Annotated Notes and Practice Pointers:

USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance

December 5, 2018

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These notes contain the verbatim information shared by USCIS during the November 15, 2018 national stakeholder teleconference via the notes they have posted on the USCIS **Electronic Reading Room**.[2] We have, however, added practice pointers and clarification where relevant, noted in *italics* or otherwise flagged. These annotated notes and practice pointers are unofficial and have not been vetted by USCIS.

ASISTA, ILRC, AILA and their partners will follow up with USCIS on outstanding questions related to implementation of the NTA memo. If you have questions regarding how the NTA memo relates to survivor-based immigration benefits, please email: questions@asistahelp.org.

At various points throughout these notes, we encourage you to contact our organizations if you are interested in connecting with us for technical assistance or for advocacy purposes. Unless otherwise noted, please contact our organizations using the following email addresses:

ASISTA: questions@asistahelp.org
ILRC: aod@ilrc.org
AILA: reports@aila.org

[1] Authors of these annotated notes are Cecelia Friedman Levin and Gail Pendleton of ASISTA, Alison Kamhi at Immigrant Legal Resource Center, and Leidy Perez-Davis from AILA. Special thanks to Yein Pyo at Asian-Pacific Institute on Gender-based Violence for her careful edits and assistance with these notes.

[2] Speakers on the call include Kate Syfert, USCIS Public Engagement Division; Carlos Munoz-Acevedo, USCIS Public Engagement Division; Tamika Gray; USCIS Directorate Office; a representative from USCIS Office of Policy and Strategy, Office of Chief Counsel, Refugee, Asylum and International Operations Directorate. USCIS solicited written questions prior to the call. During the call, the USCIS speakers read aloud some of the submitted questions and provided answers. The questions were submitted from DHS Office of Civil Rights and Civil Liberties, CIS Ombudsman, ASISTA, legal aid organizations, community organizations, and interested citizens.

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Introduction

On Nov. 15, the Public Engagement Division (PED) held a stakeholder teleconference to discuss the USCIS Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens policy memorandum (PM) that was issued on June 28. USCIS representatives provided an overview of the memorandum, shared an update on the continued implementation of the PM, and addressed many questions submitted in advance. Below are a summary of the PM and the questions and answers from the teleconference.

Key Points from Authors

A. *USCIS issued guidance on June 28, 2018, expanding the circumstances in which it will issue a Notice to Appear (NTA) to applicants. This guidance will apply to all U visa, T visa, SIJS applications, VAWA self-petitioners, and I-730 refugee/asylee relative petitions for family members who are in the United States and related applications beginning on November 19, 2018.*

B. *As of November 19, 2018, advocates should assume the new NTA policy guidance will apply to all pending humanitarian cases, regardless of whether they were filed prior to that date.*

C. *Most of the guidance USCIS shared during the November 15, 2018, teleconference contemplates issuance of an NTA only after an application has been adjudicated and then denied. While the representatives pointed out that USCIS has the authority and discretion to issue an NTA to anyone who is removable, most of their answers below suggest that the NTA will be issued after the denial has been issued and the time period for appeals or motions has expired.*

D. *USCIS reiterated several times that its adjudicators can seek prosecutorial discretion to not issue an NTA where warranted. However, it remains to be seen how and when prosecutorial discretion will be implemented.*

E. *AILA, ASISTA and ILRC and will be collecting case examples for NTAs issued after denials.[3] If you receive an NTA for a denied case, please fill out the form here: **https://www.aila.org/advo-media/agency-liaison/case-examples/ntas-issued-as-a-result-of-usciss-new-nta-policy***

[3]When the underlying petition that has been denied is a humanitarian-based petition, including but not limited to U visas, T visas, VAWA self-petitioners, and special immigrant juvenile status petitions, the information provided in this survey below will be shared among AILA, ASISTA and ILRC for advocacy purposes. Identifying information of the attorney and the client **will not** be shared without express permission from the attorney and the client.

Background

The policy memorandum outlines how our issuance of NTAs and referral of cases to U.S. Immigration and Customs Enforcement (ICE) supports the removal priorities of DHS, including those identified in Executive Order 13768, Enhancing Public Safety in the Interior of the United States. It also updates USCIS guidelines for issuing NTAs and referring cases to ICE.

The new PM supersedes PM-602-0050, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, dated Nov. 7, 2011. We have issued a separate PM, 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) Requester in Connection With a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA, in conjunction with this memorandum and will be applied to cases involving DACA recipients and requesters.

Importantly, we continue to issue NTAs under previous authority and this memo expands the cases in which we may issue an NTA. These PMs will not apply to the use of discretion in adjudicating cases. Guidance on how the enforcement priorities will affect our use of discretion in adjudicating cases will be addressed in a separate policy memorandum.

Overview of the 2011 Prior Policy Memo and 2018 Updated Policy Memo

We issued a new policy memorandum on June 28, 2018, and it became effective immediately. It updates the agency's guidelines for issuing NTAs, except for the categories of cases excluded from the new PM as stated above. We also issued a separate policy memorandum that confirms and clarifies that the NTA and referral policies reflected in the 2011 general NTA memo continue to apply to DACA requesters and recipients. Through the new NTA policy memorandum, we are carrying out Executive Order 13768, Enhancing Public Safety in the Interior of the United States, which establishes immigration policies for enhancing public safety and articulates the priorities for removing foreign nationals from the United States - promoting national security and the integrity of the immigration system.

This PM updates the policy for issuing NTAs in the following categories of cases where the individual is removable:

- Cases where fraud or misrepresentation is substantiated, and/or cases where there is evidence that the applicant abused any program related to the receipt of public benefits. We will issue an NTA in these cases 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 or 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. We will, where circumstances warrant,

refer cases to ICE before adjudication of an *[sic]* immigration benefits request pending before USCIS without issuing an NTA.

- Certain N-400 cases where applicants are deportable, ineligible to naturalize, or where the application has been denied on good moral character grounds
- Cases in which an applicant will be unlawfully present in the United States when the petition or application is denied.

The following categories are unchanged by this PM:

- 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
- Cases involving DACA recipients and requesters 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.

USCIS is implementing the memo incrementally to ensure sufficient time for training and attention to logistical detail. On Oct. 1, 2018, USCIS began the first stage of operationalizing the new NTA memo and issuing NTAs on denied status-impacting 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 held a stakeholder teleconference on Sept. 27, 2018, that focused on the first stage of implementation. The transcript of that previous engagement is available on the USCIS website. A link to the Electronic Reading Room can be found on the USCIS home page, or you can type "Electronic Reading Room" into the search box on the USCIS home page. Guidance provided in the Sept. 27 engagement
continues to apply and today's guidance will supplement it.

Beginning Nov. 19, 2018, USCIS will continue implementing the 2018 NTA memo to include denied Forms l-914/l-914A Applications for T Nonimmigrant Status, Forms l-918/l-918A Petitions for U Nonimmigrant Status, Forms 1-360 Petitions for Amerasians, Widow(er), or Special Immigrant (VAWA self-petitions and special immigrant juvenile petitions), Forms I- 929, Petitions for Qualifying Family Member of a U-1 Nonimmigrant, Forms I-730 Refugee/Asylee Relative Petitions where the beneficiary is present in the United States, and Forms I-485 Application to Register Permanent Residence or Adjust Status with these underlying form types.

We will not implement the June 2018 NTA Policy Memo with respect to employment-based petitions at this time. Existing guidance for these case types will remain in effect.

