Updated Guidance for the Referral of Cases and Issuance of Notices to Appear

Tips and Strategies for Working with Clients

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I. Introduction[1]

On June 28, 2018, U.S. Citizenship and Immigration Services (USCIS) issued a memorandum stating the expanded circumstances in which it will begin issuing a Notice to Appear (NTA), including upon denying most affirmative applications.[2] Commonly referred to as the "NTA Memo," this memorandum is a policy statement that outlines USCIS's new policy for issuing an NTA. This USCIS announcement signals a dramatic expansion of the agency's role in immigration enforcement, shifting away from its primary focus on determining eligibility for immigration benefits.

While the new NTA policy may not impact meritorious applications, it does increase the risk of a person being referred to removal proceedings. As a result of these dramatic changes, it is important for legal representatives to carefully screen and prepare all applications and advise all clients of the risk of being placed in removal proceedings.

This practice advisory provides an overview of the new USCIS NTA Memo, which incrementally went into effect starting October 1, 2018, and was expanded to include denials of humanitarian forms of relief as of November 19, 2018.[3] Additionally, the advisory will provide tools for identifying possible red flags that could trigger enforcement actions by Immigration and Customs Enforcement (ICE). Finally, it identifies some precautions that advocates should take when preparing affirmative applications in light of this new policy to ensure the best possible outcome for each client.

II. Overview of the New NTA Memo

A. What is an NTA?

An NTA is a charging document issued by the Department of Homeland Security (DHS) that initiates removal proceedings under section 240 of the Immigration and Nationality Act (INA). Issuing an NTA does not commence removal proceedings; the NTA must be filed with an immigration court in order to give a court jurisdiction over an individual's proceedings.[4] Issuing the NTA simply gives notice to the individual that they may be placed in removal proceedings; if it is not filed with

[1] Thanks to Alison Kamhi for her help with this advisory.
[2] U.S. Citizenship & Immigration Serv., PM-602-0050.1, Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens 9 (June 28, 2018) [hereinafter 2018 NTA Memo].
[3] U.S. Citizenship & Immigration Serv., USCIS Teleconference on Notice to Appear (NTA), Updated Policy Guidance 2-3 (Nov. 15, 2018) [hereinafter USCIS Policy Guidance II].
[4] 8 C.F.R. § 1003.14

the court, no formal removal proceedings will begin. Once an NTA[5] is filed with the immigration court and removal proceedings officially begin, an immigrant is on the path to potential removal from the United States. However, removal proceedings also permit review of many applications by an immigration judge and can allow an individual to seek certain forms of relief that can only be granted by an immigration judge, such as cancellation of removal.

B. What does the 2018 NTA policy say?

The June 2018 NTA Memo supersedes the prior November 2011 NTA Memo[6] and mandates that USCIS issue an NTA in many more circumstances, with some exceptions that will be discussed below.[7] Previously, USCIS issued NTAs in limited situations and typically referred cases to ICE to ultimately decide whether to put an individual in removal proceedings. The 2018 NTA Memo now mandates 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, or due to evidence of fraud, misrepresentation, or abuse of public benefits programs[8] in the individual's record or application);
3. Issuance is required by statute or regulation; or
4. National security cases.[9]

USCIS may also refer a case to ICE before adjudication if the agency suspects there is fraud or that the noncitizen has certain criminal history.[10] It is important to note that the 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. While it is unclear whether USCIS or ICE will file every NTA that is issued, the best practice for advocates is to prepare for this outcome. Additionally, USCIS will generally wait to issue an NTA until all possible appeals of a denial have been exhausted by the applicant.[11]

C. Does the policy impact all applicants?

The 2018 NTA Memo does not apply to DACA or TPS applicants. These applications will continue to be subject to the November 2011 Memo, which mandates referral of cases to ICE to issue an NTA when an application involves certain criminal convictions or a national security issue.[12] However, TPS applicants may be subject to the 2018 Memo if their TPS renewal application is denied or withdrawn, and the applicant has no other lawful immigration status.[13]

