

New Immigration Guidelines Issued, Bringing More Enforcement with Notices to Appear

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New guidelines from U.S. Citizenship and Immigration Services (USCIS) will have implications for a number of employment-based immigration, family-based immigration and naturalization cases.

The new policy memorandum issued July 5, 2018, "*Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*," represents a shift in USCIS's long-standing primary role of processing immigration benefits, to one of immigration enforcement. The new policy affects the issuance of a Notice to Appear (NTA), the government document that is issued to a non-citizen whom the government believes to be inadmissible and/or removable from the United States that compels the individual to appear in immigration court for removal proceedings. In the past, NTAs were primarily issued by Immigration and Customs Enforcement (ICE) in cases of national security concerns, fraud, misrepresentation or for those with criminal convictions rendering the non-citizen removable from the US. This memorandum now requires USCIS to issue an NTA in many more circumstances than before. Some examples include:

- **Fraud/Misrepresentation/Abuse of Public Benefits:** Cases where fraud and/or misrepresentation is substantiated, and/or when an applicant abused any program related to the receipt of public benefits.
- **Criminal Acts, Charges or Convictions:** Criminal cases where an applicant is convicted or charged with a criminal offense, or has committed acts that can be charged as criminal offenses.
- **N-400 Citizenship Application Denial:** Cases where N-400 is denied on good moral character grounds because of a criminal conviction.
- **Denials of Petitions or Applications:** Cases where an application or petition is denied, leaving the individual without lawful status in the US, and unlawfully present in the US.

Of particular concern to employers and their professional workers is the requirement that an NTA issue at the time USCIS denies a petition, if the beneficiary of the petition is "not lawfully present" at the time of the denial. Each year, USCIS denies hundreds of thousands of petitions and applications to change or extend status, green card applications, and numerous other benefits. Rather than giving these individuals the opportunity to depart the US on their own within a reasonable time, as most people typically do, USCIS will now compel these individuals to appear in immigration court for removal proceedings.

Some of the major implications of the NTA Policy Guidance and new, related policy guidance on employment-based immigration, family-based immigration and naturalization cases are outlined below:

- **Denials of Status Extension Requests for Nonimmigrant Visa Holders:** a foreign worker who has held H-1B status for years could be issued an NTA and placed in removal proceedings, if the petition to extend H-1B status is denied and, because of government backlogs in processing, the underlying H-1B status has expired at the time USCIS denies the petition. On the date of the denial, the foreign worker will be considered unlawfully present in the US, and may become subject to bars from returning to the United States.

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- **H-1B Portability Workers:** a foreign worker who transfers from one H-1B employer to another H-1B employer, and works for the new H-1B employer upon receipt of the corresponding receipt notice, could be without status and be subject to removal proceedings if the employer the H-1B worker is leaving withdraws the approved H-1B petition and the new H-1B employer's petition is denied.
- **F-1 Students:** effective August 9, 2018, a student (F-1, M-1, J-1) who has an accidental or inadvertent status violation will begin accruing unlawful presence as of the day after the date the status violation occurs, and could be subject to bars to admissibility from the US. A timely filed reinstatement application will suspend the accrual of unlawful presence while the application is pending. If the reinstatement application is denied, the accrual of unlawful presence will resume on the day after the denial, and the student could be issued an NTA and be placed in removal proceedings. Whether or not the application for reinstatement is timely filed, if the application for reinstatement is approved, the student will not accrue unlawful presence while out of status.
- **Automatic Visa Cancellation:** a foreign worker with a temporary visa who remains in the US beyond the expiration of their I-94 will have their visa automatically canceled by operation of law. The foreign worker will typically only be able to apply for future visas at the consular post in their home country, rather than applying as a third country national at consular posts outside their home country.
- **Denial without RFE:** USCIS could deny an immigration benefit or application without first issuing an RFE, and if the foreign worker is no longer maintaining status at the time of denial, USCIS may issue an NTA, placing the foreign worker in removal proceedings.
- **Denial of Green Card Application:** a foreign worker who no longer maintains their underlying nonimmigrant status while their green card application is pending could be issued an NTA and be placed in removal proceedings if the adjustment of status application is ultimately denied.
- **N-400 Applications for US Citizenship:** some minor errors in immigration-related applications may be viewed as misrepresentation, which in turn, could negatively affect an applicant's ability to apply for citizenship. An NTA could issue, placing the applicant in removal proceedings.

Guidance detailing how this new policy will be implemented has not yet been published by the government. However, it is anticipated that the implementing guidance will be published very soon. Employers need to plan ahead and file renewals of nonimmigrant petitions six months before foreign workers' status expires. Employers should consider utilizing premium processing in order to receive the decision on the extension request while the foreign worker is still in valid status in order to allow time for an evaluation of their remaining immigration options. Please reach out to the immigration team at Miller Canfield for proactive strategy discussions to ensure that foreign workers can continue their employment and status in the U.S. without interruption.