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NETWORK, INC.

Understanding the New NTA Guidance: What Practitioners Need to Know

Presenters

- Michelle Sardone, Director of Strategic Initiatives
- Rebecca Scholtz, Staff Attorney
- Susan Schreiber, Managing Attorney
Training, Litigation, and Support



Topics for Today

- NTA Guidance: Before and After
- NTA Guidance Overview: Who's at Risk of NTA Issuance?
- NTA Guidance: Implications for Practitioners
 - What it means for existing clients with pending cases
 - Screening and information gathering
 - Initial case assessment
 - Pre-filing counseling and informed consent
 - Creating a case-specific filing plan
 - Accompanying clients to interviews
 - Recognizing your limits



Old Guidance/New Guidance

November 2011 Guidance

- Where required by law
- Certain cases of fraud
- Certain natz cases, based on recommendation from N-400 NTA Panel
- Certain crimes cases referred to ICE for possible NTA issuance

June 2018 Guidance

- Where required by law
- Fraud, misrepresentation, and abuse of public benefits cases, and certain suspected fraud cases
- Certain natz cases, unless prosecutorial discretion exercised
- Crimes cases after denial, but may refer to ICE before adjudication in some circumstances
- After denial of application by person not lawfully present



New Guidance: Big Picture

- Aims to enforce January 2017 Executive Order Priorities
- More noncitizens will be placed in removal proceedings by USCIS, including denied applicants for immigration benefits who are not lawfully present in the United States



Old Guidance/New Guidance: What Does the Impact Look Like?

- It's May 28, 2018. You are about to file a U status application for client Naomi, who entered the United States EWI from Mexico. Naomi wants to know what will happen if her application is denied. You say.....



Old Guidance/New Guidance: What Does the Impact Look Like?

- It's August 2, 2018. You are about to file a U status application for client Naomi, who entered the United States EWI from Mexico. Naomi wants to know what will happen if her application is denied. You say.....



Closer Look: NTA Guidance and Crimes

- **Big Picture:** All removable noncitizens with any criminal record including arrests without disposition can expect NTA upon denial even if crime does not create inadmissibility or deportability



Closer Look: NTA Guidance and Crimes

- USCIS will issue NTA against removable individuals with any criminal history (arrested without disposition, under investigation, conviction, both “egregious public safety” and non-EPS) upon denial.
- USCIS will refer some cases with crimes to ICE before adjudication, or after adjudication in EPS situations



NTA Guidance and Crimes in Action

Mark, a refugee, applies for adjustment of status with a waiver for smuggling because he paid for his daughters to enter the United States illegally. Mark also has a recent DUI conviction. Although the DUI offense does not make him inadmissible, if his application for adjustment of status with a waiver is denied, USCIS will issue an NTA based on his non-EPS crime.



Closer Look: NTA Guidance and Fraud and Abuse of Public Benefits

- USCIS will issue NTA in cases involving fraud, misrepresentation, or abuse of public benefits where individual is removable and
 - ❖ Application denied or withdrawn or some other "negative eligibility determination"
 - ❖ There is fraud, misrepresentation, or public benefits abuse in record even if denial unrelated to these issues
- USCIS may refer to ICE before adjudication in cases of suspected fraud, in certain unspecified circumstances.



NTA Guidance and Fraud and Abuse of Public Benefits in Action

- Cecilia, a refugee from Bhutan, applies for adjustment of status with a waiver of inadmissibility for making a false claim to U.S. citizenship on Form I-9. If USCIS denies her application, she will be issued an NTA because of the fraud/misrepresentation issue assuming there are sufficient grounds to allege that she is removable based on the false claim.



Closer Look: NTA Guidance and Denied Applications

- USCIS will issue NTA where application or petition is denied, or some other “unfavorable decision” is issued, and individual is not “lawfully present”
- Lawful presence = lawful status and those who are recognized as being lawfully present even though they don’t have lawful status



NTA Guidance and Denied Applications in Action

Gregory entered the United States with a tourist visa and overstayed. After he married a U.S. citizen, he applied for adjustment of status. If his application is denied due to an inadequate affidavit of support, his denial will trigger NTA issuance because he is not lawfully present.

