AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Submitted to the U.S. Senate
Committee on Appropriations, Subcommittee on Defense

Defense Field Hearing
"Immigrant Enlistment: A Force Multiplier for the U.S. Armed Forces"
May 19, 2014, Phoenix Military Academy, Chicago, IL

Mr. Chairman and distinguished members of the committee: I am Greg Chen, Director of Advocacy of the American Immigration Lawyers Association (AILA). I appreciate the opportunity to appear before you today concerning the issue of the military enlistment of immigrants and the important role immigrants have played in the U.S. armed forces.

AILA is the national bar association of immigration lawyers and has more than 13,000 attorney and law professor members. For more than 60 years, the association has worked to promote justice, to advocate for fair and reasonable immigration law and policy, and to advance the quality of immigration and nationality law and practice.

In 2008, AILA established the Military Assistance Program (MAP) to provide immigration legal services to active duty members of the U.S. armed forces, as well as to reservists, veterans and their immediate families. AILA MAP operates with the support of the Judge Advocate's General Legal Assistance Office (JAG) and assists JAG attorneys with complex immigration law questions. Since its founding, AILA MAP has assisted more than 700 service members and their families, and has about 375 volunteer immigration lawyers who handle cases on a *pro bono* basis.

AILA MAP's goal is to support the morale, welfare, and readiness of U.S. servicemen and servicewomen, who in many instances are deployed while leaving a family member behind, often in a tenuous or uncertain immigration status. Through MAP, AILA attorneys have come to understand the incredible contributions and sacrifices foreign-born service members have made to our nation's military as well as the challenges they face as immigrants serving in the military.

Immigrant Contributions to the U.S. Military

For decades, indeed for centuries and in every war fought by the United States, immigrants have made critical contributions to our nation's military. Immigrants have been eligible to enlist since the Revolutionary War and have served with great distinction. In June of 2010, approximately

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16,500 noncitizens were serving in the military, making up 1.4 percent of the enlisted force.[1] The total percentage of immigrants—including both noncitizen and citizens—serving in the military is higher than that figure since many immigrant service members have naturalized. In recent years even more foreign-born service members became citizens and did so at a faster rate due to changes in naturalization rules to expedite the process.[2]

It has long been an American tradition that service in the armed forces can lead to U.S. citizenship. Immigrants who have served in the U.S. military and by so doing earned their citizenship include Alfred Rascon, an undocumented immigrant from Mexico who won the Medal of Honor during the Vietnam War; he later became a U.S. citizen and eventually the director of the Selective Service System. Immigrants also have been promoted to the highest ranks of the U.S. military; most notable is General John Shalikashvili, former chairman of the Joint Chiefs of Staff, who came to the United States from Poland shortly after World War II.

Even undocumented immigrants have contributed to the Armed Forces. For example, an AILA MAP attorney, Neil O'Donnell, represented Luis Lopez, who served in the Army despite being undocumented and was later assisted by his commanding officer to obtain citizenship. This is a summary of the case:

> *Luis Lopez was 8 years old in 1990 when his family came to the United States from Mexico on tourist visas. The family overstayed the visas. Luis visited an Army recruitment office after finishing high school, but was asked for a green card or a birth certificate. Luis gave the recruiter a fake "birth abstract" that stated he was born in Los Angeles County. He served in the Army and was deployed to Iraq twice and then to Afghanistan. During his service, he was awarded more than a dozen accolades. He was given commendations for his service in Afghanistan as a section chief for an airborne field artillery battalion's radar system.*
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> *In 2010, he informed his supervisors that he was an unauthorized immigrant and took steps to apply for citizenship. His application was based on the Immigration and Nationality Act of 1952 which says that foreign nationals who have "served honorably" during wartime may be naturalized "whether or not [they have been] lawfully admitted to the United States for permanent residence." Luis's commanding officer provided a recommendation letter to U.S. Citizenship and*

