

CITIZENSHIP & IMMIGRATION
SERVICES



POLICY MEMORANDUM NO. 110

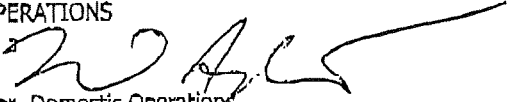
SUBJECT: Disposition of Cases Involving
Removable Aliens

U.S. Citizenship
and Immigration
Services

Interoffice Memorandum

Subject Code: 70/1-P

TO: ASSOCIATE DIRECTOR, NATIONAL SECURITY AND RECORDS VERIFICATION
REGIONAL DIRECTORS
DISTRICT DIRECTORS
DIRECTOR, NATIONAL BENEFITS CENTER
SERVICE CENTER DIRECTORS
CHIEF, SERVICE CENTER OPERATIONS
CHIEF, FIELD OPERATIONS

FROM: Michael Aytes 
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DATE: July 11, 2006

* SUBJECT: Disposition of Cases Involving Removable Aliens

This memorandum revises guidance to USCIS officers on how to process and prioritize cases in which an alien appears to be removable.

Background

USCIS has authority to issue a Notice to Appear (NTA) and thereby initiate removal proceedings against an alien¹. By regulation, this authority has been delegated through district directors and service center directors to the director's deputy, officers and assistant officers-in-charge, assistant directors, supervisory district adjudication officers and supervisory center adjudications officers.² Deciding whether a person is removable and whether an NTA should be issued is an integral part of the adjudication of an application or petition.

Since not only USCIS, but also Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) have authority to issue NTAs, USCIS must assure that its issuance of NTAs fits within and supports the Government's overall removal priorities. In addition, just as there is an element of discretion in many of our adjudications, there is also an element of prosecutorial discretion in deciding whether to issue an NTA.³

¹ *Delegation by the Secretary of the Department of Homeland Security to the Bureau of Citizenship and Immigration Services*, Delegation Number 0150.1; Paragraph 2(N). However, District Directors and officers in international offices are not authorized to issue NTAs.

² 8 CFR § 239.1. However, issuance of an NTA against a current or former member of the armed forces requires advance approval of the Regional Director.

³ In exercising prosecutorial discretion, USCIS officers will refer to the INS issued memorandum entitled *Exercising Prosecutorial Discretion*, dated November 17, 2000, which describes the principles upon which agency officials can exercise prosecutorial

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Our Mission - Efficient and effective administration of immigration, naturalization and citizenship benefits and services

Our Priorities: (1) National Security; (2) Efficient and effective case processing, production management and administration of USCIS; and (3) Customer Service.

In June 2006, USCIS and ICE signed a Memorandum of Agreement (MOA) regarding the issuance of NTAs to aliens encountered during a USCIS adjudication. The entire MOA is included as Appendix 1 to this memorandum. The MOA is designed to clarify USCIS and ICE involvement in the NTA process. The MOA describes when USCIS will issue an NTA and when we will refer the matter to ICE so that it can decide whether it will issue an NTA. This memorandum provides guidance for implementing the MOA. MOA implementation guidance applies to cases adjudicated on or after October 1, 2006. This memorandum also describes transition procedures for cases adjudicated prior to October 1, 2006.

What the MOA and this Memorandum Do Not Cover

National Security Cases

This memorandum does not affect the way cases with national security concerns are handled. The guidance from the Office of Fraud Detection and National Security (FDNS) will continue to govern the definition of these cases and procedures for resolution of national security hits.

TPS and Asylum cases

This memorandum does not apply to, or change NTA or notification procedures for Temporary Protected Status cases or cases processed by the Asylum Division, including asylum applications, applications for relief under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA 203), and credible fear and reasonable fear screenings. Separate guidance has been issued for these cases and remains in effect.

VAWA Cases

Forms I-360 processed under the Violence Against Women Act (VAWA) should continue to be processed under existing protocols. If the applicant's Form I-485 is found deniable, the guidance in this memorandum becomes applicable.

MOA Implementation Guidance

NTA issuance, apart from the categories excluded above, involving USCIS can be broken into five categories:

1. Egregious public safety cases (paragraphs '6b' and '6c' of the MOA);
2. Other criminal cases (paragraph '6d');
3. Cases where an NTA is prescribed by regulation (paragraph '6e');
4. Cases denied by USCIS based on fraud (paragraph '6f');
5. All Other Cases (paragraph '6g').

