Office of the
Citizenship and Immigration Services Ombudsman

U.S. Department of Homeland Security
Washington, DC 20528-1225

RECOMMENDATION FROM THE CIS OMBUDSMAN TO THE DIRECTOR, USCIS

To: Dr. Emilio T. Gonzalez, Director, USCIS
cc: Michael Jackson, Deputy Secretary
From: Prakash Khatri, CIS Ombudsman
Date: March 20, 2006
Re: Recommendation to USCIS that its policy on issuing Notices to Appear ("NTAs") be standardized to provide that NTAs be issued and filed with the immigration court in all cases where, as a result of adjustment of status denial, the applicant is out of status.

I. RECOMMENDATION

Recommendation to USCIS that its policy on issuing Notices to Appear be standardized to provide that NTAs be issued and filed with the immigration court in all cases where, as a result of adjustment of status denial, the applicant is out of status.

II. BACKGROUND

USCIS does not issue NTAs according to any uniform policy. It has been generally accepted that USCIS does not have the resources available to issue NTAs in every case where an adjustment of status application is denied. It has also been generally accepted that the immigration court could not process the volume of removal cases that such a policy would cause. Some USCIS facilities have access to the Enforcement Case Tracing System ("ENFORCE"), while others do not. The facilities that do not must prepare NTAs manually, refer the cases to an Immigration and Customs Enforcement ("ICE") Detention and Removal office for data entry into the Deportable Alien Control System ("DACS"), and then ensure that the NTA is served on the alien and the court.

USCIS has jurisdiction to consider adjustment of status applications in the cases of aliens who are not in removal proceedings, while EOIR has jurisdiction to consider adjustment applications made while an alien is in removal proceedings, 8 CFR § 245.2(a). Current regulations establish no less than 24 categories of federal officer who may issue and file NTAs, 8 CFR § 239.1, while policies and procedures antedating the breakup of legacy INS still grant these officers wide latitude not to relinquish jurisdiction by doing so.

Failure to issue an NTA creates problems for all interested parties:

For the government, failure to place a removable alien before an Immigration Judge creates a perception that the government tolerates violation of immigration laws;

For USCIS, if an NTA is not issued, (a) an applicant can file a new adjustment of status application which must be processed; (b) along with the new adjustment application, an applicant can also file for employment authorization. Thus, some applicants who are ineligible for adjustment of status can continue to file for it and receive employment authorization despite the knowledge that they will be denied at some point;
For applicants who wish to have an Immigration Judge review their adjustment application, USCIS failure to issue an NTA precludes such an opportunity;
For the public, USCIS failure to issue an NTA to a removable alien can be seen as neglecting a duty to ensure compliance with the immigration laws; and
For ICE, DHS's enforcement branch, retaining removable aliens in USCIS processing prevents a true assessment of the number of cases pending and, thereby, precludes accurate resource planning and allocation.

III. JUSTIFICATION

INA Section 237, 8 U.S.C. § 1227, grants USCIS authority to issue NTAs and current policy permits NTAs to issue in certain cases. Where both (1) adjustment has been denied and (2) applicant is out of status (i.e., legal status has already lapsed by means other than a negative inference -- about intent to timely depart – based on the fact of filing for adjustment or asylum), automatic NTA issuance satisfies USCIS's own guidelines regarding exercise of "prosecutorial discretion." Research reveals no law or administrative regulation prohibiting NTA issuance under these circumstances, while establishing "automatic" issuance in these cases would impose needed uniformity on a balkanized system.

The *Adjudicator's Field Manual* (*"AFM")* expresses a specific preference for issuing NTAs promptly after adjudication, concurrently with the denial, and by the same authority issuing the denial. *See AFM*, Ch. 23.2(n)(2)(B). The inclusion of Chapter 23.2(n)(2)(C), "Exceptions to Policy on Issuance of NTAs to Denied Applicants," introduces ambiguous guidance irrelevant to these clearcut cases.

