



# REPRESENTING NATURALIZATION CLIENTS IN THE WAKE OF USCIS'S NEW NTA MEMO

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## I. Introduction

The United States Citizenship and Immigration Service's (USCIS) Policy Memorandum of June 28, 2018,<sup>1</sup> outlined new guidance for when USCIS will issue a Notice to Appear (NTA) to applicants requesting immigration benefits. An NTA is the charging document that initiates removal proceedings.<sup>2</sup> USCIS has always had the authority to issue NTAs to applicants who are removable. But this recent guidance represents a significant departure from prior USCIS practices in that it requires USCIS to issue an NTA in many circumstances, including certain cases involving fraud, criminal histories, and where the benefit is denied and the applicant is not in lawful status. Practitioners must therefore be aware of how the NTA Memo may affect all of their clients.

This practice advisory will outline the NTA Memo's impact on naturalization cases. Section II discusses the NTA Memo's specific directives for naturalization cases; Section III provides the legal context for when a naturalization applicant can be placed in removal proceedings; Section IV discusses best practices for preparing a naturalization application under the new NTA Memo; and Section V offers practice tips if your naturalization client is placed in removal proceedings.

For practice advisories on the NTA Memo's effect on other forms of relief, please visit the ILRC's website at [www.ilrc.org](http://www.ilrc.org).<sup>3</sup>

## II. Application of the NTA Memo to Naturalization Cases

The NTA Memo specifically mentions naturalization applications twice. First, it directs USCIS to issue an NTA "in all cases if the N-400 [naturalization application] has been denied on good moral character (GMC) grounds based on the underlying criminal offense and provided the [applicant] is removable."<sup>4</sup> Second, it authorizes USCIS to issue an NTA pre-adjudication in certain circumstances when the applicant is deportable.<sup>5</sup> We will address each ground in turn.

### A. N-400 Denials

The NTA Memo instructs that USCIS "will" issue an NTA after an N-400 has been denied when: 1) the application was denied for a lack of good moral character based on an underlying criminal offense, AND 2) the applicant is removable. USCIS has always had the authority to issue NTAs in these circumstances, but now USCIS is mandated to issue an NTA when an applicant meets these criteria (unless USCIS exercises prosecutorial discretion, see Sections II(B) and IV(B)).

Although USCIS has broad discretion to issue an NTA whenever an applicant is removable, it is worth noting that this provision of the new NTA Memo contemplates referral only *after* the application is denied. Additionally, it specifically directs USCIS to issue an NTA when the applicant was denied for lack of good moral character based on an underlying

criminal offense. Interestingly, it does not direct USCIS to issue an NTA if the applicant is denied for another reason (failure to speak English, denial of good moral character for non-criminal issues, etc.) and is removable. Because of the broad language regarding deportable naturalization applicants in the next section, however, the ILRC believes it is even riskier than before for all deportable applicants to apply to naturalize.

## B. Pre-Adjudication

The second time the NTA Memo mentions naturalization applicants is trickier to interpret. The memo states that USCIS “may issue” an NTA *before* the N-400 is adjudicated if:

- a. The applicant is eligible for naturalization but is deportable under INA § 237 (“Examples include applicants convicted of aggravated felonies prior to November 29, 1990, or applicants convicted of deportable offenses after obtaining lawful permanent resident (LPR) status that do not preclude GMC or otherwise make an applicant ineligible for naturalization”); or
- b. The applicant was inadmissible at time of admission.
- c. Unless USCIS exercises prosecutorial discretion, as outlined by the NTA Memo.<sup>6</sup>

This language encompasses a broader range of applicants (*any* deportable applicant) than the first provision, see Section II(A), and specifically includes people who are otherwise eligible for naturalization. See Section IV(A) for a discussion of aggravated felonies and deportable offenses. But this language also specifically references USCIS’s authority to exercise prosecutorial discretion: “Unless USCIS exercises prosecutorial discretion in favor of the [applicant], as described below in Section VIII, an NTA will be issued in these two situations before adjudication.”<sup>7</sup> USCIS has confirmed that it can exercise prosecutorial discretion, e.g., not issue an NTA, for anyone applying for any benefit, even if the applicant falls under the criteria listed in the NTA Memo.<sup>8</sup> Perhaps the NTA Memo’s specific mention of prosecutorial discretion in the context of pre-adjudication referrals means that it may be more likely that a sympathetic applicant may be adjudicated, and only upon denial, issued an NTA. Perhaps the fact that the examples of deportable applicants in part (a) of the language above are all based on crimes means an applicant deportable for non-criminal issues would be treated more favorably. But the broad language authorizing pre-adjudication referral, except where prosecutorial discretion is exercised, seems to increase the risk of an NTA for *any* deportable applicant. A deportable applicant should thus be prepared to receive an NTA if they apply to naturalize. See Section IV.