This memorandum discusses each in turn. The USCIS NTA Standard Operating Procedure (SOP), which will be issued soon, describes the mechanics of NTA issuance where USCIS will issue an NTA.

1. Egregious Public Safety Cases

An egregious public safety case is defined in the MOA as any case where information indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of, any of the following:

- a. Murder, rape, or sexual abuse of a minor as defined in § 101(a)(43)(A) of the Immigration and Nationality Act (INA).
- b. Illicit trafficking in firearms or destructive devices as defined in § 101(a)(43)(C) of the INA.
- c. Offenses relating to explosive materials or firearms as defined in § 101(a)(43)(E) of the INA.
- d. Crimes of violence for which the term of imprisonment imposed or where the penalty for a pending case is at least one year as defined in § 101(a)(43)(F) of the INA.
- e. An offense relating to the demand for or receipt of ransom as defined in § 101(a)(43)(H) of the INA.

discretion and the process to be followed in making and monitoring discretionary decisions. The concepts set forth therein, especially those starting on page 6 of the memo under the heading *Initiating and Pursuing Proceedings*, remain valid and should be taken into account in order to promote the efficient and effective enforcement of the Immigration laws and the interests of justice.

- f. An offense relating to child pornography as defined in § 101(a)(43)(I) of the INA.
- g. An offense relating to peonage, slavery, involuntary servitude, and trafficking in persons as defined in § 101(a)(43)(K)(iii) of the INA.
- h. An offense relating to alien smuggling as described in § 101(a)(43)(N) of the INA.
- i. Human Rights Violators, known or suspected street gang members, or Interpol hits.
- j. Re-entry after an order of exclusion, deportation or removal subsequent to conviction for a felony where a Form I-212, Application for Permission to Reapply for Admission into the U.S. after Deportation or Removal, has not been approved.

The MOA indicates that, even without a conviction, an alien may be an egregious public safety case if there has been an arrest "without disposition." This applies specifically to an arrest where charges are still pending. If the alien was arrested but the charges were dropped or the alien was acquitted, the case will not be referred under this provision of the MOA. Also, if an arrest was for an offense described above, but the conviction was ultimately for an offense not defined as an egregious public safety case, the case will not be referred under this provision of the MOA.

The MOA contains a clause allowing additional types of cases to be added to this definition based on local criteria as agreed upon by the ICE Special Agent in Charge (SAC) and the USCIS District Director for field cases, or by the appropriate USCIS Service Center Director in conjunction with the Fraud Detection Unit (FDU) and the ICE Benefit Fraud Unit (BFU) for center cases. However, as a matter of practice, before agreeing to a local expansion of this definition USCIS offices and centers must coordinate any such request from ICE with USCIS Headquarters. Our interest is in attempting to apply the same criteria nationwide, and it is our intention to work with ICE nationally to the extent possible with respect to possible expansion of this definition.

All egregious public safety cases must be referred to FDNS using the procedures outlined below. The case will be referred as soon as it is identified, even if the adjudication has not been completed. USCIS will interrupt adjudication and FDNS will refer the case to ICE so that ICE has an opportunity to decide if, when and how it will issue an NTA and/or detain the alien.

This referral process relates to the case, not necessarily the applicant or petitioner. If an alien⁴ is arrested during his or her encounter with USCIS (e.g. at the time of an interview), the case referral process through FDNS continues as described, but the process is essentially expedited as a result of ICE's arrest.

There are several reasons why the MOA distinguishes egregious public safety cases from other criminal and non-criminal cases. The MOA identifies this group of USCIS cases as those most likely to be ICE priority removal cases. The referral process described below ensures that these cases are brought to ICE's attention as quickly as possible, and a decision made quickly whether to apprehend and detain an alien who is an egregious risk to public safety.

The prioritization of these cases also reflects the fact that, unlike applications and petitions where the customer bears the burden of proof, in removal proceedings the government bears the burden of proof. In order to establish that an alien is amenable to removal, ICE often must acquire certified disposition records directly from the appropriate authorities before it issues an NTA on criminal grounds. Thus, early notification gives ICE both an opportunity to apprehend an egregious public safety risk and an early opportunity to acquire the required evidence for removal proceedings.

Finally, since the definition of an egregious public safety case includes arrests, for which a final disposition may still be pending, an alien described by the definition may not be subject immediately to removal proceedings. The early referral of the case by USCIS gives ICE advance notice of the pending proceedings so that it can monitor the progress of the case and take the individual into custody at the appropriate point.

