

The Reference to Public Benefits in USCIS's Policy Memo on Notices to Appear

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From its earliest days, the Trump administration has unleashed wave after wave of attacks on immigrant families and communities. One of the first was an [executive order](#), issued just five days after the president's inauguration (on Jan. 25, 2017),¹ that calls for an aggressive campaign of immigration enforcement in the U.S. interior. In part, this interior enforcement order established a new list of enforcement priorities so broad that virtually all undocumented immigrants are included within their scope. One vague provision makes undocumented immigrants a priority for enforcement if they have "[abused any program related to receipt of public benefits](#)."²

Notice to Appear (NTA) policy

On June 28, 2018, U.S. Citizenship and Immigration Services (USCIS) issued a [policy memorandum](#) that instructs USCIS employees how to effectuate the Jan. 2017 executive order's enforcement priorities in a way consistent with the U.S. Department of Homeland Security's (DHS's) overall removal priorities.³ (NOTE: On July 30, 2018, USCIS announced that it would delay implementation of this memorandum until the agency develops operational guidance on NTAs and referrals to U.S. Immigration and Customs Enforcement (ICE).)

NTA initiates removal proceedings. Within DHS, removal proceedings are initiated primarily by ICE, but USCIS and border authorities also have some enforcement duties.⁴ The memorandum deals specifically with the circumstances under which USCIS issues a Notice to Appear or refers cases to ICE. An NTA is a charging document to initiate removal (deportation) proceedings. Once an NTA is issued, filed with an immigration court,⁵ and served on a non-U.S. citizen, removal proceedings against the noncitizen may proceed. In immigration court, the noncitizen may seek relief from removal (i.e., one of various types of waiver or lawful immigration status), including adjustment of status to lawful permanent residence, which USCIS may have denied the person at some point prior to the proceedings.

Memo further limits exercise of prosecutorial discretion. The policy set forth in the memorandum requires USCIS to issue an NTA to nearly all persons who are or become "not lawfully present" when their application, petition, or request for an immigration benefit submitted to USCIS is denied. Previously, in most cases individual USCIS agents could consider whether the specific facts

¹ <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

² See "Unpacking the References to Public Benefits and the Privacy Act in Trump's Executive Order on Interior Enforcement," NILC's *The Torch*, March 2, 2017, www.nilc.org/news/the-torch/3-2-17.

³ U.S. Citizenship and Immigration Services Policy Memorandum, PM-602-0050.1, Subject: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, June 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>.

⁴ USCIS and ICE are agencies within DHS, as is U.S. Customs and Border Protection.

⁵ The immigration court system is administered by the U.S. Department of Justice.

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of a case warranted the issuance of an NTA. The memorandum limits the exercise of such prosecutorial discretion to cases approved by a review panel that includes a supervisory officer and a USCIS Office of Chief Counsel attorney. Different NTA issuance rules apply to cases in which the USCIS benefit sought is [Deferred Action for Childhood Arrivals \(DACA\)](#).⁶

NTA when the record reflects “fraud, misrepresentation, or evidence of abuse of public benefit programs”

A section of the memorandum devoted to “Fraud, Misrepresentation, and Abuse of Public Benefits Cases” instructs USCIS agents to issue an NTA upon denial of an individual’s petition or application when the person is removable and the record reflects “fraud, misrepresentation, or evidence of abuse of public benefit programs.” This includes fraud or willful misrepresentation “in connection with official matters or applications before a government agency.” The NTA is to be issued even if such fraud was not the basis for the denial or the individual has withdrawn their application. The memorandum also allows for groups of cases to be transferred to ICE prior to the cases’ adjudication, if there are “articulated suspicions” of fraud associated with the cases.

Meaning of “abuse of public benefits.” The term “abuse of public benefits” does not have a precise legal meaning, but in a [Q&A](#) issued after the Jan. 25, 2017, executive order, DHS clarifies that it refers to people who have “knowingly defrauded the government or a public benefit system.”⁷ It is important to note that, under existing law, fraud or willful misrepresentation on an application for an *immigration benefit* makes a person inadmissible, and committing fraud on an application for *public benefits* can present a risk of immigration consequences (e.g., if a person is applying for U.S. citizenship or is referred for prosecution).

Policy change is unrelated to “public charge.” The memorandum changes only the USCIS agent’s ability to exercise discretion in deciding whether to issue the NTA. The change in policy is unrelated to *public charge* and does not apply to an eligible individual’s or family member’s legitimate use of public benefits.

New policy’s applicability to people’s receipt of public benefits is narrow

There are many reasons to be concerned about the new policy. It will further burden the overloaded immigration courts with low-priority cases, such as people denied extensions of nonimmigrant or student visas. It will create a chilling effect that deters people who are eligible for immigration benefits from applying for them, since they will be placed in removal proceedings if their applications are denied. Nonetheless, its applicability to the receipt of public benefits is narrow.

For more information

For more information on the June 28 memorandum, see CLINIC’s [Practice Pointer: New USCIS NTA Guidance Memo](#) and the AILA’s [Policy Brief: New USCIS Notice to Appear Guidance](#).⁸

⁶ See U.S. Citizenship and Immigration Services Policy Memorandum, PM-602-0161, Subject: Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection With a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA, June 28, 2018, <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0161-DACA-Notice-to-Appear.pdf>.

⁷ Q&A: *DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States* (U.S. Dept. of Homeland Security, Feb. 21, 2017), <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-enhancing-public-safety-interior-united-states>, answer 18.

⁸ CLINIC: <https://cliniclegal.org/resources/practice-pointer-usciss-new-nta-guidance-memo>; AILA: <https://www.aila.org/infonet/aila-policy-brief-new-uscis-notice-to-appear>.