AILA Policy Brief: New USCIS Notice to Appear Guidance

July 17, 2018

Contact: Betsy Lawrence, blawrence@aila.org; Greg Chen, gchen@aila.org

Executive Summary

With the June 28, 2018 announcement of its new policy on the issuance of Notices to Appear (NTA), U.S. Citizenship and Immigration Services (USCIS) has dramatically shifted away from its long-standing service-oriented mission to one that is centered on enforcement. The new memorandum, "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens," requires USCIS to issue NTAs, the charging document that initiates immigration court proceedings, in far more cases than ever before. In particular, it calls for the issuance of an NTA if an applicant or beneficiary is "not lawfully present" at the time an application or petition is denied.[1] This turns the agency's role on its head. Since USCIS's creation in 2003, it has primarily served as the benefits adjudications arm of the Department of Homeland Security (DHS), responsible for only about 12 percent of all NTAs that are issued for enforcement purposes.[2]

The brunt of this new policy will fall upon students, families, professional workers, and many others who have fully complied with the law but whose applications or petitions are denied. Each year, USCIS denies hundreds of thousands of petitions for green cards, applications to change or extend status, applications to waive a ground of inadmissibility, and many other immigration benefit requests. Rather than give these individuals the opportunity to depart the United States on their own, as has long been the practice and as most people do, USCIS will now compel them to appear in immigration court for removal proceedings, placing their futures in jeopardy and on hold for months if not years given the enormous court backlog.

The new NTA policy will also have a chilling effect on legal immigration in general, discouraging many people who are eligible for immigration benefits from applying out of fear they will be subject to unjustified enforcement. Thousands of individuals will face costly delays and severe consequences such as detention, forcible removable, and bars to returning to the United States for years. Moreover, this dramatic shift will divert finite USCIS resources away from its core mission of adjudicating immigration cases, resulting in even greater delays in processing that have plagued the agency for years.

The flood of cases will also add to the severely backlogged immigration court system, taking Department of Justice (DOJ) and Immigration and Customs Enforcement (ICE) resources away from more pressing matters, such as asylum cases, or priority enforcement cases. The new policy ties the hands of agency officials and eviscerates the concept of prosecutorial discretion, which is routinely and regularly exercised by every law enforcement agency to prioritize cases deemed the most important, such as those involving threats to national security or public safety. Prosecutorial and

judicial resources will now be expended unnecessarily in cases where the person is likely to depart of his or her own accord, where USCIS mistakenly denies an application, petition, or request and the case is subsequently granted upon further review or appeal, or in cases where the individual is eligible for immigration benefits outside the immigration court system.

Table of Contents

BACKGROUND

What is a Notice to Appear?

A Notice to Appear is a DHS form (I-862) that is issued to a noncitizen whom the federal government believes to be removable from the United States.[3] The NTA sets forth "[t]he charges against the alien and the statutory provisions alleged to have been violated."[4] Thus, the NTA is a charging document that initiates removal proceedings against noncitizen respondents, requiring them to appear before an immigration judge who will determine whether they should be removed from the United States, or whether they are eligible for relief allowing them to remain in the United States or voluntarily depart without an order of removal. A broad array of DHS personnel including agents and officers of USCIS, ICE, and Customs and Border Protection (CBP) have the authority to issue NTAs and initiate removal proceedings.[5]

June 28, 2018 USCIS NTA Guidance

On July 5, 2018, USCIS released the new memorandum significantly altering DHS policy as to when USCIS, as opposed to ICE, will issue an NTA, and greatly expanding the categories of individuals to whom USCIS will issue an NTA.[6] This new guidance effectively mandates USCIS issuance of an NTA when an application or petition for immigration benefits is denied and the applicant or beneficiary is deemed removable.[7] According to USCIS, the new guidance "aligns its policy for issuing Form I-862, Notice to Appear, with the immigration enforcement priorities of [DHS]."[8] Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," sets forth the administration's enforcement priorities and states that it is the policy of the executive branch to ensure the faithful execution of the immigration laws "against all removable aliens."[9]

Under the new guidance, USCIS will issue an NTA in cases where the applicant or beneficiary is deemed removable and where there is evidence of fraud, misrepresentation, or "abuse of public benefits programs."[10] NTAs will also be issued in cases involving criminal conduct, even if there is no conviction.[11] Naturalization cases denied for lack of good moral character due to a criminal offense will also be subject to an NTA. Perhaps most significantly, NTAs will now be issued in cases where the applicant, beneficiary, or requestor is "not lawfully present" in the United States at the time an application, petition, or request for an immigration benefit is denied.[12] As described herein and in Appendix A this latter provision has the potential to impact many thousands of individuals, including employment-based nonimmigrant workers and green card applicants, family-based immigrants, survivors of domestic violence and other crimes, and temporary visitors to the United States.

Under the new guidance, USCIS will continue to issue NTAs where it is required by statute or regulation.[13] NTA issuance for cases involving national security will continue to be handled by the USCIS Fraud Detection and National Security Directorate.[14] Temporary Protected Status (TPS) cases will be handled in accordance with procedures outlined in the regulations, except where the regulations have been followed or are deemed to not apply, and TPS is denied or withdrawn and the individual has no other lawful immigration status.[15] A separate DACA-specific memo preserves the general policies for DACA requestors in place before the issuance of the 2018 NTA memo, directing USCIS to consult prior NTA guidance to determine whether to issue an NTA or refer the case to ICE.[16]

Pre-2018 USCIS NTA Guidance

For decades, our nation's approach to immigration enforcement has been based upon the sound law enforcement practice of prosecutorial discretion, whereby the government exercises its power to determine whether removal proceedings should be commenced against an individual. In 1976, legacy Immigration and Naturalization Service (legacy INS) General Counsel Sam Bernsen explained, "[t]he reasons for the exercise of prosecutorial discretion are both practical and humanitarian. There are simply not enough resources to enforce all of the rules and regulations on the books…. [and] [i]n some situations, application of the literal letter of the law would simply be unconscionable and would serve no useful purpose."[17] Although prosecutorial discretion may be exercised at any time during the course of proceedings, "[n]ormally, the appropriate time … is prior to the institution of proceedings; it makes little sense to put an alien through the ordeal and expense of a deportation proceeding when his actual removal will not be sought. In addition, …[d]eportation proceedings tie up Government manpower and resources that could be used in performing other important functions."[18]

Since then, the concept of prosecutorial discretion in the context of benefits adjudications has been memorialized in at least four succeeding memoranda: (1) a comprehensive legacy INS memorandum, dated November 17, 2000, "Exercising Prosecutorial Discretion;"[19] (2) a September 12, 2003 memorandum establishing guidelines for issuance of NTAs by USCIS Service Centers;[20] (3) a July 11, 2006 memorandum revising guidance to USCIS officers on how to process cases where an individual might be removable;[21] and (4) a November 7, 2011 memorandum updating USCIS NTA policy for Field Offices, Asylum Offices, and Service Centers.[22]