If ICE determines that immediate apprehension is not appropriate, the referral process also ensures that USCIS can proceed with case processing fully cognizant of the facts of the situation. This prevents USCIS from being in the situation where it allows a deniable case to remain pending indefinitely while ICE separately pursues acquisition of the documents necessary for it to issue an NTA.

⁴A U.S. citizen could be arrested in this situation based on a warrant or warrant, but a U.S. citizen would not be an egregious public safety case by definition.

▪ Egregious Public Safety Case Referral Process

- Egregious public safety cases discovered in the four service centers (California, Texas, Vermont, Nebraska), and the National Benefits Center will be placed in abeyance and the case (including the file, when available) immediately sent to the appropriate FDU. The FDU will refer the case to the ICE BFU via a Request for Investigation (RFI). A hard copy of the RFI will be placed in the A-file and/or Receipt file.⁵ The FDU will retain the file unless ICE requests it or the 60 days expire.
- Egregious public safety cases discovered in local offices will be placed in abeyance and the case (including the file, when available) immediately referred to the Fraud Detection and National Security Immigration Officer (FDNS IO). The FDNS IO will refer the case to the local ICE SAC via an RFI. A hard copy of the RFI will be placed in the A-file and/or Receipt file.⁶ A copy of the RFI must be sent to the ICE BFU. The FDNS IO will retain the file unless ICE requests it or the sixty days expire.

An RFI should include any relevant attachments that USCIS has at the time, such as a copy of the rap sheet, and a copy of the application.

The purpose of an RFI is to give ICE the opportunity to determine the appropriate course of action before USCIS adjudicates the case. A decision to issue an NTA may directly affect the processing of the pending application. Upon issuing the RFI, USCIS will suspend adjudication for 60 days, or until ICE provides notification of its action on the case, whichever is earlier. The case shall remain pending during this period. The entity that referred the case to ICE must ensure appropriate tracking to account for the pending case and its active status.

In response to the RFI -

- ICE may request that USCIS promptly schedule an interview for the purpose of ICE arresting and taking the alien into custody.⁷ Apprehension frees USCIS to proceed with adjudication (unless jurisdiction transfers to the Executive Office of Immigration Review (EOIR)), taking full account of the basis for apprehension.⁸
- ICE may issue an NTA. Issuance of an NTA by ICE frees USCIS to proceed with adjudication (unless jurisdiction transfers to EOIR), taking full account of the basis for the NTA.
- If ICE does not issue an NTA or otherwise provide notification of its action on the case within 60 days of the RFI, USCIS may resume its adjudication of the case, taking full account of the basis that prompted the RFI.
 - If the case is approvable, USCIS will consult with ICE prior to adjudication.
 - Once adjudicated, regardless of the decision, USCIS will notify ICE of the result by sending a copy of the original RFI to ICE with a cover memorandum advising of the outcome of the case.
 - If the alien appears to be removable on a criminal ground, then the procedures for non-egregious criminal matters should be followed (referring the completed case to ICE DRO for NTA issuance).
 - If the alien is removable on other than criminal grounds, USCIS should follow the analysis and procedures described below in sections 3 through 5 of this memorandum.

Egregious Public Safety Cases referred to ICE prior to adjudication should be called up and reviewed no later than 60 days after referral. Normally the case should be adjudicated. However, USCIS retains discretion to formally place the case in abeyance for ICE to conduct further investigation, the formal abeyance process as described at 8 CFR 103.2(b)(18) should be initiated.

If, in response to an RFI, ICE requests the file, USCIS should work with the local ICE office to determine whether copies of documents are sufficient. If ICE insists that it needs the original file, the FDU or FDNS IO will promptly ship the file if in its possession, but shall retain the original of the pending application and a copy of the supporting documentation so USCIS can proceed with adjudication if that becomes appropriate. A copy of the

⁵ Both ICE Office of Investigations and Deportation and Removal will be given access to the FDNS Data System in the near future. These procedures will be updated at that time.

⁶ Ibid.

⁷ Several recent examples around the country, notably with I-90 applications, have demonstrated the effectiveness of this strategy for apprehending egregious public safety risks.

⁸ For I-90, I-751 and I-829 processing see the additional referral and processing instructions found below.

application or petition and supporting documents should be included in the A-file sent to ICE. In any case in which ICE requests the file, USCIS will consult with ICE before rendering a final decision on the case. However, these consultations should not delay denial of an application or petition, nor should they delay an approval if the case is approvable despite the basis for the RFI.

