



GMS Flash Alert

Immigration Edition

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United States – USCIS Issues New Policy on Notices to Appear (NTAs)

On June 28, 2018, U.S. Citizenship and Immigration Services (USCIS) released a [new policy memorandum](#) updating guidance used by USCIS officers. The guidance directs officers to issue a Notice to Appear (NTA) for cases where the individual is removable and there is evidence of fraud, criminal activity, or where an applicant is denied an immigration benefit and is unlawfully present in the United States.

WHY THIS MATTERS

At a time when applications for immigration benefits are facing increased levels of scrutiny and higher rates of denial, the new policy memo now delivers harsh consequences for those applicants who are denied an immigration benefit and as a result are unlawfully present in the United States.

The new policy impacts individuals currently in the United States on temporary employment-based visa categories such as H-1B specialty occupation workers, and L-1 intra-company transferees, who could be placed in removal proceedings if their request for extensions of stay are ultimately denied by USCIS and they no longer have lawful presence to remain in the United States.

What the New Policy Does

The new policy directs USCIS officers to issue a Notice to Appear (NTA) in cases where, as a result of an unfavorable decision by USCIS, an individual can no longer maintain lawful presence in the United States. The new NTA policy exempts Deferred Action for Childhood Arrivals (DACA) recipients who are governed by a DACA-specific policy guidance.¹

The new policy memo further instructed USCIS to create or update the agency's operational guidance on NTA issuance within 30 days of the memo's publication on June 28, 2018. As the publication of the operational guidance remains pending, USCIS has announced it will delay implementation of the new NTA policy until such guidance is issued.²

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What Is a Notice to Appear (NTA)?

An NTA is a charging document issued by the Department of Homeland Security (DHS) to place an individual into removal (deportation) proceedings. USCIS along with U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) have the legal authority to issue NTAs as component agencies of DHS.

Prior to this updated directive, USCIS would generally refer cases of potentially removable foreign nationals to ICE to determine whether removal proceedings should be initiated. ICE, the traditional enforcement arm for immigration matters, would then issue an NTA for the potentially removable individual.

Under this new policy, USCIS officers have been directed to issue NTAs without consultation from ICE, and to initiate removal proceedings on its own following its decision to deny an application for immigration benefit if the individual no longer has lawful presence in the United States.

KPMG NOTE

The new policy sends a clear message: USCIS is focused on expanding its immigration enforcement priorities and charging its adjudicating officers to execute on these initiatives.

Consequences Once an NTA Is Issued

The new NTA guidance will leave impacted individuals in a state of immigration “limbo” with harsh consequences once an NTA has been issued. Previously, if an individual’s application for immigration benefit was denied, the individual might seek to depart the United States voluntarily and remain abroad or reapply for another visa to return to the United States. However, once an individual is issued an NTA, the individual is legally required to appear before an immigration judge in the United States. If the individual fails to comply with the NTA and does not appear in immigration court, the court will automatically issue a removal order against the individual which carries harsh consequences in the form of five (5), ten (10), or twenty (20) year bars on re-entry into the United States.

Alternatively, if the individual remains in the United States until it is time to appear before an immigration judge in accordance with the NTA, the individual will be considered “unlawfully present” for the entire duration of that time. With lengthy backlogs in the immigration courts, currently sitting at over 700,000 cases as of May 2018³, this wait time could span over the course of several months or potentially years. It is important to note that accrual of over 180 days of unlawful presence automatically triggers a three (3) year bar on re-entry into the United States and the accrual of over a year of unlawful presence triggers a ten (10) year bar on re-entry; the immigration consequences are extreme. Furthermore, an individual placed in removal proceedings is generally ineligible for work authorization in the United States, and thus unable to work while awaiting his or her court date.

KPMG NOTE

Without clearly defined procedures on how the USCIS intends to implement issuance of the NTAs, employers and applicants should take every possible precaution to make sure applications for extensions of stay are adjudicated prior to the foreign national's existing status expiration. For example, applications to extend nonimmigrant visa status should be filed as early as possible, namely up to six (6) months prior to expiration, to provide the greatest length of time for

USCIS to adjudicate the application to completion. Similarly, employers should consider sponsoring immigrant petitions (i.e., Green Cards) for its foreign national employees earlier while the employee has remaining time in his or her underlying nonimmigrant status. Additionally, employers and applicants should consider utilizing USCIS's "premium processing" service on all eligible applications to mitigate potential lapses in nonimmigrant status and the accrual of unlawful presence should the application be denied.

KPMG Law LLP in Canada will continue to monitor the situation, and will endeavor to keep *GMS Flash Alert* readers informed as developments occur.

FOOTNOTES:

1 To see "Policy Memo: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens" (June 28, 2018), click [here](#).

2 The "[Updated Guidance on the Implementation of Notice to Appear Policy Memorandum](#)" Web page on the USCIS Web site.

3 To see TRAC Immigration, "Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location," click [here](#). *Please note that TRAC Immigration is a 3rd party (non-KPMG, non-governmental) website. Providing this link in no way represents an endorsement or a recommendation for this site.*

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Contact us

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