



**Notes from USCIS National Stakeholder Engagement Updated Notice to Appear (NTA)
Policy Guidance¹
September 27, 2018**

This advisory contains general information shared by USCIS during the September 27, 2018 national stakeholder call. We have added practice pointers and clarification where relevant. The information contained in this advisory does not create any law or rights, nor is it intended to be legal authority or advice, but is presented for informational purposes only and not for media attribution. These notes are unofficial and have not been vetted by USCIS. They were not taken verbatim and may include paraphrasing, and/or omissions. **NOTE: Formal Q&A from Stakeholder engagement have been posted to USCIS [Electronic Reading Room](#) and are available [here](#).**

ASISTA and our partners will be following up with USCIS on outstanding questions related to implementation of the NTA memo, if you have questions regarding how the NTA memo relates to survivor-based immigration benefits, please email: questions@asistahelp.org.

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¹ Speakers on call: Kate Syfert, USCIS Public Engagement Division; Carlos Munoz-Acevedo, USCIS Public Engagement Division; Karla Muran, USCIS Director’s Office, ; Representatives from USCIS Office of Policy and Strategy, Office of Chief Counsel, Refugee, Asylum and International Operations Directorate. Questions submitted from: DHS Office of Civil Rights and Civil Liberties, CIS Ombudsman, community organizations, interested citizens

I. Key Points

- A. The updated NTA memo was signed on June 28, 2018 and implementation of the memo was delayed to allow operational components to finalize their guidance. The June 2018 NTA guidance [will not be not implemented in employment based and humanitarian applications and petitions at this time.](#)² Existing guidance will remain in effect.

ASISTA Note: Humanitarian cases can include survivor-based forms of relief like VAWA self-petitions, U and T visa applications, though USCIS did not enumerate which benefits specifically were considered (e.g. typically TPS is considered “humanitarian” cases though addressed separately in the NTA memo). We assume that this means that the [2011 NTA Policy Guidance](#) will remain in effect for these applications until otherwise informed by USCIS. ASISTA will seek clarification/confirmation of this point.

- B. USCIS will be rolling out the NTA policy memo incrementally. Starting Oct 1, 2018, USCIS may issue NTAs on denied cases involving **I-485, application for adjustment of status and I-539 Application to extend or change nonimmigrant status. USCIS will apply the guidance in the NTA memo for I-485 or I-539 denials on or after Oct. 1, 2018, regardless of when application was filed.** As was always the case, USCIS has the authority and discretion to issue NTA where individual is removable.

ASISTA Note: However, USCIS did not specify whether adjustments based on these forms of relief would be considered to be “humanitarian cases.” We would argue that I-539 and I-485 applications should be considered to be extensions of humanitarian relief as statutory protections under 8 USC 1367 apply. We will seek clarification/confirmation, but in the interim, please advise ASISTA if you are seeing issuance of NTAs in denied adjustment applications for survivors, by contacting questions@asistahelp.org.

- C. **NTA will not be issued concurrent with denial:** Generally USCIS will not issue NTA immediately upon denial, but rather after motions and appeals period has run (generally 33 days from the date of denial or sooner in cases where dealing with a revocation). Language will be added to denials warning applicants that if they do not have lawful presence after the denial and do not depart the U.S., USCIS may issue NTA.

ASISTA Note: The additional language of issuing an NTA if the noncitizen does not leave the country may have a chilling effect of keeping noncitizens from pursuing available appeals and MTR. It will be important to educate clients on their rights in the event of a denial.

² USCIS indicated specifically that I-140 petitions are not applications and are not included in NTA memo implementation.

II. Background on June 2018 NTA Policy Memo

The guidance outlines how USCIS will issue NTAs and refer cases to ICE in furtherance of enforcement priorities identified in Executive Order 13768, [Enhancing Public Safety in the Interior of the United States](#). This new policy memo supersedes Policy Memorandum 602.0050 NTA guidance from Nov 2011. This memo expands the cases in which USCIS will issue an NTA but does not address the exercise of discretion in the adjudication of cases, which will be addressed in a separate memo.