Since this file protocol differs from that described in NQP and the I-485 SOP, updates to those documents will be forthcoming.

USCIS District Directors are expected to work with the local ICE SAC to ensure smooth processing of referred cases. Service Center Directors will likewise continue liaison with ICE through the FDUs. In situations where issues are identified, District Directors and Service Center Directors should immediately bring them to the attention of HQFDNS through official channels.

• **An Important Note with respect to I-90, I-751 and I-829 applications filed by a permanent resident or conditional permanent resident where the applicant is an egregious public safety risk:**

- **I-90 cases:**
 - If, within the 60 day RFI evaluation period, ICE takes a permanent resident who is an I-90 applicant into custody and issues an NTA, USCIS should leave the I-90 pending and in active suspense.
 - While in proceedings, a permanent resident not in custody will be issued temporary evidence of status in 6 month increments.
 - If removal proceedings are terminated or otherwise end without the alien's removal and loss of status, USCIS shall then adjudicate the I-90, and, if approved, issue the normal permanent resident documentation to which the person is entitled.
 - If the alien is ordered removed and thus loses permanent residence status, USCIS shall upon that basis deny the I-90.
 - If ICE does not issue an NTA or otherwise provide notification of its action on the case within the 60 day RFI evaluation period, since the alien is a permanent resident, USCIS shall adjudicate the application. Upon adjudication of the I-90, USCIS will forward a copy of the original RFI to ICE with a cover memorandum advising that the I-90 has been adjudicated. If the application is approved, USCIS will issue the normal permanent resident documentation.

Note: This I-90 referral process supersedes the I-90 Instructions in the April 10, 2006 entitled "Permanent Resident Documentation for EOIR and I-90 Cases" insofar as that memorandum relates to I-90 applicants who can be defined as egregious public safety cases. All other policy in the April 10, 2006 memorandum remains unchanged.

- **I-751 and I-829 cases:** The law limits our review of the removal of conditions to certain specific factors, not including subsequent criminal activities.
 - If, within the 60 day RFI evaluation period, ICE takes a conditional permanent resident who is an I-751 or I-829 applicant into custody and issues an NTA, USCIS should deny the I-751 if appropriate grounds for denial exist. If the petition appears otherwise approvable, ICE Counsel should be consulted as to whether USCIS should leave the I-751/829 pending and in active suspense while the person is in proceedings. (This applies only to these egregious public safety cases. In all other cases, the I-751 or I-829 should be approved if it is otherwise approvable.)
 - If removal proceedings are terminated or otherwise end without the person's removal and loss of status, USCIS shall then adjudicate the I-751/829 and, if approved, issue the normal permanent resident documentation to which the person is entitled.
 - If the person is removed and thus loses conditional permanent residence status, USCIS shall upon that basis deny the I-751/829.
 - If ICE does not issue an NTA or otherwise provide notification of its action on the case within the 60 day RFI evaluation period, USCIS shall adjudicate the petition and, if approved, issue the normal permanent resident documentation. If approved, a copy of the original RFI and a cover memorandum advising that the case has been approved will be forwarded to ICE.

2. Other Criminal Cases

In all cases in which it appears that the alien is inadmissible or removable for a criminal offense not included on the egregious public safety case list, USCIS will complete the adjudication prior to referring the case to ICE. ICE will

decide whether and how it will institute proceedings and whether or not they will detain the alien. USCIS will not prepare or issue an NTA in such a case. Once adjudication is complete, the FDU or FDNS IO will send an RFI and the accompanying file, if in the possession of the office or center issuing the RFI, directly to the appropriate ICE Field Operations Director (FOD) or designated POC. The FDU or FDNS IO will concurrently transmit a copy of the RFI to ICE HQ DRO Criminal Alien Division for statistical monitoring purposes.

If there is any confusion or uncertainty about classifying a case as egregious or non-egregious, the USCIS adjudicator should refer the matter as an egregious public safety case through supervisory channels to the FDU or FDNS IO.

The accompanying file will be referred to ICE with the RFI if the file is in the possession of the referring USCIS office or center.