[1] "Population Representation in the Military Services: Fiscal Year 2010 Summary Report," p. 39, Department of Defense, http://prhome.defense.gov/portals/52/Documents/POPREP/poprep2010/summary/PopRep10Summ.pdf.
[2] Molly F. McIntosh and Seema Sayala, with David Gregory. *Non-Citizens in the Enlisted U.S. Military*. CNA Research Memorandum D0025768.A2/Final, November 2011, https://www.cna.org/sites/default/files/research/Non%20Citizens%20in%20the%20Enlisted%20US%20Military%20D0025768%20A2.pdf.

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Immigration Services (USCIS) that Luis be awarded citizenship. Luis was granted citizenship and naturalized in 2011.

Immigrant service members are loyal to the United States and heed the call to fight for the principles of freedom and democracy just as native-born soldiers do. For noncitizens who can meet requirements to enlist and serve honorably, serving in the U.S. military offers a unique path to citizenship. Through service immigrants prove their allegiance to their new homeland and integrate more quickly into American society. Their service carries on a proud and unquestioned tradition in our nation of immigrants.

Recruiting More Immigrants Will Help the U.S. Meet Its Needs

The need for a broad, highly qualified and diverse pool of talent to join the military has been widely recognized. In *Army* magazine's April 2014 volume, Major General Allen Batchelet, the commanding general of the U.S. Army Recruiting Command wrote: "[Y]outh interest in military service is decreasing, and fewer than one in four young people meet enlistment qualifications." Today only 40 percent of young people have ever spoken with a military recruiter, down from 60 percent ten years ago. Major General Batchelet called for more aggressive recruiting policies from a broader talent pool and for changing the law to permit the enlistment of young undocumented immigrants.

Previous reports reached similar conclusions. In April 2005, CNA published a comprehensive report on immigrants in the military. The report noted that immigrants add valuable diversity to the armed forces and perform extremely well, often having significantly lower attrition rates than other recruits. The report also pointed out that "much of the growth in the recruitment-eligible population will come from immigration." The February 2006 Quadrennial Defense Review highlighted the key role that immigrants play in the Department of Defense (DOD) and called for increased recruitment in all branches of the military of immigrants who are proficient in languages other than English—particularly Arabic, Farsi, and Chinese.

In 2010, DOD published its annual report, "Population Representation in the Military Services," and examined the noncitizen population and eligibility-to-serve criteria, such as being a lawful permanent resident, having a high school diploma, and having English-language proficiency. The report estimated that 1.2 million noncitizens in the prime recruiting ages of 18 to 29 would have met the eligibility criteria in 2010.[3] Moreover, an estimated 85 percent of the eligible noncitizen population spoke a foreign language at home (39 percent Spanish, five percent Chinese, 10 percent another Asian or Pacific Island language, 15 percent languages from India, and 4 percent Middle Eastern languages).[4]

[3] "Population Representation in the Military Services: Fiscal Year 2010 Summary Report," p. 41, Department of Defense; http://prhome.defense.gov/portals/52/Documents/POPREP/poprep2010/summary/PopRep10Summ.pdf.
[4] *Ibid.*

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Immigration and Military Enlistment Law
Recognizing the important role immigrants play in the military, Congress has passed laws that enable the foreign-born to enlist and that facilitate their naturalization. Since 1952, the Immigration and Nationality Act has given broad authority to the president to expedite citizenship for immigrant U.S. military service members. In the past two decades, the government has used this authority to help service members naturalize by reducing wait times, waiving residence and physical presence requirements, and enabling naturalization to take place on completion of boot camp.

In 2003, the Army launched a program to recruit and train linguists and interpreters to address the severe shortage of U.S. military linguists who are fluent in dialects common to Iraq and Afghanistan. Immigrants have been crucial to the program's success: Two-thirds of program recruits were legal immigrants; while one-third were U.S. citizens. In 2006, Congress created a special visa program for immigrant interpreters who provided assistance as civilians to the armed forces in Iraq and Afghanistan.