D. How and when is the new policy being implemented?

Although the new NTA Memo was signed on June 28, 2018, USCIS delayed implementation of the policy in order to draft guidance for adjudicators. The first phase of the 2018 NTA Memo implementation went into effect on October 1, 2018,

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[5] Please note recent case law on the requirements for a Notice to Appear. In June 2018, Supreme Court clarified the required content of a valid NTA when filed with an immigration court. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The Board of Immigration Appeals issued a decision limiting the applicability of *Pereira* in *Matter of Bermudez*, 27 I&N Dec. 441 (BIA 2018).
[6] See Catholic Legal Immigration Network, Inc. "Practice Pointer: New USCIS NTA Guidance Memo" for a comparison between the 2011 and 2018 NTA Memos: https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Practice-Pointer-USCIS-New-NTA-Guidance-Memo.pdf.
[7] *See id.* for a more-detailed overview of the new NTA memo.
[8] On September 27, 2018, USCIS clarified that it will not yet issue an NTA in cases with evidence of fraud or abuse of public benefits. U.S. CITIZENSHIP & IMMIGRATION SERV., USCIS TELECONFERENCE ON NOTICE TO APPEAR (NTA), UPDATED POLICY GUIDANCE 5, 10 (Sept. 27, 2018) [hereinafter USCIS POLICY GUIDANCE I].
[9] 2018 NTA MEMO at 3-8.
[10] *Id.* at 5, 7.
[11] USCIS POLICY GUIDANCE II at 7-8.
[12] The 2011 NTA Memo can be found at: https://cliniclegal.org/sites/default/files/November%207,%202011%20USCIS%20Memo%20Referral%20of%20Cases.pdf.
[13] USCIS POLICY GUIDANCE I at 14-15.

for all Forms I-485, Applications for Adjustment of Status, and Forms I-539, Applications to Extend or Change Nonimmigrant Status. The second phase of the implementation went into effect on November 19, 2018, to include denials of the following applications:

- Forms I-914/I-914A, Applications for T Nonimmigrant Status;
- Forms I-918/I-918A, Applications for U Nonimmigrant Status, and Forms I-929 for U1 Qualifying Family Members;
- Forms I-360, Petition for Amerasian, Widow(er), Special Immigrant;[14] and
- Forms I-730, Refugee/Asylee Relative Petition, when the beneficiary is present in the United States.
- Forms I-485 associated with these underlying categories.[15]

Despite only these applications being named, USCIS has clarified that the issuance of an NTA is not limited to denials of these applications.[16]

The policy will apply to all applications adjudicated after October 1, 2018, and November 19, 2018, respectively, regardless of when the forms were filed with USCIS.[17] The agency also clarified that the 2018 NTA Memo will currently apply only to "status-impacting applications."[18] Thus, Form I-601A provisional waivers, Form I-140 employer petitions, and Form I-129 petitions for a nonimmigrant worker are not yet affected by this new policy.[19]

E. Are applicants for naturalization affected?

Note that the 2018 NTA Memo contains special provisions for naturalization applications. Specifically, the memo provides that USCIS will issue an NTA if a Form N-400 is denied based on lack of Good Moral Character due to a crime *and* the applicant is removable.[20] Additionally, the NTA memo provides that USCIS may issue an NTA for N-400 applicants before adjudication in cases where the applicant is eligible to naturalize but is deportable or if it is determined that the applicant was inadmissible at the time of adjustment or admission.[21] For more information on this issue, see https://www.ilrc.org/citizenship-and-naturalization.

F. Are humanitarian cases treated differently?

The NTA memo does not create a special provision for humanitarian cases such as VAWA self-petitions, applications for U and T nonimmigrant status, or related adjustment of status applications. All cases that are denied can be issued an NTA and will be treated similarly to other types of applications.[22] However, the NTA memo does not change the adjudicative process for these applications and the privacy and confidentiality provisions under 8 USC § 1367 continue to apply in these cases.[23] For more information on how the 2018 NTA memo will impact people applying for a humanitarian form of relief, see 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.