Note: *On the last stakeholder call in September 27, 2018, USCIS indicated it would not implement the NTA memo regarding humanitarian based applications at this time. We find it extremely troubling and disingenuous that humanitarian applications are the very next category on which USCIS decided to focus. Our organizations call on DHS to rescind the NTA policy guidance, as it will discourage survivors from coming forward to seek safety and justice. We encourage you to join us in our advocacy efforts by contacting us at the email addresses above.*

Also, the recently launched Alliance for Immigrant Survivors (AIS) is a national network of advocates and allies dedicated to defending and enhancing policies that ensure that immigrant survivors have access to life-saving protections. AIS maintains a clearinghouse of updates and action items around immigrant survivor protections. To join AIS' mailing list, click here.

Questions

General Processing

Q1. How will the new NTA guidance affect applicants for humanitarian benefits that are denied, in particular U visa petitioners, T Visa applicants, and VAWA Self-Petitioners?

A1. Starting Nov.19, 2018, USCIS may issue NTAs for denied Forms l-914/l-914A Applications for T Nonimmigrant Status, Forms l-918/l-918A petitions for U Nonimmigrant Status, Forms I- 360 Petitions for Amerasians, Widow(er), or Special Immigrant (VAWA self-petitions and special immigrant juvenile petitions), Forms I-929, Petitions for Qualifying Family Member of a U-1 Nonimmigrant, Forms 1-730 Refugee/Asylee Relative Petitions where the beneficiary is present in the United States, and Forms I-485 Applications to Register Permanent Residence or Adjust Status with these underlying form types. Consistent with the treatment of other status-impacting denials by USCIS, denials of these cases will inform individuals that they, or their beneficiaries/dependents, may be subject to an NTA if they are no longer in status after the denial and they do not either: 1) file a motion or appeal, or 2) depart the United States within 33 days of the date of their denial notice. Individuals who have a pending status impacting application at the time of their denial, or at the time of potential NTA issuance, will not be issued an NTA, unless circumstances warrant such action. However, USCIS has the discretion to issue an NTA in specific cases as appropriate while applications or petitions, including motions or appeals, remain pending.

Note: *A lot will depend on the wording of these denial notices. Applicants may understandably be nervous if there is language that that they must depart the country within a certain allotted time or risk the NTA. The NTA guidance places advocates in an extremely difficult position explaining the risks of filing but also the important benefits of a successful case. We believe that strong straightforward cases should still be filed with USCIS. There will be an upcoming practice advisory for attorneys and advocates*

that will address specific practice pointers for having these conversations with survivor applicants. ILRC has a practice advisory on the NTA guidance and SIJS cases, which is available here. In the meantime, please contact ASISTA or ILRC if you need technical assistance about how to communicate with clients about the import of the denial notice and the plan to challenge it.

Q2. Will USCIS be making a public statement when it announces implementation of the new NTA policy for humanitarian applications/petitions that the new policy is not intended to create a chilling effect on victims coming forward to assist law enforcement and apply for the immigration benefits for which they are eligible?

A2. Yes, USCIS will issue robust messaging surrounding this part of the NTA PM implementation to ensure that current and potential applicants/petitioners and beneficiaries of these form types are aware that they continue to be encouraged to seek humanitarian benefits under the relevant statutes and regulations. USCIS is committed to continuing to offer classifications to eligible victims. USCIS will not be issuing NTAs immediately upon denial of any of these form types. Motion and appellate processes continue to remain in place and USCIS officers are scheduled to receive training on the exercise of prosecutorial discretion for all case types as part of the NTA PM implementation.

Q3. What specific measures are planned or in place to help ensure this policy does not have a chilling effect on the willingness of victims to cooperate with law enforcement in the reporting of crimes against them and in the willingness of victims to apply to USCIS for relief?

A3. USCIS remains committed to properly and efficiently administering immigration-related humanitarian programs for eligible victims. Nothing about the adjudicative process for VAWA, T, U, SIJ, or 1-730 applications and petitions has changed as a result of the NTA PM. Appellate and motion processes, robust operational guidance and training, and the ability for officers to exercise prosecutorial discretion will all contribute to the fair and proper implementation of the new NTA policy with respect to all cases, including those impacting victims.

Notes on Questions 2 and 3: *It is clear that this policy will create a substantial chilling effect on some survivors deciding to come forward to access humanitarian protections.*[4] *While the NTA memo does*

[4] Albert. Samaha. "A Visa Program That Protected Domestic Violence Victims Is Now Putting Them At Risk Of Deportation" Buzzfeed News (October 30, 2018), available at: https://www.buzzfeednews.com/article/albertsamaha/u-visa-deportation-immigration-trump-sessions-domestic?utm_source=AILA%2BMailing&utm_campaign=b6d50eb883-AILA8_11_1_2018&utm_medium=email&utm_term=0_3c0e619096-b6d50eb883-291082641

not change the adjudication of humanitarian-based cases, USCIS suggests that there will be upcoming guidance related to discretion that will contribute to the already established chilling effect created by new USCIS policy. We encourage you to connect with our advocacy efforts through our websites as well as through the Alliance for Immigrant Survivors mailing list referenced above.

USCIS appears to be unwilling to acknowledge the conflict between a "commitment" to providing relief for victims, and an NTA policy, which threatens all undocumented applicants with removal if their cases are denied. Advocates may wish to request information on the trainings and prosecutorial discretion process, through Freedom of Information Act requests. If you are interested in joining in this effort please contact questions@asistahelp.org.

ASISTA is currently working with Asian American Advancing Justice (AAAJ) in Los Angeles and other partners to explore impact litigation on the implementation of the NTA memo. If you would like more information on how to connect to this effort, contact Executive Director, Gail Pendleton, at gail@asistahelp.org.

Those representing survivors must consider adding removal defense and impact litigation to their skill set or establishing partnerships with agencies that do this work. ASISTA has recorded webinars focused on survivor arguments in removal, and ILRC and AILA have resources to help advocates learn more about removal defense and impact litigation generally. You can contact our agencies at the email addresses above for information on more training opportunities.

Q4. Will the NTA PM be applied to applications filed prior to the issuance of the memo? Will it be applied to applications filed prior to the implementation date of the policy (whenever that may be with regard to humanitarian benefits)?

A4. The NTA PM will be applied to decisions made on or after the implementation date for each group of case types as they are announced without regard to the application filing date. However, USCIS officers may apply the 2018 NTA PM to cases denied prior to Oct. 1, 2018, or Nov. 19, 2018, as a matter of discretion. Officers may also exercise discretion to apply the 2018 NTA PM to cases denied prior to June 28, 2018, if those cases are being reviewed for cause or substantive reasons.

Note: *This position seems to violate basic notice requirements and due process, since it appears USCIS plans to apply it to every case that is currently pending (regardless of how many years ago they were filed) without prior notice or opportunity to comment. ASISTA would like to aggressively challenge this application of new policy to old cases. If you are interested in helping with this effort, please contact Gail Pendleton at ASISTA at gail@asistahelp.org*

Q5. Has the DHS Office of General Counsel (OGC) reviewed USCIS's determination that the Executive Order precludes treating victims differently in any way with regard to this policy?

A5. This determination was not made by USCIS. Executive Order 13768 clearly states: "We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement. The purpose of this order is to direct executive departments and agencies to employ all lawful means to enforce the immigration laws of the United States." Further, the Feb. 2017 DHS Implementation Memorandum reiterates that "Except as specifically noted above [regarding DACA], the Department no longer will exempt classes or categories of removable aliens from potential enforcement." Failing to implement the NTA PM with respect to entire categories of applications and petitions would be in direct violation of both the Executive Order and the DHS Implementation Memorandum.

