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CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Pointers

USCIS Issues New NTA Guidance Memo[1]

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1. What Is the June 2018 NTA Guidance Memo?

On June 28, 2018, U.S. Citizenship and Immigration Services (USCIS) issued a policy memorandum titled "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens" (hereinafter "June 2018 NTA Guidance Memo"). The June 2018 NTA Guidance Memo supersedes a 2011 policy memorandum with a nearly identical name. These memos provide guidance about when USCIS should issue an NTA or refer a case to Immigration and Customs Enforcement (ICE) for potential initiation of removal proceedings against a noncitizen who applies for an immigration benefit. Although USCIS has had longstanding authority to issue "referral NTAs" to ICE, USCIS exercised this authority sparingly and in specific situations. The June 2018 NTA Guidance Memo significantly expands the situations in which USCIS is directed to issue NTAs against individuals applying for immigration benefits. It means that many more people will likely be placed into removal proceedings, further clogging an already overburdened immigration court system.

In sum, as explained further below, under the 2018 memo:

1. If an application, petition, or benefit request is denied and the noncitizen is not lawfully present, USCIS *will* issue an NTA (see Questions 8 to 10)
2. If a lawfully present individual's application or petition is denied and he or she is removable, USCIS *will* issue an NTA if he or she falls into a specific enforcement category (see Questions 11 to 14)
3. USCIS *may* refer a case to ICE before adjudicating if there is suspected fraud (see Question 12), or the noncitizen has certain criminal history (see Question 13).

[1] This practice pointer is intended to assist lawyers and fully accredited representatives. It does not constitute legal advice, nor is it a substitute for independent analysis of the law. The hyperlinks referenced in this practice pointer were last visited in July of 2018.

2. What Is a Notice to Appear (NTA)?

A Notice to Appear (NTA) is a charging document issued by the Department of Homeland Security (DHS) to initiate removal proceedings against a noncitizen under section 240 of the Immigration and Nationality Act (INA). Under INA § 239(a)(1), an NTA must contain certain information, including the nature of and legal authority for the proceedings, the acts or conduct alleged to be in violation of law, the charges against the noncitizen, and the statutory provisions alleged to have been violated. The NTA must also specify the "time and place at which the proceedings will be held." INA § 239(a)(1)(G)(i); *see Pereira v. Sessions*, 138 S. Ct. 2105 (2018). Typically ICE and Customs and Border Protection (CBP), the enforcement branches of DHS, issue NTAs, whereas USCIS's primary role is to adjudicate requests for immigration benefits from noncitizen "customers."[2] However, the June 2018 NTA Guidance Memo greatly expands the situations in which USCIS is directed to issue an NTA in connection with adjudicating an immigration benefit request.

3. What Is a Referral to ICE?

Both the June 2018 NTA Guidance Memo and the prior 2011 memo discuss some circumstances where USCIS may refer a case to ICE rather than issue an NTA directly. In these situations, ICE makes the decision about whether, when, and how to issue an NTA. The new memo broadens the situations when USCIS issues an NTA directly rather than referring the case for ICE's consideration on whether or not to commence removal proceedings. This change effectively puts USCIS on equal footing with ICE in controlling who is placed into proceedings and when. Expanding the situations in which USCIS should issue an NTA directly means that USCIS can bypass ICE, the traditional enforcement agency, altogether.

4. What Did the Previous, Now Superseded, Memo Say?

The 2011 policy memorandum, which was superseded by the June 2018 NTA Guidance Memo, provided "USCIS guidelines for referring cases and issuing [NTAs] in a manner that promotes the sound use of the resources of the Department of Homeland Security and the Department of Justice to enhance national security, public safety, and the integrity of the immigration system."

The 2011 memo directed USCIS to issue an NTA in the following circumstances:

- Where NTA issuance was required by a statute or regulation—for example, after an asylum referral[3] (note that this group of cases was left largely unchanged by the June 2018 NTA Guidance Memo)
- When a Statement of Findings substantiating fraud is part of the record

[2] USCIS Policy Manual, vol. 1, pt. A, "Customer Service," https://www.uscis.gov/policymanual/Print/PolicyManual-Volume1-PartA.html (current as of May 23, 2018).

[3] Other cases include Termination of Conditional Permanent Resident Status and Denials of Form I-751, Petition to Remove the Conditions of Residence, Denials of Form I-829, Petition by Entrepreneur to Remove Conditions, termination of refugee status, denials of NACARA 202 and HRIFA adjustments, termination of asylum or withholding, positive credible fear findings, and certain NACARA 203 cases. Neither the 2018 nor the 2011 memo affects the handling of national security cases.

- In naturalization cases when an applicant is deportable under INA § 237, including those inadmissible at the time of adjustment or admission, if an "N-400 NTA Review Panel"[4] decided that an NTA should be issued, and
- Upon written request of the noncitizen in specified circumstances, in USCIS's discretion.

The 2011 memo directed USCIS to refer an individual to ICE in the following circumstances:

- All "Egregious Public Safety" (EPS) cases, as soon as identified
    - An EPS case was defined as a case "where information indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of" certain specified aggravated felonies as defined in INA § 101(a)(43),[5] "Human Rights Violators, known or suspected street gang members, or Interpol hits," and reentry after removal subsequent to a felony conviction where no Form I-212 has been approved
- Cases where the noncitizen is inadmissible or removable for a criminal offense falling outside of the EPS definition, after USCIS completes the adjudication.

