



AILA Policy Brief: Seven Ways USCIS Is Defying the Will of Congress

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Through dramatic changes in policy and practice under the Trump administration, USCIS has increasingly shifted its focus toward immigration enforcement, contravening Congress's intent that it function as a service-oriented immigration benefits agency. During the past two years USCIS has:

- Acted in concert with ICE to carry out deportation “traps.”
- Stripped the phrase “nation of immigrants,” as well as the reference to applicants and petitioners as “customers,” from the agency’s mission statement.
- Imposed a “Notice to Appear” policy that threatens to profoundly escalate the number of denied applicants and petitioners placed into deportation proceedings.
- Issued a memorandum authorizing adjudicators to deny certain cases without first allowing applicants the opportunity to provide additional supporting evidence.
- Unveiled guidance enhancing the likelihood that foreign students and exchange visitors could face long-term bans on re-entering the United States.
- Compounded crisis-level case processing delays that often result in applicants’ loss of legal immigration status.
- Requested the transfer of over \$200 million in applicant and petitioner fees out of USCIS into ICE for, among other purposes, the hiring of over 300 ICE enforcement officers.

By prioritizing enforcement over adjudication, these seven actions undermine the legal immigration system that the agency exists to administer. This policy brief examines how each of them, in defiance of congressional will, contributes to USCIS’s ongoing transformation from a benefits service into another immigration enforcement arm.

Background

Congress established USCIS to separate the government’s immigration benefits services from its immigration enforcement components. Prior to the creation of the Department of Homeland Security (DHS), the government housed those two functions under a single agency—legacy Immigration and Naturalization Service (legacy INS). For years, both the legislative and executive branches criticized this consolidation as inefficient and counterproductive. In 2002, the Congressional Research Service observed that there “appeared to be a consensus among interested parties that the former INS’s two main functions — service and enforcement — needed to be separated.”¹

Congress achieved this division with the passage of the Homeland Security Act of 2002, signed into law by President George W. Bush. The Act abolished INS, vesting many of its responsibilities in newly established agencies including the Bureau of Citizenship and Immigration Services—later renamed USCIS.² Adjudication functions were transferred from legacy INS to USCIS; enforcement functions to what ultimately became Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). In its official materials USCIS recognizes Congress’s intent that it function as a benefits service rather than an enforcement arm:

*We were formed to enhance the security and improve the efficiency of national immigration services **by exclusively focusing on the administration of benefit applications.** Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), components within DHS, handle immigration enforcement and border security functions (emphasis added).³*

Yet under the Trump administration, USCIS has acted contrary to its acknowledged statutory mission by increasingly prioritizing enforcement over service-oriented adjudication. The policy changes described below demonstrate the agency’s systematic deviation from Congress’s vision.

1. USCIS has acted in concert with ICE to carry out deportation “traps.”

Under the Trump administration, USCIS, in concert with ICE, has staged deportation “traps” of numerous noncitizens who adhered to USCIS’s own regulations for lawfully obtaining immigration benefits. In 2016, USCIS adopted a rule allowing certain undocumented individuals who had previously received final deportation orders to obtain legal immigration status through a “provisional waiver” process.⁴ The filing with USCIS of a Form I-130, *Petition for Alien Relative*, by the noncitizen’s spouse often marks the first step toward obtaining that waiver. However, litigation initiated in 2018 by the American Civil Liberties Union (ACLU) revealed that USCIS and ICE recently and repeatedly turned this benefits process into what ACLU has deemed a “trap.”⁵

That year, ICE executed a series of arrests of noncitizens with final deportation orders who, in conformity with the 2016 regulations, were attending I-130 interviews with their spouses at USCIS offices. USCIS regularly sent ICE lists of such I-130 beneficiaries, scheduled the I-130 interviews at ICE’s convenience, and in certain cases alerted ICE to the noncitizens’ arrival at USCIS interview sites and provided updates on the progress of the interviews.⁶ Altogether, [as ACLU observes](#), USCIS “did not appear to schedule or conduct interviews in furtherance of adjudication, but instead in order to facilitate enforcement and deprive the applicant of the benefit of the process.” In some instances, the traps resulted in the immediate detention of noncitizen spouses and the separation of their families.⁷

These actions do not reflect an agency “exclusively focusing on the administration of benefit applications.”⁸ Rather, USCIS’s conversion of an immigration benefit process it established in 2016 into an enforcement tool in 2018 represents the agency’s broader, ongoing transformation from a benefits service into a third DHS enforcement arm.

