admission. Individuals who were admitted to the United States but are currently present in the United States beyond their periods of authorized stay are not eligible for parole in place, as they are no longer applicants for admission.”

2. A new subsection (2) is added to Chapter 21.1(c) to read as follows:

(2) Deferred Action Consideration for Spouses, Parents, and Sons and Daughters of Active Duty Military Personnel, Individuals in the Selected Reserve of the Ready Reserve, and Individuals Who (Whether Still Living or Deceased) Previously Served on Active Duty in the U.S. Military or the Selected Reserve of the Ready Reserve and Were Not Dishonorably Discharged; and for MAVNI and other Enlistees in the Delayed Entry Program and their Spouses, Parents, and Sons and Daughters.

(A) Deferred Action for DoD Delayed Entry Program Enlistees (Including MAVNI Recruits) and Certain Family Members.

Individuals who have no previous military experience and are seeking to enlist in the U.S. Armed Forces must sign a contract by which they enter into the Delayed Entry Program (DEP) for a maximum of 365 days while awaiting Basic Training. While in the DEP, there can be delays in starting active duty for the Active Components or initial active duty for training for the Reserve Components.

Individuals who enlist in the military through the Military Accessions Vital to the National Interest (MAVNI) program may also enter the DEP. The MAVNI program allows certain foreign nationals to enlist in the military to fill positions where there are critical shortages in health care and foreign language skills. See the DoD MAVNI program fact sheet for further details: <http://www.defense.gov/news/mavni-fact-sheet.pdf>.

Most MAVNI recruits are in a lawful nonimmigrant status at the time that they enlist. For example, it is common for a J-1 foreign exchange visitor or F-1 foreign student to enlist in the U.S. military through MAVNI. Through no fault of their own, MAVNI recruits in the DEP may fall out of their lawful status while waiting to enter Basic Training. This may occur, for example, in cases where an F-1 foreign student completes his or her program of study while waiting to enter Basic Training in the DEP. In the same way, the family members of such recruits often lose their lawful statuses because their statuses depend on those of the recruits. In addition, family members might lack status either because they are present without being admitted or paroled, or because they were admitted or paroled but overstayed their authorized periods of stay even before their MAVNI or other DEP family member entered the DEP.

As in all deferred action determinations, USCIS will make case-by-case, discretionary judgments based on the totality of the evidence. In doing so, USCIS will weigh and balance all relevant considerations, both positive and negative. Certain factors, however, are of particular relevance to the exercise of that discretion when deferred action requests are submitted by individuals in DEP and their family members. Particularly strong positive factors specific to such requests include, but are not limited to:

- Being a DEP enlistee, including through the MAVNI program (even if the enlistee's authorized period of stay expires while in the DEP); and
- Being the spouse, parent, son, or daughter of a MAVNI recruit or other individual in the DEP (even if present in the United States without an authorized status).

The presence of one or more of the preceding factors does not guarantee a grant of deferred action but may be considered a strong positive factor weighing in favor of granting deferred action. The ultimate decision rests on whether, based on the totality of the facts of the individual case, USCIS finds that the positive factors outweigh any negative factors that may be present.

If an individual described in either of the two bullets above is granted deferred action in the exercise of discretion, the period of deferred action should be authorized in two-year increments; USCIS may consider requests for renewal of deferred action as appropriate. If the individual withdraws from the DEP or becomes disqualified from joining the military, any period of deferred action for the family member may be terminated.

See AFM Chapter 21.1(c)(2)(C) for guidance on filing requests for deferred action. See AFM Chapter 21.1(c)(1) for guidance on parole in place.

(B) Deferred Action for Certain Family Members of Active Duty Members of the U.S. Military, Individuals in the Selected Reserve of the Ready Reserve, or Individuals Who

(Whether Still Living or Deceased) Previously Served on Active Duty in the U.S. Military or in the Selected Reserve of the Ready Reserve and Were Not Dishonorably Discharged.

As in all deferred action determinations, USCIS will make case-by-case, discretionary judgments based on the totality of the evidence. In doing so, USCIS will weigh and balance all relevant considerations, both positive and negative. Certain factors, however, are of particular relevance to the exercise of that discretion when deferred action requests are submitted by the family members of military personnel and veterans. One particularly strong positive factor specific to such requests is that the person has been admitted and is the spouse, parent, son, or daughter of an individual who is serving, or has previously served on active duty in the U.S. military or in the Selected Reserve of the Ready Reserve (if the former service member was not dishonorably discharged and either is living or died while the family member was residing in the United States). Such an individual ordinarily fits the guidelines for parole under section 21.1(c)(1) above, except for being statutorily ineligible solely because of his or her prior admission. See INA §§ 212(d)(5)(A), 235(a)(1), 8 U.S.C. §§ 1182(d)(5)(A), 1225(a)(1).

The presence of the preceding factor does not guarantee a grant of deferred action but may be considered a strong positive factor weighing in favor of granting deferred action. The ultimate decision rests on whether, based on the totality of the facts of the individual case, USCIS finds that the positive factors outweigh any negative factors that may be present. If USCIS grants deferred action in the exercise of discretion, the period of deferred action should be authorized in two-year increments; USCIS may consider requests for renewal of deferred action as appropriate.

(C) Filing Request for Deferred Action.