5. Why Did USCIS Change Its NTA Issuance Policy Through the June 2018 Memo?

The June 2018 NTA Guidance Memo states that its purpose is to "better align with enforcement priorities" and refers to President Trump's January 25, 2017 executive order and then-DHS Secretary John Kelly's February 20, 2017 implementing memorandum. Those documents expanded the class of noncitizens deemed a "priority" for immigration enforcement, to include among other categories any removable noncitizen who has been charged with any criminal offense that has not been resolved, and any removable noncitizen who has committed acts that constitute a chargeable criminal offense. The memo notes that the federal government "will no longer exempt classes or categories of removable aliens from potential enforcement."[6] The new memo represents a shift from the prior memo's goal of "promoting the sound use of [DHS and DOJ] resources" to a position where essentially all removable individuals are an enforcement priority.[7]

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[4] See note 15 *infra* for a description of who formed the N-400 NTA Review Panel.

[5] The full list is as follows: murder, rape, or sexual abuse of a minor under INA § 101(a)(43)(A); illicit trafficking in firearms or destructive devices under INA § 101(a)(43)(C); offenses relating to explosive materials or firearms under INA § 101(a)(43)(E); crimes of violence for which the term of imprisonment imposed is at least one year, or where the penalty for a pending case is at least one year, under INA § 101(a)(43)(F); offenses relating to the demand for or receipt of ransom under INA § 101(a)(43)(H); child pornography-related offenses under INA § 101(a)(43)(I); offenses relating to peonage, slavery, involuntary servitude, and trafficking in persons under INA § 101(a)(43)(K)(iii); and alien smuggling offenses under INA § 101(a)(43)(N).

[6] The June 2018 NTA Guidance Memo also indicated that another guidance document on how USCIS should exercise its discretion in adjudicating cases would be forthcoming.

[7] Of course, significant DOJ resources have already been channeled to immigration enforcement. *See, e.g.*, CLINIC, *Attorney General Calls for Increased Prosecution of Immigration-Related Offenses*, https://cliniclegal.org/resources/attorney-general-calls-increased-prosecution-immigration-related-offenses.

6. How Does the New NTA Guidance Memo Differ from the 2011 Memo?

The June 2018 NTA Guidance Memo expands the situations in which USCIS will issue an NTA against a noncitizen if his or her request for an immigration benefit is not approved.

Under the memo, USCIS *will* issue an NTA in the following circumstances:

- Upon issuance of an unfavorable decision in the case of an individual not lawfully present in the United States
- Against certain TPS applicants after an application is denied or TPS is withdrawn
- When fraud, misrepresentation, or evidence of abuse of a public benefit program is part of the record, the noncitizen is removable, and there is a "negative eligibility determination" on the application or petition
- Both EPS and non-EPS criminal cases, where the noncitizen is removable and the application or petition is denied
- Naturalization applications denied on good moral character grounds due to a criminal offense, if the applicant is removable.

The memo directs that USCIS *may* issue an NTA in the following circumstances:

- Before adjudicating a naturalization application of a noncitizen who is deportable under INA § 237, including those inadmissible at the time of adjustment or admission
- After rescinding asylum status based on a determination that USCIS did not have jurisdiction to grant asylum status
- In certain circumstances where a noncitizen requests NTA issuance.

The memo states that USCIS *may refer cases to ICE* in the following circumstances:

- Prior to adjudication, where there are "articulated suspicions of fraud"
- In EPS cases, prior to adjudication and issuance of an NTA, USCIS should refer to ICE "if there are circumstances that warrant such action"
- In non-EPS criminal cases where USCIS does not issue an NTA, USCIS should refer to ICE prior to final adjudication if the noncitizen appears inadmissible or deportable "based upon a criminal offense not included on the EPS list."

7. What Policy Applies to DACA Recipients and Applicants for DACA-Related Benefits?

On June 28, 2018, USCIS issued a separate memo discussing NTA issuance for DACA-related matters (hereinafter "June 2018 DACA Memo"). The June 2018 DACA Memo clarifies that "existing USCIS policy regarding the use or sharing of information provided to USCIS by DACA requestors remains in effect." Under that policy, information provided in a DACA request is "protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice To

Appear or a referral to ICE under the criteria set forth" in the 2011 NTA guidance memo.[8] The policy also covers the requestor's family members and guardians. Thus, notwithstanding the June 2018 NTA Guidance Memo, USCIS will continue to follow the previous 2011 NTA guidance memo when processing a DACA or DACA-related request, or when seeking to terminate an individual's DACA grant.[9] Thus, generally speaking, unless there is a Statement of Findings substantiating fraud in the record or certain types of criminal history, requestors of DACA-related benefits should not be referred to ICE or issued an NTA, even if they are denied or USCIS seeks to terminate a previous DACA grant. If processing a non-DACA-related application, petition, or request, USCIS may not include or rely on information from a DACA-related request in generating an NTA or referral to ICE, unless inclusion or reliance on that information would be consistent with the DACA information-sharing policy.[10]

Example: USCIS denies Ana's DACA renewal request because of a DUI conviction that happened after the initial DACA grant. Because the 2011 NTA memo applies to Ana, USCIS should not issue an NTA or refer Ana to ICE when it denies her DACA renewal, since simple DUI is not included in the EPS list and is not a removable offense.

8. What Does the June 2018 NTA Guidance Memo Mean for Individuals Who Do Not Have Lawful Status, or Who Fall Out of Lawful Status While the Request Is Pending, If the Immigration Benefit Request Is Denied?

Many individuals who apply for an immigration benefit with USCIS do not have lawful status and apply for the immigration benefit in order to obtain a lawful status. Others have lawful status, for example, a visitor or student visa, at the time of filing, but that status expires while the benefit application, petition, or request is pending. Under the previous policy, if an individual's request was ultimately denied, removal proceedings would only be initiated if the person fell within certain priorities involving factors such as public safety or fraud. Now, in any circumstance where an individual's application, petition, or benefit request is denied and he or she is not "lawfully present," USCIS is directed to issue an NTA. This is the case even if the person has no criminal history, no fraud indicators, and no other adverse factors.