If the file is not in the referring USCIS office, the RFI should include any relevant attachments that USCIS has, such as a copy of the rap sheet and a copy of the application. Where USCIS obtained certified conviction records through normal processing of the application, it will include those records with the RFI, but it will not hold the RFI on a completed case just to obtain those disposition records. Instead ICE will decide whether and how it will directly obtain such records as part of its decision whether and when it will issue an NTA.

▪ Referral Process

A case referred under this process is referred to ICE to allow it to make a determination, based on the totality of circumstances, as to whether an NTA should be issued. If ICE does decide to issue an NTA, it will determine the appropriate grounds for removal.

- **Cases adjudicated by the Service Centers:** Once adjudication is completed,⁹ if the alien is removable on a criminal charge regardless of the reason for the denial¹⁰, the file will be referred to the FDU. The FDU will refer the case to the appropriate ICE FOD via an RFI.
- **Cases adjudicated in local offices:** Once adjudication is complete,¹¹ if the alien is removable on a criminal charge regardless of the reason for the denial, the file will be sent to the FDNS IO, who will complete an RFI. The FDNS IO will then refer the case via the RFI to the local ICE FOD.

3. Cases where the NTA is Prescribed by Regulation

In certain instances the issuance of an NTA is required by regulation. These include Petitions to Remove Conditions on Residence (Form I-751), Petitions by Entrepreneur to Remove Conditions (Forms I-829), and Applications for Family Unity Benefits (Forms I-817). See 8 CFR 216.3(a), 216.6(a)(5), and 8 CFR 236.14(c).

An NTA must also be issued after the termination of refugee status by a District Director. See 8 CFR 207.9. In these instances USCIS will issue the requisite NTA as part of completing the adjudication.

4. Cases Denied by USCIS Based on Fraud

In all pending cases where there is a suspicion of fraud, USCIS, through the FDU or the FDNS IO, sends an RFI to ICE pursuant to current procedure. If ICE declines the case, USCIS FDNS initiates an administrative inquiry to verify any fraud.

In cases where fraud has been verified in a *Fraud Verification Memorandum* and the denial is at least in part based on a finding of fraud, USCIS will issue an NTA once it denies the case. The NTA must include the appropriate fraud charge.

⁹ This includes the conclusion of any administrative appeals.

¹⁰ In determining whether the alien is amenable to a charge of removal on a criminal ground, the case must be reviewed for either 212 or 237 charges as relevant, and for any previously granted waivers (e.g., an approved Form I-601). If the alien was previously in proceedings before the Executive Office of Immigration Review, the case must be reviewed to determine if a waiver was granted (e.g., 212(c), Cancellation of Removal for Certain Permanent Residents, or Form I-601). If a waiver has been previously granted the alien is not longer removable on that ground. If USCIS has received the relevant conviction documents in the course of the adjudication, that should be noted in the RFI. If there are any questions consult with USCIS counsel.

¹¹ This includes the conclusion of any administrative appeals.

5. All Other Cases

In all other cases, once the denial of the application or petition is complete (including applications for waivers for which the applicant may be eligible), USCIS may issue an NTA where the applicant or permanent resident petitioner appears to be removable. However, if an individual submitted an application while in a valid non-immigrant status and there is no criminality surrounding the reasons for the denial and nothing else indicates that the alien will not timely depart the United States, the denial notice should clearly convey to the applicant the effect of the decision and the fact that the individual should depart the United States or potentially face removal proceedings.

If an alien is in parole status as a result of an advance parole and has not otherwise violated the terms of his or her admission, the denial will indicate that the parole is terminated 30 days after the date of the denial. Issuance of an NTA also will serve as written notice of the termination of the parole, unless otherwise specified. See 8 CFR 212.5(e).

It is important to note these provisions do not affect the ability of the District or Service Center Directors to issue voluntary departure, to recommend deferred action or to reinstate a person's nonimmigrant status. Except for national security cases, egregious public safety cases rejected by ICE, cases where an NTA is required by regulation, and fraud cases, USCIS managers retain discretion in the decision whether to issue an NTA when compelling circumstances are present. However, if an applicant is removable and there are no means of relief available (e.g., voluntary departure, reinstatement, eligibility for another status), then an NTA should normally be prepared as part of the denial. Such NTAs should be predicated on the most sustainable charge.

Additional Considerations

The primary role with respect to removal priorities and administration is ICE's. If USCIS refers an egregious public safety case or other criminal case to ICE and ICE decides not to issue an NTA, then typically USCIS will defer to the ICE decision.

