



NTA GUIDANCE: POST-WEBINAR FAQs

1. What does the new NTA guidance do?

The new Notice to Appear (NTA) guidance instructs USCIS adjudicators about when and how to issue an NTA, or refer a case to ICE, when a removable noncitizen applies for an immigration benefit.

2. Are more people removable because of the new NTA guidance?

No. Removability is determined by whether a person is inadmissible under INA § 212(a) or deportable under INA § 237(a). But, as a matter of policy and practice, many removable noncitizens have not been placed in removal proceedings if USCIS denied their applications. Under the new NTA guidance, USCIS is establishing different policies and practices about when removable noncitizens will be issued NTAs and placed in removal proceedings. Under this new policy, more removable noncitizens can expect to receive NTAs if their applications or petitions are denied, or in some cases prior to adjudication of their applications.

3. How does the new guidance impact on my clients who entered the United States EWI or overstayed an authorized stay and are now applying for an immigration benefit?

The biggest impact of the new guidance is on noncitizens who have no legal presence in the United States. This includes all of your clients applying for an immigration benefit who entered EWI or overstayed a period of authorized stay and have not subsequently established legal presence. Under the new guidance, USCIS will issue an NTA to any noncitizen who is not lawfully present and whose application for benefits is denied, even if the only reason the person is removable is because of entering the United States EWI or overstaying a tourist visa. See examples below:

Hortensia entered the United States EWI and later applied for adjustment of status under INA § 245(i). Her application was denied due to abandonment when she failed to respond to a Request for Evidence. Hortensia is removable because she is inadmissible under INA § 212(a)(6)(A) for being present without admission or parole. Because she is removable and not lawfully present, USCIS will issue an NTA upon denial of her application.

Gregory entered the United States with a tourist visa in 2014 and remained beyond his authorized stay. He later applied for adjustment of status and his application was denied when he failed to meet the affidavit of support requirements. Gregory is removable because he is deportable under INA § 237(a)(1)(C) for violating his nonimmigrant status. Because Gregory is removable and not lawfully present, USCIS will issue an NTA upon denial of his application.

4. What if my client does have lawful presence in the United States? How is my client impacted by the new guidance if his or her application is denied?

Under the new NTA guidance, application denial alone will trigger NTA issuance if your client is removable and does not have lawful presence. This probably describes many of the clients you represent. But for clients who have some form of lawful presence (*e.g.* asylee, refugee, nonimmigrant, person with deferred action or parole), denial of an application alone does not trigger NTA issuance. In those situations – where the denied applicant has lawful presence – an NTA will only be issued where the applicant is otherwise removable AND has any kind of a criminal record or there is evidence of any kind of a misrepresentation to a government agency. See examples below:

Hortensia entered the United States EWI and later applied for U status. She was placed on the U wait list in 2017 and granted deferred action. Hortensia subsequently applied for adjustment of status through her spouse, but her application was denied due to abandonment when she failed to respond to a Request for Evidence. Hortensia is removable because she is inadmissible under INA § 212(a)(6)(A) for being present without admission or parole. But in this case Hortensia is also lawfully present because of her deferred action. For this reason, even though Hortensia is removable, USCIS should not issue an NTA upon denial of her application.

What if Hortensia also has a conviction for simple DUI? Or what if she applied for a driver's license using a fake I-551 card? Neither of those actions trigger inadmissibility but would they impact on NTA issuance? Yes! Hortensia would fall within a separate basis for NTA issuance beyond just application denial if she had a simple DUI conviction or if there is evidence in the record about her conduct in applying for a driver's license. Because Hortensia is removable due to her EWI, AND has any kind of criminal record or record of misrepresentation to a government agency, the guidance directs that she be issued an NTA if her application is denied. It doesn't matter that the crime or misrepresentation itself doesn't trigger inadmissibility.

5. Does the NTA guidance on crimes mean my client will be placed in removal proceedings if he or she has any kind of a criminal record?

No. Under the new guidance, any kind of a crime – including crimes that do not trigger crime-based inadmissibility or deportability – can trigger NTA issuance if the application is denied AND the applicant is otherwise removable. But, as stated above, a noncitizen may only be removable based on grounds of inadmissibility or deportability as stated in the INA. This section of the guidance means that an otherwise removable noncitizen who has any kind of a criminal record, including one that does not trigger removability, will be issued an NTA upon denial of an application EVEN IF that individual has lawful presence. See example of Hortensia above.