***Note**: Contrary to the answer's implication, USCIS has never entirely exempted classes of humanitarian applicants from enforcement; it has, however, made clear that such enforcement was not a priority because of the chilling effect it would have on survivors seeking relief Congress intended for them.[5] The government's decision to now apply the NTA guidance to all those seeking humanitarian relief seems designed to discourage survivor applications and thwart, through policy, the laws Congress created. Targeting survivors of crime, especially those with no serious criminal records, makes our communities less safe, rips families apart, and wastes government resources. Reach out to our organizations (see p. 1) to help with advocacy, and contact ASISTA to help with litigation efforts around this significant policy change.*

[5] *See e.g.* T visa regulation preamble. " USCIS does not have a policy to refer applicants for T nonimmigrant status for removal proceedings absent serious aggravating circumstances, such as the existence of an egregious criminal history, a threat to national security, or where the applicant is implicit in the trafficking." 81 FR. 92266, 92283 (Dec. 19, 2016).

Q6. Do you foresee that this new policy will have a chilling effect on immigrants eligible to apply to adjust their immigration status via I-485, opting to not go through with the adjustment and resulting in a lower percentage of immigrants legalizing their status in this country?

A6. The intent of the NTA PM is not to deter bona fide victims from seeking humanitarian relief, but when that benefit is not issued the NTA PM allows the applicant to receive due process offered to them under the law by the issuance of the NTA.

Note: *Regardless of USCIS' "intent," the NTA policy will have a significant impact on a survivor's decision whether to apply for immigration relief. This undermines the Congressional intent in establishing these critical protections for survivors. We believe that the NTA memo should be challenged using multiple change strategies (litigation, Congressional oversight and action, media) in order to combat the chilling effect this policy will have on survivors. See how to connect with these efforts above at the notes for Questions 2 and 3.*

Q7. How will this change affect applicants/petitioners who already have an unexecuted removal order from the past? Would USCIS attempt to file a new NTA with EOIR and/or ICE in such cases? Would the privacy/confidentiality protections for U petitioners and T visa applicants prevent USCIS from otherwise notifying ICE in such cases?

A7. Generally, USCIS will not issue a new NTA if an individual has an unexecuted order of removal or active warrant of deportation. If there is evidence of a prior unexecuted order of removal in the alien's immigration record, USCIS may refer these cases to ICE's Enforcement and Removal Operations to determine if execution of the removal order is appropriate. The confidentiality provisions at 8 U.S.C. § 1367 allow for sharing information within DHS and DOJ for legitimate Departmental purposes. Guidance on issuance of NTAs for individuals who are already in removal proceedings or who have an unexecuted final order has not changed.

Note: *Many survivors eligible for status have old final orders. This is why USCIS and the AAO have acknowledged, for instance, that U and T visa applicants and VAWA self-petitioners may be able to overcome reinstatement of removal if they qualify for a 212(a)(9)(C) waiver. For example, see Matter of A-L-Unpublished AAO decision (Jan. 12, 2017), available here discussing this in the U visa context. Moreover, we believe this answer potentially overstates the communication allowed with ICE. USCIS' position ignores the Congressional intent in establishing the protections in 8 USC § 1367 and survivor relief, which is to encourage crime victims who fear deportation to access our justice system. It will be important to ensure you are effectively framing your arguments concerning prior removal orders to USCIS, to EOIR and to the federal courts. Contact ASISTA, see above, for technical assistance if you are seeking to overcome reinstatement or a waiver for 212(a)(9)(C) for a VAWA, U or T visa case.*

At the outset of their representation, practitioners should screen for prior orders of removal, as it may increase a survivor's vulnerability to an enforcement action. It is good practice to prepare stays of removal (ICE Form I-246) in advance to keep in the file and to use in the event there is an enforcement action or other direct risk of removal. Click here for sample stay materials from ASISTA. Practitioners should supplement their stay request with positive discretionary evidence and evidence of hardship that removal would cause to the applicant and his or her family (much of which may already be contained in your initial application, especially for waiver discretion).

Q8. How will the NTA policy memo apply to someone with multiple good-faith applications or petitions where one application is denied but another form of relief is still pending? Will USCIS wait until the last application or petition is adjudicated before issuing an NTA? If USCIS does issue NTAs while other forms of relief are pending, what factors will USCIS consider in deciding to issue the NTA?

A8. Generally, our officers will ensure petitions and applications which impact a person's status or authorized periods of stay are adjudicated before issuing an NTA. However, USCIS has the discretion to issue an NTA in specific cases as appropriate while applications or petitions remain pending.

Note: *USCIS did not provide information about the intersection with other kinds of cases such as asylum, where issuance of an NTA could divest USCIS of jurisdiction over the claim. ASISTA and partner organizations will follow up for clarification where there is a pending humanitarian case and an asylum case. Please keep us appraised of any cases where you believe this may happen, or has happened by filling out the case example form:*
https://www.aila.org/advo-media/agency-liaison/case-examples/ntas-issued-as-a-result-of-usciss-new-nta-policy

Q9. The regulations at 8 CFR 239.1 indicate which officers have the authority to issue NTAs. Please specify which officers will be implementing the updated NTA guidance for humanitarian applications. Who will be issuing NTAs at the VSC, or NSC for cases related to humanitarian benefits? What training have these adjudicators received on the dynamics of domestic violence, the effects of trauma on survivors, and the provisions of 8 USC 1367?

A9. 8 CFR 239.1 designates who is authorized to issue an NTA and this policy memorandum does not make changes to that designation. While any trained officer may write an NTA, only those in a position designated under 8 CFR 239.1 may issue the NTA. This is typically someone who is a supervisory immigration services officer or higher level position. Prior to issuing any NTA, it is carefully reviewed to determine if it is legally sufficient and complies with USCIS policy. Where appropriate, NTAs may also be reviewed by USCIS counsel prior to issuance

With regards to training USCIS officers receive, VAWA, T, and U adjudicators already receive specific training for the adjudication of these applications/petitions. Additionally, all USCIS adjudicators are receiving training on the new NTA PM and its implementation and this training addresses specific issues relating to cases protected under 8 USC 1367. As we implement the NTA PM, USCIS will continually evaluate training needs and provide training to staff as needed.

Note: *If you receive an NTA for a survivor client, contact ASISTA to review whether it complies with USCIS regulations and for assistance to help you challenge any unlawful merits denials. See also ASISTA, AILA, and ILRC case collector here:* ***https://www.aila.org/advo-media/agency-liaison/case-examples/ntas-issued-as-a-result-of-usciss-new-nta-policy***

Q10. How and when will USCIS refer humanitarian cases to ICE? How does this intersect with issuing NTAs?

A10. USCIS will continue to refer certain criminal cases to ICE for possible NTA issuance. In these cases, the underlying benefit type, whether or not it is humanitarian/protection-based, employment-based, or family-based, is generally not a factor in whether cases are referred to ICE.

The outcome of this NTA PM is that, upon full implementation, we will refer fewer cases to ICE for NTA issuance by them. Historically, USCIS referred aliens with criminal issues (EPS[6] and non-EPS) to ICE and allowed ICE to decide whether to take action to remove these aliens. That procedure was initiated by a Referral to ICE (RTI). If ICE accepted the RTI, they would investigate the subject and possibly issue an NTA to place the subject in removal proceedings. If the RTI was declined, we would continue adjudication and, regardless of approval or denial, would not issue an NTA.