In recognition of prosecutorial discretion, the November 7, 2011 guidance was designed to "promote the sound use of the resources of [DHS and DOJ] to enhance national security, public safety, and the integrity of the immigration system." In furtherance of this goal, in addition to cases where NTA

issuance was required by law, USCIS would issue NTAs in cases where a Statement of Findings substantiating fraud was part of the record and "N-400 NTA Review Panels" would recommend whether an NTA should be issued in certain naturalization cases. USCIS would refer most other cases to ICE to determine whether an NTA should be issued in accordance with ICE's enforcement priorities. The 2011 guidance is silent on NTA issuance where a person is denied a benefit request and is not lawfully present. In such cases, rather than issuing an NTA, USCIS's longstanding practice has been to notify the individual of the denial of their application or petition and of their obligation to depart the United States. If the individual failed to depart as required, it was incumbent upon ICE to determine whether that person was an enforcement priority, requiring the initiation of removal proceedings. As explained in more detail below, 98.5 percent of the more than 50.4 million nonimmigrants who entered the U.S. and were expected to depart in FY2016, left on time and complied with the terms of their admission.[23]

OPERATIONAL AND PRACTICAL CONSIDERATIONS

The New NTA Guidance Turns USCIS Into a Third Enforcement Component of DHS, Contrary to the Will of Congress

Prior to the creation of DHS, the federal government housed immigration benefits and enforcement functions under a single agency—legacy INS. Both the legislative and executive branches long criticized this consolidation as inefficient and counterproductive. In 1997, the U.S. Commission on Immigration Reform recommended a clear organizational division between the two functions:

> *…placing incompatible service and enforcement functions within one agency creates problems…[w]e believe the Asencio Commission was correct in contending that separating enforcement and benefits functions will lead to cost efficiencies, more effective enforcement, and improved service to the public*.[24]

Calls for separation grew in intensity following the September 11, 2001 attacks. In 2002, the Congressional Research Service noted that:

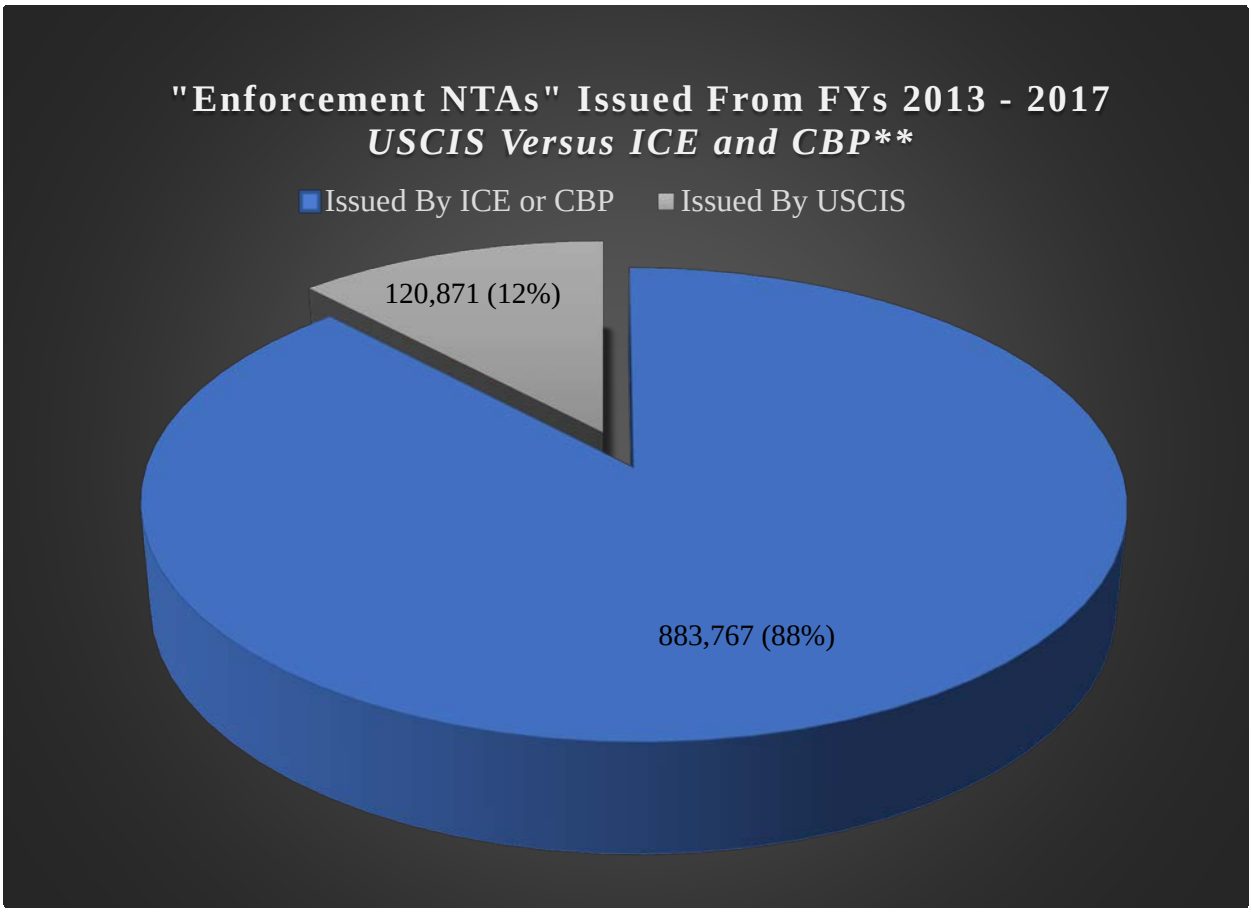
> *An underlying theme of criticism concerned what many believed were overlapping and unclear chains of command with respect to the former INS's service and enforcement functions. There appeared to be a consensus among the Administration, Congress, and commentators that the immigration system, primarily INS, was in need of restructuring. There also appeared to be a consensus among interested parties that the former INS's two main functions — service and enforcement — needed to be separated*.[25]

This division was realized when Congress passed the Homeland Security Act of 2002.[26] The Act abolished INS, transferring many of its responsibilities to newly established agencies including the Bureau of Citizenship and Immigration Services—later renamed USCIS. The sole functions transferred from legacy INS to USCIS involve the adjudication of immigration benefits.[27] Enforcement functions were assigned to what ultimately became ICE and CBP.

Official USCIS materials reinforce this division of responsibility, highlighting the agency's function as an immigration services entity and its separation from the enforcement components. The USCIS website states:

*We were formed to enhance the security and improve the efficiency of national immigration services **by exclusively focusing on the administration of benefit applications**. Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), components within DHS, handle immigration enforcement and border security functions.*[28]

Pre-2018 USCIS NTA policy also reinforced this separation of functions. As demonstrated by the chart below, 88 percent of all "enforcement NTAs" issued by DHS from 2013 to 2017 were issued by the enforcement components of DHS: ICE and CBP. Although USCIS has the authority to issue NTAs and has done so since its inception, it has primarily issued them in cases where it is required to do so by law. Historical data indicates that the great majority of NTAs issued by USCIS involved cases where an asylum officer made a positive credible fear or reasonable fear finding. USCIS regulations require these cases to be referred to an immigration judge so that the applicant can proceed to a full hearing on the merits of his or her asylum claim.[29]



*The term "enforcement NTAs" refers to NTAs issued for enforcement reasons and/or as required by statute or regulation. The term excludes NTAs issued in connection with positive credible fear determinations. Since the exact number of NTAs issued in connection with positive credible fear determinations is not publicly available, these figures are based on an estimate drawn from the total number of positive credible fear determinations made by USCIS. ICE data provided here refers to NTAs issued by ICE Enforcement and Removal Operations.[30]

Given the sheer breadth of situations where USCIS NTA issuance is mandated under the new policy, and the fact that USCIS in most cases will not consult with or transfer cases to ICE for NTA issuance, DHS is effectively turning USCIS into a third immigration enforcement component of DHS, contrary to the will of Congress.

