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Notice to Appear (NTA) Policy Memo Takes Effect 10/1/2018

U.S. Citizens and Immigration Services (USCIS) announced on September 26, 2018 that it will incrementally begin implementing the June 29, 2018 Notice to Appear policy memorandum (NTA-PM) regarding the issuance of notices instructing individuals to appear before an immigration judge. At this time, the NTA-PM only applies to applications, including but not limited to Form I-485, Application to Register Permanent Residence or Adjust Status, and Form I-539, Application to Extend/Change Nonimmigrant Status. USCIS recently reiterated that the NTA-PM "will not be implemented with respect to employment-based petitions and humanitarian applications and petitions at this time."

Background

USCIS, along with U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP), has legal authority to issue Notices to Appear (NPA), Form I-862. An NTA is a document issued to an alien that instructs her or him to appear before an immigration judge on a certain date. The issuance of an NTA commences removal proceedings against the alien.

President Trump signed Executive Order 137768 on January 25, 2017, which emphasized that enforcement of our immigration laws is critically important to national security and public safety. On February 20, 2017, former Secretary of Homeland Security John Kelly issued an Implementation Memorandum, "Enforcement of the Immigration Laws to Serve the National Interest." In response to the Executive Order and Implementation Memorandum, the NTA-PM updates the guidelines USCIS officers use to determine when to refer a case to ICE or to issue an NTA.

Policy

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The revised policy generally requires USCIS to issue an NTA in the following categories of cases in which the individual is removable:

- Cases where fraud or misrepresentation is substantiated. USCIS may consider referring groups of cases with articulated suspicions of fraud to ICE prior to adjudication.
- Cases where an applicant abused any program related to the receipt of public benefits. USCIS will issue an NTA even if the case is denied for reasons other than fraud.
- Criminal cases where an applicant is convicted of or charged with a criminal offense and criminal cases where an applicant has committed acts that are chargeable as a criminal offense, even if the criminal conduct was not the basis for the denial or the ground of removability. USCIS may refer cases involving serious criminal activity to ICE before adjudication of an immigration benefit request pending before USCIS without issuing an NTA.
- Cases in which USCIS denies a Form N-400, Application for Naturalization, on good moral character grounds because of a criminal offense.
- Cases in which, upon the denial of an application or petition, an applicant is unlawfully present in the United States.

The NTA-PM does not change USCIS policy for issuing an NTA in the following categories:

- Cases involving national security concerns;
- Cases where issuing an NTA is required by statute or regulation;
- Temporary Protected Status (TPS) cases, except where, after applying TPS regulatory provisions, a TPS denial or withdrawal results in an individual having no other lawful immigration status; and
- DACA recipients and requestors when (1) processing an initial or renewal DACA request or DACA-related benefit request, or (2) processing a DACA recipient for possible termination of DACA.

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USCIS will add language to application denial notices regarding how applicants can review information regarding their period of authorized stay, check travel compliance, or validate departure from the United States. During a recent stakeholder teleconference, USCIS stated that generally after a denial it would not issue an NTA until the expiration of the motion to reopen or appeals time period. In addition, it generally would not issue an NTA before the motion to reopen or appeal was adjudicated. However, USCIS noted that it reserves the right to issue an NTA at any time.

Premium Processing Changes

USCIS recently made it more difficult and costly to request premium processing service for eligible petitions. On August 28, 2018, USCIS expanded the suspension of premium processing for H-1B petitions. The following H-1B petitions are currently the only ones that remain eligible for premium processing:

- ??ap-exempt petition filed by a cap-exempt employer or because the beneficiary will be employed at a qualifying cap-exempt entity; and
- ??ontinuation of previously approved employment without change with the same employer.

USCIS announced it expected the suspension to last until February 19, 2019.

Petitions that remain eligible for premium processing will also cost more. Effective October 1, 2018, the filing fee for a request for premium processing is now $1,410. Petitions postmarked on or after that date must include the new fee.