[14] This form is used for self-petitions under the Violence Against Women Act and for applications for designation as a Special Immigrant Juvenile.
[15] USCIS POLICY GUIDANCE II at 3.
[16] *Id.* at 7.
[17] *Id.* at 4.
[18] *Id.* at 10-11. USCIS POLICY GUIDANCE I at 2.
[19] USCIS POLICY GUIDANCE I at 5–6.
[20] 2018 NTA MEMO at 7.
[21] *Id.* at 7, 8-9
[22] USCIS POLICY GUIDANCE II at 4.
[23] 2018 NTA MEMO at 9. 8 USC § 1367 allows for information sharing within the Department of Homeland Security and Department of Justice for legitimate departmental purposes. USCIS POLICY GUIDANCE II at 5.

III. Steps for Working with Clients to File Affirmative Relief

Filing certain affirmative applications with USCIS now carries an increased risk of an individual being placed in removal proceedings. Therefore, it is important for advocates to inform clients of this increased risk and complete a cost-benefit analysis with each client before submitting any application to USCIS. To do this, advocates should screen potential clients for red flags that may cause their application to be denied, as well as for all forms of possible immigration relief—both affirmative relief and that available in removal proceedings. Finally, advocates should take increased precautions when preparing affirmative applications and presenting supporting evidence, to ensure the greatest possibility that the application is approved by USCIS and to avoid detrimental information being used by ICE against the client in removal proceedings.

A. Screen Clients for Red Flags

The first step to minimize a client's risk of being placed in immigration court proceedings is to thoroughly screen each case for red flags that can increase the risk of denial by USCIS. It is important that clients are fully screened for eligibility, inadmissibility issues, and negative discretionary factors. Some common red flags are:

- Prior contact with police or arrests by law enforcement,
- Multiple entries to the United States,
- Prior removal or deportation orders,
- False statements made to Customs and Border Protection (CBP) officials upon entry,
- Inconsistent information contained in prior applications for immigration benefits, and
- Previous denied applications for immigration relief.

It is important to review all documentation related to a client's prior immigration applications, arrest records, and contact with immigration authorities, in order to fully advise your client of the risk that USCIS would issue an NTA in their case. While requesting such records may significantly delay the submission of an affirmative application, given the risk of removal proceedings under the new policy it will be in the client's best interest to do so in most cases.

1. Obtain and Review Criminal Records

If a client reports prior interactions with immigration officers or police, it is extremely important to do a background check prior to filing any application for relief. Individuals with arrests or cases in criminal court should obtain final disposition documents from the appropriate criminal court and ensure that they have no outstanding warrants on their record. Advocates should assess whether a client with a criminal record is eligible for post-conviction relief or should refer them to an organization or attorney who has experience in this field.

2. Request a Copy of Prior Immigration Applications

Fraud, misrepresentations, or incorrect information in prior applications could bar a subsequent application or require that the client apply for a waiver of the fraud or misrepresentation. Advocates should obtain copies of all prior applications filed with USCIS, Department of State (DOS), or the Executive Office for Immigration Review (EOIR).[24] Advocates can view the ILRC's "Step by Step Guide to Completing FOIA Request with DHS" for a guide on how to obtain records with these agencies: https://www.ilrc.org/step-step-guide-completing-foia-requests-dhs.[25] It is also important for advocates to adequately explain any misstatements in a client's prior applications to ensure that USCIS does not flag such discrepancies as possible fraud or misrepresentation.

[24] EOIR is the agency within Department of Justice that contains the Immigration Court and Board of Immigration Appeals (BIA).
[25] Instructions for submitting FOIA requests to EOIR can be found at Freedom of Information Act, EOIR, https://www.justice.gov/eoir/foia-facts.