USCIS Resources are Insufficient to Implement This Aggressive NTA Policy Without Negatively Impacting Processing Times

In a 2006 recommendation on USCIS NTA issuance, the DHS Office of the CIS Ombudsman noted, "[i]t has been generally accepted that USCIS does not have the resources available to issue NTAs in every case where an adjustment of status application is denied."[31] The new guidance requires USCIS to issue NTAs in nearly *all* cases that are denied where the individual is not lawfully present. This encompasses not just adjustment of status applications, but dozens of other form types. The massive volume of cases implicated will dramatically strain USCIS resources and further lengthen processing times across all product lines at USCIS service centers and field offices.

Despite efforts to reduce such processing times and case backlogs for more than a decade, USCIS's total workload has grown substantially and backlogs have continued to rise.[32] In FY 2016, USCIS received approximately 8.07 million applications for benefits, a 34 percent increase since FY 2012.[33] At the end of FY 2017, a total of 5.6 million applications and petitions were pending with USCIS as compared to 4.3 million at the end of FY 2016.[34] Although processing times for individual product lines vary depending on the resources available at each individual service center, over the past year overall processing times have increased.[35] Naturalization cases, for example, now take an average of eight to nine months to adjudicate.[36]

Delays and the ensuing repercussions on the lives of individuals and U.S. businesses are significant, and include job loss, loss of critical business contracts, delayed education, the inability to travel internationally for important family and business events, and the inability to renew driver's licenses.[37] By requiring adjudicators to issue NTAs rather than honoring Congress's assignment of that function to ICE and CBP, USCIS resources will, by necessity, be diverted from complex adjudications towards enforcement activities.

USCIS is funded almost entirely by fees associated with applications and petitions for immigration benefits. To ensure that the actual cost of processing immigration benefits requests is reflected in its fee structure, USCIS regularly reviews and adjusts fees as necessary. On October 24, 2016, USCIS published its current fee schedule, which raised fees across all product lines by a weighted average of 21 percent.[38] In announcing the new fee schedule, USCIS acknowledged that "since it last adjusted fees in FY 2010, the agency has experienced elevated processing times" compared to previously established goals, but recommitted to achieving those goals as soon as possible.[39] According to the spring 2018 regulatory agenda, USCIS is once again reviewing its fee structure and intends to publish a Notice of Proposed Rulemaking to revise immigration fees in October 2018.[40] As processing times will continue to rise as a result of this diversion of resources, we expect USCIS will once again attempt to raise fees. In other words, USCIS will pass the costs of its new NTA policy onto the very applicants now at risk of deportation.

The New NTA Policy Will Result in Excessive and Unnecessary Overcrowding of the Immigration Court System

Under the banner of a Strategic Caseload Reduction Plan, the Department of Justice (DOJ) has embarked upon efforts to reduce the immigration court backlog by hiring additional immigration judges (IJs), expanding the Board of Immigration Appeals, and implementing numerous policy changes.[41] In January 2018, EOIR adopted new case priorities, benchmarks, and performance metrics for IJs that emphasize case completion goals over due process.[42] In addition, EOIR has implemented guidance tightening standards on motions for continuance and change of venue requests.[43] On May 17, 2018, the Attorney General reversed more than 30 years of immigration court policy and held that IJs and the Board do not have the general authority to administratively close cases.[44] Notwithstanding these efforts, the immigration court backlog has reached crisis proportions, exceeding 700,000 cases as of May 31, 2018.[45] With the elimination of prosecutorial discretion, the termination of Temporary Protected Status for numerous countries, and the implementation of the new NTA policy, the immigration court backlog will continue to grow.

The Vast Majority of Those Placed in Removal Proceedings Would Otherwise Leave the United States on Their Own

The USCIS NTA guidance will place thousands of individuals into the court system who by any reasonable standard do not belong there. Many of these individuals, if denied an immigration benefit, would leave the United States on their own. Instead, the new NTA policy is premised on the false assumption that every person that is denied an immigration benefit and is without lawful status at the time of denial intends to break the law by remaining unlawfully in the United States. But this assumption is contradicted by DHS's own data. According to the Fiscal Year 2016 DHS Overstay Report, of the more than 50.4 million nonimmigrants who entered the U.S. and were expected to depart in FY2016, 98.5 percent left on time and abided by the terms of their admission. In addition, due to continuing departures and adjustment of status, by January 10, 2017, DHS confirmed the departure or adjustment of more than 98.90 percent of nonimmigrants.[46] In other words, less than 2 percent of the more than 50 million nonimmigrants who entered the U.S. overstayed.

The 2006 USCIS NTA policy appropriately recognized this reality. Although that guidance acknowledged that NTAs "may" be issued upon denial of an application or petition where the applicant appears to be removable, individuals who submitted an application while in valid nonimmigrant status, where "there is no criminality surrounding the reasons for the denial and nothing else indicates that the alien will not timely depart the United States," were instead to be issued a denial notice that "clearly convey[s] to the applicant the effect of the decision and the fact that the individual should depart the United States or potentially face removal proceedings."[47] Under the new 2018 policy, instead of appropriately providing an opportunity to get their affairs in order and depart the United States, many thousands of individuals will be needlessly shuttled into our already over-burdened immigration court system.

Many People Who Will be Placed in Removal Proceedings Will Have Their Denied Application or Petition Reversed on Appeal or Federal Court Challenge, or Could Refile and be Approved

USCIS adjudications are notoriously arbitrary and inconsistent.[48] Adjudication practices are constantly evolving with new policy interpretations, legal interpretations, and evidentiary requirements announced solely through the issuance of a request for evidence (RFE). Since January 2017, USCIS has rolled out numerous memoranda, announcements, and website updates that

effectively change the requirements for benefits eligibility and maintenance of status. Whereas previously an incorrect or arbitrary denial would result in a notice to depart the United States that could be navigated by most individuals while they elected to appeal or refile, now incorrect and arbitrary denials will result in the initiation of removal proceedings, even when the decision will ultimately be overturned or the person could reapply and receive an approval. This problem will be exacerbated by the release of July 13, 2018 guidance on the issuance of RFEs and notices of intent to deny (NOIDs), which provides adjudicators "full discretion to deny applications, petitions, and requests without first issuing an RFE or a NOID, when appropriate."[49]

The new NTA guidance acknowledges the fact that appellate procedures may run parallel to removal proceedings but offers little in terms of a sensible solution. The memo states, "USCIS will continue to conduct its administrative review during the course of removal proceedings. If USCIS takes favorable action upon motion or appeal, such that an individual is no longer removable, USCIS should advise ICE counsel so that appropriate action can be taken in removal proceedings."[50] In other words, rather than allowing the appeals process to run its course, USCIS will instead place people in removal proceedings and require them to file a continuance motion to hold proceedings in abeyance. If a continuance is denied, the individual will be forced to proceed with any applications for relief, most of which an immigration judge has no jurisdiction to entertain. Conversely, if a continuance is granted, court resources will be required to continually monitor the procedural posture of the appellate proceedings and if the benefit application or petition is ultimately approved, the court will be required to entertain a motion to terminate proceedings.

Many People Who Will be Placed in Removal Proceedings Are Eligible for and Would Pursue Relief Outside the Court System

In addition, a great number of individuals will be placed in removal proceedings even though they are eligible for and intend to apply for relief outside the immigration court system. For example, spouses of U.S. citizens who intend to consular process for an immigrant visa upon approval of a provisional unlawful presence waiver will lose that opportunity if their immigrant visa petition or waiver application is denied by USCIS and they are placed in removal proceedings. Toward this end, it is important to note that the 2018 NTA guidance contains no "carve-outs" for the basis for denial and therefore mandates NTA issuance even in cases that are denied for a technical deficiency. Instead of providing these individuals the opportunity to reapply and regularize their status through lawful channels, they will instead be placed in removal proceedings where they will be deemed ineligible to adjust, and will either be ordered removed or, at best, granted voluntary departure. Either way, families that could otherwise remain together will be needlessly separated.