## C. Impact of New NTA Memo

It remains to be seen exactly how the NTA Memo will be applied to naturalization applications. But as of the date of this advisory (December 2018), we have already heard, anecdotally, of an increased number of NTAs issued to deportable naturalization applicants both pre- and post-adjudication. Reading all of the provisions above together, it seems that deportable applicants are at an increased risk applying for naturalization, even if they are otherwise eligible to naturalize. See Section IV.<sup>9</sup>

## III. Remember – the Immigration Laws Have Not Changed!

In order to defend your clients from the intended harsh effects of the NTA Memo, it is important to understand the legal landscape governing removal proceedings and naturalization applicants.

First of all, remember that the NTA Memo is only a policy memo and has not changed either the eligibility requirements for naturalization, or the grounds for removal. As USCIS has emphasized repeatedly, the NTA Memo does not affect the exercise of discretion during the adjudication of an application.<sup>10</sup> In other words, the NTA Memo can apply pre-adjudication, or post-adjudication, but it does not affect how a case is decided. Secondly, USCIS cannot issue an NTA for a naturalization applicant who is not removable, even if naturalization is denied on GMC grounds.

## A. The Government Bears the Burden of Proof in Removal Proceedings

**Deportability.** A lawful permanent resident (LPR) may be found deportable if they come within any of the grounds set forth in INA § 237, including certain criminal convictions, false claims to U.S. citizenship, unlawful voting, etc. The government is required to prove deportability by clear and convincing evidence.<sup>11</sup> If the government cannot meet its burden, an LPR retains their status. If the government does meet its burden and the immigration judge finds that an LPR is deportable, the LPR still has an opportunity to apply for any relief from deportation (LPR cancellation of removal, re-adjustment of status, etc.) for which they are eligible.

**Admissibility.** LPRs can only be found inadmissible if (a) they were inadmissible at the time of initial admission, or (b) if, during a subsequent return to the United States after travel abroad, the government can prove that they fall into one of the categories described in INA § 101(a)(13)(C). These include if the LPR:

- (i) has abandoned or relinquished that status;
- (ii) has been absent from the United States for a continuous period in excess of 180 days;
- (iii) has engaged in illegal activity after having departed the United States;
- (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings;
- (v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a); or
- (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.<sup>12</sup>

Returning LPRs who are subject to the grounds of inadmissibility have more rights than other noncitizens.<sup>13</sup> For example, under INA § 235(b)(2), a returning LPR charged as an “arriving alien” has the right to a removal hearing under INA § 240. Importantly, the government bears the burden of proving, by *clear and convincing evidence*, that a returning LPR comes within one of these categories and therefore is an applicant for admission and subject to the inadmissibility grounds.<sup>14</sup> Even once the government has shown a returning LPR is subject to the grounds of inadmissibility, the government bears the burden of proving the LPR is in fact inadmissible by clear and convincing evidence.<sup>15</sup>

## IV. Strategies for Handling Naturalization Cases Under the New NTA Memo

### A. Screen Clients Carefully for Any Deportability Issues

It is critical to screen naturalization clients carefully before filing any application with USCIS. Any applicant who may be deportable should understand they may well be placed in removal proceedings if they apply to naturalize. In order to determine whether an applicant may be deportable, practitioners should conduct a detailed interview with the client to assess any prior criminal or immigration violations, the circumstances of their initial admission, any dates of travel abroad, and any issues with admissibility upon return from abroad.<sup>16</sup> Where there are any potential issues or uncertainties, practitioners should file background checks. For criminal issues, this could include a national FBI background check, a state criminal background check, and any court-specific records requests that may be needed. For information about an applicant’s immigration history and prior applications, practitioners can file a request under the Freedom of Information Act (FOIA) with USCIS, ICE, CBP, OBIM, EOIR, or any other federal agency. For a guide to filing FOIA requests, see ILRC, *A Step-By-Step Guide to Filing FOIA Requests with DHS* (Nov. 2017), <https://www.ilrc.org/step-step-guide-completing-foia-requests-dhs>.