In 2006, Congress substantially changed the military enlistment statutes, repealing the separate statutes that had previously governed enlistment in each of the services and replacing them with a single statute. The 2006 law establishes a bar against unauthorized individuals enlisting in the military and requires lawful permanent resident status for enlistment. The law allows for an exception for those whose enlistment is deemed "vital to the national interest." This provision is discussed further below.

Improving Government Policy and Practice on Immigrant Enlistment
Current military practices could be significantly improved to better meet the needs of the U.S. government to recruit and maintain a diverse and highly-qualified professional military. AILA recommends two changes that can be implemented immediately:

- Broaden the interpretation of "vital to the national interest" under 10 USC §504
- Clarify the enlistment eligibility of individuals who live with or have unauthorized spouses and dependents

Interpretation of "vital to the national interest" under 10 USC §504
The 2006 uniform enlistment practices statute effectively restricts immigrant enlistment to lawful permanent residents. But the statute also includes a broad exception where a service secretary has determined that a person's enlistment is "vital to the national interest." The 2006 law gave the secretaries of the separate services authority to waive the requirement that a person seeking to enlist have U.S. citizenship or lawful permanent resident status if they determine "that such enlistment is vital to the national interest." Using this statutory authority, in 2008, Defense

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Secretary Gates authorized a new pilot program titled "Military Accessions Vital to the National Interest" (MAVNI), under which up to 1,000 legal noncitizens with critical skills would be allowed to join the U.S. armed forces each year. The annual quota has since been increased though it is still limited to 1,500.

Under the MAVNI program, the Army, Navy, and Air Force began recruiting certain noncitizens who were not lawful permanent residents but were nonetheless lawfully present in the United States. So far, however, MAVNI has been restricted to individuals who are licensed health care professionals in certain medical specialties or fluent in one of 35 strategic languages—not including Spanish. MAVNI also restricts enlistment to persons who hold specific non-immigrant visa statuses, temporary protected status, or asylee or refugee status. Persons granted deferred action are not eligible for MAVNI. Unfortunately, this interpretation precludes an enormous pool of foreign-born individuals from enlisting.

DOD can immediately broaden the interpretation of "vital to the national interest" under 10 USC §504(b)(2), which states that the secretary of defense "may authorize the enlistment of a person not described in paragraph (1) if the Secretary determines that such enlistment is vital to the national interest." AILA is not aware of any statutory definition or legislative history that would restrict the meaning of "vital to the national interest" to the two MAVNI categories (individuals with certain language skills and health care professionals) that DOD has announced to date, or to the specific immigration statuses that DOD has selected for the MAVNI program. Accordingly, it is at the discretion of the service secretaries to use the "vital to the national interest" language to meet any and all recruitment needs.

Specifically, DOD can use the "vital to the national interest" clause to enlist those who have received grants of deferred action under the Deferred Action for Childhood Arrivals (DACA) initiative, without forcing those with DACA to fit within the narrow constraints of the MAVNI program. As of March 2014, more than half a million people had been granted DACA. Among them are these exemplary individuals who are well qualified to serve their country in the Armed Forces:

> *Juan Rios was brought to the United States from Mexico when he was 10. Juan was a leader in Air Force JROTC. He was group commander and armed drill team captain, and rose to the rank of Cadet Lieutenant Colonel. Juan dreamed of attending the Air Force Academy, but he was unable to do so because he is undocumented. Instead, Juan enrolled in Arizona State University. In 2010, he graduated with a degree in aeronautical engineering.*
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> *Gaby Pacheco was brought to the United States from Ecuador when she was seven years old. She was the highest-ranking JROTC student and received the highest score on the military aptitude test at her high school in Miami, Florida.*