Departing on One's Own and Ignoring an NTA is Not a Viable Option, But Remaining to Appear in Court Could Subject a Person to Even Harsher Penalties

Once an NTA is issued, ignoring it and simply departing the United States is not an option. A person who receives an NTA (whether issued to the individual or his or her attorney of record) and who fails to attend a proceeding "shall be ordered removed in absentia if the [government] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the [individual] is removable."[51] A person who without reasonable cause fails to appear for removal proceedings is barred from readmission to the United States for five years.[52]

However, the very act of remaining in the United States to appear in immigration court could easily exacerbate the penalties that may be applied to a person who is denied an immigration benefit and is

not lawfully present in the United States. This is true even for those who followed all the rules and applied for an extension of their immigration status in a timely manner but are denied and no longer have a valid nonimmigrant status. A person denied an immigration benefit is generally deemed to start accruing "unlawful presence" as of the date an application or petition for extension of status is denied.[53] Unlawful presence is a legal term, distinct from "status violation" or similar concepts, and is defined by reference to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."[54] A person who has been unlawfully present for more than 180 days but less than one year and who departs the United States is barred from returning for three years.[55] A person who departs after having been unlawfully present for more than one year is barred for ten years.[56]

The accrual of unlawful presence is not tolled by the initiation of removal proceedings.[57] Therefore, an individual who might not be subject to the three- or ten-year bar at the time an immigration benefit is denied, may become subject to the bar while he or she awaits an initial court date. Although DHS has the authority to grant pre-hearing voluntary departure for a period up to 120 days, the 2018 NTA guidance makes no mention of voluntary departure as an option in lieu of being subjected to removal proceedings.[58]

Due to sparse and/or incomplete data, it is difficult to predict with certainty the actual number of individuals who will be placed in removal proceedings as a result of the new USCIS NTA policy, and more specifically, due to a lack of "lawful presence" at the time an immigration benefit is denied. However, statistics on the number of applications and petitions that were denied in FY 2017 are instructive insofar as they reveal the pool of potential individuals who are at risk of NTA issuance. Appendix A describes how various populations could be impacted by the new NTA policy and includes the number of denials that were issued for the form types most commonly associated with those populations for FY 2017. The data presented in Appendix A represents only some of the immigration benefits forms that are available. Considering only these categories of immigration benefits, the pool of potential candidates for NTA issuance has expanded by hundreds of thousands.

CONCLUSION

The new NTA policy is yet another brick in the invisible wall that is being built by this administration to block legal immigration.[59] The restrictive policies adopted by the Trump administration, coupled with its antagonism towards immigrants, have already had a measurable impact. In 2018, the number of H-1B petitions received by USCIS for FY 2019 declined for the second year in a row: 190,098, down from 199,000 in FY 2018 and 236,000 in FY 2017.[60] Between 2016 and 2017, international student enrollments in U.S. colleges and universities fell 4 percent overall, and enrollments at the graduate level in science and engineering fell 6 percent.[61] According to data released by the U.S. National Travel and Tourism Office, for the first three quarters of 2017, 2.3 million fewer visitors came to the United States as compared to the same period in 2016, a 3.8 percent drop.[62] As noted by the Visit U.S. Coalition, a decline in tourism translates into billions in lost revenues, and thousands of lost American jobs.[63]

The stigma of removal proceedings is not something to be brushed aside, particularly for those who have followed the law and have done everything they can to maintain their status and abide by prescribed procedures. When it comes to legal immigration, this latest policy announcement will undoubtedly deter foreign nationals—many of whom long dreamed of a better life through the pursuit of educational or professional opportunities or family unification—from building their lives in America.

APPENDIX A

Impact of New NTA Guidance on Various Populations

The decision to issue NTAs upon denying an application, petition, or benefit request if the applicant, beneficiary, or requestor is "not lawfully present" will have far-reaching implications for individuals, businesses, students, families, and others. The following section analyzes how these various populations could be impacted by this new policy.

Students and Employment-Based Nonimmigrants

The new NTA guidance will have a significant impact on nonimmigrant workers and students in the United States who seek an extension of status, change of employer, or change of status to a different nonimmigrant classification. Our immigration laws allow an employer to apply for an extension or change of status on behalf of an individual if the required petition is filed while the beneficiary's underlying nonimmigrant status remains valid.[64] However, due to lengthy USCIS processing times, it is not uncommon for the beneficiary's status to have expired by the time USCIS adjudicates the petition.[65] If the petition is approved, there is no problem. But if the petition is denied, under the terms of the new policy, the beneficiary would be issued an NTA and would be required to appear before an immigration judge. This new policy is particularly problematic because denials of nonimmigrant petitions (Forms I-129) are on the rise.[66] In the wake of the President's "extreme vetting" directives as well as Executive Order 13788, "Buy American and Hire American" (BAHA),[67] numerous policy changes have been implemented to restrict the adjudication of temporary employment-based programs.[68]

Employment-Based Nonimmigrants Seeking Extension of Status: H-1B adjudications are more restrictive and unpredictable than ever. Particularly relevant to extension of status applicants is the October 2017 rescission of the 2004 guidance that directed USCIS officers to give deference to prior determinations when adjudicating extension petitions involving the same position and the same employer.[69] With no deference to prior adjudications, individuals who have been in the United States lawfully for years are now at risk of removal if USCIS suddenly decides their position no longer qualifies as a "specialty occupation" or involves "specialized knowledge."

Students: Notwithstanding the numerous immigration-related policy changes and restrictions on foreign students, the United States remains a top destination for international students. In 2017, the United States hosted 1.1 million of the 4.6 million foreign students enrolled in educational institutions around the world.[70] Typically, after completing a degree program, students who wish to remain in the United States need a job offer from a U.S. employer that is willing to sponsor them to work in a position that qualifies for H-1B status. Assuming the employer is lucky enough to have the petition selected in the H-1B "lottery," the petition will proceed to adjudication.[71]

A change of status will be denied if the student failed to maintain his or her previously accorded status.[72] As confirmation that it expects H-1B denials to continue to rise, USCIS recently announced that it selected 15,000 more petitions in the FY 2019 lottery than it did in the FY 2018 lottery.[73] In addition, the new NTA policy is further complicated by the new USCIS policy

on unlawful presence for F, M, and J nonimmigrants.[74] Effective August 9, 2018, unlawful presence, for purposes of the three- and ten-year bars to admissibility, will be deemed to have started accruing for students and exchange visitors as of the day after the date that a status violation occurs. This new approach to unlawful presence will have a significant negative impact on the student community. Under the new memo, even accidental and inadvertent status violations will subject unsuspecting individuals who have not acted in bad faith to extreme penalties. In addition to being subjected to unlawful presence penalties, such students will be issued an NTA and placed in removal proceedings.