The memo uses the term "lawfully present" rather than "lawful status." Lawful presence includes those who have lawful status and those who are recognized as being lawfully present although they do not have lawful status. Persons with lawful status include nonimmigrant visa holders, asylees and refugees, and lawful permanent residents. Persons with lawful presence but not

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[8] *See* USCIS, Frequently Asked Questions: DHS DACA FAQs, https://www.uscis.gov/archive/frequently-asked-questions (last updated Mar. 8, 2018) (Questions 19 and 20).

[9] DHS's DACA termination practices are currently under litigation, and in February of 2018 a federal district court certified a nationwide class and issued an injunction prohibiting the government from terminating class members' DACA grants without notice, an explanation, and a chance to respond. *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. 17-2048, 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018), *see* https://www.aclu.org/cases/inland-empire-immigrant-youth-collective-v-nielsen.

[10] The DACA memo leaves unclear what would happen to a current DACA recipient who applies for and is denied a request for another immigration benefit, such as adjustment of status, based on conduct that would trigger NTA issuance under the new memo but was disclosed in the DACA request and did not bar DACA, such as a misdemeanor marijuana possession conviction. It appears that the DACA memo contemplates that such a person would be issued an NTA even though he or she is a current DACA recipient.

lawful status include individuals with DACA and other forms of deferred action.[11] This means that, in theory, individuals who are considered lawfully present should not be issued an NTA upon denial of an immigration benefit, even if they do not have lawful status.

Note, however, that a person who is lawfully present and whose application or petition is denied may still be subject to NTA issuance because he or she falls within another enforcement category. Under the new NTA guidance, having lawful presence does not limit NTA issuance where the individual is removable because of crime or fraud-related concerns described in more detail below.

Example: Gregory entered the United States with a tourist visa and overstayed his authorized stay. He was subsequently granted deferred action as a waitlisted U visa applicant. After Gregory married a U.S. citizen, he applied for adjustment of status, but USCIS denied his application when he failed to provide an adequate affidavit of support. Since Gregory is lawfully present, the denial of his application should not trigger issuance of an NTA. But what if Gregory also had a conviction for a simple DUI? In that case, it appears that Gregory would be subject to NTA issuance under the new memo if the adjustment application is denied, because he is removable as a visa overstay and his conviction falls within a crime-based enforcement priority category, even though simple DUI does not trigger crime-based inadmissibility or deportability (see Question 13).

9. How Does the New Memo Affect Vulnerable Individuals Who Have Applied for Humanitarian Immigration Protections?

This policy change applies equally to those seeking humanitarian forms of immigration relief that are designed to protect vulnerable noncitizens who have been subjected to abuse and other harms, such as Violence Against Women Act (VAWA) self-petitions, U nonimmigrant status petitions, T nonimmigrant status petitions, Special Immigrant Juvenile Status petitions, Form I-751 petitions to remove conditions on residence based on a battered spouse or child waiver, and VAWA, T, and U-based adjustment of status applications. This means that if USCIS denies a request for a humanitarian form of immigration relief, and the individual is not lawfully present, USCIS will issue an NTA. This is a significant departure from prior policy, wherein individuals seeking certain forms of humanitarian immigration relief such as VAWA self-petitioners and U

[11] The memo does not define "lawfully present," however a now-repealed regulation previously defined that term for purposes of Social Security benefits to include the following individuals: "qualified aliens," noncitizens inspected and admitted who have not violated the terms of their status, those paroled under INA § 212(d)(5) for less than a year (with certain exceptions), TPS recipients, those with temporary resident status under INA §§ 210 or 245A, Cuban-Haitian entrants, Family Unity beneficiaries, those under Deferred Enforced Departure, those in "deferred action status pursuant to Service Operations Instructions at OI 242.1(a)(22)," spouses and children of U.S. citizens whose visa petition has been approved and who have pending adjustment applications, and applicants for asylum or withholding who have been granted employment authorization or who are under 14 and whose application has been pending at least 180 days. 8 CFR § 103.12 (reserved Aug. 29, 2011, 76 Fed. Reg. 53781). USCIS has stated that those with deferred action, including DACA recipients, are lawfully present. *See* USCIS, Frequently Asked Questions: DHS DACA FAQs, https://www.uscis.gov/archive/frequently-asked-questions (last updated Mar. 8, 2018) (Question 1) ("An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect.").

nonimmigrant petitioners were not generally placed into removal proceedings merely because their request was denied.

The memo states that the new NTA issuance policy must be followed once the benefit request has been denied even in cases involving the confidentiality protections found at 8 USC § 1367(a)(2). That statute generally prohibits the government from disclosing information about beneficiaries of certain applications for humanitarian relief, such as VAWA self-petitioners and U and T nonimmigrant status petitioners.[12] This protection ends when the application is denied and all appeal opportunities have been exhausted. The memo states that this statute does not preclude USCIS from serving an NTA on the attorney of record or at a safe mailing address, and indicates that once the confidentiality provisions have been terminated, USCIS may serve the NTA at the applicant or petitioner's physical address.[13] Service of the NTA at the individual's physical address may further endanger VAWA self-petitioners and others who had been previously protected by section 1367(a)(2) and who reside with the abusive spouse.

Example: Maria files a petition for U nonimmigrant status based on the domestic violence she has suffered and continues to suffer at the hands of her husband. When she files the petition for U nonimmigrant status, Maria has lawful status as a student visa holder. By the time her U is adjudicated years later, however, Maria has fallen out of status as she dropped out of her school program due to the psychological effects of the ongoing abuse. USCIS ultimately denies Maria's U, concluding that she has not shown that she suffered substantial physical or mental abuse. Under the new memo, USCIS is instructed to issue an NTA. Under the previous memo, Maria would not have been placed into proceedings.

