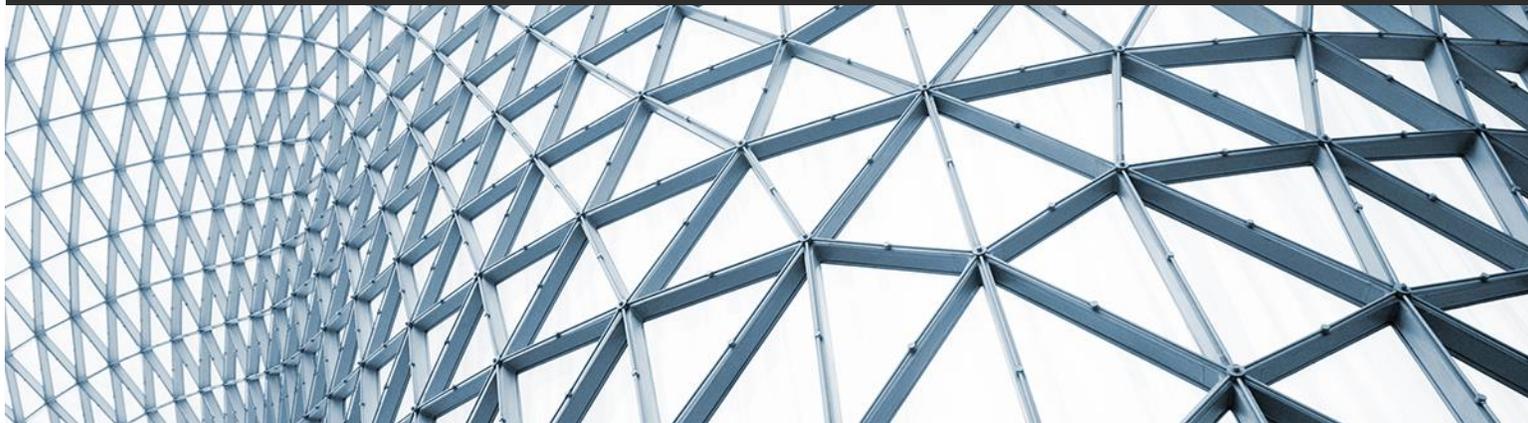


Alert | Immigration & Compliance



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USCIS Issues Two New Policy Memoranda on Notices to Appear and Denials in Lieu of RFEs and NOIDs - What This Means for You

On June 28, 2018, the U.S. Citizenship and Immigration Services (USCIS) issued a Policy Memorandum titled “[Updated Guidance for the Referral of Cases and Issuance of Notices to Appear \(NTAs\) in Cases Involving Inadmissible and Deportable Aliens](#).” Later, on July 13, 2018, the USCIS issued a Policy Memorandum titled “[Issuance of Certain RFEs and NOIDs](#).” The two memoranda do not necessarily go hand in hand, but the question lingers whether a denial on an immigration benefit (that leads to no status) will automatically lead to a Notice to Appear (NTA).

NTA Policy Memorandum

The June 28 Policy Memorandum was issued in response to President Trump’s Executive Order (EO), *Enhancing Public Safety in the Interior of the United States*. One of the priorities listed in the EO is to remove aliens from the United States where necessary, including those aliens who are deportable or inadmissible, with no exceptions. The EO, along with a Department of Homeland Security (DHS) implementation memorandum, prioritizes removable aliens who:

- Have been convicted of any criminal offense;
- Have been charged with any criminal offense that has not been resolved;
- Have committed acts that constitute a chargeable criminal offense;

- Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
- Have abused any program related to receipt of public benefits;
- Are subject to a final order of removal, but have not departed; or
- In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

In the above scenarios, USCIS has the authority to issue Form I-862, also known as the Notice to Appear (NTA), which is filed with the Immigration Court to commence removal proceedings. Traditionally, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) have issued the NTAs. Now USCIS will join and follow updated guidance. The guidance is listed below in terms of scenarios where NTAs will be issued:

1. **National security cases:** Whether an alien poses a national security risk will be subject to the judgement of the USCIS officer.
2. **Cases required by statute or regulation:** USCIS will continue to issue NTAs where there has been a termination of conditional permanent resident status, termination of refugee status, denial of NACARA, and denial of asylum cases. Temporary Protected Status (TPS) will be treated the same if the alien does not have a lawful status after the termination of the status.
3. **Fraud, misrepresentation, and abuse of public benefit programs cases:** An NTA will be issued for cases where there is fraud, misrepresentation, or evidence of abuse of public benefit programs. These cases may be referred to U.S. Immigration and Customs Enforcement (ICE).
4. **Criminal cases:** This includes removing aliens convicted of any criminal offense or charged with a criminal offense that has not been resolved under INA Section 212(a)(2) or 237(a)(2). This includes Egregious Public Safety (EPS) cases, as defined by USCIS and ICE, located in the Policy Memorandum.
5. **Aliens not lawfully present in the United States or Subject to Other Grounds of Removability:** An NTA will be issued if, upon a denial, the person is not lawfully present in the United States.
6. **Special Circumstances:** This includes certain situations where an application for naturalization has been denied, including when the person was inadmissible at the time of adjustment or admission into the United States, and thus is deportable and not eligible for naturalization.
7. **Preservation of Administrative Review:** Filing of an NTA does not negate the right to seek administrative review.
8. **Exercise of prosecutorial discretion:** There will be limited circumstances, in the exercise of prosecutorial discretion, where an NTA will not be issued. This is only to be done on a case-by-case basis, and it must go through a Prosecutorial Review Panel.

What this means:

This Policy Memorandum shows that the administration and the DHS have a list of priorities for the removal of individuals, as outlined above. Criminals and national security risks are the top priorities.

RFE and NOID Policy Memorandum

On July 13, 2018, the USCIS issued a Policy Memorandum to rescind a June 3, 2013, Policy Memorandum, titled “Requests for Evidence and Notices of Intent to Deny.” The June 3 Policy Memorandum gave an adjudicator the discretion to deny an application, petition, or request without issuing a Request for Evidence (RFE) so long as the evidence submitted does not establish eligibility. The Policy Memorandum requires an RFE or Notice of Intent to Deny (NOID) to be issued before a denial in cases where there is a possibility the denial could be overcome. The deciding factor is whether there is “no possibility” the deficiencies could be cured without giving the petitioner, applicant, or beneficiary the opportunity to respond.

This July 13 Policy Memorandum, which will go into effect Sept. 11, 2018, will rescind the “no possibility” standard, instead allowing an adjudicator to issue a denial without an RFE or NOID where the applicant, petitioner, or requestor has no legal request for the benefit, or if all the required initial evidence was not submitted with the benefit request. USCIS adjudicators may now deny on the basis that the lack of required initial evidence has constituted a failure to establish eligibility. This Policy Memorandum includes an example where a family-based or employment-based petition or application has been submitted where a required Affidavit of Support was not submitted, and as such, a denial could be issued based on the adjudicator’s discretion.

The Policy Memorandum also includes language that will give the adjudicator the ability to issue additional RFEs, and to validate assertions made in the application or petition through governmental files, or by searching the internet.

What this means:

1. Ability to deny without an RFE: It will be even more vital for each petition and application to include the required information. This includes information in the cover letter and documentary evidence. Otherwise, an adjudicator can deny the petition or application.
2. Ability to validate assertions: Adjudicators have always been able to validate assertions, but it is now even more important to include all information that is true and accurate and to avoid omitting information that can be easily searchable.

What the Two Policy Memoranda Mean

Family and employment-based cases that have been denied, with the beneficiary having no legal status in the United States, may result in an NTA; however, the chance of this occurring with proper legal counsel advising on strategy, is small. As discussed above, the priorities for issuing NTAs remain with criminal activity and national security concerns and the chances for a denial of a petition or application will need heightened scrutiny when being prepared to avoid a denial in lieu of an RFE or NOID. Greenberg Traurig will continue to monitor how these practices will be implemented, and how they will affect individuals and businesses in the immigration community.

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