Form I-129, Petition for a Nonimmigrant Worker	
Form I-129 is typically filed by a U.S. employer to sponsor a foreign worker in a nonimmigrant classification, such as H-1B (specialty occupation), L-1A/L-1B (intracompany transferee) or O-1 (individual of extraordinary ability or achievement). Form I-129 can be used by employers seeking initial authorization to employ a nonimmigrant (such as change of status from F-1 student), to extend a noninmmigrant's employment authorization, or to transfer a worker from one U.S. employer to another. Beneficiaries of an I-129 petition can either be outside the United States (if seeking a new visa), or inside the United States (seeking a change or extension of status).	
FY 2017 I-129 Denials	**102,400** [75]

Employment-Based Immigrants

The new NTA guidance will also impact foreign workers seeking permanent residence and their sponsoring U.S. employers. For example, an executive of a multinational company can work in the United States in L-1A nonimmigrant status for up to seven years. After some time, the employer may decide to sponsor the individual for a green card by filing an I-140 petition under the employment-based first preference (EB-1) classification, which like the L-1A category is reserved for qualifying executives and managers. If the executive is not from India or China, he or she can file an application for adjustment of status (Form I-485) at the same time as the petition and receive employment authorization on that basis, independent of the L-1A classification. With USCIS taking an increasingly narrow view of the qualifying organizational relationship for EB-1 purposes and the nature of the executive or managerial role, the green card application of a long-time executive can be denied and if the executive's L-1A status has expired, he or she will be issued an NTA.

Form I-140, Petition for Alien Worker
Although self-petitioning is allowed in limited circumstances, Form I-140 is most frequently filed by a U.S. employer to sponsor a foreign worker for an immigrant visa in one of the first three employment-based classifications: priority workers (EB-1), professionals with advanced degrees or individuals of exceptional ability (EB-2), or skilled workers, professionals, and other workers (EB-3).

Beneficiaries of an I-140 petition can be outside the United States but are more frequently in the United States and working in a position in a temporary visa classification by the sponsoring employer.	
FY 2017 I-140 Denials	**9,485** [76]

Form I-485, Application to Register Permanent Residence or Adjust Status	
Form I-485 is completed by applicants seeking adjustment of status to permanent residence based on an approved I-140 petition. Individuals from countries not subject to the immigrant visa backlogs can file Form I-485 concurrently with an I-140 petition and have the two requests adjudicated concurrently. Individuals from backlogged countries (India, China, and EB-3 Philippines) must obtain an I-140 approval before filing Form I-485. In order to be granted adjustment of status, applicants must be physically present in the United States. Those applicants who have work and travel authorization based on the pending adjustment application may not have an underlying nonimmigrant visa status and will likely be subject to an NTA upon denial of an adjustment of status application.	
FY 2017 Employment-Based I-485 Denials	**7,345** [77]

Families

The new NTA policy will also tear American families apart. Our immigration laws allow U.S. citizens to petition for a green card on behalf of close family relatives.[78] Marriage-based petitions will generally be approved if USCIS concludes the marriage is legally valid and bona fide. Yet even if the marriage is legally valid, USCIS can deny the I-130 petition if it is deemed deficient, if the petitioner fails to respond to a request for evidence (RFE), or as a matter of discretion.

Many beneficiaries of marriage-based cases, though not eligible for adjustment of status in the United States, are eligible for permanent residence if they depart the U.S. and apply for an immigrant visa at a U.S. consulate abroad.[79] For most, departure will trigger a three- or ten-year bar to admissibility due to prior unlawful presence, thus requiring these individuals to remain outside the United States for many months and possibly a year or more, while they await adjudication of a waiver application.[80] To alleviate the hardships associated with lengthy separation, DHS and the Department of State (DOS) created the provisional unlawful presence waiver.[81] A provisional waiver applicant is seeking "pre-approval" of an unlawful presence waiver by USCIS. If approved, the applicant departs the United States to attend an immigrant visa interview, and assuming no other grounds of inadmissibility or ineligibility apply, the immigrant visa will be approved, and the applicant will be quickly admitted to the United States. However, like most immigration benefits, the provisional unlawful presence waiver application

is complex and can be denied for a variety of reasons, including as a matter of discretion or for a technical deficiency.

Under the new NTA policy, provisional waiver applicants who are denied would be placed in removal proceedings as a matter of course, since all provisional waiver applicants are subject to the unlawful presence bars. Instead of being allowed to appeal or reapply and eventually pursue relief outside the immigration court system, these individuals will be forced to appear before an immigration judge and will either be ordered deported, or at best, will be granted voluntary departure, requiring them to remain separated from their loved ones for a long time.[82]

Form I-130, Petition for Alien Relative	
Form I-130 is the first step in the family-based green card process. It is filed by a U.S. citizen or lawful permanent resident who wishes to sponsor a close family relative for permanent residence. An I-130 approval signifies USCIS's recognition that the claimed relationship is legally valid and bona fide and establishes the "place in line" for individuals subject to family-preference visa backlogs. Approval of an I-130 does not confer any lawful status upon the beneficiary. I-130 petitions are filed on behalf of individuals who are outside the United States or inside the United States.	
FY 2017 I-130 Denials	**57,562** [83]

Form I-601A, Application for Provisional Unlawful Presence Waiver	
A provisional unlawful presence waiver is an application submitted by an individual who is eligible for an immigrant visa, but who will be subject to the three- or ten-year bar to admissibility upon departing the United States to apply for a visa at a U.S. embassy or consulate abroad. An approved I-601A can streamline the immigrant visa process for those requiring an unlawful presence waiver from one that takes many months, and sometimes more than a year, to just a couple of weeks. Because individuals who are seeking an I-601A waiver are, by definition, without lawful presence, all provisional waiver applicants who are denied would be subject to NTA issuance.	
FY 2017 I-601A Denials	**3,331** [84]

Visitors for Business and Pleasure

The United States issued more than 6.3 million B-1 (Visitor for Business), B-2 (Visitor for Pleasure) or combination B-1/B-2 visas in FY 2017.[85] B-1/B-2 visitors are admitted to the United States for the duration of time that is required to complete the purpose of their stay, though that time period by definition is limited and is often granted for no more than 6 months.[86]

B-1/B-2 visitors are not allowed to work in the United States and must prove that they have the intent to return to their home country at the conclusion of their stay.[87] However, circumstances sometimes change, and a person admitted to the U.S. as a visitor may have need to prolong their stay. For example, a person may fall ill while in the U.S. and require urgent medical care, thus necessitating an application to extend their visitor status. Processing times for extension applications can take up to one year to process.[88] If by the time USCIS denies the application the individual's underlying status has expired, he or she would be issued an NTA and placed in removal proceedings, even if he or she wanted to depart the United States and continue treatment in their home country.

Form I-539, Application to Extend/Change Nonimmigrant Status	
Except for employment-based nonimmigrant categories that require a petitioning employer, individuals seeking to change or extend their nonimmigrant status must file Form I-539. Dependents (spouses and children) of employment-based nonimmigrants must also use Form I-539 to extend or change their status.	
FY 2017 I-539 Denials	**28,366** [89]

Domestic Abuse Survivors and Crime Victims

The new NTA policy also extends to victims of domestic violence, abuse, and criminal activity who lack lawful immigration status. The memorandum expressly provides that agency personnel "must follow the guidelines established in this PM" for applicants afforded the confidentiality protections under 8 U.S.C. §1367—vulnerable populations that include battered individuals seeking protection under the Violence Against Women Act (VAWA) and victims of crime seeking U visa status. By mandating the inclusion of these and other similar form types under this policy, survivors of domestic abuse and criminal activity will be discouraged from seeking humanitarian protection and their abusers will be emboldened. Other policies introduced by the Trump administration—not least ICE's indiscriminate enforcement priorities—have already made immigrant victims of domestic violence, sexual assault, and sex trafficking less likely to notify law enforcement of these crimes for fear of enforcement consequences.[90] According to a survey conducted last year by Tahirih Justice Center, "78% of advocates reported that immigrant survivors expressed concerns about contacting police" regarding their victimization.[91] Now these survivors will fear not only ICE, but also USCIS. Aware that denial of a VAWA petition, U visa application, or other similar request (even for a technical deficiency that could be overcome by reapplying) could lead to deportation and separation from their children, many individuals will deem the risk too great. The new NTA policy thereby undermines a core bipartisan Congressional objective in establishing these immigration benefits—to empower victims to come forward and seek protection.[92] Those individuals will now feel even more trapped in ongoing situations of violence and abuse.

Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant	
Form I-360 is used for a variety of purposes. Those include petitions filed including by abused spouses and children of a U.S. citizen or permanent resident and abused parents of a U.S. citizen to self-petition for permanent residence for their own protection.	
FY 2017 VAWA-Based I-360 Denials	**2,081**[93]
FY 2017 Overall I-360 Denials	**4,441** [94]

Form I-918, Petition for U Nonimmigrant Status	
Form I-918 is filed to provide temporary status to foreign nationals who are victims of certain criminal activity, as well as their qualifying family members. Many people whose petitions for U nonimmigrant status are denied would not be lawfully present and would therefore be subject to an NTA.	
FY 2017 I-918 Denials	**3,770** [95]

Deferred Action for Childhood Arrivals (DACA)

On June 28, 2018, USCIS issued a separate memorandum specific to NTA issuance in DACA cases.[96] Since USCIS began accepting these applications in 2012, more than 800,000 individuals have been granted DACA.[97] On September 5, 2017, the Trump Administration rescinded the DACA program;[98] however, federal courts soon enjoined those efforts and directed the government to continue accepting DACA applications from those who were previously granted DACA.[99] The June 28, 2018 memorandum keeps in place the existing general policy regarding NTA issuance for DACA requestors. Individuals who are granted DACA are not referred to ICE. If an individual is denied DACA, USCIS is directed to follow the 2011 NTA memo to determine whether to issue an NTA or refer the case to ICE. USCIS officers are also directed to continue following the information-sharing protocols specified in the DACA "Frequently Asked Questions" on the USCIS website.[100]

Form I-821D, Consideration of Deferred Action for Childhood Arrivals
Form I-821D is filed by an individual to ask USCIS to grant or renew deferred action under the Deferred Action for Childhood Arrivals program established on June 15, 2012. Individuals who receive DACA are not placed in removal proceedings and are not subject to removal from the United States. DACA recipients may obtain work authorization by filing a separate Form I-765, Application for Employment Authorization, and Form I-765WS.

Recognizing that the 2018 memo retains the previous policy regarding NTA issuance for DACA requestors, it is not expected that there will be significant change in NTAs issued for this population.	
FY 2017 I-821D Denials	**13,193** [101]

Temporary Protected Status (TPS)

Under longstanding policy, USCIS has issued NTAs in connection with TPS denials exclusively when the basis for denial constituted a ground of inadmissibility or deportability.[102] Under the new memorandum, USCIS will also issue an NTA if the applicant is unlawfully present at the time of denial or withdrawal, once the TPS regulations have been followed or have been found not to apply. Further, the memorandum provides that where DHS has terminated a country's TPS designation, "certain former beneficiaries" of that designation who lack other lawful immigration status "may become a DHS enforcement priority." While the memorandum does not direct USCIS to issue NTAs to former TPS beneficiaries—unless they apply for and are denied a different immigration benefit—it directs USCIS officers to defer to "ICE and CBP regarding the appropriate timing of any NTA issuances" to these individuals. This language, while vague, appears to reserve the option of issuing NTAs on a broad scale to former TPS beneficiaries from countries whose TPS designations have been terminated by DHS.

The implications of this policy shift are severe. Due to a series of TPS designation terminations under the Trump administration, more than 313,000 individuals—upwards of 98 percent of the TPS population—will have lost their TPS status as of January 5, 2020.[103] The administration ended these designations despite widespread warnings, including from its own diplomats, that the countries in question, such as Honduras, El Salvador, and Haiti, remained unsafe for repatriation.[104] As a result, hundreds of thousands of people who may not qualify for other lawful status could become subject to mass NTA issuance, speeding their return to countries of origin plagued by failing infrastructure, lack of potable water, gang violence, disease, and famine. Meanwhile, given the risks associated with this aggressive new NTA policy, the TPS population is less likely than ever to seek protections, through TPS re-registration or through other benefits for which they might qualify, thus chilling efforts to remain in lawful immigration status and to secure the continued protection they deserve.

Form I-821, Application for Temporary Protected Status	
Form I-821 is used by eligible individuals from a designated country to apply for initial TPS or to re-register for TPS. TPS recipients are also entitled to employment authorization by filing a separate Form I-765, Employment Authorization Application. The majority of TPS applicants who are denied either initial TPS or a TPS extension will be without an underlying lawful status and would thus be subject to NTA issuance.	
FY 2017 I-821 Denials	**6,200** [105]

[1] Hereinafter "June 2018 NTA Guidance" *available at* 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.

[2] USCIS issued a total of 91,711 NTAs in 2017 and 92,229 NTAs in 2016. Of those, 8 of out 10 were issued in cases where an asylum seeker obtained a positive credible fear determination after an interview with an asylum officer. In those cases, an NTA must be issued, under 8 CFR §208.30(f), to give the asylum seeker an opportunity to present his or her case to an immigration judge. In FY 2013, 2014, and 2015, USCIS issued approximately 56,000 NTAs each year. *See* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearStatisticsNationalityReport.pdf.

[3] *See* https://www.justice.gov/eoir/dhs-notice-appear-form-i-862.

[4] INA §239(a)(1)(D).

[5] *See generally* 8 CFR §239.1(a).

[6] June 2018 NTA Guidance, *supra* note 1.

[7] *Id*. at 10. ("NTAs will be issued [by USCIS] … except in very limited circumstances involving the exercise of prosecutorial discretion….")

[8] "USCIS Updates Notice to Appear Policy Guidance to Support DHS Enforcement Priorities" (July 5, 2018), *available at* https://www.uscis.gov/news/news-releases/uscis-updates-notice-appear-policy-guidance-support-dhs-enforcement-priorities.

[9] 82 Fed. Reg. 8799 (Jan. 30, 2017), *available at* https://www.aila.org/infonet/presidential-executive-order-enhancing-public?utm_source=aila.org&utm_medium=InfoNet%20Search.

[10] June 2018 NTA Guidance, *supra* note 1 at 5. Under the November 7, 2011 NTA guidance, discussed *infra*, USCIS had the authority to issue an NTA in cases where a Statement of Findings substantiating fraud was a part of the record.

[11] *Id*. at 6-7. "Egregious public safety" cases may be referred to ICE before adjudication of the application or petition without issuing an NTA.

[12] *Id*. at 7-8. Use of the term "not lawfully present" raises a question as to whether USCIS intends to apply the statutory definition of "unlawful presence" at INA §212(a)(9)(B)(ii), to determine whether an NTA shall be issued or whether a violation of status or failure to maintain status is sufficient to trigger an NTA.

[13] *Id*. at 3-4. For example, NTAs are required upon denial or termination of conditional resident status (Form I-751 or Form I-829), 8 CFR §§216.3, 216.4, 216.5, 216.6; termination of refugee status, 8 CFR §207.9; and asylum cases referred to an immigration judge, 8 CFR §208.14(c)(1).