This middle step, issuing an RTI, was unnecessary for many criminal cases. USCIS has the authority to issue NTAs directly. Instead of referring cases to ICE so they can issue the NTA, USCIS will, upon full implementation of the new NTA PM, and for categories of cases expressly laid out in the NTA PM, adjudicate the application/petition and issue NTAs directly under the updated NTA PM. USCIS reserves the right to refer cases to ICE as appropriate.

Note: *Please let ASISTA know if/when ICE detains or attempts to remove survivors. Memoranda on how ICE should treat survivors they encounter have not been rescinded and advocates must continue to insist ICE complies with its own guidance, whether through challenges to removal, litigation, or Congressional advocacy.*

[6] EPS and Non-EPS refers to "Egregious Public Safety" and "Non-Egregious Public Safety". See USCIS NTA Policy Memo for additional clarification, available here.

Q11. Will USCIS review if denials leading to NTAs comply with the specificity requirements for denials under 8 USC 103 (must provide *specific* reasons for denial)? This is of particular concern for *prose* applicants, who may be unable or unaware of review options.

A11. Denials, including those that result in the issuance of a NTA, will comply with the statutory requirement that denials state the specific reasons for denial.

Note: *Many RFEs, NOIDs and other forms of denial from the Vermont Service Center (VSC) lack the specificity required by statute and USCIS' own guidance, see, e.g., 8 CFR 103.3(a)(1)(i). If you receive a deficient RFE, NOID or denial, contact ASISTA so we can help you mount preemptive challenges and anticipate responses if VSC issues an NTA.*

Q12. The USCIS announcement on Nov. 8, 2018, states the following: "USCIS will continue to prioritize cases of individuals with criminal records, fraud, or national security concerns for referral for removal proceedings. USCIS has not changed the current processes for issuing NTAs on these case types, and the agency will continue to use discretion in issuing NTAs for these cases."

Q12a. What is the agency's policy for issuing NTAs in cases that do not involve any of these factors?

A12a. During the initial implementation, which began Oct. 1, and the subsequent implementation, beginning Nov. 19, USCIS may issue NTAs on the following denied status impacting applications, including but not limited to, Form I-485, Application to Register Permanent Residence or Adjust Status, Form I-539, Application to Extend/Change Nonimmigrant Status, Form I-914, Application for T Nonimmigrant Status, Form I-918, Petition for U Nonimmigrant Status, and Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant and I-730, Refugee/Asylee Relative Petition, where the beneficiary is present in the U.S.

Q12b. If USCIS will exercise discretion in such cases, what factors will guide them in the exercise of discretion?

A12b. There is no list of factors to determine whether or not to exercise prosecutorial discretion as the Secretary's memo says that we are no longer to apply prosecutorial discretion to classes or categories of people. Prosecutorial discretion will be determined on a case-by-case basis considering the individual

factors of that particular case.

Note: *See Note to Q29 below.*

Q12c. In this context what will be viewed as a "national security concern"?

A12c. National security cases fall under the priorities outlined in Executive Order 13768, and they include aliens engaged or suspected of terrorism or espionage, or those otherwise described in INA 212(a)(3) or 237 (a)(4). In addition, any removable alien which, in the judgement *[sic]* of a USCIS officer, otherwise poses a risk to national security is considered a priority for removal.

Note: *The June 28, 2018 NTA guidance specifically states that individual immigration officers may make judgments about applicants who "otherwise pose a risk to public safety or national security."* [7] *Please immediately contact ASISTA if you believe USCIS is scrutinizing your client for national security issues; we work closely with the National Immigration Project of the National Lawyers Guild and other organizations that challenge the overbroad application of these provisions.*

Q13. Will the NTA policy be applied retroactively to humanitarian protections that have already been denied prior to the issuance of the updated NTA guidance (June 28, 2018)?

A13. The second phase of the implementation of the NTA PM does not apply to cases that were denied prior to Monday, Nov. 19, 2018. However, USCIS retains discretion to apply the NTA PM to cases denied prior to Nov. 19, 2018, if the case is being reviewed for cause or a substantive reason.

Note: *USCIS did not say so directly, but it seems USCIS is not planning on digging up old denied cases and issuing NTAs. However, it may be possible that approved cases may be reviewed again. (For example, in the past there were a small number of approvals that were subject to random quality check reviews.) If there is an additional review, those cases may be subject to NTA issuances if denied. In addition, it is possible that issues presented during an underlying VAWA, U, T, or SIJS application may be reviewed again at the adjustment of status phase.*

If a survivor receives an NTA issued in a case that was denied prior to November 19, 2018 (with no intervening facts between denial and NTA issuance such as criminal convictions or immigration violations), please reach out for technical assistance on ways to challenge the implementation of the NTA guidance for these cases, and fill out the case collector form here: **https://www.aila.org/advo-media/agency-liaison/case-examples/ntas-issued-as-a-result-of-usciss-new-nta-policy**

[7] *See* USCIS NTA Policy Memo for additional clarification, available here at 2.

Q14. Will an NTA be issued in cases where an application/petition is withdrawn by the applicant/petitioner before the conclusion of USCIS adjudication?

A14. Withdrawal of a benefit request does not interrupt USCIS' authority or responsibility to pursue enforcement actions as appropriate. USCIS may issue an NTA if the individual is removable even if they withdraw their application before it is adjudicated.

Note: *USCIS's policy here is extremely important to note. If withdrawal will not protect a person, it may often be a better course of action to fight the case. This may mean responding to the RFE, NOID, etc.; appealing a denial; and/or resubmitting a good faith application. Please contact us using the contact information above if you require technical assistance.*

Q15. How does this updated NTA guidance apply to applications that are on appeal with the AAO? Please confirm that USCIS will wait until the appeal process is final before serving an NTA.

A15. Generally, USCIS will not issue an NTA until the decision on an Appeal or Motion is completed. However, it is important to note that while this has always been the case, USCIS has the authority and discretion to issue an NTA on any case where the individual is removable.

Note: *If USCIS issues the NTA before the appeal or motion is final, please contact ASISTA to discuss litigation strategies.*

In U visa and T visa cases, the Administrative Appeals Office (AAO) lacks real review of denied I-192 waivers. This, however, is purely regulatory and, in our view, ultra vires and subject to litigation (let ASISTA if you would like to work on this issue). The AAO, moreover, may review legal frailties in such inadmissibility denials, including the failure to apply the Congressionally mandated 212(d)(14) standard. For examples of legal arguments we suggest you include in all your inadmissibility arguments, see here. Although the AAO has, so far, ignored this argument, we believe federal court judges will find it compelling.

The 7th circuit has also found that immigration judges may adjudicate (d)(3) waivers for U applicants (although not the rest of an application) and practitioners are pursuing this argument in other circuits. See National Immigrant Justice Center (NIJC) practice advisory here. NIJC is spearheading this effort, and you may contact ASISTA to get plugged into that project.

Q16. How does this updated NTA guidance apply to applications in which a Motion to Reopen and/or Reconsider is filed with USCIS? Please confirm that USCIS will wait until the conclusion of the of the motion adjudication before serving an NTA.

A16. While USCIS may issue an NTA at any time, generally USCIS allows 33 days from the date of the decision to allow for an appeal or motion to be filed. A shorter appeal period may apply to some cases such as the revocation of the approval of a petition, which has an 18 day deadline. As not all applications or petitions allow for a motion or appeal to be filed, the decision will tell the applicant/petitioner if an appeal or motion is permitted and how long they have to file the appeal or motion if one is permitted. There is no extension to this deadline. Generally, USCIS will not issue an NTA until a decision on a motion is completed; however, USCIS retains discretion to issue NTAs during the pendency of a motion if circumstances warrant such action.

