

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

ICE Directive 10039.2: Consideration of U.S. Military Service When Making Discretionary Determinations with Regard to Enforcement Actions Against Noncitizens

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Superseded: Memorandum from Marcy M. Forman, Acting Director, U.S. Immigration and Customs Enforcement Office of Investigations, to All Special Agents in Charge, et al., Issuances of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service (June 21, 2004) (later published as ICE Policy No. 10039.1 in the ICE Policy Manual).

Memorandum from Victor Cerda, Acting Director, U.S. Immigration and Customs Enforcement Office of Detention and Removal Operations, to All Field Office Directors, Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service (Sept. 3, 2004).

- 1. Purpose/Background.** This Directive sets forth U.S. Immigration and Customs Enforcement (ICE) policy regarding removable noncitizens with U.S. military service, including the identification of noncitizens with U.S. military service, the collection of information relevant to their U.S. military service, evaluation of their eligibility for citizenship, and consideration of U.S. military service in the issuance of Notices to Appear (NTA), administrative orders of removal, or reinstatement of final removal orders, and other civil immigration enforcement actions. Additionally, the Directive articulates ICE policy regarding the consideration of U.S. military service by a noncitizen's immediate family member(s) when making civil immigration enforcement decisions involving the noncitizen. Finally, the Directive also provides guidance on recordkeeping and reporting.
- 2. Policy.** It is ICE policy to consider a noncitizen's U.S. military service when deciding whether to take civil immigration enforcement actions against them, what enforcement action to take, if any, whether to release an individual from ICE custody, in accordance with the law, and the conditions of such release (including enrollment in Alternatives to Detention). Examples of civil immigration enforcement actions include determining whether to issue an NTA, an administrative order of removal, or reinstatement of a final order of removal. A noncitizen's U.S. military service, or the active duty U.S. military service of a noncitizen's immediate family member(s), is a significant mitigating factor that must be considered when deciding whether to take civil immigration enforcement

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action against the noncitizen based on the totality of the circumstances.¹ U.S. military service by a noncitizen's immediate family member(s) will also be considered as a mitigating factor in making case-by-case enforcement decisions.

- 2.1. **Naturalization Eligibility.** Officers and agents should generally not initiate removal proceedings against noncitizens who are statutorily eligible for naturalization as a result of their military service pursuant to sections 328 or 329 of the Immigration and Nationality Act (INA), absent significant aggravating factors being present in the case.²
- 2.2. **Verifying U.S. Military Service.** Officers and agents must ask all noncitizens during intake interviews whether they have served, or are currently serving, in the U.S. military³ and if they have any immediate family members who have served, or are currently serving, in the U.S. military. When officers or agents encounter noncitizens who claim service in the U.S. military (or service by an immediate family member in the U.S. military), this claim must be investigated and documented in the Enforce Alien Removal Module (EARM) or any relevant case management systems and in the A-file.
- 2.3. **Active Duty.** Officers and agents will generally not issue an NTA, administrative order of removal, or reinstatement of final order of removal to a noncitizen who is currently serving on active duty in the U.S. military, absent significant aggravating factors being present in the case.
3. **Definitions.** The following definitions apply for purposes of this Directive only:
 - 3.1. **A-File.** File composed of relevant immigration forms and documents related to a noncitizen's immigration case and labeled with bar codes indexed in the Central Index System and tracked by the National File Tracking System. Temporary A-Files, also called T-Files, are created when the original A-File is unavailable.
 - 3.2. **Field Responsible Officials (FROs).** The highest-ranking official in any ICE field location. This includes Special Agents in Charge, Field Office Directors, ICE Attachés,

¹ Officers and agents may apply discretion in cases involving noncitizens with U.S. military service, including those who enlist under the Military Accessions Vital to the National Interest program. *See, e.g.,* Memorandum from David Venturella, Acting Director, U.S. Immigration and Customs Enforcement Office of Detention and Removal Operations, to Field Office Directors, et al., *Department of Defense (DOD) Enlistment of Certain Nonimmigrant and Other Aliens Determined to be Vital to the National Interest* (Oct. 14, 2009). Officers and agents may also apply discretion in cases involving noncitizens whose immediate family members are on active duty in the U.S. military or who are veterans of the U.S. military.

² *See* INA §§ 328, 329. Additionally, U.S. military service is considered an indicia of potential U.S. citizenship that triggers additional investigative responsibilities, including the preparation of a U.S. citizenship memorandum. *See* ICE Directive 16001.2, *Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE* (Nov. 10, 2015).