B. Advise Clients Regarding the Risk of Filing an Affirmative Application

Individuals should continue to apply for immigration benefits for which they are eligible. However, advocates should talk to clients about the increased risk of being placed in removal proceedings when applying for immigration relief and help clients understand the costs and benefits of filing each type of application. It is important to advise the client as to the strength of their case relative to other successful cases and explain the inherent risk of removal from the United States when applying for any immigration benefit. Additionally, advocates must inform the client whether there are factors present in their case that might result in an NTA being issued by USCIS. Prior removal orders, criminal convictions, or misrepresentations during previous interactions with immigration officials could increase the risk that USCIS will deny an application and issue an NTA or trigger enforcement action.

Advocates should also fully screen clients for all affirmative forms of relief and explain the risks, processing times, and benefits associated with each form of relief. Advocates should review with their client the following advantages and risks of each applicable form of relief:

- **Whether the application is currently subject to the new NTA policy:** Advocates should ensure that the client understands whether the application that they are filing will subject them to the new policy. The NTA policy changes currently apply to Forms I-360, I-485, I-539, I-751, I-914, and I-918, along with Forms I-730 when the beneficiary is in the United States.[26] It is important to explain to clients that the new NTA policy is not limited to these forms and that the NTA memo is being implemented incrementally; thus we can expect more applications to be announced in the future. However, clients can continue to apply for DACA, TPS, Form I-130 family petitions, Form I-601A provisional waivers, and employment-based petitions without the increased risk of receiving an NTA.[27]
- **Processing times for each applicable application:** It is important to inform the client as to how quickly they may expect USCIS to issue an NTA if their particular application is denied. Some applications, such as a U Visa and many Form I-751s currently have processing times of many years and so the issuance of an NTA after a denial may not happen for many years into the future. However, other applications, such as a Form I-485, I-539, or I-730 could be denied more quickly.
- **The risks of abandoning or withdrawing any application:** Because USCIS can issue an NTA when an individual abandons or withdraws their application, clients should be advised of the circumstances that could cause them to abandon or withdraw their application. For example, USCIS will consider an application to be "abandoned" if the client fails to appear at an interview or any scheduled biometrics appointments. Additionally, subsequent contact with law enforcement or divorce from a petitioning spouse may disqualify a client from relief and cause them to withdraw their application.

C. Advise Clients Regarding their Options in Removal Proceedings

Advocates should assess clients for eligibility for relief from removal if their application is denied and they are placed in removal proceedings or subject to a removal order. Note that some clients may be eligible for affirmative relief from USCIS, but may also have a strong case for immigration relief that may be granted only by an immigration judge.[28] Advocates should explain to the client the extent of the advocate's scope of representation and to whom the client will be referred if they are placed in removal proceedings or subject to other ICE enforcement.

[26] USCIS POLICY GUIDANCE II at 3.
[27] USCIS POLICY GUIDANCE I at 2, 9.
[28] See *Removal Defense: Defending Immigrants in Immigration Court*, for additional information about defenses to removal in Immigration Court: https://www.ilrc.org/publications.

1. Clients Who Have Never Been in Removal Proceedings

Individuals who have never been subject to removal proceedings or who are currently in removal proceedings may be eligible to seek a variety of forms of relief before an immigration judge. It is important to understand what types of relief a client might be eligible for if placed in removal proceedings so that a client may prepare for this possibility:

- Clients who have been in the United States for certain periods of time might be eligible for cancellation of removal if they are lawful permanent residents (LPRs), noncitizens with a qualifying relative, or victims of battery and extreme cruelty.[29] Note that service of a non-defective NTA to a non-citizen prevents an applicant from accruing physical presence that may be required for certain forms of cancellation of removal.[30]
- Clients from El Salvador, Guatemala, or certain other countries may be eligible for benefits under the Nicaraguan Adjustment and Central American Relief Act (NACARA).[31] Note there are special provisions under the Violence Against Women Act for family members who have been battered or subject to extreme cruelty by a principal applicant for NACARA.
- Clients with a fear of harm or torture in their home country may apply for asylum, withholding of removal, or protection under the Convention Against Torture (CAT).
- Clients who have family members who are U.S. citizens may be able to adjust status through a family-based petition if they had a lawful admission, traveled on advance parole, have a family member in the US Military, or had a petitioned filed for them on or before April 30, 2001.[32]
- Individuals who are eligible for consular processing or who wish to simply return to their home country may wish to seek voluntary departure.
- Lawful permanent residents may be eligible for certain waivers that are only granted in removal proceedings, such as relief under sections 212(c) and 237(a)(1)(H) of the INA.
- Finally, applicants may renew before the immigration judge certain applications for relief that were denied by USCIS, including applications for asylum, adjustment of status, removal of conditions on permanent residence, and related waivers.

Advocates should identify and explain to clients any potential options for relief in immigration proceedings and provide this information in writing for future reference. If a legal organization or office does not represent individuals in removal proceedings, it is important for clients to understand that limitation. Advocates should also advise clients whether they should consult another legal service provider that can assess their eligibility for relief in the event they are placed in removal proceedings.

2. What About Clients with Prior Removal or Deportation Orders?

Know Before Applying: DHS can detain and remove a client with an outstanding final removal or deportation order at any time if they do not take steps to ask an immigration court to reopen their proceedings or have their removal or deportation order rescinded. Additionally, a removal order may make a client ineligible for certain forms of relief, such as adjustment of status or asylum. If the client does apply for this relief while subject to a final order, USCIS will deny such applications and refer such information to ICE for enforcement of the removal or deportation order. Therefore, it is important for advocates to understand a client's immigration history before filing any affirmative application with USCIS. Advocates can call the EOIR Hotline (1-800-898-7180) to find out whether a client was or is currently in removal proceedings, has a prior order of removal, or has an upcoming hearing date. Advocates can also submit a FOIA request to EOIR or CBP through email or mail to obtain the client's immigration file. Step-by-step guidance on how to complete this request can be found

[29] See INA § 240A(a) (LPR cancellation), 240A(b)(1) (non-LPR cancellation), 240A(b)(2)(A)-(D) (VAWA cancellation).
[30] *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (U.S. Supreme Court addressed the effect of an NTA that does not state the time or date of the hearing, as required by the INA on a respondent's case for cancellation of removal. The court found that a notice that does not inform a noncitizen when and where to appear for removal proceedings is not an NTA under USC section 1229(a) and therefore does not trigger the stop-time rule).
[31] See 8 CFR 1240.60 for a list of requirements for cancellation of removal or suspension of deportation under NACARA.
[32] Note that clients may also be able to adjust through an LPR spouse or parent (if the client is under 21 years old) if a petition was filed for them or a parent on or before April 30, 2001. See INA § 245(i).

in the ILRC "Step by Step Guide" located at https://www.ilrc.org/step-step-guide-completing-foia-requests-dhs. Finally, advocates should also advise all clients to refuse to sign any documents while in ICE custody until they are able to speak with an attorney.

Motions to Reopen: Because a motion to reopen may allow a client to become eligible for relief, advocates should determine whether a client is eligible to file a motion to reopen an order of removal or deportation before filing applications with USCIS. Motions to reopen have specific legal requirements and each case should be evaluated individually to determine if this strategy is advantageous for the client.[33] Importantly, orders of removal entered *in absentia* (when the person did not appear at the hearing), have different rules. If the client can show that they never received notice of the hearing, or that they meet another requirement for filing a motion to reopen, advocates should file a motion to reopen or refer the client to a trusted legal services office that can.