**Example:** Pablo has been an LPR for 15 years. He disclosed that he was arrested 12 years ago for marijuana. He tells you that he did not serve any time in jail and he is pretty sure the case was dismissed.

Pablo should not apply for naturalization until it is clear how this case was resolved. If he was convicted (even if he served no time in jail, had the case later dismissed for rehabilitative purposes, and has been clean since then), he could have a deportable controlled substances offense. You should file a criminal background check and obtain the state court records to learn more about what happened.

**Note: Older Aggravated Felony Convictions.**<sup>17</sup> Conviction of an aggravated felony has two serious potential consequences for a naturalization applicant. First, if the conviction occurred on or after November 29, 1990, it is a *permanent* bar to establishing GMC, and therefore an absolute and permanent bar to eligibility for naturalization. Second, conviction of an aggravated felony is a ground of deportation, although two federal circuits have held that convictions from before November 18, 1988 do not cause deportability under the aggravated felony ground. We will discuss each consequence in turn.

An aggravated felony conviction that occurred on or after November 29, 1990 is a *permanent* bar to establishing GMC,<sup>18</sup> which is a requirement for naturalization. As a permanent bar, the conviction will destroy eligibility for naturalization even if it occurred before the statutory GMC time period. An aggravated felony conviction from before November 29, 1990 is not a permanent bar to a finding of GMC.<sup>19</sup>

**Example:** Chen became an LPR in 1981. In October 1995, he was convicted of fraud where the loss to the victims exceeded \$10,000. Assume that this is an aggravated felony<sup>20</sup> and that it is Chen's only conviction. Now Chen would like to apply for naturalization. He must show GMC for the preceding five years. Unfortunately, Chen cannot make this showing. Even though the conviction occurred far outside his five-year GMC period, as a post-November 29, 1990 aggravated felony it is a *permanent* bar to establishing GMC. (It also is a deportable conviction.)

If instead Chen's conviction had occurred in October 1990, it would not be a permanent bar to establishing GMC or eligibility for naturalization, because that date is before November 29, 1990. (But it still would be a deportable conviction.)

Even if an LPR can establish the required GMC, it is risky to apply for naturalization with a deportable conviction, including an old one. As mentioned in Section II, the NTA Memo specifically authorizes pre-adjudication issuance of an NTA for cases where the person has an aggravated felony conviction from before November 29, 1990.

Unfortunately, even immigration relief that eliminates an aggravated felony conviction as a ground of removal does not eliminate it as a permanent bar to establishing GMC. A few forms of relief will waive an aggravated felony as a removal ground. For example, under INA § 212(c), the predecessor to the current LPR cancellation, an LPR can waive deportability for an aggravated felony conviction (or inadmissibility or deportability based on almost any conviction) received before April 24, 1996. Or, in some cases an LPR can adjust status as a defense to removal, despite having an aggravated felony conviction.<sup>21</sup> While relief can prevent a conviction from making the person removable, courts have held that it does *not* eliminate the conviction as a bar to establishing GMC. The GMC bar at INA § 101(f)(8) is based simply on having been "convicted" of an aggravated felony, whether or not the conviction makes the person removable. The only real solution is to go back to criminal court and vacate (eliminate) the conviction due to legal error.

**Example:** Let's return to Chen and say that his aggravated felony conviction occurred in November 1995. This is his only conviction. Last year he was put in removal proceedings and was granted a § 212(c) waiver. Now he is no longer removable for the conviction. However, he still is permanently barred from establishing GMC, because he still has been "convicted" of an aggravated felony.

If instead Chen's conviction had been from October 1990, he would be in good shape. He would not be deportable because of the grant of § 212(c) relief. He could establish GMC because the aggravated felony conviction was from before November 29, 1990.

