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10 Key Points From New USCIS 'Notice To Appear' Policy

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On Sept. 27, the U.S. Citizenship and Immigration Services' Public Engagement Division hosted a live stakeholder teleconference to inform the public about how the agency plans to implement a new policy memorandum, or PM, issued on June 28, 2018, named "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens," which expands the agency's authority to issue NTAs. The agency began to implement the new policy on Oct. 1. The expansion of what constitutes an NTA action is important for its impact on the deportation, or removal, process for foreign nationals. The NTA is a charging document that notifies and requires its recipient to appear in court before an immigration judge. The notice serves as the first step in removal proceedings and initiates the prospective deportation of the foreign national upon the denial of an immigration benefit.

After presenting a brief overview of the new NTA policy, which supersedes 2011 federal guidance on the same topic, USCIS presented a Q&A series from more than 100 questions received by stakeholders. The teleconference presenters represented a spectrum of USCIS divisions, including USCIS Public Engagement, Field Operations, Policy, and Office of Chief Counsel. USCIS also announced the NTA information will be posted in the agency's electronic reading room, and that related NTA news and public engagement events will be posted online in a timely fashion.

The aim of the NTA policy is to align USCIS operations with the president's 2017 Executive Order 13768: Enhancing Public Safety in the Interior of the United States, which outlines the administration's removal priorities. (The Ninth Circuit recently ruled EO 13768 provisions regarding federal funding as unconstitutional on Aug. 1, 2018, on the grounds that only Congress, and not the president, may determine federal grant funding for known sanctuary city jurisdictions.)

In sum, the top 10 takeaways of the USCIS teleconference regarding its new NTA policy implementation, in which USCIS will now both issue and refer NTAs to U.S. Immigration and Customs Enforcement, include the following key points:

1. USCIS will apply the NTA policy in cases where: there is evidence of fraud, willful misrepresentation or abuse related to the receipt of public benefits; there is a conviction or charge of a criminal offense; the

applicant is denied the opportunity to naturalize as a U.S. citizen on good moral character grounds; the foreign national has accrued unlawful presence, and lacks a lawful status under which she can remain in the United States.

2. “At this time,” USCIS will not apply the policy in cases of employment-based petitions, such as I-140 and I-129 petitions. While the news that the NTA policy does not apply to employment-based immigration petitions provides relief for employers and their immigrant workforce, from small businesses to corporations, this does not preclude USCIS from expanding the NTA policy to include employment-based petitions at a later time. Thus, employers should remain engaged and current on changes to NTA implementation in case the policy is further expanded next year.

3. USCIS will not apply the policy in cases of Deferred Action Childhood Arrivals (DACA) recipients or requestors, temporary protected status (TPS) or humanitarian cases. Nevertheless, USCIS will apply the policy in instances where an individual is denied or withdraws from TPS, leaving her without lawful status in the United States. Thus, pre-existing policy concerning DACA, TPS and humanitarian cases remains in effect.

4. USCIS began its implementation of the new policy effective Oct. 1, 2018, in cases where the agency denies status-impacting applications such as Form I-485 (Adjustment of Status) or Form I-539 (Extend/Change Non-Immigrant Status) applications.

5. USCIS will implement the policy in an “incremental” fashion. Although USCIS did not specify a time frame, “incremental” implies that there will be a period of gradual increase in the number and frequency of NTAs issued as the agency hones its coordination and logistics in the rollout of its new NTA implementation. At this time, USCIS describes its incremental approach to “implement the new policy for denials issued on or after Oct. 1, 2018, regardless of when the application or petition was filed,” but warns that the agency still has the authority and discretion to deport individuals.

6. USCIS may still refer immigration cases to ICE without issuing a NTA. The new policy does not change how ICE will operate nor ICE’s authority to operate and issue NTAs. ICE will continue to issue NTAs on criminal cases, and USCIS will issue NTAs on cases related to criminal offenses as appropriate. What does change under the new policy is that USCIS will now directly issue NTAs rather than refer NTAs to ICE, eliminating what the agency now deems as an “unnecessary” middle step, streamlining the NTA process particularly for criminal cases. Interestingly, USCIS states that this revised process will lower the agency’s NTA referrals to ICE, rather than expand its NTA referrals.

7. USCIS will not issue an NTA immediately upon the denial of a benefit request, but will wait for the expiration of an appeal or motion period before issuing an NTA. This interim period is usually 33 days from the date of the decision, but may be less depending upon the case type, and could be as brief as 18 days. USCIS clearly states that the new NTA policy will not change or limit motion or appeal rights.

8. USCIS will exercise prosecutorial discretion on a case-by-case basis, and will establish prosecutorial discretion panels in local (regional) USCIS offices, which will determine whether cases warrant prosecutorial discretion over a NTA. Each prosecutorial review panel will include a USCIS officer supervisor and attorney to ensure legal sufficiency before a USCIS field office director ultimately determines whether to issue a NTA or instead exercise prosecutorial discretion.

9. USCIS will issue NTAs either by mail or in person by service of process, implying the importance of applicants to maintain accurate addresses on file with USCIS. ICE enforcement activities will not be linked to the USCIS NTA issuance process.

10. USCIS will soon host a public webpage intended to answer questions from the public, and is considering other public engagement support. Other questions may be sent to public.engagement@uscis.dhs.gov.

Conclusion

In sum, the most important news for employers and their sponsored workforce is that the new NTA policy implementation does not include employment-based petitions such as I-129 and I-140 employment-based petitions. Whether or not USCIS will later expand its NTA implementation to include employment-based petitions remains to be seen, as USCIS only stated that "at this time" these petitions will be omitted. Nevertheless, the new NTA policy is of concern to unauthorized immigrants, who are the most impacted by the directive, as USCIS appears to be placing the exercise of prosecutorial discretion as an exception on a "case-by-case" basis, rather than the norm. What is clear however is that unless applicants seeking immigration benefits are confident that their respective applications will be approved, their chances and risk of facing an NTA and a subsequent deportation proceeding in court have now significantly grown.

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