³ For the purposes of this Directive, references to the U.S. military or U.S. military service refers to service in the National Guard or the United States Army, Navy, Marine Corps, Air Force, Space Force, and Coast Guard, including the reserve components thereof. *See* 38 U.S.C. § 101(10).

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Chief Counsels,⁴ and any other officials who have been designated, in writing, by the Director.

3.3. Immediate Family Member. A noncitizen's parent,⁵ spouse,⁶ or child.⁷

3.4. Headquarters Responsible Officials (HROs). Executive Associate Directors (EADs) of Enforcement and Removal Operations, Homeland Security Investigations, and Management and Administration; the Principal Legal Advisor, the Associate Director of the Office of Professional Responsibility; and the Assistant Directors, Officers, or equivalent positions who report directly to the Director, Deputy Director, or Chief of Staff.

3.5. U.S. Military Service. Includes service in the National Guard or the active or reserve component(s) of the U.S. Army, Air Force, Navy, Marine Corps, Coast Guard, or Space Force. Service can be for any length of time but must be more than just for training.⁸

4. Responsibilities.

4.1. HROs are responsible for:

- 1) Ensuring compliance with the provisions of this Directive within their Directorate or Program Office;
- 2) Developing and issuing any necessary implementation guidance relating to this Directive specific to their Directorate or Program Office, in consultation with the Office of Regulatory Affairs and Policy (ORAP);
- 3) Ensuring that a system for the centralized tracking and monitoring of Covered Individuals in ICE custody is created and maintained; and
- 4) Ensuring that the training is developed and delivered, as described in this Directive.

4.2. FROs are responsible for:

- 1) Ensuring compliance with the provisions of this Directive within their area of responsibility (AOR);

⁴ This Directive applies to the OPLA to the extent it is not inconsistent with directives, policies, or formal guidance issued by the General Counsel of the Department of Homeland Security (DHS). DHS Delegation No. 0400.2, Delegation to the General Counsel (Sept. 14, 2004).

⁵ For the purposes of this Directive, a parent is an individual, who shares a biological, legally adoptive, or marital (stepparent) parent-child relationship with the noncitizen child.

⁶ For the purposes of this Directive, a spouse refers to a married person or person joined to another in a comparable legally recognized union, considered in relation to their partner.

⁷ For the purposes of this Directive, a child is an individual, regardless of age or marital status, who shares a biological, legally adoptive, or marital (stepchild) parent-child relationship with the noncitizen parent.

⁸ See 38 U.S.C. § 101(10).

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- 2) Implementing the policy and procedures set forth in this Directive within their respective AOR;
- 3) Approving or rejecting recommendations made by supervisory officers and agents regarding whether to exercise prosecutorial discretion in favor of, or to take an enforcement action against, a noncitizen with U.S. military service or a noncitizen with an immediate family member currently serving on active duty in the U.S. military in writing, and ensuring the outcome is recorded in relevant case management systems and the A-file;
- 4) Consulting with OPLA attorneys when immigration proceedings against noncitizens with U.S. military service are initiated by another component to ensure military service is adequately considered, documented, and described in the continuation of immigration proceedings, consistent with the procedures and requirements outlined in this Directive; and
- 5) Providing their relevant HRO a quarterly report identifying all noncitizens who claim U.S. military service or the U.S. military service of their immediate family members, and the status of their immigration case.

4.3. Supervisory Officers and Agents are responsible for:

- 1) Ensuring officers and agents within their chain of command adhere to the policies and procedures outlined in this Directive;
- 2) Coordinating and reporting information about noncitizens with U.S. military service or noncitizens with immediate family members with U.S. military service to the FRO on a monthly basis; and
- 3) Reviewing recommendations made by officers and agents regarding whether to exercise prosecutorial discretion in favor of, or to take an enforcement action against, a noncitizen and providing a final written recommendation based on the totality of the circumstances in the noncitizen's case to the FRO.

4.4. Officers and Agents are responsible for:

- 1) Asking noncitizens if they have served, or are currently serving, in the U.S. military or if an immediate family member has served, or is currently serving, in the U.S. military;
- 2) Recording and verifying a noncitizen's U.S. military service claim, including instances where the claim could not be verified or was found to be false;
- 3) Preparing a U.S. citizenship claim memorandum when a noncitizen claims U.S. military service, in consultation with OPLA, documenting relevant facts of the case in

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accordance with the requirements of Section 5.1 of ICE Directive 16001.2, Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE (Nov. 10, 2015), or as updated;

- 4) Notifying supervisory officers and agents when a noncitizen claims U.S. military service or that an immediate family member has U.S. military service;
- 5) Making a recommendation to their supervisor regarding whether to exercise prosecutorial discretion in favor of, or to take an enforcement action against, a noncitizen based on the totality of the circumstances in the noncitizen's case; and
- 6) Reporting the number of noncitizens with U.S. military service or noncitizens with immediate family members with U.S. military service, and the status of their immigration case to supervisory officers and agents on a monthly basis.

