

Legal Sidebar

[A Few Good DACA Recipients: Congress Debates Facilitating DACA Military Enlistment](#)

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Ever since 2012 when the U.S. Department of Homeland Security (DHS) [announced its policy](#) of deferring action on removal for certain aliens through the Deferred Action for Childhood Arrivals (DACA) program, Congress has [debated](#) whether to facilitate [DACA recipients'](#) eligibility for military service along with whether, pursuant to some form of [DREAM Act legislation](#), to offer persons similarly situated, who complete a period of post-secondary education or military service, a path to legalization. Permitting DACA recipients to enlist has been an issue for both the U.S. Department of Defense (DOD)'s [existing recruitment authority](#) and [congressional revision](#) of this authority. As described below, current legislative proposals would expand opportunities for DACA recipients, or similarly situated persons, to enlist and/or provide lawful permanent resident (LPR) status for them.

[DACA recipients do not have a legal immigration status](#). Historically, deferred action has been perceived as an exercise by the federal government of prosecutorial discretion not to remove aliens. Consistent with this view, the Obama Administration [has indicated](#) that a DACA grant is subject to revocation at any time at the discretion of the DHS. Potentially, individual grants of deferred action could be revoked or the entire DACA program could be terminated. Notably, the states and/or DHS employees [have sued the federal government](#) to challenge the legality of the original 2012 DACA program and subsequent [expansions announced](#) by the Obama Administration in 2014. Although the original DACA program remains operational, the announced 2014 expansions are [subject to court-ordered preliminary injunctions barring their implementation](#). The outcome of litigation could complicate the continued operation of the DACA program and participation of DACA recipients in the Military Accessions Vital to the National Interest (MAVNI) program described below.

Aliens who do not have LPR status, such as DACA recipients, generally are not [eligible to enlist](#) in the U.S. armed forces. The military enlistment statute, however, permits the Secretary of an [armed forces branch](#) to authorize enlistment of aliens without LPR status if the Secretary concerned determines that such enlistment is [vital to the national interest](#). Pursuant to this authority, in 2008, the DOD established a [pilot program for MAVNI](#), permitting enlistment of aliens who had certain types of nonimmigrant status or had been granted certain types of humanitarian relief and who also could fill military needs for health professionals and persons proficient in certain languages. Since the original pilot, the MAVNI program has been [extended](#)

[and suspended](#) a couple times. When the Department of Defense announced in the fall of 2014 that it would extend MAVNI until the end of FY2016, it also announced that eligibility for the program would be [opened to DACA recipients](#). After a [delay](#) in implementation [to resolve administrative complications](#) with processing MAVNI enlistments of DACA recipients, the MAVNI program began accepting applications from DACA recipients. DACA recipients are not automatically granted a legal immigration status as MAVNI enlistees.

The absence of a statute establishing an immigration status for DACA recipients participating in the MAVNI program could lead to complications in the future. At the current time, a DACA recipient can naturalize based on wartime military service because the applicable naturalization statute does not limit eligibility to service members with LPR status. Aliens [who enlisted in the United States or its territories or on board a U.S. public vessel in U.S. waters](#) may also naturalize based on wartime military service. The wartime service naturalization statute does not require a specific minimum period of military service; DHS policy is [that one day of service suffices](#). Accordingly, the current policy of the DOD and DHS is to facilitate the naturalization of enlisted aliens by the time they [complete basic training](#). Depending on individual circumstances, a MAVNI participant may technically be out of status at the beginning of his or her tour of duty, since, under current policy, a MAVNI participant apparently [may lawfully remain in the United States and in the MAVNI program while his or her naturalization application is pending](#). This policy, however, accommodates the currently operational wartime naturalization statute and also serves as [a recruitment incentive](#) for the MAVNI program. The wartime naturalization process will end, however, whenever the President declares by executive order that the current period of hostilities (the war on terror) is terminated for naturalization purposes, pursuant to the [wartime naturalization statute](#).

If the MAVNI program were to continue during peacetime, its participants, including DACA recipients, who begin their service after the date when the current period of hostilities ends, would have no clear path to citizenship under the statute for naturalization based on peacetime military service, which [requires LPR status](#). If a peacetime MAVNI participant could not otherwise acquire LPR status and be naturalized as a U.S. citizen, the participant would either remain with his or her current status or immigration benefits (*e.g.*, refugee/asylee, certain nonimmigrant visa status (such as F student, H worker, or J exchange visas), or DACA recipient) or [have no status](#) because his or her prior nonimmigrant status has terminated/expired, *e.g.*, F student or H worker visa status. Notably, the DHS immigration [regulations](#) provide that a MAVNI participant, during enlistment, is considered authorized to be employed by the relevant armed force service branch regardless of whether the alien's employment is not otherwise authorized under immigration laws and regulations. Without a path to acquiring citizenship, or at least LPR status, a MAVNI participant may, however, be [unable to reenlist in certain service branches](#) or be [ineligible for certain positions](#).

In the 114th Congress, the few legislative proposals to expand enlistment eligibility for DACA recipients or Dreamers have proven controversial. For example, [H.R. 1735](#), the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016, was reported by the House Armed Services Committee with a provision, §538, that it is the sense of the House of Representatives that the Secretary of Defense should consider using authority under the enlistment statute to expand enlistment to all DACA recipients as opposed to only those with language or health care

skills. In opposition, a [proposed floor amendment](#) has been submitted to the House Rules Committee to eliminate this provision. [H. Res. 179](#), a free-standing proposal, is similar to §538 of H.R. 538.

[H.R. 1989](#), the Encourage New Legalized Immigrants to Start Training (ENLIST Act), is [similar](#) to a proposed amendment to the NDAA for FY 2015 that [was rejected for floor consideration](#) last year. It would amend the enlistment statute to provide enlistment eligibility for Dreamers who are otherwise qualified aliens but were unlawfully present in the United States on December 31, 2011; have been continuously present in the United States since that date; and were younger than 15 years old on the date of initial entry into the United States. The bill would further amend the statute to provide LPR status for such alien enlistees, with the condition that such LPR status can be rescinded if an alien is discharged from the armed forces under other than honorable conditions before completing the enlistment obligation. The bill, however, does not refer to the DACA recipients whom the DHS has already screened and investigated as part of the DACA process; persons who qualify for MAVNI under the terms H.R. 1989 sets forth may not necessarily qualify for a DACA benefit. [A similar proposed floor amendment](#) to H.R. 1735 has been submitted to the House Rules Committee. Also, [a proposed floor amendment](#) to H.R. 1735 that would permit DACA recipients to be appointed to the military service academies and commissioned as officers upon graduation has been submitted to the House Rules Committee.

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