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> *The Air Force tried to recruit Gaby, but she was unable to enlist because of her undocumented status. Gaby earned three degrees from Miami Dade College, where she was elected student government president and statewide student body president.*
>
> *Jhon Magdaleno was brought to the United States from Venezuela when he was nine years old. During high school, he was the 4th highest ranking officer and Commander of the Air Honor Society in his JROTC unit. Jhon is currently an honor student majoring in Chemical and Biomolecular Engineering at the Georgia Institute of Technology, one of the top engineering schools in the country. He works in a biomedical engineering lab at the university researching glaucoma. He has also recently secured an internship with Eastman Chemical Company.*

The enlistment of people under DACA is clearly vital to the national interest because DACA beneficiaries are U.S.-educated persons who have good moral character, who have resided in the United States for at least five years, and who can meet other military enlistment standards, including passing a DHS background check and a National Crime Information Center check. Increasing the military recruitment pool to include those granted DACA is vital to our nation's ability to maintain a highly qualified, diverse and inclusive all volunteer force.

Enlistment eligibility of individuals with unauthorized spouses and dependents

DOD should clarify that an individual is not barred from enlistment if he or she lives with, or is married to, an unauthorized person or has unauthorized dependents. Last year Kathleen Welker of the Army Recruiting Command confirmed that Army policy bars these individuals from enlistment.[5] The Marine Corps and Navy have specific written regulations barring the enlistment of such persons. The bar against these individuals is allegedly based on the view that a person has committed the crime of harboring under the Immigration and Nationality Act, 8 USC § 1324, if he or she merely co-habitates with someone who is not authorized to be in the United States.

AILA strongly disagrees with this view. The harboring statute states in part that it is a punishable offense to:

> knowing[ly] or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceal[], harbor[], or shield[] from detection, or attempt[] to conceal, *harbor*, or shield from detection, such

[5] Transcript of NPR interview by Jude Joffe-Block with Kathleen Welker broadcast on December 16, 2013. http://hereandnow.wbur.org/2013/12/16/military-undocumented-family. See also "New Immigration Hope For Military Dependents, But Enlistment Hurdles Remain," Fronteras, November 20, 2013, http://m.fronterasdesk.org/content/9256/new-immigration-hope-military-dependents-enlistment-hurdles-remain.

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> alien in any place, including any building or any means of transportation . [emphasis added]

No U.S. circuit court of appeals that has considered the issue has found that co-habitating with someone of unauthorized status, with knowledge of his or her unauthorized status, is sufficient to constitute harboring. The U.S. Court of Appeals for the Third Circuit has defined "harboring" as conduct "tending to substantially facilitate an alien's remaining in the United States illegally *and to prevent government authorities from detecting the alien's unlawful presence. " Lozano v. City of Hazelton*, 620 F.3d 170, 223 (3d Cir. 2010) (emphasis in original). The Second Circuit and Eleventh Circuit have applied similar definitions. See *United States v. Kim*, 193 F.3d 567, 574 (2d Cir.1999) and *United States v. Chang Qin Zheng*, 306 F.3d 1080, 1086 (11th Cir. 2002). Although not all the circuit courts of appeals have held that a showing of concealment is necessary to meet the definition of harboring, I am not aware of any federal court in which someone has been convicted of harboring merely because the individual lived with an unauthorized person with knowledge of that person's status.

It makes little sense that the various branches of the military would take a view contrary to the weight of federal court jurisprudence. Indeed, the current Army, Navy, and Marine Corps policy is a recent development that had not previously been applied by any of these service branches. The secretary of each of the services has the authority to allow otherwise qualified applicants who live with or are married to unauthorized persons to enlist.

Excluding from enlistment those individuals who live with an unauthorized person also runs counter to the policies and practices of both DOD and DHS. DOD does not discharge Americans from military service when their spouses and children fall out of status. AILA MAP has assisted many spouses of servicemen or servicewomen who come to the United States on a visitor visa, or another kind of visa, and then fall out of status by overstaying the visa. In such cases, the armed forces do not discharge the service member out of concern that he or she is committing the criminal act of harboring an unauthorized person.