The second consequence of an aggravated felony conviction is that the LPR is deportable under INA § 237(a)(2). Courts are split as to whether this causes deportability, regardless of the date of conviction. The Seventh and Ninth Circuit Courts of Appeals have held that aggravated felony convictions from before November 18, 1988 (the effective date of legislation that created the aggravated felony ground) do *not* trigger deportability.<sup>22</sup> The Board of Immigration Appeals and the Second and Eleventh Circuit Courts of Appeals have ruled that they do trigger deportability.<sup>23</sup>

**Example:** Sean lives in New York, which is within the jurisdiction of the Second Circuit. He is a long-time LPR who has a conviction from 1986 of a domestic violence offense for which he was sentenced to one year, suspended. This is an offense that today is classed as an aggravated felony. Is he barred from naturalizing for lack of good moral character? Is it safe for him to apply for naturalization? Also, Sean's girlfriend lives in Chicago (in the Seventh Circuit) and Sean is thinking of moving there.

**Answers:** Sean is not barred from establishing GMC, because his aggravated felony conviction is from before November 29, 1990. But Sean is deportable where he lives now, in New York, because the Second Circuit held that even a conviction from before November 18, 1988 will trigger the aggravated felony deportation ground. That makes it risky to apply for naturalization, because USCIS easily could decide to issue an NTA against Sean.

Sean could consider some alternatives. Perhaps the safest would be to try living in Chicago, because Chicago is under the jurisdiction of the Seventh Circuit, which along with the Ninth Circuit has held that a pre-November 18, 1988 conviction does *not* trigger the aggravated felony deportation ground. If his residence was Chicago and he applied for naturalization there, he could not be charged with being deportable under the aggravated felony ground. But Sean must get an expert opinion to make sure that his conviction does not cause deportability under some *other* ground, e.g., as a crime involving moral turpitude or crime of domestic violence. The November 18, 1988 effective date only helps with the aggravated felony deportation ground. (Note that another important effective date is that a conviction from before September 30, 1996 does not trigger the domestic violence deportation ground. See next section.) In addition, if Sean ever has traveled outside the United States, he also needs to make sure he is not deportable for having been inadmissible at last entry (see section below).

If moving to Chicago is not feasible, or if his conviction triggers an additional deportation ground beyond aggravated felony, Sean should get expert counsel as he considers whether he might want to (a) try to vacate the conviction in the criminal court jurisdiction where he received it, or (b) apply for naturalization even though he risks being placed in removal proceedings (among other things, he needs to know if he would be eligible for some relief from removal, and the chances of actually winning the case), or (c) just lay low, not travel, not renew his green card, and hope for the best.

**Note: Older Convictions of Domestic Violence, Stalking, or Child Abuse.** Another key effective date applies to the "domestic violence" deportation ground at INA § 237(a)(2)(E). Under that ground, an LPR who is convicted of a "crime of domestic violence," "stalking," or a "crime of child abuse, neglect, or abandonment" is deportable. (All of these terms have federal definitions, and are subject to a strict legal analysis under the categorical approach.) In addition, an LPR is deportable if a judge in a criminal or civil court has found that the person violated a portion of a domestic violence protective order aimed at preventing threats, injury, or repeat harassment.<sup>24</sup>

For this ground to apply, the conviction, or the conduct that was found to have violated the protective order, must have occurred on or after September 30, 1996.<sup>25</sup> For instance, in an example above, LPR Sean has some kind of domestic violence conviction from 1986. We know that this conviction cannot trigger deportability under the domestic violence

ground, because it occurred before September 30, 1996. (But we must check to make sure it is not does not cause deportability under the aggravated felony, crime involving moral turpitude, firearms, or other grounds).

**Inadmissibility at Time of Initial Admission.** As part of this analysis, check how the client obtained their LPR status to ensure they were in fact eligible. If the client was inadmissible at the time of their first admission, they should never have acquired lawful permanent residence. At the time of naturalization, the adjudicator could discover this and place the person in removal proceedings for being inadmissible at the time of entry or adjustment under INA § 237(a)(1)(A). If the government meets its burden to show that the person never acquired lawful permanent residence, the person is deportable and not eligible for LPR cancellation of removal under INA § 240A(a) (although they could be eligible for other relief from removal).

**Example:** Maribel obtained her green card through her LPR father when she was 25. She got married right before the interview and did not tell the adjudicator.