6. Does the NTA guidance on fraud and misrepresentation mean my client will be placed in removal proceedings if he or she has any kind of prior conduct related to misrepresentation to a government agency?

No. Under the new guidance, any kind of misrepresentation in connection with any official matter or application to a government agency – including misrepresentations that do not trigger inadmissibility or deportability – can trigger NTA issuance if the application is denied and the applicant is otherwise removable. But, as stated above, a noncitizen may only be removable based on grounds of inadmissibility or deportability as stated in the INA. This section of the guidance means that an otherwise removable noncitizen will be issued an NTA upon denial of an application EVEN IF that individual has lawful presence, where the record indicates misrepresentation to a government agency. It does not matter whether the misrepresentation itself triggers removability, so long as the noncitizen is otherwise removable and there is misrepresentation in the record. See example of Hortensia above.

7. Does the new guidance apply to applicants for DACA renewal?

No. A separate memo issued by USCIS states that USCIS will continue to follow the 2011 NTA guidance memo when processing a DACA-related application or when seeking to terminate a grant of DACA.

8. If my client has no lawful presence, does he or she have any greater exposure to NTA issuance based on the crime and misrepresentation categories in the NTA guidance?

Not really. If your client has no lawful presence, he or she is already removable. If USCIS denies an application filed by a person with no lawful presence, that individual will be issued an NTA based on that fact alone. But with the new NTA guidance, it is possible that a client without lawful presence who also falls within the crime or misrepresentation categories in the NTA guidance might be referred to ICE prior to application adjudication for ICE to decide whether to issue an NTA.

9. How does the guidance affect clients who apply for an I-601A and are denied?

The USCIS policy on I-601A denials has been based on the now superseded NTA guidance from 2011. Under this policy, I-601A denials would not generally trigger NTA issuance unless the applicant fell within certain crime or fraud categories in the 2011 NTA guidance. The new NTA guidance does not identify any special policy for adjudications of I-601As, and without a special policy, provisional waiver applicants without lawful presence (most applicants) would be subject to the new NTA guidance, including issuance of an NTA upon denial of their applications. Notably, the USCIS website text on provisional waivers and exposure to NTA issuance upon denial has not been changed to reflect the impact of the new NTA guidance.

<https://www.uscis.gov/family/family-us-citizens/provisional-unlawful-presence-waivers>. This is one of the many issues that will need clarification by USCIS. In the meantime, we recommend that you caution clients applying for provisional waivers that they may be subject to the new NTA guidance.

10. Are there new risks for lawful permanent resident (LPR) clients applying for residency card renewals?

No. The new NTA guidance does not really create any new risks of exposure to removal proceedings for LPRs filing I-90s for new residency cards. As before, the application process exposes the LPR's criminal record to review, which in turn may alert USCIS and ICE that the LPR may be removable under INA §237(a)(2) for crime-based deportability or under INA § 237(a)(1) for deportability for falling with a category of crime-based inadmissibility under INA §212(a)(2) at the time of returning from a trip abroad. This exposure to enforcement was true before and remains unchanged.

11. Are there new risks for LPR clients applying for naturalization?

No. The new NTA guidance does not really create any new risks of exposure to removal proceedings for LPRs filing for naturalization. As before, the application process exposes the LPR's underlying residency status and post-LPR conduct to review and assessment which in turn means that the adjudicator may determine that the LPR (a) has a defect in his or her underlying residency; (b) is deportable for post-LPR conduct; or (c) is ineligible to establish good moral character due to a crime that creates deportability. All of these circumstances could lead to NTA issuance before and this remains unchanged but for the procedural mechanism for assessing whether to exercise prosecutorial discretion.

12. What issues should I analyze to determine how the NTA guidance applies to my client?

First, assess whether your client is removable. If your client is NOT removable, the NTA guidance is not applicable.

Second, determine if your client has lawful presence.

- a. If your client is removable and does not have lawful presence, you can advise your client that, under the NTA guidance, USCIS will issue an NTA if his or her application is denied.
- b. If your client is removable but has lawful presence, denial of an application alone will not trigger issuance of an NTA. But if the removable noncitizen has conduct that falls within the guidance on crimes or misrepresentation, then he or she is still is subject to NTA issuance either through referral of the case to ICE or by USCIS upon denial of the application.

13. What should I do if I have questions about how to counsel individual clients about exposure to NTA issuance?

Contact CLINIC's Training, Litigation, and Support Section for technical assistance.