Policy memoranda concerning DACA related benefits was issued in conjunction with this memo and will be applied to cases involving DACA recipients and requestors, which can be viewed [here](#). This new memo indicates that the referral policy outlined in the 2011 memo will apply to DACA requestors and DACA recipients.

This NTA PM updates the policy for the following categories of cases where individual may be removable.

- Fraud where substantiated, or where there is evidence of abuse of a program related to receipt of public benefits.
- Criminal cases where one has been charged, convicted of a criminal offense or committed acts that constitute a chargeable criminal offenses even if criminal conduct was not the basis of denial or a charged ground of removability. USCIS may refer cases to ICE before adjudication of benefit request pending before USCIS without issuing NTA
- Cases in which N-400 is denied on GMC grounds because of criminal offense
- Cases in which an individual is unlawfully present after application is denied.

Policies around the issuance of NTAs where there are identified national security concerns or where the issuance of an NTA is required by statute or regulation remain unchanged.

III. Procedure

- A. Will USCIS consider exceptions to the issuance of NTAs such as physical impossibility of departure?

USCIS answer: If adjudicator believes prosecutorial discretion is warranted, may submit recommendation to prosecutorial discretion review panel, which will review whether prosecutorial discretion is warranted based on facts of case. (See Section IX below).

- B. What will happen if an applicant has multiple cases pending?

USCIS answer: Generally, officers will make sure all cases have been adjudicated prior to issuing NTA. However, USCIS may issue NTA as appropriate prior to adjudication of all applications.

C. Can an attorney request USCIS issue an NTA?

USCIS answer: Accredited representatives with pending or adjudicated case may request USCIS to issue an NTA in order to seek lawful status or other relief in removal proceedings. Request must be made in writing to office with jurisdiction over the case.

D. What types of criminal issues would be looked at in the new NTA policy?

USCIS answer: USCIS recommend looking at INA 212(a)(2) and INA 237(a)(2) which list removable crimes, some of which don't require conviction.

E. What criteria would adjudicator use to determine risk to public safety?

USCIS answer: To maintain integrity of internal processes, USCIS will not comment on specific criteria, but officers will refer cases with public safety concerns.

F. How does USCIS plan to inform people about the NTA policy memo implementation?

USCIS answer: USCIS has issued a news release, and will post updates on their website and have additional public engagement as implementation continues.

G. Can USCIS cancel NTA if case is reopened?

USCIS answer: If the NTA has been filed with Immigration Court, USCIS is unable to cancel the NTA. USCIS will coordinate with ICE if there has been a favorable decision on motion or appeal.

H. If application is withdrawn, will the withdrawal lead to an NTA?

USCIS answer: Withdrawal of benefit request does not interrupt USCIS' ability to enforce if an individual is removable, even if withdrawal prior to adjudication.

I. Where can the NTA process guidance be found?

USCIS answer: USCIS operational guidance is not publically available. Information for stakeholders will be available on USCIS website.

J. What is timeline for issuance of NTA?

USCIS answer: Generally, USCIS will not issue an NTA upon denial of a benefit request, but will wait until expiration of appeal or motion period (33 days from date of denial or

shorter period may apply in case of revocation). If they are no longer in period of authorized stay, NTA may be issued.

- K. The NTA policy memoranda requires the issuance of an NTA in the event of a denial and evidence of abuse of public benefits? What is the standard for this? What training will adjudicators receive in making this determination.

USCIS answer: This first stage of the implementation of the NTA policy guidance does not include abuse of public benefits cases.

IV. Training

- A. How is USCIS prepping adjudicators to implement this policy?

USCIS answer: USCIS had training for officers who currently generate NTAs and will continue to have training for officers who will be issuing NTAs.

- B. Will all officers adjudicating filings be given training and have authority to issue NTAs or only some? How are NTAs reviewed before being issued?

USCIS answer: 8 CFR 239.1 designates which officers are authorized to issue NTA. Prior to issuing NTA, they are carefully reviewed to determine they are legally sufficient and complies with policy. USCIS will evaluate training needs and provide trainings as needed. USCIS has prepared training materials. NTAs may have additional review prior to issuance.

V. Motions and Appeals

- A. How does USCIS handle case where applicant can file MTR or appeal? What if application can be re-filed?