Note*: The deadline for filing an appeal is actually 30 days from the date of the mailing of the decision, plus 3 days (so 33 days from the date of mailing). See 8 CFR 103.8(b) ("Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.") and 8 CFR 103.3(a)(2) ("The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions within 30 days after service of the decision") (emphasis added). Given the presenters' repeated reference to "date of denial" as the beginning of the 33-day appeals period, it is unclear if USCIS will allow the full appeals period to expire before issuing an NTA. In addition, ASISTA is seeing many improper Notices of Intent to Revoke. Please contact us as soon as you receive them, see contact information above.*

It is unclear from this answer whether USCIS would generally refrain from issuing an NTA while a late-filed motion is pending. Late-filed motions to reopen are allowed if the applicant can demonstrate that the delay was reasonable and beyond his/her control. (See 8 C.F.R. § 103.5(a)(1)(i)). *This is becoming an important argument for those whose fee waivers were denied so late that the appeal period has lapsed (contact ASISTA if you have such cases to discuss current arguments and strategies for challenging the impact of USCIS' abrupt fee waiver policy change).*

Q17. How does the updated NTA guidance apply to applications on review at the Board of Immigration Appeals (BIA)?

A17. Generally, USCIS will not issue an NTA until the decision on an Appeal or Motion is completed, including appeals under the jurisdiction of the BIA. However, it is important to note that as has always been the case, USCIS has the authority and discretion to issue an NTA on any case where the individual is removable.

***Note**: The BIA lacks jurisdiction to review U or T visa denials by USCIS, though the case law regarding U visa applicants in proceedings remains valid (See e.g. Matter of Sanchez-Sosa, 25 I&N Dec. 807 (BIA 2012)) The BIA does retain jurisdiction over VAWA self-petition denials (See 8 CFR 1003.3 and 8 CFR 1003.1(b)(5). Please contact ASISTA if you wish to consider that route for reviewing a self-petition denial.*

Q18. How does the updated NTA guidance apply to applications subject to federal court action?

A18. Cases that are subject to federal court action will need to be reviewed in conjunction with OCC to determine whether or not issuance of an NTA is appropriate, based on the specific circumstances of the case.

Q19. If an alien is in valid DACA at the time their application or petition for other humanitarian relief is denied, will they be issued an NTA?

A19. If the evidence of record shows that an applicant or petitioner is in a period of authorized stay at the time of denial, USCIS would not issue an NTA. USCIS has issued a separate PM to be applied to cases involving DACA recipients and requesters: 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) Requester in Connection With a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA.

Q20. What will the process be for issuing NTAs for applicants/petitioners for humanitarian relief who have prior expedited removals?

A20. If an individual was previously removed and subsequently re-entered without inspection, USCIS would follow existing procedures and refer the individual to ICE for reinstatement of the order of removal. The NTA PM does not impact such a situation. If an individual was previously removed, but subsequently entered lawfully, USCIS will follow the process outlined in the NTA PM.

***Note on Q20-Q22:** If you have clients with old expedited (or other administrative) removal orders, see note above in question 7 concerning overcoming reinstatement of removal.*

Q21. What will the NTA process be for applicants/petitioners for humanitarian benefits with old prior 240-based orders?

A21. The NTA PM does not change the handling of situations in which an applicant has an outstanding order of removal. USCIS would follow existing procedures and refer the individual to ICE for execution of the order of removal.

Q22. How will Us, Ts, and VAWAs who have prior orders of removal be treated if their cases are denied? Is there discretion in referring these cases to ICE, or will having a prior order of removal result in an automatic referral to ICE (no NTA)?

A22. As explained previously, how a situation is handled will vary depending on whether the order is outstanding or whether it was effectuated but the individual re-entered unlawfully, or whether it was effectuated and the individual reentered lawfully.

T/U Visas

Q23. Will USCIS issue an NTA if a U visa petitioner files a Form I-918, Petition for U Nonimmigrant Status, without a Form I-192, Application for Advance Permission to enter as a Nonimmigrant, and USCIS determines that the petitioner is inadmissible? Or will USCIS issue a Request for Evidence and allow the petitioner to file a Form I-192 at a later date?

A23. The implementation of the NTA PM does not affect the adjudicative processes regarding U petitions. Adjudicators will continue to follow existing form-specific guidance in adjudicating these case types and will only issue an NTA, as appropriate, where the case is denied.

Note: *It is important to consider the NTA guidance together with the June 2018 guidance on the Issuance of Requests for Further Evidence (RFEs) and Notices of Intent to Deny (NOIDs).*[8] *That guidance states that a denial may be issued without an RFE in cases where an application lacks "sufficient initial evidence" or if an applicant has no legal basis for the benefit/request sought.*[9] *While USCIS has posted initial evidence "checklists" on USCIS' website, advocates should still review the relevant statutes, regulations, and form instructions carefully. If you believe USCIS is either ignoring their own checklists or failing to follow guidance and regulations on eligibility requirements and materiality, contact ASISTA or ILRC for technical assistance.*

Q24. How will the new NTA guidance affect U visa and T visa recipients whose adjustment of status applications get denied?

[8] USCIS. PM-602-0163. "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

[9] *Id.*

A24. If a person remains in any valid lawful status or period of authorized stay at the time their adjustment of status application is denied, an NTA will not be issued unless that individual is otherwise removable and an enforcement priority (e.g., criminal/fraud).

Note: *This means that if someone still has valid U or T status at the time the adjustment is denied (or has some other form of lawful immigration status), she can remain lawfully in that status until it ends. It may also be worth trying to apply for an extension of the U or T nonimmigrant status and/or re-applying for adjustment. For example, if the person did not qualify for adjustment because her U nonimmigrant status expired and she failed to ask for an extension, she could try applying for an extension of her U nonimmigrant status and re-applying for adjustment. If the person's U or T nonimmigrant status has expired and their adjustment is denied, she could be issued an NTA.*

We are seeing many problems with U and T adjustment adjudications out of the VSC, particularly as it relates to discretion. If this is relevant to your case, contact ASISTA for technical assistance and strategies to challenge the denial.

Q25. Will this guidance apply even for trafficking victims who submit T Visa applications? For example, if a trafficking victim submits a T Visa application including the I-914B Declaration of Law Enforcement Officer, but the visa is denied based on some other factor, e.g. USCIS interpretation of "physically present on account of trafficking"-would USCIS still issue an NTA?

A25. USCIS will apply the 2018 NTA PM when any status-impacting application or petition is denied and the applicant, petitioner, or beneficiary is removable from the United States, regardless of the basis of the denial. In any denied case, an adjudicator may recommend the exercise of prosecutorial discretion not to issue an NTA if he/she determines there is evidence in the file that warrants such action. That recommendation is subject to review by the Prosecutorial Review Panel (PRP) and, ultimately, the respective office director.

Note: *For more on prosecutorial discretion, please see notes below Q29.*

Q26. Would you mind clarifying DHS's interpretation of the prioritization list promulgated by Executive Order 13768 contained in subsections (a) - (f) of the "Background" section of USCIS' NTA Memo? If a petition for Forms l-918/l-918A is denied and the deportable alien falls under one of these categories, will an NTA positively be issued? OR will there be prosecutorial discretion per the "may" language contained in USCIS' 11/12/18 follow up memorandum, within the described subsection (a) - (f)? For instance, per subsection (a) if a deportable alien is charged with a motor vehicle offense, will this be treated differently than say an assault?