In November 2013, USCIS issued a memorandum on the granting of parole requests made on behalf of the spouses, children, and parents of active-duty military personnel, reserve members, and veterans, when those spouses, children and parents are already physically present in the United States without inspection or admission. The parole-in-place policy is intended to protect military personnel who have undocumented spouses, children or parents by easing the stress and anxiety placed on military service members and veterans when their family members lack immigration status. The memorandum notes that "[m]ilitary preparedness can potentially be adversely affected if active members ... who can be quickly called into active duty, worry about the immigration status of their spouses, parents and children." The USCIS parole-in-place policy makes it clear that these military personnel are not viewed as harboring an unauthorized person.

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Moreover, the policy is designed to support them and their families and allow the unauthorized persons to obtain valid immigration status.

AILA MAP has helped several individuals in these circumstances. For example, the following case was handled by attorney Grant Godfrey:

> *David is a U.S. citizen Navy hospitalman and the son of a Navy servicewoman. David's wife Mary, who was undocumented, was brought to the United States when she was six months old. David and Mary met in high school and got married a year later after he enlisted. Mary lived with David's mother as David was stationed around the country for training and then was deployed to Afghanistan. Because of the difficulties of getting documents from David while he was in a warzone, the filing of Mary's application for parole-in-place was delayed until David returned. Mary was then granted parole-in-place; six months later, she received her green card. Mary has no criminal history other than a ticket for driving without headlights and for driving without a license for which she paid the fine in full.*
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> *In his letter in support of his wife's application for parole-in-place, David wrote: "In the event that my wife was forced to return to Mexico and were subject to the 10-year bar, then I would make every effort to move to Mexico so I could be with her. Since I signed a 5 year enlistment contract with the Navy, before I could do so I would either have to wait that out or I would have to try to get discharged. I also would be giving up my military career to move to a different country with an unfamiliar culture that speaks a language I don't understand. I imagine that my job prospects would be very bad, and I have a great fear that my status as an American, not to mention a military veteran, would make me a target for violence. The truth is that the separation from my beloved wife has already been one of the most difficult things I have ever done. If her application were denied, then what has been a very trying situation would only be compounded, and I cannot imagine the level of hardship and anxiety I would face if she would have to face the uncertainty of going back to Mexico, not to mention the uncertainty inherent in my own efforts to reunite with her in Mexico"*

Reforming Immigration and Military Enlistment Law

AILA recommends that Congress reform both immigration law and military enlistment law to expand the opportunities for immigrants to enlist. AILA supports passage of the Development, Relief, and Education for Alien Minors (DREAM) Act, or a comparable proposal enacted separately or as part of a broader immigration bill such as the one included in the Senate-passed bill, S. 744. The DREAM Act would allow young people who have grown up in this country, have graduated from high school, have been acculturated as Americans, and have no serious

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criminal record to go to college or to serve in the military and thereby legalize their immigration status. In addition to offering legalization for a large population of young unauthorized people, a goal that AILA supports for its own sake, the passage of the DREAM Act would enable the U.S. military to draw on a larger, highly qualified and diverse pool of candidates that will be essential to meeting the military's and America's needs.

AILA also supports H.R. 435, the Military Enlistment Opportunity Act, a bipartisan bill sponsored by Congressman Mike Coffman (R-CO). The Military Enlistment Opportunity Act would broaden the pool of those eligible to enlist in the U.S. armed forces beyond citizens and lawful permanent residents, and those who are eligible under the current MAVNI program. The bill would allow persons who have resided continuously in a lawful status in the United States for at least two years, as well DACA recipients, to enlist. The measure further provides a path to lawful permanent status for both categories of enlistees by amending the current process.

Thank you again for the opportunity to address this important topic.

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