2. USCIS stripped the phrase “nation of immigrants,” as well as the reference to applicants and petitioners as “customers,” from the agency’s mission statement.

In February 2018, USCIS devised a new mission statement that broadcast the agency’s shift away from service-oriented case processing. The revised language omits the prior version’s recognition of the United States as a “nation of immigrants” as well as a reference to applicants and petitioners as “customers.”⁹ The elimination of this language is inconsistent with Congress’s creation of a DHS component expressly dedicated to providing “immigration and citizenship services.” An [anonymous government official suggested](#) that the revised version harkens back to an era when service and enforcement functions were bound together in a single counterproductive agency:

“The change from INS to USCIS, the official said, was in part rooted in an effort ‘to move away from that image where people were afraid of us. We wanted people to feel comfortable with coming to us and know that they could get a fair hearing — that we were different from ICE and CBP...this is a step backwards.’”

The new mission statement, then, both reflects and conveys a thinning line between USCIS on the one hand and ICE and CBP on the other. In its rhetoric, as in its policy, the agency is deemphasizing the service-oriented adjudications at the core of its congressional mandate.

3. USCIS imposed a “Notice to Appear” policy that threatens to dramatically escalate the number of denied applicants and petitioners placed into deportation proceedings.

In June 2018, [USCIS announced a policy](#) that widely expands the circumstances under which it can issue a “Notice to Appear” (NTA)—the document initiating deportation proceedings. Critically, USCIS may now issue NTAs if applicants or petitioners are not “lawfully present” in the United States at the time their applications or petitions are denied. This shift could result in the deportation of far more applicants and petitioners than under prior guidance.

While the agency has long had the authority to issue NTAs, traditionally USCIS has limited the exercise of that authority in keeping with its statutory mission as a benefits service. In fact, USCIS has opted to refer certain cases to ICE, leaving the determination of whether to initiate deportation proceedings to the latter agency. USCIS notes that its new NTA policy will decrease these referrals because, “...[i]nstead of referring cases to ICE so they can issue the NTA, we will, upon full implementation of the new NTA PM [policy memorandum], and for categories of cases expressly laid out in the NTA PM...issue NTAs directly under the updated NTA PM.”¹⁰ As concluded by the Catholic Legal Immigration Network (CLINIC) “[t]his change effectively puts USCIS on equal footing with ICE in controlling who is placed into proceedings and when.”¹¹ USCIS has therefore assumed, in sharply enhanced degree, an immigration enforcement function that until now has been predominantly performed by ICE and CBP.

The new NTA policy will also exert a profound chilling effect on the filing of applications and petitions with USCIS due to fear of unjustified enforcement. From survivors of human trafficking who might otherwise have obtained humanitarian protection from their captors, to skilled workers who would have filled critical workforce gaps in U.S. businesses, many noncitizens will opt not to seek immigration benefits despite their eligibility. Contrary to the will of Congress, then, the NTA policy deters legal immigration instead of facilitating it.

4. USCIS issued a memorandum authorizing adjudicators to deny certain cases without first allowing applicants the opportunity to provide additional supporting evidence.

As a result of a [July 2018 USCIS memorandum](#) that went into effect in September of that year, adjudicators now have the discretion to deny cases that are missing initial evidence without first requesting that applicants supply the needed information. Previous agency guidance required adjudicators to issue a “Request for Evidence” if a filing was insufficient and/or failed to meet the standard of proof—helping ensure a fair opportunity to complete the record—unless the adjudicator found “no possibility” that further evidence could establish eligibility for the benefit sought.¹² The new guidance leaves applicants subject to peremptory denials even for innocent filing mistakes or misunderstandings of evidentiary requirements—a risk particularly acute for individuals lacking legal representation.

The potential consequences of this change are compounded by the Trump administration’s “Notice to Appear” memorandum. As described above, under that guidance USCIS’s denial of an applicant not lawfully present in the United States may trigger the issuance of an NTA.¹³ In combination, therefore, these enforcement-oriented memorandums threaten to create a two-step fast-track to removal proceedings: (1) a denial stemming from an inadequate adjudication; and (2) an NTA stemming from that denial. Altogether, the volume of denied and deported applicants who might previously have received case approvals and continued residing in the United States could substantially rise.

5. USCIS unveiled guidance enhancing the likelihood that foreign students and exchange visitors could face long-term bans on re-entering the United States.