The February 16, 2005 memorandum from USCIS Associate Director of Operations William R. Yates ("Yates Memo") regarding "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)" reinforces current policy that applicants *whose denials cause their status to lapse* comprise a class of cases suitable for summary issuance of an NTA when denial is based on clear evidence of ineligibility, *see* Yates Memo at 2. While a five-year old memorandum from then INS Commissioner Doris Meissner ("Meissner Memo") entitled "Exercising Prosecutorial Discretion" cannot be overlooked, as Mr. Yates approved it in a September 12, 2003 Memo, it has largely been superseded as NTA policy both by the later Yates Memo and by its self-limitation to the enforcement branches within INS. The Meissner Memo remains useful as ICE guidance for resource-based discretionary decisions on deportation caseload management. Viewed this way, rather than as more generally applicable to all officials having NTA-issuing authority, its provisions mandating the exercise of discretion do not conflict with USCIS's goal of systematically forwarding denial cases to ICE via NTAs.

To fulfill its customer service mandate, USCIS is committed to streamlining procedures, eliminating backlogs, and progressing toward greater operational efficiency. Uniform processes are critical to systemic efficiency and also do, or should, keep cases moving forward toward resolution. Simultaneous, automatic issuance of denials and NTAs to out-of-status aliens will enhance processing by placing them speedily within the purview of DHS elements best situated to resolve requests for extraordinary relief by persons otherwise deportable.

IV. BENEFITS

A. Customer Service

The benefits to applicants include:

Reducing uncertainty – Automatic NTA issuance on petition denial avoids fomenting false hopes of adjustment by persons whose denial and lack of status make such a result extremely unlikely.

Allowing preparation for the removal hearing – Prompt NTA issuance is often requested by counsel on behalf of clients denied adjustment to permit preparation of arguments to persuade the prosecutor or, if that avenue fails, the judge: to contest removal, to argue for voluntary departure (or some other less prejudicial result than ordered removal), or to make a record for appeal (to the BIA and, possibly, to federal appellate court).

Enhancing adjudicators' ability to process approvable cases – Removal of unapprovable cases from the system gives more time to handle other pending cases. This resource saving should yield individual applicants quicker turnarounds and/or better decisions in difficult cases.

B. USCIS Efficiency

The benefits to USCIS include:

Streamlining processing – Issuing officers will have clear guidance regarding cases warranting simultaneous issuance of denials and NTAs. Cases qualifying for summary treatment will be culled earlier from the universe of matters in which officers are required to weigh factors before placing denied applicants in removal.

Improving use of labor resources – Automatic issuance of NTAs will ease the case burden on USCIS adjudicators, while shifting prosecutorial discretion to those better able to implement relevant policy against deportation, ICE attorneys. Adjudicators' caseload will also benefit from denied applicants being rendered unable (a) to file a new adjustment petition, or (b) to seek along with adjustment a new employment authorization. For ICE, receiving automatic pass-through of denied cases once retained in USCIS limbo will permit better assessment of the cases in the system and, thereby, more accurate resource planning.

Promoting consistency within USCIS – Uniform treatment of cases appropriate for automatic issuance of NTAs will enhance the perception of evenhandedness. Consistent treatment should result in greater credibility of USCIS decisions before the immigration court and on appeal.

Stemming flow of applicants seeking "perpetual employment authorization" – Viewed from the perspective of ending a systemic abuse, rather than that of resource conservation, denied applicants unlikely ever to qualify for adjustment will be unable to continue filing adjustment applications solely to gain work permission.

C. National Security

The benefits to the U.S. government include:

Greater enforceability of immigration laws -- This recommendation poses no risk to national security. Processing efficiency that permits prompt, simultaneous issuance of denials and NTAs before applicants leave the office after their interviews may reduce incidence of nonappearance due to lack of notice. "Personal service" accompanied by an explanation of the consequences of nonappearance (e.g. *in abstentia* deportation order) will reduce the cases in which notice is subject to attack and may induce higher appearance rates. The more applicants that appear for removal hearings, the greater the court's control and likely enforceability of the court's ruling.

Heightened deterrence – Effective enforcement of immigration violators eliminates the perception that violation of the immigration laws is tolerated. This, in turn, increases the credibility of legal enforcement, which should deter some putative illegal immigrants.