10. What Does the June 2018 NTA Guidance Memo Mean for TPS Cases?

The memo directs that if USCIS denies an initial or re-registration TPS application or withdraws TPS, and the individual has no other lawful status or authorization to remain in the United States, officers must follow any applicable TPS regulations[14] and then "will issue an NTA," unless there is "sufficient reason" to delay or not issue an NTA.

The memo also discusses the situation where the DHS Secretary terminates a country's TPS designation and a former TPS recipient no longer has authorization to remain in the United States. In this circumstance, USCIS "should defer to ICE and CBP" about NTA issuance. However, if USCIS issues an "unfavorable decision" on a benefit request filed by or on behalf of

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[12] With the exception of "a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes." 8 USC § 1367(a)(2).

[13] The memo notes that there are separate protections found at 8 USC § 1367(a)(1) that prevent the government from making an adverse inadmissibility or deportability determination based solely on certain sources, such as an abusive spouse. These protections never expire, even if the application or petition is ultimately denied.

[14] *See, e.g.*, 8 CFR §§ 244.18(a) (NTA may be issued against TPS grantee on grounds of removability that would have rendered the individual ineligible for TPS, but not if USCIS expressly granted a waiver), 244.14(b)(3) (if USCIS withdraws TPS and basis for withdrawal constitutes ground of removal which renders the person ineligible for TPS under 8 CFR § 244.4 or inadmissible under 8 CFR § 244.3(c), the decision shall include a charging document), 244.10(c)(1) (if basis for TPS denial is a ground of removal which renders the individual ineligible for TPS under 8 CFR § 244.4 or inadmissible under 8 CFR § 244.3(c), a charging document shall be included with the decision), 244.10(d)(2) (if AAO dismisses appeal, USCIS "may issue a charging document").

a former TPS beneficiary, that individual would be treated like any other noncitizen with a denied application who is not lawfully present.

Practitioners should remember that if a TPS applicant is placed into removal proceedings, he or she has a right to *de novo* review of the TPS application before the immigration judge. *See* INA § 244(b)(5)(B); 8 CFR §§ 244.18(b), 1244.18(b), 244.11, 1244.11.

Example: Thapa timely re-registers for Nepali TPS and seeks a waiver of health-related inadmissibility based on several hospitalizations for severe depression and suicide attempts. USCIS denies his application for a waiver and thus denies his re-registration application. Under the new memo, assuming he has no other authorization to remain in the United States, Thapa would be issued an NTA unless USCIS found there was "sufficient reason" not to.

11. What Does the June 2018 NTA Guidance Memo Mean for Naturalization Applicants?

As before, USCIS can, but is not obligated to, issue an NTA when a naturalization applicant is deportable under INA § 237, but not barred from a good moral character determination.[15] But the new memo changes the process for deciding whether to issue an NTA. Under the prior regime, an officer would make a written recommendation about whether to issue an NTA and the final decision would be made by an N-400 NTA review panel.[16] Under the new policy, USCIS will issue an NTA "[u]nless USCIS exercises prosecutorial discretion in favor of the alien." A separate section of the new memo, discussed in Question 15 below, describes how prosecutorial discretion may be exercised by USCIS in "very limited circumstances," through a "Prosecutorial Review Panel." This process would apparently be initiated by the individual USCIS adjudicator and would presumably add to his or her workload. In contrast, under the previous policy, the USCIS officer had to make a recommendation in every applicable case, one way or the other, for the N-400 NTA review panel to consider. As before, if USCIS issues an NTA, the N-400 is placed on hold until removal proceedings have concluded.

Example: Jonathan, who obtained his lawful permanent resident (LPR) status as the unmarried child of a U.S. citizen, files for naturalization. During the adjudication, USCIS discovers that Jonathan had gotten married while his LPR application was pending and thus he was inadmissible at the time of adjustment. USCIS will issue an NTA unless the adjudicator decides to refer the case to the Prosecutorial Review Panel, which then decides to exercise discretion favorably.

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[15] The memo notes two exceptions where U.S. courts of appeal decisions limit NTA issuance in N-400 cases. It states that in the Third Circuit, if a noncitizen has been an LPR for at least five years, he or she cannot be placed in removal proceedings based on fraud or willful misrepresentation of a material fact at the time of adjustment if USCIS could have learned of the fraud or misrepresentation through reasonable diligence before the five-year rescission period expired, citing *Garcia v. Att'y Gen.*, 553 F.3d 724 (3d Cir. 2009). It also instructs that officers in the Ninth Circuit should consult with counsel before issuing an NTA under *Yith v. Nielsen*, 881 F.3d 1155 (2018).

[16] An N-400 NTA review panel included a Supervisory Immigration Services Officer, a local USCIS Office of Chief Counsel attorney, and a district representative. An attorney from ICE's local Office of Chief Counsel was also invited to participate in an advisory role.

Further, under the new policy, USCIS will issue an NTA if the N-400 is denied on good moral character grounds based on a criminal offense and the applicant is removable. Under the old policy, any EPS case had to be referred to ICE prior to adjudication, and non-EPS criminal cases were referred to ICE if the N-400 was denied on good moral character grounds based on the criminal offense.