5. Procedures/Requirements.

5.1. Implications of U.S. Military Service on Civil Immigration Enforcement Actions.

- 1) Noncitizens with U.S. Military Service. Noncitizens with U.S. military service may be subject to civil immigration enforcement action consistent with applicable DHS and ICE civil immigration enforcement priorities. In weighing civil immigration enforcement action against a noncitizen with U.S. military service, ICE officers and agents should carefully analyze the totality of facts and circumstances of the case. Although not alone dispositive, the individual's U.S. military service is a significant mitigating factor that weighs against taking enforcement action. The decision to take civil immigration enforcement actions against a noncitizen with U.S. military service must be made by the relevant FRO.

If the evidence indicates a noncitizen with U.S. military service is eligible for naturalization under INA §§ 328 or 329, ICE should generally not take civil immigration enforcement actions against the noncitizen, absent significant aggravating factors. Where ICE will not commence removal proceedings or where, as a matter of discretion ICE will seek to terminate removal proceedings, ICE must notify all encountered individuals who may be eligible for naturalization under INA §§ 328 or 329 that they may be eligible to apply with U.S. Citizenship and Immigration Services.⁹

- 2) Noncitizens Serving on Active Duty. Civil immigration enforcement actions generally will not be taken against noncitizens currently serving on active duty in the U.S. military, absent significant aggravating factors being present in the case. The decision to take civil immigration enforcement action against a noncitizen serving on active duty in U.S. military must be made by the relevant FRO.

⁹ Officers and agents should provide the noncitizen a copy of Form N-400, Application for Naturalization.

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- a) The FRO must consult with the noncitizen U.S. military service member's chain of command and appropriate military law enforcement authorities;¹⁰
- b) Prior to issuing an NTA, administrative removal order, or reinstatement of final order of removal in such a case, the FRO must:
 - i) Obtain advance approval from the appropriate HRO;
 - ii) Coordinate with military law enforcement authorities and the U.S. service member's chain of command and the Judge Advocate General; and
 - iii) Coordinate service of the NTA, administrative removal order, or reinstatement of final order of removal so that the noncitizen can be served immediately upon discharge.
- 3) Noncitizens with Immediate Family Members with U.S. Military Service. U.S. military service, including current active-duty U.S. military service, by a noncitizen's immediate family member(s) is a mitigating factor that must be considered in making case-by-case discretionary enforcement decisions. The decision to take civil immigration enforcement actions against a noncitizen with an immediate family member currently serving on active duty in the U.S. military must be made by the relevant FRO.

5.2. Screening and Reporting.

- 1) Officers and agents will:
 - a) Conduct interviews with noncitizens and affirmatively inquire¹¹ whether the noncitizen is currently serving, or has served, in the U.S. military, or if an immediate family member is currently serving, or has served, in the U.S. military;
 - i) The response to these questions, even where military service is not claimed, will be recorded in the EARM, or relevant case management systems, and in the narrative section of Form I-213, Record of Deportable/Inadmissible Alien, if prepared by ICE.
 - b) Notify their respective supervisory officers and/or agents as soon as practicable when a noncitizen claims U.S. military service or that an immediate family member has U.S. military service; and
 - c) Provide a monthly report to their supervisory officer or agent identifying all individuals who, upon intake, claimed U.S. military service or the U.S. military

¹⁰ Unless it is infeasible to do so, such consultation should occur prior to the enforcement action being taken.

¹¹ See attached Military Service Checklist. This checklist is to be used for investigative purposes to assist officers and agents in conducting initial intake interviews and must be placed in the A-File.

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service of their immediate family members, and the status of their immigration case.

- 2) Supervisory Officers and Agents will:
 - a) Coordinate and report information about noncitizens with U.S. military service or that an immediate family member has U.S. military service within their AOR to the FRO.
- 3) FROs will:
 - a) Provide a monthly report to the relevant HRO identifying all individuals who claimed U.S. military service or the U.S. military service of their immediate family members, and the status of their immigration case.