Where USCIS issues an NTA, calendaring the case with the EOIR will be initiated based on local procedures coordinated with ICE Counsel and DRO. USCIS must ensure that these local procedures result in the creation of an IBIS record.

USCIS will prioritize NTA issuance in the following order: (1) cases where fraud is established, (2) cases where the NTA is prescribed by law or regulation, and (3) the 'all other cases' category. However, it is important that we promptly provide EOIR with the NTA in each case in which USCIS prepares an NTA. Offices must report to HQ Domestic Operations through normal channels any backlog with respect to NTA preparation that may exist. In furtherance of that goal, where USCIS decides to issue an NTA, the case will not be counted as a denial until the NTA is forwarded to EOIR. As noted above, this referral can be either direct or through DRO, as established by local procedures.

It is understood that many cases will contain special circumstances that are not addressed by this memorandum. As such, USCIS counsel is available to review all NTAs. Procedures for review should be set at a local level, but counsel review is particularly encouraged on NTAs that include the fraud charge. Deviations from the procedures described in this memorandum must be approved through channels by the Director of Service Center Operations or by the Director of Field Operations.

When making determinations, based upon the categories listed above, employees must keep in mind USCIS' obligations under 8 USC § 1367, which prohibits the release outside of DHS of any information relating to aliens who are seeking or have been approved for the following:

1. Immigrant status under the provisions for battered spouses and children in the Violence Against Women Act ("VAWA"),
2. Nonimmigrant status under INA Section 101(a)(15)(T), and
3. Nonimmigrant status under INA Section 101(a)(15)(U). [Limited exceptions to this prohibition can be found at 8 U.S.C. sec. 1367(b)].

Moreover, 8 USC § 1367 prohibits any Department of Justice or Department of Homeland Security employees -- including CIS/CBP/ICE officers/agents and Immigration judges -- from making an adverse determination of admissibility or deportability using information provided solely by the abusive spouse or parent or other member of the household.

Additionally, Legalization and SAW cases are covered under the confidentiality protections identified in Section 245(c)(5) and 210(b)(6) of the INA respectively, and LIFE legalization cases are covered under Section 1104(c)(5) LIFE Act (Pub.L. No. 106-553), which affords the same protection as those identified in Section 245A(c)(5) of the INA. In general, NTAs cannot be issued based on information obtained from legalization applications or supporting documents.

USCIS' role is largely to facilitate the execution of ICE removal priorities. ICE manages the removal docket, and also remains the prosecutor. Therefore, while USCIS can identify through a referral or an NTA that a person appears amenable to removal proceedings, the role of USCIS is not to prove removability in proceedings.

Transition Guidance

The new MOA is effective for cases adjudicated on or after October 1, 2006. Certain USCIS procedures are already consistent with the MOA-based procedures outlined in this memorandum.

- For cases adjudicated through September 30, 2006, USCIS will follow the MOA-based procedures for egregious public safety cases.
- USCIS will follow current local procedures for non-egregious public safety removable aliens and egregious public safety cases rejected by ICE.
- In the interim, USCIS will also follow the procedures outlined earlier in this memorandum with respect to cases where fraud is established and where the NTA is prescribed by regulation.
- With respect to the 'all other cases' category, some USCIS field offices as a practice routinely prepare NTAs for these cases. Those offices should not reduce their commitment to this process, but shall continue to exercise prosecutorial discretion as appropriate with respect to preparing an NTA. Offices that currently do not routinely prepare NTAs in cases in this category should begin to prepare to implement these procedures with cases adjudicated on or after October 1, 2006, and in the interim should ensure that NTAs are prepared on any case deemed significant. Cases and associated files not deemed significant enough to warrant issuance of an NTA should be handled normally after the adjudicative process is complete.

Any questions or concerns pertaining to this memorandum should be directed, through channels to Headquarters, Domestic Operations. Given the complexity of issues associated with this memorandum, it is expected that significant questions will be addressed in a following Question and Answer document that will be incorporated, in effect, into this memorandum and will be posted under this memorandum in the Intranet page for Policy guidance.

The Associate Director for National Security and Records Verification has concurred with this memorandum.