12. What Does the June 2018 NTA Guidance Memo Mean for Cases Involving Alleged Fraud?

The June 2018 NTA Guidance Memo expands the situations in which USCIS will issue an NTA in cases involving alleged fraud. The memo notes that cases involving fraud or willful misrepresentation in connection with any official matter or application before a government agency, or abuse of a public benefits program, are priorities for removal under the executive order. Whereas under the prior memo only cases with a Statement of Findings substantiating fraud required NTA issuance, the new policy states that USCIS will issue an NTA when the following circumstances exist:

- USCIS denies an application or petition or otherwise reaches a "negative eligibility determination" including cases when the applicant or petitioner withdraws
- There is "fraud, misrepresentation, or abuse of public benefit programs" in the record, even if the denial had nothing to do with the alleged fraud, and
- The individual is removable.

In sum, while the 2011 memo called for NTA issuance in situations involving a Statement of Findings substantiating fraud, the new memo calls for NTA issuance under a lower standard – any time there is evidence of fraud, misrepresentation, or abuse of public benefits programs in the record. The memo does not specify how a USCIS officer is to make this determination, how this type of information would make its way into the record, or what constitutes an abuse of a public benefits program. The memo directs that USCIS should include a fraud or misrepresentation charge in the NTA "whenever evidence in the record supports such a charge."

Remember that for any individual who is not lawfully present, a denial will result in NTA issuance even without any fraud allegations; for such individuals USCIS might include a fraud-related charge in the NTA in addition to a charge based on being present without admission or parole.

Example: Fatima is a refugee who files for adjustment of status with a waiver of inadmissibility under § INA 209(c) because she made a false claim of U.S. citizenship on a Form I-9 after her employer would not recognize her I-94 card as proof of her work authorization. If USCIS denies the discretionary waiver, the new memo directs that USCIS will issue an NTA if it determines that the false claim was a misrepresentation and she is removable.

The new memo also provides that "USCIS may consider referring groups of cases with articulated suspicions of fraud to ICE prior to adjudication." USCIS will not refer individual cases to ICE based on suspected fraud "except as agreed upon by USCIS and ICE." When USCIS refers a case to ICE for investigation prior to adjudication, it suspends adjudication for 60

days to allow ICE to respond. If ICE does not respond within that timeframe, then USCIS can resume adjudication.

13. How Does the June 2018 NTA Guidance Memo Change the Adjudication of Cases Where the Noncitizen Has a Criminal History?

"Egregious Public Safety" (EPS) Cases. The June 2018 NTA Guidance Memo uses the same definition for EPS cases as set forth in the 2011 memo (see Question 4 above). This includes situations where an individual is under investigation for, has been arrested for (without disposition), or has been convicted of certain offenses. While under the prior memo, all EPS cases were to be referred to ICE prior to adjudication, under the new memo USCIS will issue an NTA against a removable individual meeting the EPS definition if it denies the application or petition.

In unspecified "circumstances that warrant such action," USCIS should refer an EPS case to ICE prior to adjudication, similar to the previous procedure. If USCIS refers the case to ICE, then ICE decides whether, when, and how to issue an NTA or detain the noncitizen. If USCIS does not receive a response from ICE about the referral after 60 days, USCIS resumes adjudication.

The memo also directs that USCIS will refer Form I-90 applications, and other adjudications where an NTA has not been issued, to ICE after adjudication if there are EPS concerns. This means that just because a removable individual's I-90 application is approved does not mean that the agency has decided not to take enforcement action; if the individual's case is considered to have EPS concerns, it will be referred to ICE.

Non-EPS Criminal Cases. The new memo defines a "[n]on-EPS criminal case" as a case "where information indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of any crime not listed above." This is a significant departure from the previous memo's description of non-EPS cases, which included only those who were inadmissible or removable for a non-EPS criminal offense. The new definition is extremely broad and would include individuals convicted of, or arrested without disposition for, minor offenses such as trespassing. Whereas under the previous policy USCIS would refer non-EPS cases (with previous more narrow definition) after completing the adjudication for ICE to decide whether to issue an NTA, under the new memo USCIS "will issue" an NTA in any non-EPS criminal case (with broad definition) if the application or petition is denied and the individual is removable. The new memo also states that where USCIS does not issue an NTA, it "should refer [n]on-EPS cases to ICE prior to final adjudication if the alien appears inadmissible to or deportable from the United States based upon a criminal offense not included on the EPS list."[17]

[17] This language raises the question whether, in any situation where an individual is inadmissible or deportable for a non-EPS crime and is seeking a waiver of inadmissibility, USCIS must refer the case to ICE before adjudicating the immigration benefit request. One example would be an individual filing for adjustment of status with a waiver (such as an INA § 212(h) waiver or INA § 209(c) waiver for a refugee or asylee) who is inadmissible or deportable based on a crime involving moral turpitude such as a theft conviction. Under the memo, would USCIS would have to first refer the case to ICE before adjudicating? This is one of many questions raised by the new memo that could be posed to USCIS for clarification. See Question 23.

Example: Mark, a refugee, applies for adjustment of status with a waiver request for smuggling because he paid for his daughters to enter the United States unlawfully. He was never arrested or investigated for any smuggling-related offense, but the smuggling conduct makes him removable. Several years ago he was convicted for misdemeanor trespassing, which is not a removable offense in his jurisdiction. If USCIS denies Mark's waiver application and adjustment, his trespassing conviction, as a "non-EPS" offense, means that USCIS will issue an NTA upon denial of the application.

14. In What Circumstances Can USCIS Issue an NTA upon a Noncitizen's Request?

The June 2018 NTA Guidance Memo expands on the circumstances in which USCIS can issue an NTA upon a removable noncitizen's request.[18] It states that in "limited and extraordinary circumstances," USCIS can issue an NTA before or after the adjudication of an application or petition so that the noncitizen can seek relief in removal proceedings. The request must be made in writing.

