



RISKS OF FILING AFFIRMATIVE T VISA APPLICATIONS UNDER THE CURRENT NTA MEMO

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I. Introduction¹

T nonimmigrant status (often called a “T visa”) is a form of immigration relief for survivors of human trafficking that provides four years of lawful immigration status, employment authorization, access to certain public benefits, and the opportunity to apply for lawful permanent residency.² However, the current U.S. Citizenship and Immigration Services (USCIS) policy on Notices to Appear (NTA), which has been in effect since 2018, has drastically increased the risks of applying for T nonimmigrant status. Although T visas remain a vital pathway to lawful status for trafficking survivors, there are various considerations that trafficking survivors and their advocates should keep in mind when deciding whether to submit affirmative T visa applications.

The Department of Homeland Security (DHS) has authority to publish policy guidance on when it issues NTAs. An NTA, issued on DHS Form I-862, is the charging document that initiates removal proceedings under section 240 of the Immigration and Nationality Act (INA). DHS issues NTAs to noncitizens whom it believes are removable from the United States because they are inadmissible or deportable for one or more reasons.³

On June 28, 2018, USCIS issued a memorandum containing updated guidance for when it would issue an NTA to noncitizens applying for immigration benefits.⁴ This policy guidance could change under subsequent administrations, but the 2018 memo, commonly referred to as the “NTA Memo,” currently governs DHS NTA practices. Although USCIS has always had the authority to issue NTAs to applicants who are removable, it has traditionally only issued NTAs in limited circumstances, and sparingly. The NTA Memo expanded the range of circumstances under which USCIS is *required* to issue NTAs.

Although USCIS issued its NTA Memo in June 2018, it was not officially implemented against T visa applicants until November 2018,⁵ and practitioners did not begin reporting many denials and NTAs issued until 2019. Now that advocates have experienced the NTA Memo’s implementation, this advisory reviews the policy’s impact on noncitizens applying for T nonimmigrant status as survivors of a severe form of human trafficking, with practice tips interspersed throughout.

For practice advisories on the NTA Memo's effects on applications for other forms of immigration relief, please see ILRC, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear: Tips and Strategies for Working with Clients* (Dec. 2018), <https://www.ilrc.org/updated-guidance-referral-cases-and-issuance-notices-appear-tips-and-strategies-working-clients> and the ILRC's website at www.ilrc.org.

II. Background

A. Notices to Appear (NTAs)

As explained above, an NTA is a charging document issued by DHS that initiates removal proceedings. After issuing an NTA, DHS must file the NTA with an immigration court to give the court, which is part of the Department of Justice (DOJ), jurisdiction over an individual's proceedings.⁶ Once an NTA is filed with the immigration court and removal proceedings begin, a noncitizen must respond to the charges and allegations in the NTA. The noncitizen can contest their removability and/or apply for relief from removal.

B. The NTA Memo

The June 2018 NTA Memo replaced the previous November 2011 NTA Memo⁷ and *mandates* that USCIS issue an NTA in various circumstances. As discussed above, before the 2018 NTA Memo, USCIS was *permitted* to issue NTAs but rarely did for T visa applicants. By requiring USCIS to issue NTAs in certain situations, the NTA Memo subverts USCIS's role as the adjudicatory branch of DHS whose officers review immigration relief applications in lieu of expanding the agency's role in immigration enforcement efforts.

The NTA Memo now requires that USCIS issue NTAs when:

1. An application, petition, or benefit request is denied, and the applicant is not lawfully present;
2. An individual's application is denied, and the person is lawfully present and removable (e.g., because of criminal history, evidence of fraud, or abuse of public benefits programs in the individual's record or application);
3. Issuance is required by statute or regulation; or
4. There are national security concerns.⁸

USCIS may also refer an applicant's case to ICE *before* adjudication if the agency suspects there is fraud or that the noncitizen has certain criminal history.⁹ It is important to note that the NTA Memo only mandates that USCIS *issue* an NTA, but the agency must still decide whether to file the NTA with an immigration court and begin removal proceedings. Nevertheless, advocates and clients should be prepared that any denied T visa applicant may be referred to proceedings once all possible appeals of a denial have been exhausted by the applicant.¹⁰