This memorandum is designated as **FOR OFFICIAL USE ONLY**, and is not to be released to outside entities. It is intended for USCIS personnel performing duties relative to cases that require decisions pertaining to the placement of aliens in removal proceedings. This internal guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

MEMORANDUM OF AGREEMENT
BETWEEN
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES
AND
UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT
ON THE ISSUANCE OF NOTICES TO APPEAR
TO ALIENS ENCOUNTERED DURING AN ADJUDICATION

1. PARTIES. The parties to this Memorandum of Agreement (MOA) are U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE), two components of the U.S. Department of Homeland Security (DHS).
2. AUTHORITY. In section 2(N) of DHS Delegation Number 0150.1, Delegation to the Bureau of Citizenship and Immigration Services, and in section 2(K) of DHS Delegation Number 7030, Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement, USCIS and ICE received concurrent authority to issue notices to appear (NTAs) under the Immigration and Nationality Act (INA). In their respective delegations, USCIS and ICE were further directed by the Secretary of Homeland Security to coordinate the concurrent responsibilities provided under these Delegations. This MOA outlines the coordination between USCIS and ICE, as authorized by these Delegations.
3. PURPOSE. The purpose of this MOA is to set forth when each party will make the determination whether or not to issue an NTA or other charging document to an alien who is amenable to removal proceedings and who is encountered during the process of a USCIS adjudication.
4. SCOPE OF AGREEMENT: This MOA is limited in scope to the specific responsibilities described herein and will apply to cases adjudicated by USCIS on or after October 1, 2006. Additionally, this MOA does not apply to cases identified by either USCIS or ICE as involving an alien described in sections 237(a)(4) or 212(a)(3) of the INA, relating to national security grounds.
5. DEFINITION.

An EGREGIOUS PUBLIC SAFETY CASE is one where information indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of, any of the following:

- a. Murder, rape, or sexual abuse of a minor as listed in §101(a)(43)(A) of the Immigration and Nationality Act (INA).
- b. Illicit trafficking in firearms or destructive devices as defined in §101(a)(43)(C) of the INA.
- c. Offenses relating to explosive materials or firearms as defined in §101(a)(43)(E) of the INA.
- d. Crimes of violence for which the term of imprisonment imposed is at least one year as defined in §101(a)(43)(F) of the INA.
- e. An offense relating to the demand for or receipt of ransom as defined in §101(a)(43)(H) of the INA.
- f. An offense relating to child pornography as defined in §101(a)(43)(I) of the INA.
- g. An offense relating to peonage, slavery, involuntary servitude, and trafficking in persons as defined in §101(a)(43)(K)(iii) of the INA.
- h. An offense relating to alien smuggling as described in §101(a)(43)(N) of the INA.
- i. Human Rights Violators, known or suspected street gang members, or Interpol hits.
- j. Re-entry after an order of exclusion, deportation or removal subsequent to conviction for a felony where a Form I-212, Application for Permission to Reapply for Admission into the U.S. after Deportation or Removal, has *not* been approved.
- k. Additional types of cases can be added based on local criteria as agreed upon by the ICE Special Agent in Charge (SAC), Office of Detention and Removal, Field Office Director (FOD), and the USCIS District Director for field cases or by the appropriate USCIS Fraud Detection Unit (FDU) and the ICE Benefit Fraud Unit (BFU) for center cases.

6. USCIS RESPONSIBILITIES

- a. This MOA does not change existing procedures relating to USCIS Asylum Division's issuance of NTAs for affirmative asylum cases, credible fear referrals or NACARA section 203 referrals. Additionally, this MOA does not change USCIS' existing procedures for issuing NTAs in Temporary Protected Status cases. USCIS may change those procedures after consultation with the ICE Point of Contact (POC)

identified in paragraph 8, but such changes will not be considered to be a modification of this MOA.