A motion to reopen must be filed with the court that last entered the removal or deportation order—either the Immigration Court or the Board of Immigration Appeals (BIA), depending on which decision-maker last issued the order of removal.[34] This means that the motion will be filed with the immigration judge that issued the removal order, unless your client or DHS appealed the immigration judge's decision to the BIA. Note that *in absentia* orders can only be filed with the immigration judge or immigration court that entered the order.[35]

If a motion to reopen is granted, the client's removal proceedings will proceed in front of the last adjudicator that decided the case. This means that the client will have to present to the immigration judge or BIA all evidence that they are no longer removable and/or file any applications for relief from removal. It is important for advocates to ask clients to prepare for upcoming removal proceedings by asking them to begin collecting documentary evidence for the forms of relief that they intend to request and to refer them to an immigration expert as soon as possible if the advocate does not intend to represent the client in removal proceedings: https://www.immigrationadvocates.org/nonprofit/legaldirectory/.

A Warning about Clients with Reinstated Orders of Removal: Individuals who have reentered the country without authorization after being deported under a final order of removal are ineligible for most forms of immigration relief and likely subject to reinstatement of removal.[36] While these individuals may be able to waive their prior removal order by requesting a waiver in conjunction with filing an application for a U visa or T visa, the new NTA Memo dramatically increases the risk of applying for affirmative relief in this situation.

Given the prior order, USCIS will not issue an NTA to these individuals if it denies an application for relief. Instead, under the 2018 NTA Memo, it will refer the client's information to ICE so that this agency may attempt to remove them based on this prior removal order.[37] However, these individuals may still seek withholding of removal or protection under CAT if they are arrested by ICE and express a fear of return. Advocates should advise clients subject to reinstatement of the risk of being removed if they are arrested by ICE and, if they have a bona fide fear of returning to their country, to express that fear to immigration officials. Advocates should also advise clients to refuse to sign any documents while in ICE custody, until they are able to speak with an attorney.

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[33] For further information about filing motions to reopen, see *Removal Defense: Defending Immigrants in Immigration Court*, https://www.ilrc.org/publications; American Immigration Council, "The Basics of Motions to Reopen EOIR-Issued Removal Orders," February 7, 2018, https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf. See also 8 C.F.R. §§ 1003.2 & 1003.23 for a list of reasons that a final order of removal may be reopened by the BIA or immigration judge.

[34] 8 C.F.R. § 1003.2, 1003.23.

[35] *Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999).

[36] See INA § 241(a)(5).

[37] Note that an individual who reenters lawfully after being removed under a final order is no longer subject to that prior removal order and will be issued an NTA by USCIS. USCIS POLICY GUIDANCE II at 9.

IV. Best Practices for Preparing and Filing Affirmative Applications

Even though USCIS is gradually implementing the 2018 NTA memo, all applications submitted to USICIS should be prepared as if all types of applications will fall under the new policy. Anecdotally, practitioners report that the NTA memo is already being applied to applications not specifically listed. Below are some practice tips for advocates to consider when working with clients and preparing applications filed with USCIS.

A. Preparing the Application

1. Provide a Correct or Safe Client Address

Advocates should ensure that clients provide updated and correct contact information with USCIS and EOIR (either the advocate's address or a trusted mailing address) so they can get all information, decisions, and notices in a timely manner.

Practice Tip: 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. Note that advocates who decline to include a client's physical address for safety reasons also submit a Form G-28 to enter an appearance as the client's legal representative and include their office addresses to ensure they receive all correspondence.

2. Diligently Review the Content of Each Application

The 2018 NTA Memo and corresponding policy guidance emphasize that USCIS can use information within an application to issue an NTA or refer a case to 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.

- **Limit evidence of criminal or immigration violations**: All documents should be reviewed carefully. Remember that 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.
- **Include evidence of positive equities:** Advocates should also 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 LPR 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.