Example: Josefa, who does not have lawful status, has lived in the United States for 15 years and has a four-year-old U.S. citizen son with a severe disability. She files a request for humanitarian deferred action with USCIS and requests that USCIS issue an NTA so that she can seek non-LPR cancellation of removal. Under the new memo, USCIS may, in its discretion, issue an NTA before or after the adjudication of the deferred action application.

The memo also lists specific circumstances in which the USCIS Asylum Office may, in its discretion, issue an NTA:

- An asylum applicant issued an NTA makes a written request that his or her family members not included on the asylum application as dependents also be issued NTAs "for family unification purposes"
- An asylum applicant is issued a denial while in lawful status but subsequently falls out of lawful status and makes a written request that the Asylum Office issue an NTA
- The Asylum Office rescinds asylum status based on a determination that USCIS did not have jurisdiction to grant asylum status
- The Asylum Office dismisses NACARA 203 because the applicant was not removable, and the applicant later falls out of lawful status and requests in writing that an NTA be issued.

15. What About Prosecutorial Discretion?

The 2018 NTA Guidance Memo states that USCIS may exercise prosecutorial discretion not to issue an NTA "in very limited circumstances," on a "case-by-case basis after considering all USCIS and DHS guidance, DHS's enforcement priorities, the individual facts presented, and any

[18] The 2011 memo allowed for NTA issuance upon noncitizen request to renew an adjustment application or after a denied N-400, or to request NTA issuance for family members not included as dependents on an asylum application, for family unification purposes.

DHS interest(s) implicated." The memo calls for the creation of a "prosecutorial review panel" in each USCIS office authorized to issue NTAs. This panel, which must include a local supervisory officer and USCIS Office of Chief Counsel attorney, makes a recommendation about the exercise of prosecutorial discretion. Then a Field Office Director, Associate Service Center Director, Assistant Center Director of the National Benefits Center, or the Deputy Chief of International Operations must concur with the recommendation before prosecutorial discretion can be exercised favorably. The memo does not specify in what circumstances a case will be presented to the prosecutorial discretion review panel. It appears that a referral to the panel would come from the individual USCIS adjudicator, who would thus control whether or not a given case was even considered for prosecutorial discretion. The memo does not specify particular factors that would counsel in favor of a prosecutorial discretion grant.

16. When Does the Memo Take Effect?

According to a USCIS announcement of the new memo, it took effect on the date it was issued. However, on July 30, 2018, USCIS announced that implementation of the guidance would be postponed until "operational guidance is issued." It is not clear whether USCIS will apply the memo retroactively to cases that were filed while the previous 2011 memo was in effect. Practitioners could consider arguing against retroactive application of the memo to pending cases, citing reliance interests and rule-of-law principles among other arguments.

17. When Is an Application, Petition, or Request Considered "Denied" so as to Trigger NTA Issuance Under the Memo?

Different parts of the memo use different language about what negative adjudicatory event will trigger NTA issuance. Some provisions use the term "denial." These include TPS cases, EPS cases, and non-EPS criminal cases. The section on fraud, misrepresentation, and public benefits abuse cases refers to a denial "or other appropriate negative eligibility determination (e.g., withdrawal, termination, rescission)," "lack of prosecution or abandonment," and revocation. The section on individuals who are not lawfully present refers to the "issuance of an unfavorable decision on an application, petition, or benefit request." Given the ambiguity, **practitioners should take a broad interpretation of the word "denial" when advising clients about filing for immigration benefits, to include withdrawal by the applicant or petitioner**.

18. What Steps Should Practitioners Take for Removable Clients Who Have Applications or Other Requests Pending with USCIS?

Practitioners should advise clients affected by the new memo about what it might mean for their cases. Practitioners should advise any removable noncitizen to expect and plan for removal proceedings if the application, petition, or request is denied. Presumably, the practitioner will already have discussed the likelihood of success on the application or petition and the possible risks if the application or petition were denied, prior to filing. However, the new memo changes the risk calculus for many noncitizens in the event of denial, perhaps most notably those requesting certain forms of humanitarian protection. Practitioners should work with the client to develop a strategy depending on the client's goals, which will of course be different for each client. For example, some clients may desire removal proceedings in the event of a denial so that

they can seek cancellation of removal or renew an application before the immigration court. For clients who wish to avoid removal proceedings, practitioners could prepare and file a packet with a cover letter laying out the arguments for approval and requesting prosecutorial discretion in the alternative, along with supporting documents.

19. What Steps Should Practitioners Take at the Outset of Representation of a Removable Client Who Is Not in Removal Proceedings and Is Considering Whether to File an Application or Petition with USCIS?

Practitioners should conduct a careful case assessment at the initiation of representation and provide the client with information about risks and benefits so that the client can make an informed decision.

An initial case assessment should include the following steps:

- Ensure that the client is eligible for the benefit that is being contemplated[19]
- Assuming the client is eligible, assess the likelihood that the particular USCIS office will approve the benefit, given agency practices in the given jurisdiction and use of discretion. Consider whether adverse factors may trigger a denial based on discretion. Practitioners may want to consult with experienced colleagues to find out about recent USCIS outcomes for similar cases.
- Identify whether the client is removable, and which grounds of inadmissibility or deportability might apply in removal proceedings. A careful investigation will include filing appropriate Freedom of Information Act requests to obtain any previous immigration filings and other immigration records such as of border encounters. If the client is definitively not removable, the subsequent steps need not be analyzed.
- Analyze how the case would be treated under the June 2018 NTA Guidance Memo. For example, if USCIS denied the case, would it issue an NTA?[20] Might USCIS refer the case to ICE before adjudicating?
- Assess whether the client would be subject to mandatory detention if placed in removal proceedings. If not at risk of mandatory detention, consider the likelihood that a bond would be set, and the likely amount of any bond given the circumstances of the case and the particular immigration court and ICE office.
- Consider what relief the client might be eligible for if placed in removal proceedings. For many clients, placement in removal proceedings might open up additional forms of relief, some of which they would not be able to seek affirmatively. Examples of relief in removal proceedings include:
    - Cancellation of removal for LPRs, non-LPRs, and battered spouses and children
    - Asylum, withholding, and Convention Against Torture relief
    - Adjustment of status with a waiver

[19] CLINIC offers e-learning, webinars, in-person trainings, technical assistance, and written resources to help practitioners asses immigration benefit eligibility, *see* www.cliniclegal.org.