The NTA Memo initially went into effect starting October 1, 2018 regarding Form I-485, Application to Register Permanent Residence or Adjust Status, and Form I-539, Application to Extend/Change Nonimmigrant Status.¹¹ USCIS implemented the NTA Memo with regard to denials of the following humanitarian forms of relief on November 19, 2018:

- Form I-914, Application for T Nonimmigrant Status, and Form I-914, Supplement A, Application for Family Member of T-1 Recipient;
- Form I-918, Petition for U Nonimmigrant Status, and Form I-918, Supplement A, Petition for Qualifying Family Member of U-1 Recipient;
- Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant;
- Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (including but not limited to VAWA self-petitions and Special Immigrant Juvenile Status petitions);
- Form I-730, Refugee/Asylee Relative Petition, where the beneficiary is present in the United States; and
- Forms I-485, Application to Register Permanent Residence or Adjust Status, with these underlying form types.¹²

The NTA Memo primarily applies to application *decisions* made on or after the relevant implementation date for each set of applications (i.e., the October 1, 2018 applications or the November 19, 2018 applications) regardless of application filing date.¹³

C. Ramifications of the NTA Memo for T Visa Applicants

The NTA Memo does not include special provisions applicable to T nonimmigrant or other humanitarian applications, or related adjustment of status applications. USCIS can issue an NTA to all such denied applications, and they will be treated like other types of applications in that sense.¹⁴

Nevertheless, the privacy and confidentiality provisions under 8 U.S.C. § 1367 applicable to T visa applications, U visa applications, and applications for relief under the Violence Against Women Act (VAWA) continue to protect these cases.¹⁵ The NTA Memo did not alter these protections, which are statutory and can only be changed by Congress.

Under 8 U.S.C. § 1367(a)(1), DHS, Department of State (DOS), and Department of Justice (DOJ) employees cannot make any adverse determinations against noncitizens solely using information provided by their traffickers, perpetrators, or batterers, with certain minor exceptions; this protection never ends.¹⁶ The NTA Memo explicitly instructs officers to comply with the statute, noting that the protection “does not expire upon denial of the benefit petition or application and applies regardless of whether any application or petition has been filed.”¹⁷

Under 8 U.S.C. § 1367(a)(2), DHS employees who work directly with applicants for T, U, or VAWA relief or who have access to any information relating to a beneficiary of a pending or approved application for one of these forms of relief are prohibited from disclosing such information to anyone other than another officer or employee of DHS, DOS, or DOJ,¹⁸ with several minor exceptions.¹⁹ Applicant protections under 8 U.S.C. § 1367(a)(2) only terminate once the benefit request has been denied *and all opportunities for appeal have been exhausted*.²⁰ During the time the protections apply, the NTA Memo reiterates that USCIS can only serve an NTA on an applicant’s attorney of record or safe mailing address.²¹ After the protections end (e.g., once the

application has been denied and the appeal period exhausted), USCIS can serve the NTA on the physical address of the applicant.

Practice Tip: Provide a Correct, Safe Client Address. Advocates should ensure that clients provide updated and correct contact information (i.e., either the advocate’s address or a trusted mailing address) to USCIS and the Executive Office for Immigration Review (EOIR), for those in removal proceedings, so they receive all information, decisions, and notices in a timely manner. Some advocates write in “confidential” in place of a client address when safe addresses are a concern. This has been noted as a best practice in the context of T visa, U visa, and VAWA self-petition applications. Advocates who decline to include a client’s physical address for safety reasons should also submit a Form G-28 to enter an appearance as the client’s legal representative and include their office address to ensure they receive all correspondence on behalf of the client.

