

CITATION: VAOPGCPREC 11-89
Vet. Aff. Op. Gen. Couns. Prec. 11-89

DATE: 4-11-89

TEXT:

Eligibility for Burial in a National Cemetery--

1. This is in response to your memorandum of January 6, 1989, concerning the eligibility of the above-referenced claimant, a Philippine World War II veteran, for interment in a Department of Veterans Affairs (VA) national cemetery. It is our conclusion that, absent special action by the Secretary of Veterans Affairs, the claimant is ineligible.

2. This claim arises out of the claimant's service from 1942 through 1945 as an officer in the Philippine Commonwealth Army and as a member of a recognized Philippine guerilla unit. He claims he was called to active duty on December 24, 1941, pursuant to President Roosevelt's order of July 26, 1941, served in the United States Armed Forces in the Far East beginning on January 1, 1942, and joined a recognized guerilla unit under an American officer on September 16, 1942, as part of the United States Army Forces in the Philippines. His claims are partly substantiated by the Ministry of National Defense of the Republic of the Philippines in a certification dated January 11, 1983. Army records indicate the claimant served from September 16, 1942, through May 26, 1945, in the Philippine Commonwealth Army, and in a recognized guerilla unit. As the actual dates of service are not determinative of the issues presented, this discrepancy need not be resolved.

3. The claimant is a naturalized citizen of the United States now living in a state. According to documents supplied by the claimant, he was naturalized in August 1987, pursuant to the Nationality Act of 1940, as amended by the Second War Powers Act, 56 Stat. 176, 182 (1942), providing for the overseas naturalization of persons who served in the United States military. In the Matter of Narcisco Y. Digamon, Civil No. K-87-1818, slip. op. at 2, 3 (D. Md. Aug. 30, 1982) (citing in re Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931, 937-40 (N.D. Cal. 1975)). Although he did not become a citizen prior to the expiration of these provisions of the Act, he was naturalized because he had taken affirmative action amounting to a constructive filing of a naturalization petition prior to the Act's expiration date. Id.

4. Eligibility for burial in a national cemetery is limited to the categories of persons specified in 38 U.S.C. § 1002 and includes, in section 1002(1), 'a ny veteran'. A 'veteran' is defined, for purposes of title 38, United States Code, as 'a person who served in the active military, naval, or air service, and who was

discharged or released therefrom under conditions other than dishonorable.' 38 U.S.C. § 101(2).

5. Pursuant to 38 U.S.C. § 107, service before July 1, 1946, 'in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941,' including guerilla forces which were subsequently recognized, 'shall not be deemed to have been active military, naval, or air service' for purposes of United States benefit laws, except for those set forth in that section. See also Digested Opinion, 7-11-85, (8-12 Classes of Persons Entitled to Benefits-- Philippine Army--WWII) (explaining distinction between Regular Philippine Scouts and Commonwealth Army veterans and new Philippine Scouts) (copy attached). Allowable benefits include service-connected death-and-disability benefits, benefits under the Missing Person Act, benefits under existing insurance contracts, and certain burial benefits. Eligibility for burial in a national cemetery under chapter 24, title 38, United States Code, is not among the benefits included.

6. The constitutionality of section 107 of title 38 has been upheld. See *Filipino American Veterans and Dependents Association v. United States*, 391 F. Supp. 1314, 1323-24 (N.D. Cal. 1974; cf. *Lagtapon v. Secretary of Health, Education and Welfare*, 481 F.2d 538, 540 (D.C. Cir. 1973) (exclusion of Philippine Army veterans from Social Security benefits). The applicability of the section is not affected by the fact that the Filipinos covered later became residents or citizens of the United States. *Filipino American Veterans*, 391 F. Supp. at 1324.

Moreover, the VA has long taken the position that under the section in question, 'no distinction may be made by reason of citizenship, residence or theater of operations in which the service was performed.' A.D. No. 696 (1946) (interpreting earlier version of the statute.) Thus, the claimant cannot qualify as a 'veteran' for purposes of section 1002.

7. A U.S. citizen who served in the armed forces of an allied government during a war in which the United States was engaged is also eligible for burial in a national cemetery under 38 U.S.C. § 1002(4). However, under VA regulations, this exception only applies to a person who was a citizen of the United States both at the time of entry into such service and at the time of death. 38 C.F.R. § 1.620(e). See also Op. G.C. 19-79, (4-11-79). Thus, the claimant cannot qualify under this subsection either, despite his subsequent citizenship.