5.3. Investigation/Verification.

- 1) Claims of U.S. Military Service by a Noncitizen. Officers and agents will investigate all claims of U.S. military service by a noncitizen.
 - a) In investigating a claim of U.S. military service by a noncitizen, officers and agents should obtain any material evidence regarding the individual's service, such as branch and duty status (prior full-time military service, active duty, current or former national guard or reserve duty); date and type of discharge; service during a designated conflict; number of years of service; decorations or medals awarded; injuries sustained; evidence of court martials, if any; and any other relevant service-related information.
 - b) While the burden of producing documentation to verify claims of U.S. military service remains with the noncitizen and/or their representative, officers and agents must take reasonable steps to verify claims of U.S. military service by a detained noncitizen. This includes contacting relevant federal departments and agencies for service records (e.g., a copy of the noncitizen's DD Form 214, Certificate of Release or Discharge from Active Duty).
 - c) Officers and agents should facilitate the efforts of a detained noncitizen to secure records regarding their U.S. military service to the greatest extent practicable. Facilitation of communication between the noncitizen and their representative and/or family members with relevant documentation may include but is not limited to:
 - A) Facilitating the pre-scheduling of representative calls at no cost to the detained noncitizen; and
 - B) Providing extended time for calls or visitation with the noncitizen's representative and/or family members, as necessary.

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- d) The following non-exclusive list of documents may serve to verify noncitizen claims to U.S. military service:
 - A) DD Form 214, Certificate of Release or Discharge from Active Duty;
 - B) NGB Form 22, National Guard Report of Separation and Record of Service;
 - C) Veterans Administration issued identification card;
 - D) Veterans Administration disability letter; and/or
 - E) Evidence of service-connective disability payments.
 - e) Where a noncitizen has prior U.S. military service, officers and agents, in consultation with OPLA, must investigate and analyze the noncitizen's eligibility for naturalization under sections 328 and/or 329 of the INA, as well as any other potential claims to U.S. citizenship for which there is probative evidence in accordance with the requirements of Section 5.1 of ICE Directive 16001.2, Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE (Nov. 10, 2015), or as updated, and produce a U.S. citizenship claim memorandum.
- 2) Claims of U.S. Military Service by a Noncitizen's Immediate Family Member(s). Where a noncitizen claims U.S. military service by an immediate family member, officers and agents should obtain as much detail regarding the immediate family member's U.S. military service from the noncitizen as possible.
- a) While the burden of producing documentation to verify claims of U.S. military service remains with the noncitizen and/or their representative, the noncitizen should be given a reasonable opportunity to submit evidence regarding the U.S. military service of their immediate family member, and officers and agents should facilitate such efforts to the greatest extent practicable where the noncitizen is detained.
 - b) Where a noncitizen claims that an immediate family member is currently serving on active duty and/or is deployed in the U.S. military, officers and agents must also make reasonable efforts to verify such claim(s).
- 3) Documentation.
- a) Officers and agents must:
 - i) Document the following, to be placed in the A-File and relevant case management system:

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- A) Details regarding any claim of U.S. military service by a noncitizen or the U.S. military service of their immediate family member(s);
 - B) The results of any investigation regarding a noncitizen's claim to U.S. military service or the U.S. military service of their immediate family member(s), including instances where the claim could not be verified or was found to be false; and
 - C) Any supporting documents obtained or received by ICE regarding a noncitizen's claim to U.S. military service or the U.S. military service of their immediate family member(s).
- b) Complete a memorandum when a noncitizen has U.S. military service, prior to any enforcement action and in consultation with OPLA, documenting relevant facts of the noncitizen's case in accordance with the requirements of Section 5.1 of ICE Directive 16001.2, Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE (Nov. 10, 2015), or as updated. This memorandum must analyze the noncitizen's eligibility for naturalization under Sections 328 and/or 329 of the INA, as well as any other potential claims to U.S. citizenship for which there is probative evidence.

5.4 Recommendations/Decisions.

1) Recommendations.

- a) Noncitizens with U.S. Military Service. Where a noncitizen has U.S. military service, following completion of the investigation required by Section 5.2 of this Directive, officers and agents must provide a recommendation to their supervisor regarding whether to exercise prosecutorial discretion in favor of the noncitizen or to take an enforcement action. Supervisory officers and agents must provide a written recommendation to the relevant FRO regarding whether to exercise prosecutorial discretion in favor of the noncitizen or to take an enforcement action.
- i) Recommendations must consider the noncitizen's case based on the totality of the circumstances and be consistent with Section 5.1 of this Directive. Factors to consider when making recommendations include but are not limited to:
 - A) Details regarding the noncitizen's U.S. military service, including branch and duty status (prior full-time military service, active duty, current or former national guard or reserve duty); date and type of discharge; service during a designated conflict; number of years of service; decorations or medals awarded; injuries sustained during military service; claims of post-traumatic stress disorder or military sexual trauma; evidence of court martial, if any; and any other relevant service-related information. An Honorable Discharge is a significant mitigating factor;