Maribel was not eligible to obtain a green card after she got married because there is no family-based category for LPRs to petition their married sons and daughters. If she applies to naturalize, the adjudicator will likely notice the date of her marriage and the date she obtained her green card and may well issue an NTA to place her in proceedings. She should not apply for naturalization unless she is prepared to apply for back-up relief from deportation in immigration court.

**Inadmissibility at Time of Subsequent Admission.** As described in Section III(A), an LPR does not make a new admission after returning from a trip outside the United States unless that person falls within the categories set out in INA § 101(a)(13)(C).<sup>26</sup> If they fall within one of those categories, check to make sure they were not inadmissible upon return. If so, they can be found to be deportable based on being inadmissible at time of entry, even if they were erroneously admitted at the border.

**Example:** Yuval obtained his green card in 2005. In 2015, he was convicted of theft, a crime involving moral turpitude, and sentenced to 8 months. He went to his cousin's wedding in Canada in 2017 for a week. He was let back into the United States without any questions.

Yuval is deportable for being inadmissible at time of last admission. Because of his conviction, he falls within the categories at INA § 101(a)(13)(C) and was subject to the grounds of inadmissibility when he re-entered the country. His conviction made him inadmissible. It does not matter that he was let back in; he can be placed in deportation proceedings now.

Whether an LPR in this circumstance may be eligible for relief from removal depends on how long they were an LPR before they became inadmissible and whether a waiver of that inadmissibility is available.<sup>27</sup> Such an individual might be eligible for LPR cancellation of removal under INA § 240A(a) or even for re-adjustment of status, depending on the circumstances.

## B. Warn Clients Who Are Both Eligible for Naturalization AND Deportable

Where a naturalization applicant is eligible for naturalization, but at the same time is deportable, the applicant may be placed in proceedings before the application is adjudicated. As discussed in Section II(B), the NTA Memo explicitly authorizes USCIS to issue NTAs pre-adjudication when the applicant is deportable. Whereas it has always been risky to apply for naturalization if the client is deportable, those risks have increased with the new NTA Memo. Instead of warning deportable applicants that they *may* be referred to removal proceedings, practitioners now need to warn deportable applicants that they likely *will* be referred to removal proceedings.

In such cases, you must discuss this possibility with your client and assess all options. If the client is deportable because of a criminal conviction, consider the possibility of obtaining post-conviction relief before filing the N-400.<sup>28</sup> If the deportable conviction can be eliminated for immigration purposes, your client will no longer be at risk. If the deportable conviction cannot be eliminated, your client must understand that filing an N-400 will likely result in an NTA.

If your client, understanding the risks, insists on going forward with a naturalization application, it is critical to confirm that they are eligible for some form of relief from removal, such as LPR cancellation of removal or re-adjustment of status. Warn them that even if they ultimately win their case in immigration court (which is never guaranteed), the process could be expensive and take many years. Depending on why they are deportable, they could also be subject to mandatory detention. If you are not prepared to represent them in court, advise them to find other counsel in advance.

If the client insists on going forward, or the naturalization application has already been filed, your client can also ask for prosecutorial discretion. The NTA Memo specifically authorizes USCIS to exercise prosecutorial discretion and not issue an NTA in cases where the naturalization applicant is deportable.<sup>29</sup> At this time, it is unclear how prosecutorial discretion might be applied and what kinds of cases USCIS might find worthy of prosecutorial discretion. Until more is known, it seems prudent to articulate a request for prosecutorial discretion at any point where a denial or referral seems likely and support the request by submitting as much evidence as possible to establish that your client merits a favorable exercise of discretion and that placing them in removal proceedings would be contrary to the interests of the United States, such as testimonials from family members and friends as well as employers, landlords, pastors, and others in the client's community that demonstrate her contributions to society.<sup>30</sup>

### C. Screen Clients Carefully for Back-Up Relief

Screen clients thoroughly for eligibility for relief from removal, such as LPR cancellation of removal under INA § 240A(a), re-adjustment of status under § 245(a), a waiver of inadmissibility under § 212(h), or other forms of relief from removal. For more information on other forms of relief, see ILRC publications such as *Removal Defense and Remedies and Strategies for Permanent Resident Clients*.