3. Ensure the Application is Complete

As of September 11, 2018, USCIS adjudicators can deny an application or petition without first issuing a Request for Evidence (RFE) or Notice on Intent to Deny (NOID).[38] Advocates should submit a complete application and are encouraged to submit the checklists that USCIS has published on its website to show they have submitted all the required initial

[38] The USCIS memo grants adjudicators the discretion to deny an application without first issuing an RFE or NOID in specified circumstances. See Issuance of Certain RFEs and NOIDs; Revision of Adjudicator's Field Manual (AFM) Chapter 10.5(s), Chapter 10.5(b) at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf. See also U.S. CITIZENSHIP & IMMIGRATION SERV., USCIS POLICY UPDATE ON ISSUING RFES AND NOIDS (Sept. 6, 2018).

evidence. Advocates should place the checklist on top of their filings, indicating all required evidence is included. These checklists can be accessed on the USCIS page for the relevant application form.

B. Appealing Denials with USCIS

The 2018 NTA Memo guidance indicates that an NTA will generally not be issued until a denial is final.[39] In the event that USCIS denies a client's application, advocates should exhaust all appeals with USCIS. This is especially important since USCIS has stated that it will not generally issue an NTA until the appeals process has been exhausted.[40] Advocates should file an appeal of an unfavorable decision, where warranted, with the USCIS Administrative Appeals Office (AAO) or the BIA, depending on where the application was initially filed, and which agency last reviewed it. Most affirmative filings will be reviewed by the AAO.

- **Prosecutorial Discretion:** In a denied case, an adjudicator can recommend the exercise of prosecutorial discretion to not issue an NTA if there is evidence in the file that warrants this action.[41] This recommendation is subject to review by the Prosecutorial Review Panel and the respective office director. This is the case for all applicants and petitioners.[42] It is unclear how this will play out and USCIS has stated that decisions will be made on a case-by-case basis using the client's specific facts. There is no application process for requesting prosecutorial discretion.[43] Because of this, it is important to ensure the client's initial application includes evidence of positive equities, such as connections to the United States, education, contributions to the community, and hardship to the applicant or family members if removed. In the case of humanitarian relief, advocates should remind USCIS of the Congressional intent of minimizing harsh immigration consequences in its creation of survivor-based forms of immigration status.
- **Appeals Generally:** Most appeals of denials are filed on Form I-290B, Notice of Appeal or Motion.
- **N-400 Denials:** Appeals of decisions on an N-400, Application for Naturalization, are made on a Form N-366, Request for a Hearing on a Decision in Naturalization Proceedings.
- **I-130 Denials:** Appeals of decisions on an I-130, Petition for Alien Relative, like decisions made by an immigration judge, are filed on Form EOIR-29, Notice of Appeal to the Board of Immigration Appeals.[44]

Advocates should review any denial or revocation notice to determine the corresponding appeal rights and the appeal process for specific form. Generally, an appeal must be filed within 33 days from the date of the decision. There are shorter appeal periods for some types of applications, so it is important to look closely at the time allotted for filing an appeal in each client's case. ***There are no extensions to appeal deadlines.***

V. Conclusion

The 2018 NTA Memo could have a very negative impact on clients and communities if advocates do not properly screen clients and diligently prepare affirmative applications. Advocates need to ensure that clients are appropriately advised about the strength of their immigration case and are given sound and complete advice about the benefits and risks of applying. This includes ensuring that a client's filing is properly documented and completely prepared. Furthermore, advocates should provide both short-term and long-term strategies for their clients' cases, screening clients for all forms of relief, pursuing appeals where warranted, and ensuring clients can obtain competent legal representation if placed in removal proceedings. Lastly, it is important for advocates to stay informed of developments

[39] USCIS POLICY GUIDANCE II at 12-13.
[40] USCIS POLICY GUIDANCE I at 8-9.
[41] USCIS POLICY GUIDANCE II at 11.
[42] *Id*. at 13-14.
[43] *Id*. at 8-9
[44] Note that USCIS will not currently issue an NTA when it denies a Form I-130, Petition for Alien Relative.

by USCIS in this rapidly changing policy environment. With competent, diligent, and zealous representation, advocates can continue assisting immigrants in obtaining lawful status despite this dramatic policy change.

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