



AILA Policy Brief: Expanded NTA Guidance Will Have Devastating Effects on Survivors of Domestic Abuse, Trafficking, and Other Serious Crimes

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In June 2018, United States Citizenship and Immigration Services (USCIS) announced a new policy greatly expanding the agency's authority to issue notices to appear (NTAs), the document that places people into removal proceedings. The new guidance increased the categories of individuals to whom USCIS will issue an NTA; as a result, thousands of people could be referred for removal and shuttled into our immigration court system. The change is one of several that dramatically shifts the agency away from its long-standing service-oriented mission to one that is far more focused on enforcement.

Disturbingly, USCIS recently announced it is now applying the new NTA policy memorandum to survivors of domestic abuse, survivors of trafficking, and survivors of other serious crimes, as well as other people applying for humanitarian benefits. The result will be devastating and will hurt precisely those victims of crimes and survivors of abuse whom Congress intended to protect when it passed trafficking and violence prevention laws. Survivors will be afraid to come forward and access protections, legitimately fearing they will be put into removal proceedings if their application is denied, even for technical deficiencies. The guidance will have a chilling effect on the immigrant community's willingness to report abuse, crimes, and trafficking and on their willingness to help law enforcement prosecute the perpetrators of these crimes. Lastly, although prosecutorial discretion is an option available to the agency, the many layers of review necessary to exercise this power make it unlikely that the agency will regularly exercise this discretion.

Background on the June 28, 2018 USCIS Policy Memorandum

On June 28, 2018, USCIS issued a policy memorandum entitled "[Updated Guidance for the Referral of Cases and Issuance of Notices to Appear \(NTAs\)](#)" (hereinafter "June 2018 memorandum")¹ expanding the circumstances in which the agency will issue a Notice to Appear ("NTA") to applicants and superseding a prior policy memorandum from November 7, 2011.² The June 2018 memorandum updates the policy for several categories of cases where an applicant is considered removable, including cases where someone is unlawfully present when USCIS denies the petition or application.³ For more information on the June 2018 memorandum, read AILA's [Policy Brief: New USCIS Notice to Appear Guidance](#).

USCIS announced that it would implement the June 2018 memorandum incrementally, starting on [October 1, 2018](#) when it began issuing NTAs to people whose applications to adjust, change, or extend status were denied.⁴ The second phase of this expansion began on November 19, 2018, and applies to humanitarian-based applications denied by USCIS, including applications for relief filed by victims of human trafficking (T visas), victims of serious crimes (U visas), victims of abuse (VAWA relief), and others.⁵

On a November 15, 2018 stakeholder call, USCIS stated that it will inform individuals that they may be subject to an NTA after denial of their petition unless the applicant files for appeal or departs the United States within 30 days of the notice.⁶ USCIS representatives also stated that this phase of the memorandum does not apply for cases denied before June 28, 2018, but that USCIS retains the discretion to apply this guidance retroactively.⁷ USCIS specified that withdrawal of existing applications will not preclude the agency from issuing an NTA to applicants.⁸ It is important to note that USCIS also recently announced that an application or petition can be denied without giving someone the opportunity to correct a deficiency or supplement the record with additional evidence.⁹ Combined, these policies mean that the government may seek to deport a survivor whose application is denied for something as simple as forgetting to include a piece of evidence.

The New NTA Policy Protects Abusers and Captors at the Expense of Survivors.

Historically, survivors of abuse, trafficking, and other serious crimes have not been put into removal proceedings if they are unlawfully present and their application is denied, barring certain exceptions, including for public safety. This has been long-standing policy for a number of important reasons, including to encourage survivors to report crimes and to allow survivors to feel comfortable accessing relief.¹⁰ Doing away with these protections will mean survivors may face damaging consequences to their lives and immigration cases as the direct result of coming forward to report their abusers and captors.

In fact, in many cases, survivors of abuse and trafficking are unlawfully present in the United States *because of their abusers or captors*. As part of the victimization, captors and abusers commonly take away their victims identifying documentation or prevent the immigrant from filing the necessary paperwork to remain lawfully present in the United States—even when the immigrant has options available for lawful status.¹¹ Captors and abusers often have complete physical, mental, and emotional control over their victim’s lives.¹² This control can include what their victims eat, where they can go, and whether they are able gather and submit documentation and evidence to remain lawfully present in the United States.¹³ Placing these victims in removal proceedings for reasons that directly result from their abuse and victimization over which they had no control causes further harm to an already vulnerable community.

The Issuance of NTAs for Humanitarian-Based Petitions Will Have a Chilling Effect on Reporting of Violent Crimes and Trafficking.

The June 2018 memorandum will have a clear chilling effect on the reporting of violent crimes, as survivors will be reluctant to report these crimes and access relief knowing that the end result could mean they will be deported and/or exposed to their abusers or captors. USCIS has stated that it plans to issue robust messaging around the June 2018 memorandum so that it will not have a chilling effect on victims reporting crimes of violence and trafficking. However, this position fails to recognize the inherent conflict between stating that it is “committed to providing relief for victims” and a contradictory NTA policy that discourages victims from seeking protection by putting them at risk of deportation. USCIS has also stated its commitment to upholding the protections of confidentiality set forth by 8 U.S.C. § 1367 for survivors of violence.¹⁴ Under this regulation, USCIS may not serve the NTA on the physical address of the applicant or petitioner unless the confidentiality protections of this regulation have been terminated.¹⁵ But these confidentiality protections for humanitarian petitions do not prevent USCIS from issuing the NTA upon the attorney of record or safe mailing address provided by the applicant. Most importantly, the confidentiality protections expire when the benefit request has been denied and all opportunities for appeal have been exhausted.¹⁶ In effect, this means that once the USCIS adjudicator has denied the petition, the confidentiality protections end, and USCIS can then issue the NTA to survivors at any address they so choose.