### D. Consider Appealing the Naturalization Denial

If your client's naturalization application was denied, consider whether you have grounds to appeal the denial. USCIS has stated that it generally will not issue an NTA for deportable applicants whose applications were denied until the appeal period has lapsed.<sup>31</sup> However, USCIS retains the authority to issue an NTA for any deportable applicant, even before the application has been adjudicated, so there is no guarantee that your client will not be issued an NTA earlier in the adjudication process. See Section II(B).

## V. What to Do If Your Naturalization Client is Issued an NTA

If your client is issued an NTA, check to see if there are any grounds to terminate proceedings, such as that the NTA is legally defective, or that the government cannot prove that your client is deportable. If not, apply for any back-up relief for which your client might be eligible.

### A. Effect of Removal Proceedings on the N-400

There is conflicting authority as to when and whether USCIS is permitted to adjudicate naturalization applications of individuals who are in removal proceedings. Generally, courts have held that this is not permitted under INA § 318, which provides that the "Attorney General" (now USCIS, Department of Homeland Security) cannot adjudicate a naturalization application if removal proceedings "pursuant to a warrant of arrest" are pending against the applicant. Significantly, the Ninth Circuit recently interpreted § 318 to mean that USCIS is only barred from adjudicating the application if the removal proceedings really are "pursuant to a warrant of arrest." *Yith v. Nielsen*, 881 F.3d 1155, 1165-68 (9th Cir. 2018). It found

that a warrant of arrest is distinct from an NTA. Thus, if removal proceedings in the Ninth Circuit are brought only pursuant to an NTA, advocates should argue that USCIS is not barred from adjudicating the case. In the NTA memo, USCIS instructs that in light of *Yith*, USCIS staff in the Ninth Circuit should talk to counsel before filing an NTA.<sup>32</sup>

If USCIS denies a naturalization application, the applicant can appeal to a federal district court, which can make a *de novo* review of the basis for the denial. The Ninth Circuit has held that a federal district court can consider an appeal even if the person is in removal proceedings, because INA § 318 does not limit jurisdiction of courts, only of the executive branch.

If USCIS does not adjudicate an N-400 application within 120 days after the examination (naturalization interview), federal district courts have jurisdiction to adjudicate the application. In the above-mentioned *Yith* decision, the Ninth Circuit held that federal district courts retain this jurisdiction regardless of whether the person is placed in removal proceedings, or whether the removal proceedings are pursuant to a warrant of arrest. For further discussion of *Yith*, see ILRC, *Yith v. Nielson and Defense Strategies for Naturalization Applicants in Removal Proceedings*, (Dec. 2018).

## B. Check to See If the NTA Is Legally Defective

The Supreme Court, in *Pereira v. Sessions*, recently held that an NTA that does not contain a notice of the time and date of the hearing does not meet the statutory requirements of an “NTA” in 8 U.S.C. § 1229(a).<sup>33</sup> Although this case was in the context of cancellation of removal, advocates have been using this reasoning to argue that such an NTA cannot vest jurisdiction in the immigration court, and therefore that proceedings can never commence unless the NTA satisfies all of the statutory requirements. Unfortunately, the Board of Immigration Appeals (BIA), in *Matter of Bermudez-Cota*,<sup>34</sup> limited *Pereira* and held that “a notice to appear that does not specify the time and place of an alien’s initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, so long as a notice of hearing specifying this information is later sent to the alien.”<sup>35</sup>

Advocates should check to see if any NTA issued in their client’s case satisfies the requirements outlined by *Pereira* and *Bermudez-Cota*. If you are able to successfully challenge the legal sufficiency of the NTA, whether because the time and date of the hearing are missing or for other omissions, the removal proceedings will be found to be defective, as if they had never begun.<sup>36</sup> The implications of *Pereira* are still being litigated, so make sure to check your circuit for updates and to see if there are any additional ways to challenge an NTA.

## C. Hold the Government to its Burden of Proof

Whether your client is being charged under a ground of deportability, or a ground of inadmissibility, remember that the government bears the burden of proof by *clear and convincing evidence*.<sup>37</sup> See Section II. Do not, therefore, admit the allegations in the NTA; rather, make the government prove the allegations and challenge the government’s assertions whenever applicable. For more information on removal defense, see the ILRC’s manual, *Removal Defense: Defending Immigrants in Immigration Court*, <https://www.ilrc.org/defending-immigrants-in-immigration-court>.

