AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AILA Member Talking Points on USCIS NTAs

AILA Doc. No. 17070675 | Dated July 6, 2018

What is it? On July 5, 2018, U.S. Citizenship and Immigration Services (USCIS) published new guidance, dated June 28, 2018 regarding the issuance of Notices to Appear (NTA).

An NTA is a charging document that is issued to foreign nationals who are deemed "removable" from the United States.

People who receive NTAs must appear before an immigration judge to determine whether they should be removed from the United States (which carries significant penalties), or whether they are entitled to some type of relief from removal, allowing them to remain in the United States legally.

Why is this bad policy? The new USCIS NTA policy is a dramatic change from more than a decade of consistent practice, that will divert scarce USCIS resources and needlessly force a massive number of individuals into our already overburdened immigration court system.

In 2003, when DHS was created, Congress purposefully separated the enforcement functions and the service functions of the legacy INS into three components: CBP (border enforcement and inspections); ICE (interior enforcement) and USCIS (adjudication of immigration benefits).

Prior agency guidance appropriately shifted NTA issuance to the interior enforcement arm of DHS. With ICE largely responsible for issuing NTAs, USCIS could focus primarily on benefits adjudications, its primary responsibility.

The new guidance turns USCIS into a third enforcement component of DHS.

It requires USCIS to issue NTAs against individuals who have lived and worked in the U.S. legally for years providing valuable service to U.S. employers, but whose applications to extend their stay or move to new jobs are unexpectedly denied by USCIS due to changing USCIS policies, such as USCIS' rescission of its prior guidance directing USCIS officers to give deference to prior determinations when adjudicating employment-based extension petitions.

For example, a person who has held H-1B status for years, working as a Software Engineer or Computer Systems Analyst, will be issued an NTA and placed in removal proceedings if their application to extend H-1B status is denied, and due to USCIS

processing backlogs, their underlying H-1B status has expired by the time USCIS gets around to reviewing their case.

Another example is a multinational manager or executive in L-1A status who is pursuing permanent residency status in the United States. Given the lengthy time for processing an I-140 petition and permanent residency application for EB-1 Multinational Managers and Executives, if the individual's underlying L-1 status expires while the green card process is pending and USCIS unexpectedly denies the adjustment of status application, the multinational manager or executive will be issued an NTA and placed in removal proceedings.

An NTA will be issued and the person will be forced into the court system, preventing them from departing the U.S. even if they want to.

The new policy will also sweep foreign students into court. USCIS recently changed its requirements for students, who already face confusing regulations, that will render many of them out of status, even though they were following longstanding policy.

The new policy is based on the false assumption that everyone who comes to the United States and seeks an immigration benefit intends to break the law by overstaying if they are denied. However, DHS's own data contradicts that assumption.

According to the **May 2017 DHS Overstay Report**, of the more than 50.4 million nonimmigrants who entered the U.S. and were expected to depart in FY2016, less than 2 percent overstayed.

Instead of appropriately providing an opportunity to individuals to get their affairs in order and depart the United States, many thousands of individuals will be needlessly shuttled into our already over-burdened immigration court system, which is currently backlogged with over 700,000 pending cases.

Who is impacted? According to USCIS, **the January 25, 2017 Executive Order, "Enhancing Public Safety in the Interior of the United States**," provides support to USCIS authority to initiate removal proceedings against any individual who is removable.

The new NTA guidance mandates USCIS to issue an NTA upon denial of an application, petition, or immigration benefit request where the applicant, beneficiary, or requestor is removable except in very limited circumstances.

The new guidance mandates USCIS to issue an NTA to every person who is "not lawfully present" in the United States at the time an application, petition, or request for an immigration benefit is denied. This is particularly significant because USCIS is simultaneously attempting to re-define "lawful presence" more narrowly via policy memo that will take effect on August 9. The NTA memo and the "lawful presence" have to be read together

New policy will draw agency resources away from threats to national security and public safety by requiring USCIS to issue an NTA in cases when it may not be necessary. Past policy required USCIS to refer most cases to Immigration and Customs Enforcement (ICE) to make that determination.

Prosecutorial Discretion, a cornerstone of America's judicial system for centuries, allowing for the efficient and effective prioritization of cases, has been relegated to the dust bin; it is a thing of the past.

The memos do not change policy regarding issuance of NTAs in cases where it is required by statute or regulation, in cases involving national security concerns, in cases involving criminal conduct that renders a person removable, and in cases involving fraud or misrepresentation. In those cases DHS will continue to issue NTAs.

In addition to issuing an NTA when fraud or misrepresentation is part of the record (which USCIS has long had the authority to do), USCIS will now issue an NTA when there is "evidence of abuse of public benefit programs." This change must be read in conjunction with the administration's impeding changes to the public charge rule.

A separate DACA-specific memo appears to keep the same general policies for DACA requestors that were in place before the issuance of the 2018 NTA memo, directing USCIS to consult the 2011 NTA memo to determine whether to issue an NTA in a DACA case or refer a DACA case to ICE.

The guidance also instructs USCIS officers to defer to ICE and CBP regarding the timing of NTA issuance to former TPS beneficiaries after the country's TPS designation ends.

Impact on USCIS and EOIR Resources. This aggressive new NTA policy ties the hands of USCIS, is a waste of USCIS resources, and turns the agency into another part of the deportation machine.

In 2006 NTA guidance, USCIS recognized that it does not have the resources available to issue NTAs in every adjustment of status (green card) case that is denied, and that the courts could not process the volume of removal cases that would be generated by such a policy.

Since then, USCIS processing times across all product lines have grown consistently worse, and resources today are stretched thinner than ever. In addition, the immigration court backlog has reached crisis proportions, exceeding 700,000 cases as of May 31, 2018.

The new guidance requires USCIS to issue NTAs in **nearly all** cases that are denied where the individual is without lawful immigration status. In terms of volume, this would encompass not only adjustment of status cases, but far more than that, including applications to extend/change nonimmigrant status and many more.

Chilling Effect. This new NTA policy is yet another brick in the invisible wall and sends another message to the world that immigrants are not welcome here.

This new policy will undoubtedly have a chilling effect on individuals who may be lawfully and legally entitled to immigration benefits but who will forego applying out of fear and will remain in the shadows.

Cite as AILA Doc. No. 17070675.