Effective September 2018, [USCIS profoundly changed](#) how it calculates foreign students and exchange visitors’ accrual of “unlawful presence,” the duration of which can hold serious enforcement consequences. Previously, these individuals would accrue unlawful presence only after a formal finding by USCIS or an immigration judge that they had failed to maintain lawful immigration status. Under the revised guidance, they begin accruing unlawful presence on the day after the status violation itself.¹⁴ This penalty extends even to inadvertent and de minimis violations. The change in policy eviscerates due process by eliminating notice upfront of unlawful presence accrual. In many cases, noncitizens may not be aware that the violations occurred until years after the fact.

The new policy undermines the student and exchange visitor visa system by prioritizing enforcement over fundamental fairness. It could broadly inflate rates of unlawful presence, in turn triggering years-long bars that prevent affected individuals who depart the United States from re-entering the country.

6. USCIS has compounded crisis-level case processing delays that oftentimes result in applicants’ loss of legal immigration status.

An [AILA report published in January 2019](#) highlights crisis-level delays in USCIS case processing under the Trump administration. As measured in that report, the overall average case processing time increased by 46% from the end of FY 2016—the last full fiscal year under the

prior administration—to the end of FY 2018—the first full fiscal year under the current one.¹⁵ During that two-year period, USCIS has adopted a series of policies—such as a sweeping in-person interview requirement for employment-based green card applicants and certain relatives of asylees and refugees—that compound delays by needlessly hindering adjudication efficiency.¹⁶ This case processing crisis harms families, U.S. businesses, and vulnerable populations throughout the country that depend on timely adjudications.

A key outcome of these slowdowns is an enhanced danger that, as a noncitizen awaits delayed processing of an application for a *new* immigration benefit, the validity period of her *existing* immigration benefit expires, leaving her without lawful immigration status through no fault of her own. On an immediate level, that expiration can trigger job loss, insolvency, and a host of other severe practical consequences.¹⁷ What is more, on account of the agency’s new NTA policy, a subsequent denial of the application for a new benefit could prompt the noncitizen’s placement into deportation proceedings—proceedings that might never have occurred had the agency efficiently adjudicated the case in the first place. In this respect, runaway case processing delays heighten the prospect of deportation for many applicants and petitioners, accelerating the agency’s ongoing evolution into a third immigration enforcement agency.

7. USCIS requested the transfer of over \$200 million in applicant and petitioner fees out of USCIS into ICE for, among other purposes, the hiring of over 300 ICE enforcement officers.

At the same time that USCIS is failing to meet its statutory mission of efficient benefits administration, it has sought to transfer over \$200 million into ICE for immigration enforcement purposes. USCIS is primarily funded through filing fees paid by applicants and petitioners. Most of those fees get deposited into the “Immigration Examination Fees Account,” which the agency states is “used to fund the cost of processing immigration benefit applications and associated support benefits.”¹⁸ Yet in the 2019 budget justification that USCIS submitted to Congress, it requested to transfer \$207.6 million out of IEFA—and the agency altogether—into ICE.¹⁹ USCIS observed that the transfer would enable, among other ends, ICE’s hiring of over 300 law enforcement officers. ICE’s budget request indicates that those officers “would support the review of an estimated 700,000 alien files” in connection with “Operation Second Look,”²⁰ an initiative aimed at determining whether certain current U.S. citizens were improperly naturalized.²¹

USCIS’s request occurred amid widespread, ongoing media coverage of the agency’s formation of a “task force” charged with examining naturalization cases flagged for possible fraud and initiating denaturalization proceedings when deemed warranted.²² The creation of this unit has spurred concern from naturalized individuals around the country who, irrespective of the absence of fraud in their own cases, fear that their status as U.S. citizens is no longer secure. In addressing these developments, USCIS Director Francis Cissna stated that, “[w]hat we’re looking at, when you boil it all down, is potentially a few thousand cases.”²³ However, read together, the USCIS and ICE budget requests indicate that USCIS has sought to use its funding to support the inspection of hundreds of thousands of previously adjudicated naturalization applications.

This effort to move funds intended for “processing immigration benefit applications” into ICE for denaturalization and other enforcement activities brings USCIS’s changing focus into sharp

relief. USCIS's prioritization of ICE's work over its own, particularly at a time of crisis-level case processing delays, is directly at cross-purposes with its statutory mission.

Conclusion

The seven actions detailed above reveal an agency repurposing itself into a third DHS enforcement arm. This ongoing metamorphosis disregards the will of Congress and impairs immigration benefits processes that USCIS was established to administer. To realign USCIS with its statutory mandate, AILA recommends that: (1) the agency rescind the harmful enforcement-oriented policies adopted over the past two years such as its new NTA memorandum and other measures described in this policy brief; and (2) Congress engage in vigorous oversight of USCIS using its full range of powers. The legislative branch created USCIS: now it must hold this increasingly misguided agency to account.