## D. Apply for All Possible Forms of Relief from Removal

As mentioned in Section IV, before deciding whether to go forward with a client’s N-400, it is necessary to research both whether they may be deportable or inadmissible, and whether they qualify for any relief from removal. There are various forms of relief from removal that are available to LPR clients, depending on the ground of deportability or inadmissibility alleged, the amount of time the person has been an LPR, and the existence of family members who might be able to petition for them. A full discussion of each and every possible remedy is beyond the scope of this practice advisory; however, we recommend that practitioners utilize both ILRC’s and others’ resources to determine the relief that may be available to each client.<sup>38</sup>



## End Notes

- <sup>1</sup> USCIS, Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens PM-602-0050.1 (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> [hereinafter NTA Memo].
- <sup>2</sup> 8 U.S.C. § 1229(a).
- <sup>3</sup> See, e.g., ILRC, ASISTA, & AILA, *Annotated Notes and Practice Pointers: USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance*, (Dec. 2018), <https://www.ilrc.org/annotated-notes-and-practice-pointers-uscis-teleconference-notice-appear-nta-updated-policy-guidance>; ILRC, *Risks of Applying for SIJS in Affirmative Cases*, (Aug. 2018), <https://www.ilrc.org/risks-applying-special-immigrant-juvenile-status-sijs-affirmative-cases>.
- <sup>4</sup> NTA Memo, p. 7.
- <sup>5</sup> NTA Memo, pp. 8-9.
- <sup>6</sup> *Id.*
- <sup>7</sup> The NTA Memo outlines a strict process for any exercise of prosecutorial discretion not to issue an NTA. According to the NTA Memo, prosecutorial discretion in all cases, not just naturalization cases, can only be exercised after both a review by a Prosecutorial Review Panel and agreement by a Field Office Director, an Associate Service Center Director, the Assistant Center Director of the National Benefits Center, or the Deputy Chief of International Operations. See NTA Memo, pp. 10-11.
- <sup>8</sup> See, e.g., ILRC, ASISTA, & AILA, *Annotated Notes and Practice Pointers: USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance*, (Dec. 2018), <https://www.ilrc.org/annotated-notes-and-practice-pointers-uscis-teleconference-notice-appear-nta-updated-policy-guidance>.
- <sup>9</sup> See NTA Memo, p.8 (“For aliens removable under any other grounds not specifically addressed in this NTA Memo, USCIS will ensure all grounds for removability supported by the record are addressed and result in the issuance of an NTA, whenever appropriate.”).
- <sup>10</sup> See, e.g., ILRC, ASISTA, & AILA, *Annotated Notes and Practice Pointers: USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance*, (Dec. 2018), <https://www.ilrc.org/annotated-notes-and-practice-pointers-uscis-teleconference-notice-appear-nta-updated-policy-guidance>.
- <sup>11</sup> INA § 240(c)(3).
- <sup>12</sup> INA § 101(a)(13).
- <sup>13</sup> Noncitizens charged under the inadmissibility grounds who are *not* LPRs are required to prove either that they are clearly and beyond doubt entitled to be admitted, or that they are lawfully present in the United States pursuant to a prior admission, by clear and convincing evidence. See INA § 240(c)(2).
- <sup>14</sup> *Matter of Rivens*, 25 I&N Dec. 623, 624-7 (BIA 2011).
- <sup>15</sup> See *Landon v. Plasencia*, 459 U.S. 21 (1982); *Centurion v. Holder*, 755 F.3d 115, 118-20 (2d Cir. 2014); *Ward v. Holder*, 733 F.3d 601 (6th Cir. 2013).
- <sup>16</sup> See INA § 101(a)(13)(C).
- <sup>17</sup> For a brief definition and overview of aggravated felonies, see ILRC, *Practice Advisory: Aggravated Felonies*, (2017), <https://www.ilrc.org/practice-advisory-aggravated-felonies>.
- <sup>18</sup> See INA § 101(f)(8). Although this section states that one who has been convicted of an aggravated felony “at any time” is barred from establishing GMC, in fact there is a statutory effective date of November 29, 1990 in the legislation that created the permanent bar, the Immigration Act of 1990 (IMMACT 90), Pub.L. 101-649.
- <sup>19</sup> *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 851 (9th Cir. 2006); see also *Matter of Reyes*, 20 I&N Dec. 789 (BIA 1994).
- <sup>20</sup> See INA § 101(a)(43)(M)(ii).
- <sup>21</sup> For information on immigration relief, including INA § 212(c) relief, adjustment of status, and waivers under INA § 212(h), see summaries in ILRC, *Immigration Relief Toolkit*, (2018), [https://www.ilrc.org/sites/default/files/resources/relief\\_toolkit-20180827.pdf](https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf).
- <sup>22</sup> *Zivkovic v. Holder*, 724 F.3d 894 (7th Cir. 2013); *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1067-76 (9th Cir. 2011).
- <sup>23</sup> *Matter of Lettman*, 22 I&N Dec. 365 (BIA 1998) (*en banc*); *Lettman v. Reno*, 207 F.3d 1368 (11th Cir. 2000); *Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000).
- <sup>24</sup> See further discussion at ILRC, *Case Update: The Domestic Violence Deportation Ground*, (June 2018), <https://www.ilrc.org/case-update-domestic-violence-deportation-ground>.
- <sup>25</sup> The ground is effective for “convictions, or violations of court orders, occurring after” September 30, 1996, the IIRIRA date of enactment. IIRIRA § 350.
- <sup>26</sup> INA § 101(a)(13)(C) does not apply to acts committed before September 30, 1996. *Vartelas v. Holder*, 132 S.Ct. 1479 (2012).
- <sup>27</sup> See ILRC, *Remedies and Strategies for Permanent Resident Clients*, (2017), <https://www.ilrc.org/remedies-and-strategies-for-permanent-resident-clients>.
- <sup>28</sup> For more information on post-conviction relief, see <https://www.ilrc.org/immigrant-post-conviction-relief>.
- <sup>29</sup> NTA Memo, pp. 8-9.
- <sup>30</sup> *Id.* at 10 (“[P]rosecutorial discretion to not issue an NTA should only be exercised on a case-by-case basis after considering all USCIS and DHS guidance, DHS’s enforcement priorities, the individual facts presented, and any DHS interest(s) implicated (e.g., federal court litigation-related considerations or deconfliction with law enforcement priorities of other agencies)).
- <sup>31</sup> See, e.g., ILRC, ASISTA, & AILA, *Annotated Notes and Practice Pointers: USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance*, (Dec. 2018), <https://www.ilrc.org/annotated-notes-and-practice-pointers-uscis-teleconference-notice-appear-nta-updated-policy-guidance>.