A Favorable Exercise of Prosecutorial Discretion Will Be Difficult for Survivors to Obtain.

The June 2018 memorandum states that “NTAs will be issued in cases where the individual is a priority for removal under this memorandum. . . except in very limited circumstances involving the exercise of prosecutorial discretion. . .”¹⁷ The memorandum also states that “prosecutorial discretion to *not* issue an NTA should only be exercised on a case-by-case basis after considering all USCIS and DHS guidance, DHS’s enforcement priorities, the individual facts presented, and any DHS interest(s) implicated.” (emphasis added) Practically speaking, this standard will block nearly all cases from receiving a favorable exercise of discretion. In order to exercise prosecutorial discretion and not issue an NTA, the adjudicating officer must give a recommendation to a Prosecutorial Review Panel (comprised of at least a local supervisory officer and a local USCIS Office of Chief Counsel attorney), which then must agree and recommend prosecutorial discretion to the appropriate final signatory (a field office director, associate service center director, the assistant center director of the National Benefits Center, or the Deputy of International Operations). This final signatory must concur with the recommendation to exercise prosecutorial discretion for a positive exercise of prosecutorial discretion to be effectuated.¹⁸ Given the time and resource constraints facing USCIS officers and staff, this multi-layer review process will make it extremely rare for USCIS to exercise discretion.

Conclusion

Lifting the protections for survivors who choose to come forward and report their abuse or trafficking to law enforcement will have terrible and irrevocable effects on both survivors and our communities. As word begins to spread of the risk that survivors would be taking by contacting law enforcement and assisting in the prosecution of their abusers and captors, survivors will have little choice but to remain in the shadows, placing their own lives and potentially others’ lives at risk.

¹ See Department of Homeland Security, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens Policy Memorandum*, June 28, 2018, available at <https://www.aila.org/infonet/uscis-will-begin-implementing-new-policy-memo>. This memorandum is meant to further the guidance of [Executive Order 13768](#) which articulates priorities of removal in certain categories of cases, including cases that involve people who are not lawfully present in the United States or who are subject to other grounds of removability.

² See Department of Homeland Security, *Revised Guidance for the Referral of Cases and Issuance of Notice to Appear (NTAs) in Cases involving Inadmissible and Removable aliens*, November 7, 2011, available at <https://www.aila.org/infonet/uscis-issue-an-nta>.

³ The memorandum also applies to cases where fraud or misrepresentation is substantiated, and/or cases where there is evidence the individual abused any program related to receiving public benefits; cases where an individual is charged with (or convicted of) 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; and cases where USCIS denied a Form N-400, Application for Naturalization, on good moral character grounds because of a criminal offense.

⁴ See *USCIS Provides Q&As from Teleconference on Updated NTA Policy Guidelines*, September 27, 2018, available at <https://www.aila.org/infonet/uscis-qas-teleconference-nta-policy>.

⁵ See *USCIS to Continue Implementing New Policy Memorandum on Notices to Appear*, November 8, 2018, available at <https://www.aila.org/infonet/uscis-continue-implementing-new-policy-memorandum>. (“Starting Nov. 19, 2018, USCIS may issue NTAs as described below based on denials of I-914/I-914A, Applications for T Nonimmigrant Status, and petitions for Forms I-918/I-918A, Petitions for U Nonimmigrant Status; I-360 Petition for Amerasian, Widow(er); I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant, Special Immigrant (Violence Against Women Act self-petitions and Special Immigrant Juvenile petitions); and I-730 Refugee/Asylee Relative Petition, when the beneficiary is present in the US, as well as Form I-485, Application to Register Permanent Residence or Adjustment of Status, filed with these underlying form types.”)

⁶ Notes for this call are forthcoming. This policy brief will be updated once notes become available.

⁷ See *id.*

⁸ See *id.*

⁹ See USCIS Issues Policy Memorandum on Issuance of Certain RFEs and NOIDs, July 13, 2018 available at <https://www.aila.org/infonet/uscis-policy-memo-issuance-of-rfes-and-noids>.

¹⁰ See Department of Homeland Security, *Revised Guidance for the Referral of Cases and Issuance of Notice to Appear (NTAs) in Cases Involving Inadmissible and Removable aliens*, November 7, 2011, available at <https://www.aila.org/infonet/uscis-issue-an-nta>; but see Department of Homeland Security, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens Policy Memorandum*, June 28, 2018, available at <https://www.aila.org/infonet/uscis-will-begin-implementing-new-policy-memo>.

¹¹ See United Nations, *Providing Effective Remedies for Victims of Trafficking in Person*, 2016, available at https://www.unodc.org/documents/human-trafficking/ICAT/ICAT_Policy_Paper_3_Providing_Effective_Remedies_for_Victims_of_Trafficking_in_Persons_2016.pdf at 12. See, e.g., Polaris Project, May 3, 2015, available at <https://polarisproject.org/blog/2015/05/03/survivor-story-four-children-and-16-year-relationship>.

¹² See *supra*, United Nations, *Providing Effective Remedies for Victims of Trafficking in Person*, 2016.

¹³ See, e.g., Polaris Project, November 8, 2014, available at <https://polarisproject.org/blog/2014/11/08/survivor-story-he-dreamed-working-united-states>.

¹⁴ See 8 U.S.C. § 1367.

¹⁵ See *id.*

¹⁶ See June 2018 Policy Memorandum *supra* note 1 at 9.

¹⁷ See *id.* at 10.

¹⁸ See June 2018 Policy Memorandum *supra* note 1 at 10.