[20] Remember that some individuals, such as those with unexecuted orders of removal and those subject to reinstatement of removal, would likely not be placed in section 240 proceedings but instead would be subjected to swift removal without a hearing. These scenarios are beyond the scope of this document.

- Certain standalone waivers such as under INA §§ 237(a)(1)(H) and 237(a)(7)
- Renewal of the application denied by USCIS before the immigration court, such as with adjustment, waivers of inadmissibility,[21] and TPS applications.

A pre-filing discussion with a removable client should include the following points:

- The benefits of pursuing the application or petition, including the permanent legal status that will result if the application is approved
- The risks in pursuing the application or petition. This should include a discussion of how the June 2018 NTA Guidance Memo will apply to the case; an explanation of what removal proceedings are; an explanation of whether the client would be subject to mandatory detention if placed into removal proceedings; if the client would not be subject to mandatory detention, a discussion of discretionary detention and of the process involved in seeking bond; and a discussion of what potential relief the client might be eligible for in removal proceedings
- An agreement about whether or not the practitioner will represent the client in the event of any removal proceedings. The practitioner should consider whether or not he or she is competent to represent the client in removal proceedings and whether he or she can gain competence through training and mentorship. If the practitioner will not represent the client in any removal proceedings, the client should make plans for removal defense representation.
- The practitioner should ensure that the client fully understands the information presented and is able to make an informed choice. It is best practice to incorporate this into a written document signed by the client, either in the retainer or a separate informed consent document.

If a removable client decides to proceed with filing the application or petition, practitioners should consider making a request for prosecutorial discretion in the event of a denial in the cover letter accompanying the filing, and submitting documentation of positive equities to support a favorable prosecutorial discretion request. Practitioners should also exercise careful judgment in deciding what documents are submitted with the filing, including with respect to any criminal records and statements or admissions from the applicant/petitioner.

20. What Steps Should Practitioners Take If USCIS Issues an NTA?

The memo discusses NTA issuance, but it does not discuss procedures for filing of the NTA. It is possible that USCIS would file the NTA directly. It is possible that USCIS would forward the NTA to ICE for filing. It is possible that USCIS or ICE might not file the NTA immediately, or at all. Delay or disorganization in filing a large amount of NTAs under this new policy could increase the risk that individuals are not made aware of hearing dates and receive *in absentia*

[21] For example, several U.S. courts of appeal have recognized immigration court jurisdiction to consider waivers of inadmissibility under INA § 212(d)(3)(A) for individuals seeking U nonimmigrant status. *See, e.g., Meridor v. Att'y Gen.*, 891 F.3d 1302 (11th Cir. 2018); *Baez-Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017); *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014). *But see Sunday v. Att'y Gen.*, 832 F.3d 211 (3d Cir. 2016); *Matter of Khan*, 26 I&N Dec. 797 (BIA 2016).

orders of removal. To avoid this, practitioners should ensure that clients seeking immigration benefits keep their contact information current with USCIS by filing a change of address on Form AR-11. If an NTA is served, practitioners should advise clients to periodically call the EOIR hotline at 1-800-898-7180 using their "Alien Number." If an NTA is served and the practitioner will not be representing the client in removal proceedings, the practitioner should communicate this clearly to the client and assist the client in securing removal defense counsel.

21. What Steps Should Be Taken If an NTA Is Filed?

Once an NTA is filed with the immigration court, removal proceedings commence. In representing clients in removal proceedings who were issued NTAs by USCIS, practitioners should advocate zealously at all stages of proceedings and pursue all possible defenses, just as with any other case. Practitioners should pay special attention to the NTA and consider denying the allegations and charges and pursuing termination. Since USCIS is not as practiced at issuing NTAs and not all USCIS officers are attorneys, some NTAs issued by USCIS may be legally invalid or contain allegations not supported by evidence. This may be especially true in any case where there are allegations of fraud, misrepresentation, or abuse of a public benefits program. Note also that in some cases, the applicant or petitioner can pursue an administrative appeal of the denial during removal proceedings.[22] In other cases, the individual can renew the application before the immigration judge.

22. What Are the Consequences of the June 2018 NTA Guidance Memo?

It remains to be seen how the June 2018 NTA Guidance Memo will be implemented in practice. However, taken at face value, the memo's directives will result in many more individuals being placed in removal proceedings, which will worsen the already severe immigration court backlog. The memo will likely cause a chilling effect for some individuals eligible for immigration protection. For example, many noncitizens who are in abusive relationships seek VAWA, U, or T status, and are able to leave the abusive relationship. Such vulnerable individuals may now be deterred from applying for protections for which they are eligible, keeping them in abusive and unsafe relationships and thwarting Congress's intent in enacting these humanitarian programs. Note that the Attorney General's decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), may similarly deter domestic violence victims fleeing harm in Northern Triangle countries from seeking asylum protections in the United States.

23. When Will USCIS Issue Clarification About This Guidance?

There are many questions that the memo leaves unanswered. Practitioners should contact USCIS with questions about how the memo will be implemented, at public.engagement@uscis.dhs.gov.