<sup>32</sup> NTA Memo, p. 9.

<sup>33</sup> 138 S.Ct. 2105 (June 21, 2018).

<sup>34</sup> 27 I&N Dec. 441 (BIA 2018).

<sup>35</sup> *Bermudez-Cota*, at 447 (emphasis added).

<sup>36</sup> If you are able to challenge the legal sufficiency of the NTA successfully, the prohibition against USCIS adjudicating the N-400s (everywhere except the Ninth Circuit) while removal proceedings are pending would no longer apply. See Section V(A). If your client is eligible for naturalization and has an N-400 pending, this opens up the possibility of compelling USCIS to adjudicate the petition without further delay via a writ of mandamus under 28 USC § 1361. You may also be able to file the N-400 directly in federal district court if 120 days have passed since the N-400 was first filed with USCIS. However, if the person is still deportable USCIS or ICE could always issue a new NTA that complies with *Pereira* and *Bermudez-Cota* and place the person back in proceedings.

<sup>37</sup> INA § 240(c)(3) (burden of proving deportability); and see *Landon v. Plasencia*, 459 U.S. 21 (1982); *Centurion v. Holder*, 755 F.3d 115, 118-20 (2d Cir. 2014); *Ward v. Holder*, 733 F.3d 601 (6th Cir. 2013) (burden of proving inadmissibility of LPRs).

<sup>38</sup> See resources such as the ILRC's manuals, in addition to resources from the American Immigration Council (AIC), the American Immigration Lawyers Association (AILA), the National Immigration Law Center (NILC), and the Catholic Legal Immigration Network (CLINIC). For diagnostic aids and a short summary of forms of relief and their criminal record bars, see the free online resource, ILRC, *Immigration Relief Toolkit*, (2018), [https://www.ilrc.org/sites/default/files/resources/relief\\_toolkit-20180827.pdf](https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf).



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#### About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.