8. Section 1002(2), (3), and (5) refer to certain members of reserve components and certain next of kin of otherwise eligible persons and are thus of no assistance to the claimant. Section 1002(6) refers to 'such other persons or classes of persons as may be designated by the Secretary.' See also 38 C.F.R. § 1.620(h). It appears to be within the authority of the Secretary of Veterans Affairs under this provision to designate the claimant and those similarly situated as eligible for burial in a national cemetery. We are only aware of two instances

in which this authority has been exercised in the past. Whether the Secretary should authorize persons such as the claimant to be buried in national cemeteries is a policy matter upon which we express no opinion.

9. The claimant raises several arguments in support of his claim of eligibility for burial in a national cemetery. As discussed below, these arguments are meritless.

10. First, he argues that he is eligible for burial in a national cemetery under section 1002(4) as a citizen who served in the armed forces of an allied government. In this regard, he notes that as a Filipino, he was a United States national prior to the independence of the Philippines on July 4, 1946. However, as noted above, under 38 C.F.R. § 1.620(e), in order to qualify under subsection (4), the claimant must have been a citizen at the time of entry into service.

Filipinos were not American citizens prior to the independence of the Philippines, although they were considered American nationals. See 68 Filipino War Veterans, 406 F. Supp. at 940-41; Filipino American Veterans, 391 F. Supp. at 1324. As noted above, the claimant's subsequent naturalization does not allow him to qualify under this provision.

11. Second, the claimant argues that language in the M40-2 manual, which indicates that members of the Philippine Commonwealth Army who 'enlisted' between July 26, 1941, and July 30, 1946, are not eligible for interment in a national cemetery, is applicable only to enlisted persons and not to former officers such as himself. Although we disagree with this interpretation, extended discussion is unnecessary as similar language does not appear in the statute or regulations. VA Manual M40-2 is an administrative guideline, adopted without notice and public comment, which cannot substantively affect the rights of claimants. To the extent it may be inconsistent with the statute and regulations discussed above, which do not distinguish between officers and enlisted personnel, it has no force and effect.

12. The claimant's third argument is based upon dicta in *Olegario v. United States*, 629 F.2d 204, 210 n.5 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981). The claimant notes that the Attorney General and the Immigration and Naturalization Service (INS) initially took the position that service in the Philippine Commonwealth Army constituted active-duty status but reversed this position after passage of the provision which became 38 U.S.C. § 107 (derived from the First Supplemental Surplus Appropriation Rescission Act of February 18, 1946, Pub. L. No. 79-301, 60 Stat. 14 (hereafter 'the Surplus Appropriation Act')). He argues that the Attorney General's original position was somehow revived by rejection of the position taken by the INS in *in re Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957), discussed in footnote 5 of *Olegario*.

However, the only position of the INS which was rejected by the district court in *Munoz* was the argument that the language in the Surplus Appropriation Act affected the right to summary naturalization under the Second War Powers Act,

discussed above. The district court held that the Surplus Appropriation Act did not 'take away' the right to summary naturalization but merely affected rights to veterans' benefits. 156 F. Supp. at 186. As the right to burial in a national cemetery is clearly a veterans' benefit, Munoz is inapposite here.

13. The claimant also points to section 635 of title 38, U.S. Code, which defines 'Commonwealth Army veterans' and includes within that definition recognized guerilla forces, as conferring veteran status on persons who served in those forces. However, that definition is applicable by its terms only to subchapter IV of title 38, chapter 17. That subchapter deals only with hospital and nursing home care and medical services. It does not confer any eligibility for veterans' benefits other than those referred to therein.

14. Finally, the claimant makes reference to judicial decisions which acknowledge that nationals from territories such as Puerto Rico and the Philippines (prior to its independence) possess certain due process rights. However, none of these decisions recognizes a constitutionally protected right to burial in a national cemetery. Moreover, it is well settled that claimants from Puerto Rico or the Philippines can be treated differently from claimants from the fifty United States as long as there is a rational basis for the disparity in treatment. See, e.g., *Harris v. Rosario*, 446 U.S. 651, 652 (1980); *Filipino American Veterans*, 391 F. Supp. at 1323; see also *Immigration and Naturalization Service v. Pangilinan*, 108 S. Ct. 2210 (1988); *Dorr v. United States*, 195 U.S. 138, 146-47 (1904); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901). A rational basis for the distinctions drawn in 38 U.S.C. § 107 was found in *Filipino American Veterans*, 391 F. Supp. at 1322-23.

HELD:

Pursuant to 38 U.S.C. §§ 107 and 1002 and 38 C.F.R. § 1.620, Philippine nationals who served in the Philippine Commonwealth Army and in recognized guerilla units during World War II are ineligible for burial in national cemeteries, regardless of whether they later become American citizens. However, the Secretary of Veterans Affairs may designate such persons or classes of persons as eligible for burial in national cemeteries pursuant to 38 U.S.C. § 1002(6) and 38 C.F.R. § 1.620(h).

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