[14] "Policy for Vetting and Adjudicating Cases with National Security Concerns," (Apr. 11, 2008), *available at:* https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/CARRP_Guidance.pdf

[15] *See generally* 8 CFR Part 244; June 2018 NTA Guidance, *supra* note 1 at 4. In addition, the guidance notes that "if the Secretary terminates a country's TPS designation, certain former beneficiaries who have been granted TPS under that country's designation, but who do not have other lawful immigration status or authorization to remain in the United States, may become an enforcement priority. In such circumstances, USCIS officers should defer to ICE and CBP regarding the appropriate timing of any NTA issuances to former TPS beneficiaries after the country's TPS designation ends." *Id*.

[16] "Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection With a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA," (hereinafter "2018 DACA NTA Memo") (June 28, 2018), *available at* https://www.aila.org/infonet/uscis-issues-policy-memo-on-ntas-for-cases.

[17] Sam Bernsen, INS General Counsel, "Legal Opinion Regarding Service Exercise of Prosecutorial Discretion" (July 15, 1976), *available at* https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf.

[18] *Id*.
[19] *Available at* https://www.aila.org/infonet/ins-memo-on-prosecutorial-discretion?utm_source=aila.org&utm_medium=InfoNet%20Search.
[20] "Service Center Issuance of Notice to Appear (Form I-862)," (Sept. 12, 2003), *available at* https://www.aila.org/infonet/uscis-service-center-issuance-of-ntas?utm_source=aila.org&utm_medium=InfoNet%20Search.
[21] Policy Memorandum No. 110, "Disposition of Cases Involving Removable Aliens" (July 11, 2006), *available at* https://www.aila.org/infonet/uscis-memo-on-issuance-of-ntas.
[22] "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-an-nta?utm_source=aila.org&utm_medium=InfoNet%20Search.
[23] "Fiscal Year 2016 Entry/Exit Overstay Report," *available at* https://www.dhs.gov/sites/default/files/publications/Entry%20and%20Exit%20Overstay%20Report%2C%20Fiscal%20Year%202016.pdf.
[24] U.S. Commission on Immigration Reform, Becoming an American: Immigration and Immigrant Policy. 1997:148-49.
[25] Congressional Research Service, "Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress" (Dec. 30, 2002,; *available at* https://www.everycrsreport.com/files/20021230_RL31388_3678de56f7aba9d7d612f19a020d1f0030db4d9c.pdf.
[26] Pub. L. No. 107–296, 116 Stat. 2135 (Nov. 25, 2002), *available at* https://www.dhs.gov/sites/default/files/publications/hr_5005_enr.pdf.
[27] *Id*. at Sec. 451(b). The specific functions that were transferred involved: adjudications of immigrant visa petitions, naturalization applications, asylum and refugee applications, "[a]djudications performed at service centers," and "[a]ll other adjudications performed by [INS] immediately before the effective date [of the Act]."
[28] USCIS Webpage, "Our History" (May 25, 2011), *available at* https://www.uscis.gov/about-us/our-history (emphasis added).
[29] 8 CFR §208.30(f).
[30] DHS, Border Security Status Report: Fourth Quarter, Fiscal Year 2017 (May 2, 2018) *available at* https://www.dhs.gov/sites/default/files/publications/DMO%20-%20PLCY%20-%20Border%20Security%20Status%20Report%20-%20Fourth%20Quarter%2C%20FY%202017.pdf; Julio Ricardo Varela, "Where Does Trump Stand on Credible Fear Immigration Cases," *Latino USA* (May 4, 2017), *available at* http://latinousa.org/2017/05/04/trump-stand-credible-fear/; USCIS Credible Fear Workload Report Summary: FY 2013 Total Caseload, *available at* https://www.aila.org/infonet/uscis-asylum-statistics-10-22-13; USCIS Credible Fear Workload Report Summary: FY 2017 Total Caseload, *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17_CFandRFstatsThru09302017.pdf.
[31] Recommendation from the CIS Ombudsman to the Director, USCIS, (Mar. 20, 2006), *available at* https://www.aila.org/infonet/cis-ombudsmans-recommendation-on-nta-issuance.
[32] USCIS Announces Elimination of Naturalization Backlog (Sept. 15, 2006), *available at* http://www.aila.org/infonet/uscis-elimination-natz-application-backlog?utm_source=aila.org&utm_medium=InfoNet%20Search.
[33] CIS Ombudsman Annual Report to Congress (2017), *available at* https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202017_0.pdf.
[34] *See generally* Data Set: All USCIS Application and Form Types, *available at* https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types.
[35] *See generally* USCIS Processing Time Information, *available at* https://egov.uscis.gov/cris/processTimesDisplayInit.do. Historical processing time data is available at: http://www.aila.org/infonet/processing-time-reports.
[36] *Id*. This estimate is based on a review of USCIS Field Office processing times as of December 31, 2017.
[37] AILA Letter to Director Rodriguez on USCIS Processing Delays (Mar. 11, 2016), *available at* http://www.aila.org/advo-media/aila-correspondence/2016/letter-director-rodriguez-uscis-processing-delays.
[38] USCIS Fee Schedule, 81 Fed. Reg. 73292 (Oct. 24, 2016).
[39] *Id*. at 73308.

[40] *See* Office of Mgmt. & Budget, Exec. Office of the President, RIN 1615-AC18, USCIS Fee Schedule, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1615-AC18.
[41] *See generally* Backgrounder on EOIR Strategic Caseload Reduction Plan, *available at* https://www.justice.gov/opa/press-release/file/1016066/download.
[42] EOIR Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018), *available at* https://www.aila.org/infonet/eoir-updates-its-case-priorities-and-immigration.
[43] EOIR Operating Policies and Procedures Memorandum 18-01: Change of Venue, *available at* https://www.aila.org/infonet/eoir-releases-oppm-on-change-of-venue-requests and Operating Policies and Procedures Memorandum 17-01: Continuances, *available at* https://www.aila.org/infonet/eoir-ops-policies-procedures-memo-17-01-continuanc.
[44] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).
[45] *See* TRAC Immigration, "Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location," *available at*: http://trac.syr.edu/phptools/immigration/court_backlog/.
[46] "Fiscal Year 2016 Entry/Exit Overstay Report," *supra note 23*..
[47] USCIS Policy Memorandum No. 110, "Disposition of Cases Involving Removable Aliens" (July 11, 2006) *available at* https://www.aila.org/File/DownloadEmbeddedFile/47933.
[48] *See e.g.*, CIS Ombudsman Annual Report (2014) at 20 ("Stakeholders continue to report concerns regarding the quality and consistency of adjudications of high-skilled petitions."), *available at* https://www.aila.org/infonet/cis-ombudsman-annual-report-2014?utm_source=aila.org&utm_medium=InfoNet%20Search.
[49] Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b) (July 13, 2018) *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.
[50] June 2018 NTA Guidance, *supra* note 1 at 10.
[51] INA § 240(b)(5).
[52] INA §212(a)(6)(B).
[53] Adjudicator's Field Manual (AFM) 40.9.2(b)(2)(G), (b)(3)(D)(iv). *But see* "Accrual of Unlawful Presence for F, J, and M Nonimmigrants" (May 10, 2018) *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/AccrualofUnlawfulPresenceFJMNonimmigrantsMEMO_v2.pdf.
[54] INA §212(a)(9)(B)(ii).
[55] INA §212(a)(9)(B).
[56] *Id*.
[57] AFM 40.9.2(b)(2)(E)(i); 8 CFR §239.3.
[58] INA §240B(a); 8 CFR §240.25.
[59] *See* AILA Report: Deconstructing the Invisible Wall, *available at* https://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall?utm_source=aila.org&utm_medium=InfoNet%20Search.
[60] USCIS Completes the H-1B Cap Random Selection Process for FY 2019, *available at* https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2019 USCIS Completes the H-1B Cap Random Selection Process for FY 2018, *available at* https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2018; USCIS Completes the H-1B Cap Random Selection Process for FY 2017, *available at* https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2017.
[61] *Declining International Student Enrollment at U.S. Universities and its Potential Impact*, National Foundation for American Policy (Feb. 2018), *available at* https://nfap.com/wp-content/uploads/2018/02/Decline-in-International-Student-Enrollment.NFAP-Policy-Brief.February-2018-2.pdf.
[62] *See* National Travel and Tourism Office, U.S. Dept. of Commerce, 2017 Monthly Tourism Statistics, *available at* https://travel.trade.gov/view/m-2017-I-001/table1.asp.
[63] *See* VISIT U.S. COALITION, *available at* https://www.visituscoalition.com/.
[64] 8 CFR §214.1(c)(4).
[65] For example, H-1B processing fluctuates greatly but is currently estimated, according to the USCIS website, as up to 4.5 months. *See USCIS Webpage, "Check Case Processing Times" available at* https://egov.uscis.gov/processing-times/.