- What is Gregory in on the U status waiting list and has deferred action?



NTA Guidance and Humanitarian Benefits

- New guidance applies even when USCIS denies application for humanitarian relief – e.g. VAWA, U, T, SIJS - to applicant who is not lawfully present
- USCIS must still comply with statutory protections for certain victim-based applicants found at 8 USC 1367:
 - (a)(1) – prohibition about source of information for adverse removability determinations – never expires!
 - (a)(2) – prohibition about use/disclosure of information – ends when application denied and appeal opportunities exhausted



NTA Guidance and DACA

- NTA issuance to DACA grantees addressed in separate memo
- For DACA-related adjudications, USCIS will continue to use November 2011 NTA guidance
- Unclear exactly how new NTA guidance applies to DACA grantee applying for non-DACA benefit



NTA Guidance and DACA in Action

Javier is a DACA recipient with a conviction for marijuana possession which was disclosed in his application. His DACA status does not expire until April 2019, but he also has a pending application to adjust status through his USC spouse. Javier needs a waiver of inadmissibility to be approved for adjustment; if his application is denied, will he be subject to NTA issuance?



NTA Guidance and TPS

- As before, USCIS will issue NTA where basis for denial of TPS is ground of inadmissibility or deportability which makes the noncitizen ineligible for TPS
- USCIS will also issue an NTA when TPS is otherwise denied or withdrawn and the noncitizen has no other lawful immigration status or authorization to remain in the United States unless there is a sufficient reason to delay issuance of, or to not issue the NTA
- Where TPS country designation terminated, USCIS should defer to ICE and CBP re NTA issuance to former TPS beneficiaries who no longer have lawful status or authorization to remain in the United States



NTA Guidance and TPS in Action

Daniel, from Nicaragua, lost his TPS status in January 2019, when the TPS designation from Nicaragua terminated. Daniel entered the United States EWI and no longer has any legal status or authorization to remain in the United States. Per the NTA guidance, USCIS should defer to ICE and CBP about NTA issuance. If Daniel applies for another immigration benefit, however, USCIS will issue an NTA if the application is denied because he is not lawfully present.



NTA Guidance and N-400 Applicants

- USCIS will issue NTAs on all N-400 cases if N-400 denied on GMC grounds based on a criminal offense, and applicant is removable
- Where applicant is (a) eligible to naturalize but deportable, or (b) ineligible to naturalize because of defect in underlying residency, USCIS will issue NTA unless exercising prosecutorial discretion



N-400 Guidance in Action

USCIS denies the N-400 application of LPR Jorge for lack of GMC based on his 2015 conviction for marijuana possession in excess of 30 grams. Because this conviction also makes Jorge deportable, he is placed in removal proceedings.

- What if Jorge's conviction happened in 2005, after he became an LPR?
- What if Jorge immigrated as the unmarried son of an LPR when he was already married?



Guidance on Requesting an NTA

- In some situations, an applicant may want to be placed into removal proceedings, such as when the person has a strong cancellation of removal case.
- The new guidance allows USCIS, in its discretion, to issue an NTA upon the removable noncitizen’s written request, before or after adjudicating an application or petition.



Guidance on Prosecutorial Discretion

- The guidance says that USCIS can exercise prosecutorial discretion not to issue an NTA in “very limited circumstances,” on a case-by-case basis.
- USCIS must set up a Prosecutorial Review Panel in each office that makes recommendations about exercising PD.
- A high-level officer such as the field office director must concur with a PD recommendation.



Unanswered Questions Include

- Implementation! How? When?
- NTA guidance as it applies to DACA grantees applying for non-DACA benefits
- Impact of confidentiality protections on NTA issuance
- Referral of crime issue cases to ICE
- Meaning of abuse of public benefits
- Impact of guidance on beneficiaries of denied I-130s
- How prosecutorial discretion will be exercised
- Whether guidance will be applied retroactively





NTA GUIDANCE: IMPLICATIONS FOR PRACTITIONERS

What Does It Mean for Clients with Pending Cases?