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- B) The noncitizen's criminal history, the facts and circumstances underlying any arrests and convictions, the nature of any criminal sentences received, compliance with the criminal justice process, any evidence of rehabilitation; and
 - C) The noncitizen's family and financial ties to the United States, employment history, health, community service, and any other relevant factors.
- b) Noncitizens with Immediate Family Members Currently Serving on Active Duty in the U.S. Military. Where a noncitizen has an immediate family member that is currently serving on active duty in the U.S. military, following completion of the investigation required by Section 5.2 of this Directive, officers and agents must provide a recommendation to their supervisor regarding whether to exercise prosecutorial discretion in favor of the noncitizen or to take an enforcement action. Supervisory officers and agents must provide a written recommendation to the relevant FRO regarding whether to exercise prosecutorial discretion in favor of the noncitizen or to take an enforcement action.
- i) Recommendations must consider the noncitizen's case based on the totality of the circumstances and be consistent with Section 5.1 of this Directive. Factors to consider when making recommendations include but are not limited to:
 - A) Any supporting documentation of service from the noncitizen's immediate family member who is currently serving on active duty;
 - B) Whether the noncitizen is eligible for immigration relief based on their relationship with the immediate family member with U.S. military service;
 - C) The noncitizen's criminal history, the facts and circumstances underlying any arrests and convictions, the nature of any criminal sentences received, compliance with the criminal justice process, any evidence of rehabilitation; and
 - D) The noncitizen's family and financial ties to the United States, employment history, health, community service, and any other relevant factors.
- 2) Written Recommendation. Supervisory officers and agents must provide a written recommendation to the relevant FRO detailing whether to exercise prosecutorial discretion in favor of, or to take an enforcement action against, a noncitizen with U.S. military service or a noncitizen with an immediate family member currently serving on active duty in the U.S. military based on the totality of the circumstances and considering all relevant factors.

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- 3) **Decision.** The decision of whether to exercise prosecutorial discretion in favor of, or to take an enforcement action against, a noncitizen with U.S. military service or a noncitizen with an immediate family member currently serving on active duty in the U.S. military must be made by the relevant FRO based on the totality of the circumstances and considering all relevant factors. The FRO's decision in such cases must be made in writing, placed in the noncitizen's A-file, and recorded in all relevant case management systems.
- 5.5. Training.** The HRO, or their designee, must develop and provide annual training on the procedures and documentation requirements involving noncitizens with U.S. military service or noncitizens with immediate family members with U.S. military service, as described in this Directive, to officers and agents, supervisory officers and agents, and FRO's. This training must be completed upon entry on duty and annually thereafter.
- 5.6. Centralized Tracking and Reporting.** ICE must collect and maintain relevant data and information related to individuals covered under this Directive. HRO's must develop a system for maintaining this information in a manner that permits continuous monitoring and tracking of such individuals to ensure compliance with the Directive, and such information should be maintained in a format where it may be made available for reporting to the Office of the Director.
- 5.7. Privacy.** The above responsibilities and procedures in no way relieve ICE personnel of their responsibility to maintain detainee privacy. When collecting, using, and maintaining detainees' sensitive personally identifiable information, ICE employees must comply with all applicable confidentiality laws and policies.
- 6. Recordkeeping.** All relevant documents produced or provided in accordance with this Directive must be maintained in accordance with an applicable National Archives and Records Administration (NARA) General Records Schedule or a NARA-approved agency-specific records control schedule. If the records are not subject to a records schedule, they must be maintained indefinitely by the agency. In the event the records are subject to a litigation hold, they may not be disposed of under a records schedule until further notification.
- 7. Authorities/References.**
- 7.1.** 8 U.S.C. § 1439.
- 7.2.** 8 U.S.C. § 1440.
- 7.3.** ICE Directive 16001.2, Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE (Nov. 10, 2015), or as updated.
- 7.4.** Memorandum from David Venturella, Acting Director, U.S. Immigration and Customs Enforcement Office of Detention and Removal Operations, to Field Office Directors, et

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al., *Department of Defense (DOD) Enlistment of Certain Nonimmigrant and Other Aliens Determined to be Vital to the National Interest* (Oct. 14, 2009).

8. Attachments.

8.1. U.S. Military Claim Checklist Template

9. No Private Right. This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. 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 by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.



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