A26. Cases that fall under the definition of "Egregious Public Safety" (EPS) cases are a top immigration enforcement priority for the government. For the definition of EPS cases, see USCIS Policy Memorandum PM-602-0050.1, dated June 28, 2018. In any denied case, an adjudicator may recommend the exercise of prosecutorial discretion not to issue an NTA if he/she determines there is evidence in the file that warrants such action. That recommendation is subject to review by the PRP and, ultimately, the respective office director.

VAWA

Q27. How does USCIS propose to implement this memo and avoid increasing barriers and the vulnerability of abuse victims contrary to the legislative purpose of VAWA?

A27. USCIS is committed to properly and efficiently administering immigration-related humanitarian relief programs for eligible victims. The VAWA, T, and U programs allow those eligible for these programs to self-petition, meaning an individual applies for these immigration benefits without the need for a family-based or employment-based sponsor. VAWA, T, and U applications/petitions will continue to be accepted and adjudicated according to USCIS policies and procedures. Appellate and motion processes, robust operational guidance and training, and the ability for officers to exercise prosecutorial discretion will all contribute to the fair and proper implementation of the new NTA policy with respect to all cases, including those impacting protected populations. USCIS officers are scheduled to receive training on the exercise of prosecutorial discretion for all case types as part of the NTA PM implementation.

DHS employees and contractors will continue to follow 8 U.S.C. 1367(a)(1), which prohibits them from making adverse determinations of admissibility or deportability, including in evaluating a case for NTA issuance, using derogatory information furnished by prohibited sources, unless the derogatory information has been independently corroborated. The NTA PM confirms USCIS' obligation to comply with the provisions at 8 U.S.C. 1367(a)(1).

Note: *If you suspect an 8 USC § 1367 violation in your case, you can make a complaint to the DHS Office of Civil Rights and Civil Liberties to investigate. See here for more information. If you have reason to believe an enforcement action may have resulted from an 8 USC § 1367 violation, seek termination of proceedings unless ICE shows that the NTA complies with INA § 239(e) or otherwise fails to comply with the 8 USC § 1367 protections.*[10] *Even if ICE states the information provided by a prohibited source was*

[10] *See* Dan Kesselbrenner and Sejal Zota. "NIPNLG Practice Advisory: Remedies to DHS Enforcement at Courthouses and other Protected Locations" (April 12, 2017). Available at: https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2017_12Apr_remedies.pdf

independently verified from another source of information, you may still seek to challenge the enforcement action, as this approach undermines the Congressional goal of this law. ASISTA is seeking cases to challenge "ICE's loophole argument" through impact litigation, FOIA and other strategies. If you are interested in helping with such challenges, contact Gail Pendleton at gail@asistahelp.org.

Q28. Will the denial of all applications related to VAWAs result in an NTA, including the I- 601?

A28. As has always been the case, USCIS has the authority and discretion to issue an NTA where an individual appears to be removable. Please note that Form, I-601, Application for Waiver of Grounds of Inadmissibility, is not a status-impacting application or petition; however, the denial of a Form I-601, coupled with the denial of another application, may result in the issuance of an NTA.

Note: *We are seeing many problems with how district offices are handling VAWA adjustments generally and specifically with I-601 waivers, most likely due to change in personnel and lack of training. If this is relevant to your case, contact ASISTA or ILRC for technical assistance* ***before the interview*** *to discuss best arguments and to monitor whether the local office violates USCIS policy or law when/it denies a VAWA adjustment.*

Q29. Will USCIS take into account humanitarian situations, i.e. a single parent situation or previous trauma to a victim or survivor filing for immigration benefits?

A29. If an adjudicator believes an exercise of prosecutorial discretion not to issue an NTA is warranted, he or she may submit a recommendation to the PRP, which will decide whether to recommend the exercise of prosecutorial discretion based on the specific facts of the case.

Note: *As discussed above, this lack of criteria is extremely problematic and we will continue to push for criteria that reflect the context of crime survivors. While we are exploring FOIA efforts to obtain documentation related to USCIS training materials on NTA guidance, practitioners should ensure that information regarding a survivor's positive equities is in the file. Most of the evidence you will wish USCIS to consider in a recommendation for prosecutorial discretion may already be submitted as supporting evidence with your application (e.g. good moral character in a VAWA case, "public interest" for U visa (d)(14) waiver; extreme hardship in T visa cases).*

How much evidence to include related to positive equities to include may depend on the strength and posture of the case as well as the scope of your representation. For example, practitioners may wish to ensure they have substantial information regarding equities at the outset, or else wait until the RFE or NOID stage when they realize there may be issues with the case. USCIS will consider all evidence submitted including at the appeals/motions stage in the exercise of prosecutorial discretion not to issue the NTA.

While there are other general factors DHS has used to determine prosecutorial discretion in the past,[11] *stakeholders should remind USCIS of the Congressional intent in establishing these survivor-based applications. A bipartisan majority in Congress created these forms of immigration relief because it recognized that survivors might not be willing to reach out for help because of the threat or fear of removal.*[12] *The issuance of an NTA in survivor-based cases contravenes this intention.*

Furthermore, in creating the record for the exercise of prosecutorial discretion, stakeholders can consider factors that are specific to a survivor's experiences and trauma. For example, in VAWA cancellation, factors the Court may consider include the nature and extent of the physical or psychological consequences of abuse and the impact of loss of access to the United States courts and criminal justice system.[13] *The applicant's needs and/or needs of the applicant's child(ren) for social, medical, mental health or other supportive services for victims of domestic violence that are unavailable or not reasonably accessible in the home country; and other factors.*[14]

Appeals/Motions

Q30. Will USCIS issue an NTA during the pendency of an appeal or motion filed in response to a denial of a petition or application?

A30. Generally, USCIS will not issue an NTA until the decision on an appeal or motion is issued, though such issuance remains in USCIS discretion. Should removal proceedings be initiated before a decision on the appeal or motion is completed, and favorable action is taken on the appeal or motion, USCIS will work with ICE to ensure that ICE is aware of the favorable administrative action.

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[11] *See e.g*. USCIS. PM-602-0050. " Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens" (November 7, 2011), available at. https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf; Similarly, while the ICE general prosecutorial discretion memo is no longer in effect, it too had a list of factors to be considered as prosecutorial discretion to be considered. As of the summer of 2018, the June 2011 ICE prosecutorial discretion memo for victims and witnesses has not yet been formally rescinded. See ICE response to Representative Pramila Jayapal Inquiry dated June 2018 available here.

[12] *See* H.R. REP. NO. 103-395, at 26-27 (1993)(stating "Consequently, a battered spouse may be deterred from taking action to protect him or herself, such as filing for a civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation. Many immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave"). *See also* Section 1513(a)(2)(A), Public Law No: 106-386, 114 Stat. 1464 (2000) (indicating that Congress created the U and T visa program to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking...and other crimes...committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.")