- b. USCIS will refer all Egregious Public Safety Cases in its centers to the appropriate ICE BFU via a Referral for Investigation (RFI) prior to the completion of the USCIS adjudication. The RFI will include any relevant attachments (e.g. copy of the rap sheet). Similarly, USCIS will refer via an RFI all Egregious Public Safety Cases in the field to the local ICE SAC or designated POC with concurrent electronic notification to the ICE BFU prior to completion of the USCIS adjudication. Files (A-File, T-File, and or the receipt file) in the possession of the referring USCIS office or center will also be sent to the appropriate ICE office upon request.
- c. Upon forwarding an Egregious Public Safety RFI to the ICE SAC, designated POC or ICE BFU as described in paragraph b, USCIS will suspend adjudication for 60 days or until ICE provides notification of its action on the case, whichever is earlier. If no request is received from ICE in the 60 days, USCIS may resume adjudication of the case. If ICE requests the file anytime before adjudication, USCIS will consult with ICE prior to approving the case. In all referred cases, USCIS is to immediately notify the ICE SAC, designated POC or the ICE BFU, as appropriate, of any pending federal litigation so to coordinate how the cases will be handled.
- d. USCIS will refer, via RFI and the accompanying file, if in the possession of the referring USCIS office or center, all other cases in which an alien is inadmissible or removable from the United States based upon conviction of a criminal offense not listed under the definition of Egregious Public Safety Case in paragraph 5 of this agreement to ICE Detention and Removal (DRO). The RFIs and files in possession of the referring USCIS office or center will be forwarded upon completion of the USCIS adjudication to the appropriate Field Office Director (FOD) or designated POC. USCIS will also concurrently transmit a copy of the RFI to the HQ DRO Criminal Alien Division for statistical monitoring purposes. All referred cases to the FOD or designated POC is to include any previously obtained certified conviction records.
- e. USCIS will issue NTAs after a case has been denied where an NTA is prescribed by regulation. This includes, but may not be limited to, Form I-751, Petition to Remove Conditions on Residence; Form I-829, Petition by Entrepreneur to Remove Conditions; and Form I-817, Application for Family Unity Benefits. See 8 CFR 216.3(a) and 8 CFR

236.14(c). USCIS will also issue an NTA after termination of an alien's refugee status by a District Director. See 8 CFR 207.9.

- f. USCIS will issue NTAs in cases in which fraud is, wholly or in part, a basis for denying the adjudication.
- g. In all other cases in which an alien becomes amenable to removal proceedings based upon a denial of an application or benefit, USCIS will issue an NTA or otherwise exercise prosecutorial discretion.

7. ICE RESPONSIBILITIES

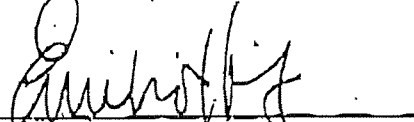
a. The ICE SAC or ICE BFU to which USCIS has referred an Egregious Public Safety case will electronically notify the referring USCIS POC within 60 days of the referral if ICE intends to issue an NTA, return the case, or if additional time is needed for ICE to complete an investigation. If ICE continues to investigate the case after 60 days, ICE will respond in a timely manner to any USCIS inquiries about the status of the case.

b. Once USCIS has completed its adjudication of an application, petition and/or waiver in a non-egregious criminal case and has referred the file, if in the possession of the referring USCIS office or center, to the appropriate DRO FOD or designated POC, the DRO FOD or designated POC will determine whether an NTA or other charging document is appropriate, and will electronically notify the USCIS Office of Fraud and Detection and National Security of any action taken. If the DRO FOD or designated POC determines that the alien is not removable based on a criminal ground, DRO shall issue an NTA on other grounds or shall document in the file the finding that no criminal ground of removal exists and return the file to the referring USCIS office.

- 8. POINTS OF CONTACT. The ICE/OI Point of Contact for purposes of notification under this agreement for matters not otherwise specified is the Identity and Benefit Fraud Unit. The ICE/DRO POC for purposes of notification under this agreement for matters not otherwise specified is the HQ DRO Criminal Alien Division. The USCIS POC for purposes of notification under this agreement for matters not otherwise specified is the Office of Fraud Detection and National Security.
- 9. OTHER PROVISIONS. Nothing in this MOA is intended to conflict with existing laws, regulations, or DHS directives. If a term of this MOA is inconsistent with such authority, then that term shall be invalid, but the remaining terms and conditions of this MOA shall remain in full force and effect.

10. **EFFECTIVE DATE.** The terms of this MOA will become effective upon signature of this document.
11. **MODIFICATIONS.** This MOA may be modified upon the mutual written consent of the parties.
12. **REVIEW.** The parties agree to undertake a review of the MOA within six (6) months of the effective date under paragraph 4 to determine whether any modifications are necessary to more effectively accomplish the goals of the MOA. Failure to conduct a review, however, will not result in the termination of this MOA.
13. **TERMINATION.** The terms of this MOA, and any subsequent modifications consented to by both parties, will remain in effect unless terminated as provided herein. Either party, upon 60 days written notice to the other party, may terminate this MOA.

SIGNATORY AUTHORITIES:



Dr. Emilio T. Gonzalez
Director
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security

6/20/06
Date



Julie L. Myers
Assistant Secretary
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

6/15/06
Date