To request deferred action, one must submit the following to the director of the USCIS office with jurisdiction over the requestor's place of residence:

- Letter stating basis for the deferred action request [See AFM 21.1(c)(2)(A) and (c)(2)(B)];
- Evidence supporting a favorable exercise of discretion in the form of deferred action as elaborated in AFM 21.1(c)(2)(A) and (c)(2)(B) – (e.g., evidence of family member's current or previous military service, or alien's or family member's enlistment in the DEP; note that in the case of family members of veterans, whether still living or deceased, the service member must not have received a dishonorable discharge upon separation from the military);
- Proof of family relationship, if applying based on family relationship to military member, veteran, or enlistee (this may include proof of filing a petition in certain cases - see section below);
- In the case of surviving family members, proof of residence in the United States at the time of the service member's death;

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- Proof of identity and nationality (including a birth certificate, a passport and/or identification card, driver's license, notarized affidavit(s), etc.);
- If applicable, any document the alien used to lawfully enter the United States (including, but not limited to, Form I-94, Arrival/Departure Record, passport with visa and/or admission stamp, and any other documents issued by other components of DHS or legacy INS);
- Form G-325A, Biographic Information;
- Two identical, color, passport style photographs; and
- Evidence of any additional discretionary factors that the requestor would like USCIS to consider.

Individuals who have obtained deferred action are eligible to apply for work authorization for the period of deferred action if they can demonstrate economic necessity. See 8 CFR 274a.12(c)(11), (14). See Form I-765, Application for Employment Authorization.

A requestor who has legal representation must submit a properly completed Form G-28, Notice of Entry as Attorney or Accredited Representative.

3. A new subsection (3) is added to Chapter 21.1(c) to read as follows:

(3) Petition Filing Requirement for Certain Parole or Deferred Action Requests.

USCIS encourages applicants to continue on a path toward lawful permanent resident status whenever applicable. In cases where it is applicable, USCIS encourages the filing of a Form I-130, Petition for Alien Relative (or Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant) to allow USCIS to use an established process in evaluating the bona fides of the pertinent family relationship. In some cases where subsequent parole in place or renewal of deferred action is requested, such filing may be required (see AFM 21.1(c)(3)(A) below). USCIS checks the bona fides of the qualifying family relationship in all parole in place and deferred action requests regardless of whether the Form I-130 (or Form I-360) has been filed.

In all cases where a Form I-130 or Form I-360 has been filed, USCIS may grant either parole in place, as provided in AFM 21.1(c)(1), or deferred action, as provided in AFM 21.1(c)(2), as long as the applicant's Form I-130 (or Form I-360) is pending or approved (and still valid). Even in cases where the Form I-130 or Form I-360 is required, it does not need to be approved prior to a grant of either parole in place or deferred action. Upon receiving the receipt notice for the Form I-130 or Form I-360, the alien may file the request for either parole in place or deferred action with the USCIS office with jurisdiction over the alien's place of residence. The request for either parole in place or deferred action must include documentation to establish an eligible family relationship. Such evidence may include a previously approved petition.

Note: Proof of filing the Form I-130 or Form I-360 is not required, even in applicable cases,

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for initial requests for parole in place or deferred action as provided under AFM 21.1(c)(1) and AFM 21.1(c)(2). See AFM 21.1(c)(3)(B).

(A) Petition Required for Request for Subsequent Parole in Place or Renewal of Deferred Action.

Active Duty military members, individuals in the Selected Reserve of the Ready Reserve, individuals who have previously served on active duty in the U.S. military or in the Selected Reserve of the Ready Reserve, and DEP enlistees, if eligible to file a Form I-130 on behalf of a family member requesting subsequent parole in place or renewal of deferred action as provided under AFM 21.1(c)(1) or (c)(2), must submit a completed Form I-130 for the family member, with fee and according to the instructions on the form, prior to filing the request for subsequent parole in place or renewal of deferred action, as applicable. (See Form I-130 instructions for more information on who may file.)

Surviving spouses, parents, sons, and daughters of deceased service members and veterans (described above) who were residing in the United States at the time of the service member's death and who are eligible to file Form I-360 on their own behalf must submit a completed Form I-360, with fee and according to the instructions on the form, prior to filing the request for subsequent parole in place or renewal of deferred action, as applicable. (See Form I-360 instructions for more information on who may file. See also the USCIS web site at: <http://www.uscis.gov/military/family-based-survivor-benefits/survivor-benefits-relatives-us-citizen-military-members>.)

The Form I-130 (or Form I-360) filing requirement for requests for subsequent parole in place or renewal of deferred action as provided under AFM 21.1(c)(1) and AFM 21.1(c)(2) applies only to requests that are submitted on or after November 23, 2017 (one year after publication of this memorandum).

(B) Cases where Petition is Not Required at Any Time.

Individuals who are ineligible to file a Form I-130 or a Form I-360 are not required to do so; they may still request parole in place or deferred action, as applicable. In particular, MAVNI recruits in the DEP are not eligible to file Form I-130 and therefore not required to do so. MAVNI recruits may, however, become eligible for naturalization under INA § 329(a) upon entering active duty. Recruits typically must wait until they naturalize before filing a Form I-130 for any eligible family members.

Proof of filing the Form I-130 (or Form I-360) also is not required, even in applicable cases, for initial requests for parole in place or deferred action as provided under AFM 21.1(c)(1) and AFM 21.1(c)(2).

4. The AFM Transmittal Memorandum button is revised by adding a new entry, in numerical order, to read:

AFM Update (11/23/2016)	Chapter 21.1	This PM amends AFM Chapter 21.1(c) to address discretionary options for designated spouses, parents, and sons and daughters of certain military personnel, veterans, and enlistees.
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Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Field Operations Directorate or Office of Policy & Strategy.