[22] Practitioners should become familiar with administrative review options for different benefits and assess whether USCIS would have jurisdiction over a new application or petition or an appeal if removal proceedings are initiated after a denial. *See* USCIS, The Administrative Appeals Office (AAO), https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/administrative-appeals-office-aao (last reviewed/updated July 11, 2018).

Comparison Chart – 2018 v. 2011 NTA Guidance Memo – Treatment of Removable Noncitizens Seeking an Immigration Benefit

Description of Noncitizen/Case	Stage in Adjudication	Outcome Under 2018 Memo	Outcome Under 2011 Memo
Seeking an immigration benefit where statute or regulation requires NTA issuance	Post-adjudication[1]	USCIS will issue NTA (section II of 2018 memo)	USCIS will issue NTA (section II of 2011 memo)
Not lawfully present	Post-adjudication, upon issuance of an "unfavorable decision"	USCIS will issue NTA (section V of 2018 memo)	No NTA, unless another category applied
Fraud cases	Post-adjudication	USCIS will issue NTA upon denial or other "negative eligibility determination" if noncitizen is removable and "fraud, misrepresentation, or evidence of abuse of public benefit programs" is part of the record (section III of 2018 memo)	USCIS will issue an NTA when a Statement of Findings substantiating fraud is part of the record (section III of 2011 memo)
"Suspected fraud" cases	Pre-adjudication	USCIS may refer to ICE for investigation as agreed upon by USCIS and ICE (section III of 2018 memo)	N/A
TPS applications	Post-adjudication	USCIS will issue NTA after following any applicable regulatory procedures, *see* 8 CFR part 244, if applicant has no authorization to remain in United	Issue NTA if required by regulations. *See* 8 CFR §§ 244.10(c)(1), 244.14(b)(3) (section II of the 2011 memo, referencing 2003 agency memo)

[1] These cases include Termination of Conditional Permanent Resident Status and Denials of Form I-751, Petition to Remove the Conditions of Residence; Denials of Form I-829, Petition by Entrepreneur to Remove Conditions (2018 memo added "Termination of Conditional Permanent Resident Status" to this category); termination of refugee status; denials of NACARA 202 and HRIFA adjustments; asylum referrals; termination of asylum or withholding; positive credible fear findings; and certain NACARA 203 cases (2018 memo added a second type of NACARA 203 case to the list).

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Comparison Chart – 2018 v. 2011 NTA Guidance Memo – Treatment of Removable Noncitizens Seeking an Immigration Benefit

		States, unless "sufficient reason" not to (section II of 2018 memo)	
"Egregious public safety" case[2]	Depends	1. USCIS will issue NTA if the application or petition is denied and the noncitizen is removable 2. USCIS will refer to ICE after adjudicating an I-90 or other adjudication where NTA not issued 3. USCIS should refer to ICE pre-adjudication if circumstances warrant (section IV.A.1 of 2018 memo)	USCIS must refer to ICE as soon as identified (section IV.A.1 of 2011 memo)
Non-"egregious public safety" criminal cases	Depends	If applicant is under investigation for, has been arrested for (without disposition), or has been convicted of any crime not on EPS list: 1. USCIS will issue NTA if application or petition is denied and noncitizen is removable	If noncitizen is inadmissible or removable for a criminal offense not on the EPS list, USCIS will adjudicate and then refer to ICE (section IV.A.2 of 2011 memo)

[2] The memos define EPS cases as those where the noncitizen is under investigation for, has been arrested for (without disposition), or has been convicted of any of the following: murder, rape, or sexual abuse of a minor under INA § 101(a)(43)(A); illicit trafficking in firearms or destructive devices under INA § 101(a)(43)(C); offenses relating to explosive materials or firearms under INA § 101(a)(43)(E); crimes of violence for which the term of imprisonment imposed is at least one year, or where the penalty for a pending case is at least one year, under INA § 101(a)(43)(F); offenses relating to the demand for or receipt of ransom under INA § 101(a)(43)(H); child pornography-related offenses under INA § 101(a)(43)(I); offenses relating to peonage, slavery, involuntary servitude, and trafficking in persons under INA § 101(a)(43)(K)(iii); alien smuggling offenses under INA § 101(a)(43)(N); Human Rights Violators, known or suspected street gang members, or Interpol hits; or re-entry after an order or exclusion, deportation, or removable after a felony conviction where no Form I-212 has been approved.

Comparison Chart – 2018 v. 2011 NTA Guidance Memo – Treatment of Removable Noncitizens Seeking an Immigration Benefit

		2. If USCIS does not issue an NTA, it should refer to ICE prior to adjudication if noncitizen appears inadmissible or deportable based on a non-EPS criminal offense (section IV.A.2 of 2018 memo)	
N-400 applicants	Depends	1. USCIS will issue NTA if N-400 denied on good moral character offense based on crime, and applicant is removable (section IV.A.3 of 2018 memo) 2. Before adjudication, USCIS will issue an NTA if applicant is deportable, unless USCIS exercises prosecutorial discretion following prosecutorial review panel process (section VI.C of 2018 memo)	1. USCIS will refer to ICE if N-400 denied on good moral character grounds based on a non-EPS criminal offense for which the applicant is removable. (EPS cases get referred as described above) (section IV.A.2 of 2011 memo) 2. USCIS may issue an NTA prior to adjudication if the applicant is deportable, if the USCIS officer makes a written recommendation for NTA issuance and a review panel agrees (section V.A of 2011 memo)

This chart does not include national security cases or cases where the applicant requests an NTA. Remember that the 2018 memo does not apply to applicants for DACA-related benefits.