USCIS Changes Unlawful Presence Calculation for Students & Exchange Visitors

Unlawful presence begins to accrue when foreign nationals enter without inspection or overstay the period they are authorized to remain in the U.S. Previously, a Student (F) or Exchange Visitor (J) that was admitted for duration of status (D/S) did not begin to accrue unlawful presence until the day after USCIS formally found a

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nonimmigrant status violation while adjudicating another benefit, or the day after an immigration judge ordered the foreign national excluded, deported, or removed, whichever came first.

If F, J, or M (vocational student) foreign nationals were admitted until a specific date, they began to accrue unlawful presence on the day after their Form I-94 expired, the day after USCIS formally found a nonimmigrant status violation while adjudicating another benefit, or the day after an immigration judge ordered the foreign national excluded, deported, or removed, whichever came first.

Under USCIS' new policy memorandum, unlawful presence will begin on the date the student fails to maintain status. If F, J, or M foreign nationals have failed to maintain their status before August 9, 2018, they will start accruing unlawful presence on August 9, 2018, unless they had already started accruing unlawful presence because their Form I-94 had expired, the USCIS formally found a nonimmigrant status violation while adjudicating another benefit, or an immigration judge had ordered the foreign national excluded, deported, or removed.

According to the policy memorandum, on or after August 9, 2018, F, J, or M foreign nationals will start accruing unlawful presence on the earliest of any of the following:

- the day after they no longer pursue the course of study or the authorized activity, or the day after they engage in an unauthorized activity;
- the day after completing the course of study or program, including any authorized practical training plus any authorized grace period;
- the day after the I-94 expires; or
- the day after an immigration judge orders them excluded, deported, or removed (whether or not the decision is appealed).

The accrual of unlawful presence can have serious consequences. A foreign national who has been unlawfully present in the U.S. for more than 180 days (but less than a year) and who departs the U.S. cannot re-enter the U.S. for 3 years. A foreign national who has been

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unlawfully present in the U.S. for a year or more and who departs the U.S. cannot re-enter the U.S. for 10 years. An application to waive the 3/ 10-year bars to admission can be requested for a foreign national that wishes to enter as a nonimmigrant; however, it is more difficult to qualify for a waiver if a foreign national seeking permanent resident status (green card) is subject to a 3/10-year bar.

Memorandum of Understanding Between DOJ and DHS targets Employers

The Department of Justice's Civil Rights Division and Department of Homeland Security's USCIS have entered into a Memorandum of Understanding (MOU) to increase data sharing regarding employers that utilize employment-based nonimmigrant and/or immigrant visas. The objectives of the data sharing are two-fold. The first goal is to identify employers that are discriminating against U.S. workers. The second goal is to identify employers that are violating regulations regarding employment-based nonimmigrant and/or immigrant visas. The MOU indicates that data elements such as employer name, employer address, and immigration benefit may be shared, in addition to other data elements to be identified, such as E-Verify data. In addition to data sharing, the two agencies plan to cross-train each other and collaborate on investigations.

ICE & DOL Enforcement in Full Swing

Immigration and Customs Enforcement (ICE) has announced that from Oct. 1, 2017 through May 4, 2018, it opened 3,510 worksite investigations; initiated 2,282 I-9 audits; and made 594 criminal and 610 administrative worksite-related arrests, respectively. After ICE reported that they have doubled the number of investigations compared to last year, Derek Benner, head of ICE, stated "another nationwide wave of audits planned this summer would push the total 'well-over' 5,000 by September 30." According to ICE, it "uses a three-pronged approach to worksite enforcement: (1) compliance, from I-9 inspections, civil fines and referrals for debarment; (2) enforcement, through the criminal arrest of employers and administrative arrest of unauthorized workers; and (3) outreach,

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through the ICE Mutual Agreement between Government and Employers, or IMAGE program, to instill a culture of compliance and accountability."

Recently, the Department of Labor (DOL) also announced it was focusing on compliance with respect to the H-2B visa program. The DOL has launched two initiatives focusing on the hotel and landscaping industries. The H-2B program requires employers to provide evidence that they were unable to find sufficient U.S. workers who were qualified and available for the offered temporary positions. One of the key components of these investigations is confirming whether employers recruited U.S. workers before submitting their H-2B petitions.

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