[13] (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation)

[14] *See* 8 CFR 1240.58(c); Although Congress eliminated the extreme hardship requirement for VAWA self-petitions in 2000, prior INS guidance has a useful discussion of hardship and explained these factors, now adopted and applied by EOIR to VAWA cancellation cases. See Paul Virtue. INS General Counsel. HQ 90/15-P. "Extreme Hardship and Documentary Requirements Involving Battered Spouses and Children," (No date on Document), available at: http://bit.ly/INSCredibleEvidenceMemo;

Note: *See Notes to Q15 and 16 supra. Contact ASISTA for technical assistance on the best approach to challenging improper denials -- motion to reconsider, motion to reopen or appeal to AAO.*

Q31. In some circumstances, USCIS permits the filing of Form I-485 concurrently with an underlying application or petition. If an underlying petition (e.g. Form I-360) is denied, will USCIS refrain from adjudicating Form I-485 and hold it in abeyance until ripe for adjudication? Will USCIS also refrain from issuing an NTA during the period for filing a motion or appeal with respect to the denial of the underlying Form I-360, and during the pendency of such motion or appeal?

A31. The NTA PM does not change guidance related to the adjudication of form specific applications or petitions. When an individual is applying for adjustment of status based on a visa petition, concurrent filing is only permitted when the applicant is eligible to receive an immediately available immigrant visa. Generally, if a Form I-485 is filed concurrently with a visa petition, such as the Form I-360, and the underlying petition is denied, USCIS will concurrently deny the Form I-485 based on the applicant not being the beneficiary of an approved and immediately available visa petition.

Note: *Practitioners should only file one-step VAWA self-petition/adjustments where the petitioner would be immediately eligible to adjust once the self-petition is approved. VSC does NOT have jurisdiction to determine the merits of VAWA adjustment applications; their role is limited to granting fee waivers, granting (c)(9)-based EADs based on evidence of immediate eligibility to adjust, and packaging the case for district office review at adjustment. As noted, we are seeing many unlawful VAWA adjustments at local offices. Contact ASISTA as soon as you know you have a case that must go to a local office to adjust, so we can share latest best strategies for avoiding improper denials.*

Q32. Will USCIS utilize Requests for Evidence and Notices of Intent to Deny to determine whether denial of an application/petition and subsequent issuance of an NTA is avoidable through clarification of issues identified during adjudication?

A32. There is no change to policies regarding Requests For Evidence (RFE) or Notices Of Intent to Deny (NOID); RFEs and NOIDs will still be issued according to current guidance and NTAs will not be issued until after the response period for the RFE or NOID has passed and the issues set forth in the RFE or NOID have not been favorably resolved.

Note: *Given the recent changes to RFE and NOID policy guidance, practitioners may receive denials they believe to be erroneous in light of the new guidance (e.g. if the applicant included initial evidence that was discounted). If you believe you've received a denial in a matter that should have been subject to an*

RFE or NOID, please contact ASISTA or ILRC for technical assistance.

Q33. When USCIS has issued an NTA and an appeal is later filed within the allowed period, will USCIS notify ICE of the pending appeal, and can USCIS request that ICE refrain from filing the NTA in immigration court?

A33. Generally, USCIS will not issue the NTA until an appeal or motion period is exhausted. However, in instances where USCIS adjudicates an appeal or motion after a Notice to Appear has been issued and filed with EOIR, USCIS will notify ICE of any favorable adjudication on the appeal or motion.

Note: *See note on Question 15 supra.*

Q34. Will USCIS issue NTAs based solely on the denial of any of the enumerated humanitarian petitions or applications, in the absence of evidence of substantiated fraud, misrepresentation, or criminal grounds?

A34. NTAs may be issued merely upon the denial of a benefit application, without the presence of fraud, misrepresentation, or criminal factors, if the applicant is removable. The 2018 NTA PM aligns USCIS policy on NTA issuance with the President's removal priorities as outlined in Executive Order 13768, Enhancing Public Safety in the Interior of the United States, and the Department of Homeland Security's removal priorities. USCIS will prioritize for removal individuals who have been convicted of or charged with a criminal offense, have committed acts that constitute a chargeable criminal offense, have engaged in fraud or willful misrepresentation in connection with any official matter, have abused any program related to receipt of public benefits, are subject to a final order of removal but have not departed, pose a risk to public safety or national security, or are unlawfully present in the United States.

Note: *Note that some of the "priorities" for NTA issuance (i.e., final orders, unlawful presence) flow from survivor experience. Congress created VAWA self-petitioning and the U visa to help victims of domestic and sexual violence too afraid of deportation to access safety and justice. To now target these victims precisely for the reasons they need the special relief Congress created for them illustrates the overbroad nature of this policy. To join us in challenging this overbroad attack on survivors, contact ASISTA.*

Q35. During USCIS' Sept. 27 teleconference on an earlier phase of the policy rollout, USCIS stated that, although it reserves the option to issue an NTA before expiration of the motion or appeal period, USCIS would generally not do so. Does that remain USCIS policy, and if so, how will USCIS evaluate the appropriateness of issuing an NTA during the appeal or motion period?

A35. Generally, USCIS will not issue an NTA immediately upon denial of a benefit request, but will wait

for the expiration of the appeal or motion period. Appeals must be filed within 33 days from the date of the decision (not the date you received the decision) except where a shorter appeal period applies, such as for the revocation of the approval of a petition, which has an 18 day deadline. However, as stated during the public engagement held on Sept. 27, USCIS retains the authority to issue an NTA at any time based on the facts and circumstances

of a particular case if the individual is removable. Some factors that may warrant the issuance of an NTA immediately upon denial include instances where there are no motion or appeal provisions or instances where the individual appears to be a threat to the public or a threat to our nation's security.

Note: *As mentioned above, the deadline for filing an appeal is actually 30 days from the date of the mailing of the decision, plus 3 days (so 33 days from the date of mailing). See 8 CFR 103.8(b) ("Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.") and 8 CFR 103.3(a)(2) ("The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions within 30 days after service of the decision") (emphasis added). Given the presenters' repeated reference to "date of denial" as the beginning of the 33-day appeals period, it is unclear if USCIS will allow the full appeals period to expire before issuing an NTA. In addition, ASISTA is seeing many improper Notices of Intent to Revoke. Please contact us as soon as you receive them, see contact information above.*

Q36. The Nov. 8 announcement specified a list of eight forms covered by the current phase of the NTA policy implementation, while the implementation that took effect Oct. 1 was described as including but not limited to Forms I-485 and I-539. Can you clarify whether the implementation date is confined to the ten expressly identified forms?

A36. USCIS is using an incremental approach to implement the 2018 NTA PM. As discussed in our Sept. 27 public engagement session, USCIS began issuing NTAs on denied status impacting applications, including but not limited to the Form I-485 and Form I-539, when the alien is removable from the United States. The incremental implementation of the NTA PM at this time affects all status-impacting applications as well as the eight form types that are addressed in this phase of implementation. It is important to note, however, that nothing in the PM or this implementation restricts or revokes any other existing authorities that USCIS has to issue NTAs.

Training

Q37. Can we see all training, templates and guidance related to the new NTA policy?

A37. Training, templates, and guidance are internal USCIS documents and are not publicly available.

USCIS continues to post FAQs related to the NTA PM and its implementation to the public-facing USCIS website.

Q38. Will additional specific training be developed for USCIS adjudicators of VAWA self-petitions, T visas, and U visas for when NTAs will be issued in these cases? If so, what is the timeframe?

A38. VAWA, T, and U adjudicators already receive specific training for the adjudication of these petitions. All USCIS adjudicators will receive training on the new NTA PM and its implementation; this training addresses specific issues relating to cases protected under 8 USC 1367.