[66] *See* H-1B Trends: 2007 to 2017, *available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/h-1b-2007-2017-trend-tables-12.19.17.pdf.
[67] Exec. Order No. 13788, 82 Red. Reg. 18837 (Apr. 18, 2017).
[68] *See* USCIS Policy Memorandum, Rescission of the December 22, 2000 "Guidance Memo on H-1B Computer Related Positions" (Mar. 31, 2017), *https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf*; and USCIS Policy Memorandum, Contracts and Itineraries Requirements for H-1B petitions Involving Third-Party Worksites, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf.
[69] Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status (Oct. 23, 2017) *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf.
[70] Migration Policy Institute Spotlight: International Students in the United States, (May 9, 2018), *available at* https://www.migrationpolicy.org/article/international-students-united-states.
[71] Under INA §214(g), no more than 65,000 H-1B visas shall be issued in any given fiscal year, plus an additional 20,000 H-1B visas for individuals who have earned a master's degree or higher from a U.S. institution of higher education.
[72] 8 CFR §214.1(c)(4).
[73] For FY 2019, USCIS selected 113,000 petitions, as compared to 98,000 in FY 2018. *See* "Highlights from CIS Ombudsman Teleconference on H-1B Lottery" (June 27, 2018), *available at* https://www.aila.org/infonet/highlights-from-cis-ombudsman-teleconference-h-1b.
[74] Accrual of Unlawful Presence for F, J, and M Nonimmigrants" (May 10, 2018) *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/AccrualofUnlawfulPresenceFJMNonimmigrantsMEMO_v2.pdf.
[75] USCIS Data Set: All USCIS Application and Petition Form Types (FY 2017) (hereinafter "FY 2017 USCIS Data Set"), *available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY17Q4.pdf.
[76] *Id*.
[77] *Id*.
[78] INA §203(a).
[79] *See* INA §§245(a) and (c).
[80] *See* INA §212(a)(9)(B).
[81] *See generally* 8 CFR §212.7(e).
[82] Under INA §240B(b), an immigration judge may grant voluntary departure before completion of proceedings (up to 120 days) or at the conclusion of proceedings (up to 60 days). To be eligible for pre-completion voluntary departure, the individual must (1) request voluntary departure prior to or at the master calendar hearing; (2) request no other relief; (3) concede removability; (4) waive appeal; and (5) not have been convicted of an aggravated felony or be removable on security-related grounds. To be eligible for voluntary departure at the completion of proceedings, the individual must (1) be physically present in the U.S. for at least one year prior to service of the NTA; (2) establish good moral character for at least five years preceding the voluntary departure request; (3) not be deportable for an aggravated felony or on terrorism grounds; (4) establish by clear and convincing evidence the ability and intent to leave at one's own expense; and (5) have the financial ability to post a bond designated by the judge within 5 days of the judge's order.
[83] FY 2017 USCIS Data Set, *supra* note 75.
[84] *Id*.
[85] *See* "Nonimmigrant Visas Issued by Classification" *available at* https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXVIB.pdf.
[86] *See generally* 9 FAM 402.2-2.
[87] 9 FAM 402.2-2(B).
[88] *See* USCIS Processing Times, *available at* https://egov.uscis.gov/processing-times/.

[89] FY 2017 USCIS Data Set, *supra* note 75.
[90] DHS Memorandum, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017); https://www.aila.org/infonet/leaked-dhs-memo-implementing-president-trump.
[91] Tahirih Justice Center, Survey Reveals Impact of New Immigration Enforcement Policies on Survivors of Violence (May 19, 2017); *available at* https://www.tahirih.org/news/survey-reveals-impact-of-new-immigration-enforcement-policies-on-survivors-of-violence/.
[92] National Immigrant Women's Advocacy Project, State Justice Initiative, American University Washington College of Law, "Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality" (Jun. 17, 2015); *available at:* http://library.niwap.org/wp-content/uploads/2015/VAWA_Leg-History_Final-6-17-15-SJI.pdf.
[93] FY 2017 USCIS Data Set, *supra* note 75.
[94] USCIS Data Set: Form I-360 Victims of Domestic Violence, Battery or Extreme Cruelty (VAWA) (Jul. 7, 2018); *available at:* https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-360-victims-domestic-violence-battery-or-extreme-cruelty-vawa.
[95] *Id*.
[96] 2018 DACA NTA Guidance, *supra* note 16.
[97]"Number of Form I-821D,Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake and Case Status Fiscal Year 2012-2018" (May 31, 2018); ,https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2018_qtr2_plus_may.pdf
[98] Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)," (Sept. 5, 2017), *available at* https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.
[99] *See Regents of the University of California v. DHS*, Case 3:17-cv-05211-WHA (N.D. Cal. Jan. 9, 2018); and *Batalla Vidal v. Nielsen*, Case 1:16-cv-04756-NGG-JO (E.D.N.Y. Feb. 13, 2018).
[100] https://www.uscis.gov/archive/frequently-asked-questions.
[101] FY 2017 USCIS Data Set, *supra* note 75.
[102] *See* USCIS memorandum, *Service Center Issuance of Notice to Appear* (Form I-862) (Sept. 12, 2003), *available at* https://www.aila.org/infonet/uscis-service-center-issuance-of-ntas?utm_source=aila.org&utm_medium=InfoNet%20Search.
[103] *See* National Immigration Forum, *Fact Sheet: Temporary Protected Status* (May 5, 2018), *available at* https://immigrationforum.org/article/fact-sheet-temporary-protected-status/.
[104] *See, e.g.*, Washington Post, *U.S. embassy cables warned against expelling 300,000 immigrants. Trump officials did it anyway* (May 8, 2018), *available at* https://www.washingtonpost.com/world/national-security/us-embassy-cables-warned-against-expelling-300000-immigrants-trump-officials-did-it-anyway/2018/05/08/065e5702-4fe5-11e8-b966-bfb0da2dad62_story.html?noredirect=on&utm_term=.a61d371ed332.
[105] FY 2017 USCIS Data Set, *supra* note 75.