The NTA Memo’s shift to requiring USCIS to issue NTAs to denied T visa applicants represents a significant change in the T visa application process, and correspondingly, in the risk assessment involved in deciding whether to apply for T nonimmigrant status. Previously, USCIS officials generally did not issue NTAs to survivors of trafficking and other violent crimes who applied for a T visa, U visa, or VAWA relief and were denied. This was agency practice implemented to comport with Congressional intent in creating these forms of relief, i.e., to encourage noncitizen survivors of trafficking and other serious crimes to cooperate with law enforcement by offering them a secure pathway to lawful immigration status in exchange for their willingness to report the crimes they experienced and aid police. By turning away from this policy in favor of the immigration enforcement-focused dictates of the NTA Memo, DHS as an agency is acting to undermine the purpose of these remedies.

Practice Tip: Records Requests and Eligibility Screening. Before submitting any relief application on behalf of a client, practitioners should ensure that all eligibility requirements are met and any possible issues that could be grounds for denial are identified and addressed, as applicable. USCIS has increased its scrutiny of cases with criminal history and of those with credibility issues because of inconsistent statements from previous applications.²² Therefore, advocates should perform FBI background checks, FOIA requests,²³ and/or other background checks for any clients with previous criminal or immigration violations. Obtaining immigration and criminal records can be critical to ensure that any T visa application clients file is submitted as accurately and completely as possible, that any required waivers are included, and that the applicant and their advocate can strategize about how to address any potential issues.

Given this shift in USCIS policy, the risks of filing affirmative T visa applications have increased significantly for noncitizens. Trafficking survivors used to be able submit T visa applications without much concern about triggering an enforcement action against them. However, in the wake of the NTA Memo, noncitizens and their advocates must analyze more carefully whether to file T nonimmigrant petitions, including considering the strength of the merits of each case, whether the client has any backup relief if ultimately placed in removal proceedings, and the risk of immigration enforcement or removal the client already faces without applying for T visa status. Each client’s desire to apply for T nonimmigrant status and their personal risk tolerance level is also a critical component of deciding whether to apply under the NTA Memo.

Practice Tip: Diligently Review the Content of Each Application. The NTA Memo and corresponding policy guidance emphasize that USCIS can use information within an application to issue an NTA or refer a case to Immigration and Customs Enforcement (ICE) for enforcement. Therefore, it is important to consider what information ICE could use against a client in future removal proceedings and include evidence of positive equities to support approvals in the agency's discretion. For example:

- *Think strategically about what limited evidence to submit regarding criminal or immigration violations.* All documents should be reviewed carefully, because every document you submit can be used against your client. This is especially important if you have access to damaging or uncorroborated evidence about your client, or juvenile records that are protected under state confidentiality laws.
- *Make sure to include evidence of positive equities.* Advocates should provide evidence of good moral character and connections to the United States, including documents showing work or education history, proof of the U.S. citizenship or lawful permanent residency status of family members, certificates or awards for community service or volunteer work, and letters from community members attesting to the client's character and contributions to the community.
- *Avoid boilerplate language.* Advocates should prepare applications with an eye toward avoiding any perception that the application is fraudulent. Specifically, preparers should avoid using boilerplate declarations, prepare all documents with the specific client's facts, and ensure that all information on the application is consistent with prior applications submitted to immigration agencies.

Practice Tip: Backup Relief for Trafficking Survivors. When beginning to work with trafficking survivor clients, screen thoroughly to spot *all* potential relief avenues, including relief in removal proceedings. For instance, trafficking survivors may be eligible to apply affirmatively for more than one form of relief. Given USCIS's practice of generally not issuing NTAs to noncitizens who have pending applications for relief,²⁴ it may be advantageous for clients who risk denial to file additional applications where they qualify. For example, depending on the client's particular experiences and circumstances, a trafficking survivor may be eligible to apply for T nonimmigrant status,²⁵ U nonimmigrant status,²⁶ asylum,²⁷ and/or relief through VAWA.²⁸ Petitioning for a U visa based on the crime of trafficking may be especially strategic given the years-long waiting period for adjudication of such petitions right now.²⁹

Also consider what relief a client might be eligible for if they eventually receive an NTA based on a denied T Visa or other application. For example, noncitizen trafficking survivors may be eligible to apply for cancellation of removal or asylum before an immigration judge. Practitioners may want to develop a response strategy with each trafficking survivor client in the case of an NTA and/or initiation of removal proceedings depending on the client's goals, which will likely vary from one person to another. For instance, some clients may in fact hope for removal proceedings if an affirmative asylum application they submit is denied, so that they can renew their asylum application before the immigration court and/or seek cancellation of removal, withholding of removal, or relief under the Convention Against Torture, remedies which are only available in removal proceedings.³⁰