USCIS answer: Applicants will have 33 days from the date of denial to file appeal or motion. Shorter appeal period may apply, such as revocation of approval (18 day deadline). No extensions. Generally, denial of an application does not bar refiling.

- B. How long will offices wait post denial to issue NTA?

USCIS answer: Generally not immediately and USCIS will wait for expiration of appeal/motion period, but USCIS reserves right to issue NTA at any time.

- C. Any concerns about processing times for appeals lengthening in response to more denials?

USCIS answer: No indication of increase in denials based on this policy memoranda. Processing times listed on USCIS website.

- D. What if case doesn't qualify for administrative relief? Is refiling with new fee the only option?

USCIS answer: Denial doesn't bar someone from re-submitting application. If appeal is filed timely, USCIS will generally not issue NTA; however, USCIS reserves the option to issue an NTA before or after the appeal as appropriate.

- E. If NTA issued but USCIS Motion to Reopen is granted, how will the NTA be handled?

USCIS answer: USCIS generally will not issue NTA until Motions are adjudicated. If removal proceedings started prior to grant of Motion to Reopen, USCIS will work with ICE to make sure ICE is aware of favorable decisions.

- F. Under new NTA policy, will USCIS be issuing NTAs after denials of I-601a provisional waivers?

USCIS answer: Provisional waivers do not confer status or authorize stay, and they are not included in this part of NTA policy memo implementation.

- G. Will there be publicly available scenarios illustrating cases that would result in NTA?

USCIS answer: USCIS will host public facing webpage as the NTA policy memo is implemented.

- H. Will kids be treated differently than adults? If so, will they be more likely to receive prosecutorial discretion than adults?

USCIS answer: Individuals who are removable based on DHS enforcement priorities may be issued NTA regardless of age. Prosecutorial discretion is exercised on case by case basis. If officer encounters case, where prosecutorial discretion is permitted and compelling factors exist not to issue NTA, adjudicators can submit recommendation to prosecutorial discretion review panel, and Office Director must concur with recommendation.

VI. Processing times/Statistics

- A. How will the the NTA memo improve adjudication?

USCIS answer: This does not impact adjudication of cases except that they will now issue NTAs on a broader range of cases than in the past.

- B. What will be the impact of the NTA memo on processing times?

USCIS answer: USCIS has implemented range of processing and operation reforms; hired staff and expanded facilities to ensure that adjudications keep up with demand for services.

- C. Can USCIS provide NTA statistics?

USCIS answer: These reports are online and can be found “enforcement actions” and will provide website in transcript of Q&A.

ASISTA Note: the NTA statistics can be viewed here:

<https://www.dhs.gov/immigration-statistics/enforcement-actions>

- D. How many NTAs does USCIS expect to issue?

USCIS answer: USCIS expects NTA increase, not possible to provide exact data. USCIS has implemented range of processes to ensure ability to adjudicate applications keeps pace with increasing demand for services.

VII: ICE

Additional questions and answers on ICE will be posted on USCIS website. The NTA policy memo says that USCIS will continued to conduct administrative review during removal proceedings. If USCIS takes favorable action on appeal/MTR, USCIS should advise ICE so appropriate action can be taken in removal proceedings. The NTA policy memo does not change appeal rights. USCIS not limited to issuing NTA to after appeal. If proceeding commence prior to appeal grant, then cis will work with ice to make sure ice is aware of favorable action.

- A. Why does USCIS prioritize NTAs when someone is only charged with crime. Aren't there due process concerns?

USCIS answer: The policy memo says an NTA will be issued if benefit denied and individual is removable. Sometimes someone may be removable regardless of charged crime, following the guidance in the executive orders.

- B. Will NTA policy mean that there will be more ice arrests at uscis?

USCIS answer: NTAs may be served by regular mail or in person. Ice enforcement not directly linked to USCIS NTA memo issuance.

- C. Can we say with certainty that USCIS will refer more people to ICE?

USCIS answer: USCIS will probably refer fewer people to ICE. Before, USCIS could referred people to ICE then ICE would decide whether to issue NTA. If they declined, USCIS will continue with the adjudication. Now, CIS will not need referral to ICE, rather will just issue NTA themselves.