- We don't have any certainty yet
- Things to consider doing:
 - Audit your current caseload
 - Flag cases that already seemed more problematic
 - Call clients in for a touch-base meeting
 - Supplemental filings, including prosecutorial discretion requests
 - Community education (live or online)



Screening and Information Gathering

- What information do you need to properly assess the case, and how will you get it?
 - Intake questions (do you need to add to them?)
 - FOIA requests
 - Other records requests, e.g. criminal records, FBI
- Can you make a decision about case acceptance at the first meeting, or do you need a different structure?

Examples:

 - Letter to potential client explaining that decision will be made after team meeting
 - Investigative retainer



Screening in Action

Lourdes is the victim of an armed robbery who now wants to apply for U status. She entered the United States in 2000 at the age of 18 claiming to be a U.S. citizen; she has resided here since then. Lourdes is living with an LPR and has two U.S. citizen children; she's been steadily employed since 2001, using a fake I-551 card. Before her successful entry, she had one attempted entry but she was turned back without seeing a judge. She has no criminal record other than one time she was arrested for domestic violence but her boyfriend did not press charges.

Do you have all the information you need to assess this case?
If not, what more do you need and how will you get it?



Initial Case Assessment

- Is client eligible?
 - Does the client meet the requirements for the benefit sought?
 - Is a waiver needed, and does the client qualify?
 - **Do we have all the required initial evidence?**
- How likely is it that this case will be approved?
 - How will the relevant USCIS office likely view this case?
 - Are there adverse discretionary considerations?



Initial Case Assessment

- Is client removable?
- How will client be treated under NTA Guidance?
- If subject to NTA
 - Mandatory detention?
 - Eligible for relief from removal?
- Is my office able to take on this case to present the strongest possible affirmative case, and/or can we become better through training, education, support, mentorship arrangements, etc.?



Initial Case Assessment in Action

After getting records and asking more questions, you learn that Lourdes' only border encounter was a voluntary return. You also learn that the domestic violence arrest resulted in dismissed charges with no plea. Remember that Lourdes entered in 2000 claiming to be a U.S. citizen, has resided here since then, lives with an LPR, has two U.S. citizen children, has been steadily employed since 2001, uses a fake I-551 card for work, and has no criminal record other than the dismissed domestic violence charge. How will you assess her case?



Pre-Filing Discussion and Client Counseling

- Benefits of going forward
- Risks of going forward
- Clarification re representation if removal proceedings commenced
- Informed consent



Pre-Filing Discussion in Action

- How will you counsel Lourdes about whether to proceed with filing for U status and what the potential risks and benefits are?



Creating a Filing Plan

- What steps can you take to maximize success and protect your client?
 - Affirmative prosecutorial discretion request?
 - What will you file initially?
 - Think carefully about admissions/statements from client and criminal records
 - Consider RFE/NOID guidance and need to avoid denial without warning
 - How can I educate myself and provide the best possible representation?



Creating a Filing Plan

- What is the plan if the case is denied?
 - Administrative appeal? Re-file? Representation in removal proceedings or referral?
- What advice/reminders should you give your client?
 - Staying in touch, updating contact information
 - Know-Your-Rights reminders
 - www.cliniclegal.org/kyr
 - Removal defense and bond plan?



Filing Plan in Action

- What kind of filing plan would you consider in Lourdes' case, assuming she decides she wants to file the U visa and signs an informed consent document?



Re-Thinking Interviews

- When does your program accompany clients to interviews?
 - What factors impact this decision?
 - How does the new NTA guidance impact this decision?
- How and when does your program prepare clients for their interviews?
 - How will the NTA guidance change this?



Action Plan for Moving Forward

- Training: eligibility, inadmissibility, relief from removal?
- Connection to local networks to monitor practices at USCIS?
- Using TA?
- New screening tools?
- Informed consent document?
- Removal proceedings referrals?



Questions?





Catholic Legal Immigration Network, Inc.

National Office
8757 Georgia Avenue, Suite 850
Silver Spring, MD 20910
Main Phone: (301) 565-4800
Main Fax: (301) 565-4824

cliniclegal.org
fb.com/cliniclegal