USCIS began issuing NTAs in connection with some denied T visa applications in May and June of 2019, and continues to do so.³¹ For the most part, practitioners are seeing NTAs issued *after* the period for any appeals of or responsive motions to denials has lapsed,³² which comports with USCIS guidance on the NTA Memo.³³ Advocates are also observing that USCIS is generally not issuing NTAs to individuals who have another immigration application pending, which likewise tracks existing USCIS guidance.³⁴

Practice Tip: Keep Your Client's T Visa or Other Case Alive. If a client's application for a T visa or other relief is denied, consider all possible avenues for administrative review, including appealing the denial, filing a motion to reopen or reconsider, or re-filing the application, as appropriate. This is because USCIS will likely only issue an NTA to your client after the appeals and motion period has expired and there are no pending applications for relief.³⁵

For more information on T visas, the Coalition to Abolish Slavery & Trafficking (CAST) offers technical assistance and case liaison assistance for T visa applicants and assistance with trafficking survivor issues generally.³⁶ ASISTA and the ILRC also offer case-specific consultations and assistance.³⁷

End Notes

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² See *T Visas: A Critical Immigration Option for Survivors of Human Trafficking* (ILRC 2019) for a comprehensive explanation of the requirements of and application process associated with petitioning for T nonimmigrant status.

³ INA § 239(a); 8 C.F.R. §§ 1229, 1239.1; see also ILRC, *The Notice to Appear (NTA)* (July 2020), available at [https://www.ilrc.org/notice-appear-nta#:~:text=A%20Notice%20to%20Appear%20\(NTA,as%20the%20%E2%80%9Crespondent.%E2%80%9D%20The](https://www.ilrc.org/notice-appear-nta#:~:text=A%20Notice%20to%20Appear%20(NTA,as%20the%20%E2%80%9Crespondent.%E2%80%9D%20The).

⁴ USCIS, Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (June 28, 2018), <https://www.uscis.gov/sites/default/files/document/memos/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> [hereinafter NTA Memo].

⁵ See USCIS, *Notice to Appear Policy Memorandum*, <https://www.uscis.gov/laws-and-policy/other-resources/notice-to-appear-policy-memorandum>.

⁶ 8 C.F.R. § 1003.14.

⁷ USCIS, Policy Memorandum: Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (Nov. 7, 2011), available at https://www.aila.org/infonet/uscis-issue-anta?utm_source=aila.org&utm_medium=InfoNet%20Search.

⁸ NTA Memo at 3–8.

⁹ *Id.* at 5, 7.

¹⁰ See USCIS, *USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance 7–8* (Sept. 27, 2018), available at https://www.uscis.gov/sites/default/files/document/notices/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA.pdf [hereinafter USCIS Policy Guidance I].

¹¹ USCIS Policy Guidance I at 3.

¹² See USCIS, *USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance 3* (Nov. 15, 2018), available at https://www.uscis.gov/sites/default/files/document/notices/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA_11.15.18.pdf [hereinafter USCIS Policy Guidance II].

¹³ USCIS Policy Guidance II at 4. The agency has indicated that it could apply the NTA Memo to cases denied prior to those dates as a matter of discretion, and that officers also have the discretion to apply the NTA Memo to cases denied even before the NTA Memo's initial publication date of June 28, 2018 if those cases are being reviewed. *Id.* However, while these applications of the NTA Memo remain possible, they might not affect many cases at this point given that two years have passed since the NTA Memo's issuance.

¹⁴ *Id.*

¹⁵ See 8 U.S.C. § 1367. The protections at 8 U.S.C. § 1367(a)(1) apply even more broadly, i.e. to any noncitizens, not necessarily only to noncitizens who have applied for U, T, or VAWA relief.

¹⁶ 8 U.S.C. § 1367(a)(1).

¹⁷ NTA Memo at 9.