¹ Congressional Research Service, "Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress" (Dec. 30, 2002);

https://www.everycrsreport.com/files/20021230_RL31388_3678de56f7aba9d7d612f19a020d1f0030db4d9c.pdf.

² Pub. L. No. 107–296, 116 Stat. 2135 (Nov. 25, 2002),

https://www.dhs.gov/sites/default/files/publications/hr_5005_enr.pdf.

³ USCIS Webpage, "Our History" (May 25, 2011), <https://www.uscis.gov/about-us/our-history>.

⁴ "Expansion of Provisional Unlawful Presence Waivers of Inadmissibility," 81 Fed. Reg. 50243 (July 29, 2016); <https://www.federalregister.gov/documents/2016/07/29/2016-17934/expansion-of-provisional-unlawful-presence-waivers-of-inadmissibility>.

⁵ ACLU, "ICE and USCIS Conspired to Arrest, Detain Immigrants Wishing to Remain with Families" (Aug. 14, 2018); <http://www.riaciu.org/news/post/ice-and-uscis-conspired-to-arrest-detain-immigrants-wishing-to-remain-with>.

⁶ *Id.*

⁷ See, e.g., Brenda Medina, "Her husband went to an immigration interview about their marriage. He was detained by ICE," *Miami Herald* (Oct. 1, 2018);

<https://www.miamiherald.com/news/local/immigration/article219298775.html>.

⁸ USCIS Webpage, "Our History" (May 25, 2011), available at <https://www.uscis.gov/about-us/our-history>.

⁹ See Ryan Devreaux, "U.S. Citizenship and Immigration Services Will Remove 'Nation of Immigrants' From Mission Statement," *The Intercept* (Feb. 22, 2018); <https://theintercept.com/2018/02/22/u-s-citizenship-and-immigration-services-will-remove-nation-of-immigrants-from-mission-statement/>.

¹⁰ USCIS Webpage, "USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance," (Sep. 27, 2018);

https://www.uscis.gov/sites/default/files/files/natedocuments/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA.pdf.

¹¹ CLINIC, "Practice Pointers: USCIS Issues New NTA Guidance Memo" (updated Jul. 31, 2018);

https://cliniclegal.org/sites/default/files/clinic_practice_pointer_on_uscis-new-nta-guidance-memo_0.pdf.

¹² USCIS Policy Memorandum, "Requests of Evidence and Notices of Intent to Deny" (Jun. 2, 2013);

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20%28Final%29.pdf>.

¹³ USCIS Policy Memorandum, "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens" (Jun. 28, 2018);

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

¹⁴ USCIS Policy Memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (Aug. 9, 2018);

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf>.

¹⁵ AILA Policy Brief, “USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration” (Feb. 12, 2019); <https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays>.

¹⁶ *See id.*

¹⁷ *See, e.g.*, Johana Bhuiyan and Andrea Castillo, “Immigrant tech workers struggle to get H-1B visas under Trump: ‘I’ve never felt so helpless,’” *Los Angeles Times* (Feb. 1, 2019); <https://www.latimes.com/business/technology/la-fi-tn-h1b-workers-tech-trump-20190201-story.html>.

¹⁸ USCIS, “Fiscal Year 2019 Congressional Justification;” <https://www.dhs.gov/sites/default/files/publications/U.%20S.%20Citizenship%20and%20Immigration%20Services.pdf>.

¹⁹ *Id.*

²⁰ ICE, “Fiscal Year 2019 Congressional Justification;” <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>

²¹ Seth Freed Wessler, “Is Denaturalization the Next Front in the Trump Administration’s War on Immigration?” *New York Times Magazine* (Dec. 19, 2018); <https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html>.

²² Dara Lind, “Denaturalization, explained: how Trump can strip immigrants of their citizenship,” *Vox* (Jul. 28, 2018); <https://www.vox.com/2018/7/18/17561538/denaturalization-citizenship-task-force-janus>.

²³ Elliot Hannon, “Trump Administration Launches Effort to Strip Citizenship From Those Suspected of Naturalization Irregularities,” *Slate* (Jun. 11, 2018); <https://slate.com/news-and-politics/2018/06/trump-administration-launches-denaturalization-effort-to-strip-citizenship-from-those-suspected-of-irregularities.html>.