VIII.Fraud

- A. New memo calls for NTA whenever evidence of fraud, wilful misrepresentation, or abuse of public benefits in the record. There will be cases where there may be fraud committed by a party other than applicant is present (like attorney, notario). Will suspected fraud on part of another actor result in NTA for applicant or beneficiary?

USCIS answer: This part of implementation does not change process for issuing NTAs for cases with fraud.

- B. Will USCIS issue NTA for Fraud without NOID or RFE?

USCIS answer: Generally, USCIS will issue RFE or NOID in cases where fraud suspected.

- C. Before, USCIS required formal statement of findings (SOF) where suspected of fraud. Is the issuance of an SOF still policy?

USCIS answer: Generally SOF is not necessary to issue NTA. New policy allows USCIS to issue NTA if fraud is part of record and person is removable. NTA will be issued even if denied for reason other than fraud if fraud is a part of the record.

- D. Why are cases involving fraud sometimes not charged as fraud on NTA?

USCIS answer: Charge is determined by evidence of record, as appropriate.

IX. Prosecutorial Discretion Review Panel

- A. Who serves on prosecutorial discretion panels?

USCIS answer: 2018 policy guidance requires establishment of prosecutorial discretion panel. Each panel has to have local supervisory officer, and local USCIS office of chief counsel attorney who will review recommendations for prosecutorial discretion to not

issue an NTA. The panel will provide recommendation to Field Officer Director to make a decision whether to issue prosecutorial discretion. The guidance mandates one prosecutorial discretion panel in each office and it will only convene when recommendation to not issue NTA is submitted.

- B. How do you expect prosecutorial discretion outlined memo to be exercised? Will prosecutorial discretion apply to whole memo?

USCIS answer: Prosecutorial discretion may be exercised on case by case basis through panel. If adjudicator thinks prosecutorial discretion is warranted, they may submit recommendation to panel, which will decide whether to recommend prosecutorial discretion based on individual facts of case. Office director must concur with recommendation in order to exercise prosecutorial discretion. When reviewing cases for prosecutorial discretion, officers will take into consideration of positive and negative equities.

- C. Could there be multiple prosecutorial discretion panels in one area? Can USCIS identify where these panels are maintained?

USCIS answer: Each office authorized to issue NTAs will maintain its own prosecutorial discretion review panel.

- D. What is the status of discretionary adjudication guidance that is forthcoming?

USCIS answer: This memo is under development.

- E. How does NTA memo work with unlawful presence memo?

USCIS answer: The NTA PM not drafted in conjunction with any other memo. If removable upon denial, then NTA would be appropriate.

- F. How does the NTA memo interact with RFE and NOID memo?

USCIS answer: If denial issued in error (e.g. for piece of evidence that was submitted but not considered) . The Notice to Appear policy memo was not drafted in conjunction with any other memo, and does not limit any appellate rights.

X. Impact on Forms of Relief

- A. Will the NTA policy memo perpetuate family separation?

USCIS answer: No. PM does not change USCIS issuance of NTAs in CFI or affirmative asylum proceedings.

- B. Will USCIS issue NTAs for people affected by termination of TPS designation?

USCIS answer: The NTA memo does not change TPS cases as described in 8 CFR 244. TPS provisions re: NTA issued in 2003 still apply. If USCIS issues an unfavorable decision whose TPS designation terminated and that person is removable and otherwise not lawfully present, officers may issue NTA. This provision is not included in this part of NTA PM implementation.

- C. What is the effect on DACA?

USCIS answer: PM does not apply to (1) DACA requestors for data related requests; (2) data recipients where government is seeking termination of DACA approval. Adjudicators must continue to see the November 2011 guidance on referral of cases and issuance of NTAs to determine whether RTI or NTA should be issued.

- D. Will there be additional FAQs for DACA and TPS recipients?

USCIS answer: Additional FAQ that address DACA and TPS will not posted with general FAQs. These are separate processes.

- E. If someone applies for non data benefit, will information submitted in DACA request be used to issue NTA for them or for family?

USCIS answer: It depends. When processing non DACA application, USCIS will refer to PM 602-0050 to determine whether any information in conjunction with DACA request may be included or relied upon.

For Feedback about the event: public.engagement@uscis.dhs.gov