¹⁸ 8 U.S.C. § 1367(a)(2).

¹⁹ 8 U.S.C. § 1367(b)(7).

²⁰ *Id.*

²¹ Generally, the NTA Memo contemplates NTAs only after opportunities for appeal have been exhausted, so USCIS would not be issuing NTAs while the confidentiality provisions still apply.

²² See ASISTA et al., *Practice Update: Issuance of NTAs on Denied Humanitarian-based Immigration Cases 1* (June 2019), available at <https://www.ilrc.org/practice-update-issuance-notices-appear-ntas-denied-humanitarian-based-immigration-cases>.

²³ See ILRC, *A Step-by-Step Guide to Filing FOIAs with DHS* (Sept. 2020), available at <https://www.ilrc.org/step-step-guide-completing-foia-requests-dhs>.

²⁴ See USCIS Policy Guidance II at 3.

²⁵ See, e.g., *T Visas: A Critical Immigration Option for Survivors of Human Trafficking* (ILRC 2019), available at <https://www.ilrc.org/publications/t-visas>, for information on eligibility for T nonimmigrant status.

²⁶ See, e.g., *The U Visa: Obtaining Status for Immigrant Victims of Crime* (ILRC 2019), available at <https://www.ilrc.org/the-u-visa> [hereinafter "U Visa Manual"], for information on eligibility for U nonimmigrant status.

²⁷ See, e.g., *Essentials of Asylum Law* (ILRC 2018), available at <https://www.ilrc.org/essentials-of-asylum-law>, for information on eligibility for asylum.

²⁸ See, e.g., *The VAWA Manual: Immigration Relief for Abused Immigrants* (ILRC 2017), available at <https://www.ilrc.org/vawa-manual>, for information on eligibility for relief under VAWA.

²⁹ See, e.g., U Visa Manual at 75–77.

³⁰ See CLINIC, *Practice Pointers: USCIS Issues New NTA Guidance Memo 12–14 (July 31, 2018)*, available at [file:///C:/Users/slakhani/Downloads/Practice-Pointer-USCIS-New-NTA-Guidance-Memo%20\(1\).pdf](file:///C:/Users/slakhani/Downloads/Practice-Pointer-USCIS-New-NTA-Guidance-Memo%20(1).pdf).

³¹ See, e.g., ASISTA et al., *Practice Update: Issuance of NTAs on Denied Humanitarian-based Immigration Cases* (June 2019), available at <https://www.ilrc.org/practice-update-issuance-ntas-denied-humanitarian-based-immigration-cases>.

³² In general, appeals and/or motions to reopen or consider must be filed within 33 days from the date of USCIS denial decision except where a shorter appeal period applies, such as for the revocation of the approval of a petition, which has an 18-day deadline. 8 C.F.R. § 214.11(d)(10); 8 C.F.R. § 103.3(a)(2); 8 C.F.R. § 103.8(b). See also USCIS Policy Guidance 11 at 12; CAST, *Motion to Reconsider and Reopen (MTRs) for T Visas* (Nov. 2019), available at https://casttta.nationbuilder.com/mtrs_for_t_visas.

³³ USCIS Policy Guidance II at 3, 12–13.

³⁴ USCIS Policy Guidance II at 3; see also *id.* at 5 (“Generally, our officers will ensure petitions and applications which impact a person’s status or authorized periods of stay are adjudicated before issuing an NTA. However, USCIS has the discretion to issue an NTA in specific cases as appropriate while applications or petitions remain pending”). For more information on tips for working with clients more generally under the NTA Memo, see ILRC, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear: Tips and Strategies for Working with Clients* (Dec. 2018), available at

<https://www.ilrc.org/updated-guidance-referral-cases-and-issuance-ntas-appear-tips-and-strategies-working-clients>.

³⁵ USCIS Policy Guidance II at 3, 5.

³⁶ For more information, see <http://www.castla.org/training-resources/> or https://www.castla.org/about/contact/contact_or_contact_CAST_at_info@castla.org.

³⁷ For more information, see <https://asistahelp.org/> and <https://www.ilrc.org/technical-assistance>.



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