Notes to Q37 and 38: *Training materials should be available via FOIA. Please contact Gail Pendleton (gail@asistahelp.org) if you are interested in helping with a FOIA request for these materials and other documents relevant to this policy change.*

Q39. Is USCIS considering affording discretion to adjudicators to determine whether to issue an NTA since these adjudicators are best-positioned to ascertain whether the case was submitted by a bona fide victim who was unable to qualify for the benefit for reasons that do not undermine their credibility as a victim, or alternatively was clearly not meritorious and/or possibly involved fraud and therefore warrants issuance of an NTA?

A39. In any denied case, an adjudicator may recommend the exercise of prosecutorial discretion not to issue an NTA if he or she determines there is evidence in the file that warrants such action. That recommendation is subject to review by the PRP and, ultimately the respective office director. This is the case for all applicants and petitioners, not just vulnerable populations.

Note: *Given that a recommendation for prosecutorial discretion is subject to multiple levels of review, USCIS has created high barriers for the exercise of prosecutorial discretion. The adjudicator who has evaluated the case is most familiar with the details of the application, and yet his/her recommendation is subject by two higher levels of review by those who lack that specific knowledge. Rather than placing such a high burden on the exercise of prosecutorial discretion, USCIS should create these heightened standards for the issuance of NTAs in survivor-based cases.*

SIJ

Q40. How will NTA referrals be handled for SIJ cases? This is a humanitarian benefit by nature but treated technically like an employment visa (EB4). Please clarify if NTA referrals will be made for denials on SIJ visas.

A40. As has always been the case, USCIS has the authority and discretion to issue an NTA on any cases where the individual may be removable. NTA issuance for SIJ-related cases will be handled like other form types and in accordance with the preliminary injunction issued in *J.L., et al v. Cissna, et al,* 18-cv-04914 (N.D. Cal. Oct. 24, 2018). Upon issuance of a denial of the Form I-360 (SIJ) or Form I-485 for which the underlying basis is an SIJ-related Form I-360, USCIS adjudicators will review the case to determine if the individual is removable from the United States and if NTA issuance would be appropriate under USCIS policy, supporting operational guidance and any legal requirements. NTAs will be issued accordingly unless USCIS exercises its prosecutorial discretion not to issue an NTA. As was discussed in our previous public engagement on the NTA policy implementation, prosecutorial discretion may only be exercised on a case-by-case basis and only when there are factors that warrant the exercise of prosecutorial discretion.

Asylum

Q41. Are there any policy updates/changes for asylum adjustment cases? If so, what are they?

A41. There are no policy updates for asylum-based adjustment of status cases at this time.

Prosecutorial Review Panels

Q42. Will the operational guidance provide clear direction on when it is appropriate to refer a case to the Prosecutorial Review Panel (PRP) or the factors to be considered by the PRP and how those factors are to be weighed? If not, how will USCIS help ensure similarly-situated applicants/petitioners are not treated differently by various adjudicators across the country?

A42. USCIS adjudicators are well-versed in the exercise of discretion. The operational guidance and training materials relating to prosecutorial discretion and referring cases to the PRP provides officers with clear guidance on determining whether it may be appropriate to exercise prosecutorial discretion and not issue an NTA in a given case. Delineating factors for prosecutorial discretion would not be appropriate, as discretion is an individualized determination exercised on a case-by-case basis given the totality of the circumstances. The high level of review required for the PRP will ensure consistent implementation of the NTA PM across all case types.

Note: *This statement (a) seems to ignore their own guidance that lists discretionary factors, see e.g., memoranda noted above; (b) is internally inconsistent (how can decisions be consistent if it there are no*

criteria?); (c) ensures that meaningful review is impossible; and (d) seems designed to ensure inconsistent and inequitable decision making.

Practitioners should think strategically about how to include enough positive equities upfront in an initial filing to warrant exercising prosecutorial discretion, without flagging that a case may be weak. If such arguments have not already been included to show eligibility, it may be helpful to address discretion in response to an RFE, NOID, or other communication from USCIS that indicates a case may be denied. See suggestions in Note to Question 29 supra. In addition to tracking denials, NTAs, and the use of prosecutorial discretion, ILRC and ASISTA will provide updates on discretion criteria we suggest you use for survivors and arguments to challenge abuse of this unfettered discretion. Keep us posted on what you are seeing using the case collector document above.

Q43. What level of oversight will USCIS headquarters have over quality assurance in implementing proper and consistent processes for both referring cases to the PRP, as well as PRP determinations regarding whether to exercise prosecutorial discretion in a case?

A43. Quality assurance is built into the review panel process. USCIS HQ components have provided officers with operational guidance and training materials relating to the exercise of prosecutorial discretion and referring cases to the PRP. Not only are adjudicators thoroughly trained, but there is a high-level of review for each case-by-case determination. The head of the office where the enforcement action will be initiated, such as the field office director or associate center director, will review the recommendation by the Panel and determine whether or not prosecutorial discretion will be exercised to not issue an NTA. USCIS will also track and publicize the number of cases referred to PRPs, as well as the number of cases in which discretion is exercised.

Q44. Has USCIS considered the possibility of automatically referring every victim applicant to the PRP? This would not exempt them categorically from enforcement but would provide them an extra layer of protection/due process before removal proceedings are initiated.

A44. Because the exercise of prosecutorial discretion is an individualized determination made on a case-by-case basis, it would not be appropriate to refer every filing of a given form type to the PRP. Adjudicators are encouraged to refer all cases where they believe an exercise of prosecutorial discretion is warranted to the PRP for review.

Q45. Will USCIS accept evidence in support of referring a denied case to the PRP and in support of a positive exercise of discretion? Although USCIS said there would not be a process for this, what if an

applicant or an attorney requests to provide additional information that might support a referral or a positive exercise of discretion? We anticipate many will want to try to do so in the 33 days for motions/appeals filings before the NTA is issued.

A45. The process for evaluating and exercising prosecutorial discretion is internal. As such, there is no mechanism for an individual to request or submit evidence in support of an exercise of prosecutorial discretion. Any and all information included in an applicant's A-file (including information submitted in support of an appeal or motion) would be considered in the adjudicator's decision whether or not to recommend the exercise of prosecutorial discretion.

Note: *We oppose USCIS' position that there is not a process or ability to request prosecutorial discretion. Under prior guidance, attorneys and advocates could make an affirmative request for the exercise of prosecutorial discretion. This reinforces USCIS' position as an enforcement arm of DHS. As mentioned above, please contact us should you wish to be connected to advocacy efforts.*

Q46. If a local law enforcement agency has certified a victim for a T or U visa, will that agency be consulted before the USCIS adjudicator decides whether to send the denial to the PRP? What if the victim is still cooperating in a case? Will law enforcement and prosecutors be alerted that their victim is now at risk of being removed?

A46. USCIS will continue to follow established procedures for coordinating with law enforcement in ongoing investigations.

Note: *ASISTA is interested in working with other organizations to discover the "existing procedures" described in this answer, through FOIA or discovery in litigation. Please contact us using the contact information if you are interested in helping with this effort. Undermining law enforcement's work with undocumented immigrants is a corollary, if perhaps unintentional, consequence of subjecting survivors to removal. This again contravenes the Congressional intent in establishing these critical protections.*

Confidentiality

Q.47 Is there implementing guidance that ensures Section 1367 protections are being taken into account in NTA issuance?

A47. Yes, operational guidance and related training materials provide clear and detailed instructions for the handling of cases protected by 8 USC 1367.

Note: We are interested in working with other organizations to discover the "operational guidance and instructions" described in this answer, through FOIA or discovery in litigation. Please contact us if you are interested in helping with this effort.