Recommendation #22
Notice to Appear

On March 20, 2006, the Ombudsman recommended 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.

The proposal calls for an "automatic" issuance of an NTA upon the denial of an adjustment application when the alien is out of status or otherwise subject to removal from the United States. The issue of NTA issuance is presently the subject of a proposed MOA between ICE and CIS.

The proposal's suggestion that NTA issuance should be "automatic" in certain cases fails to take into account the government's prosecutorial discretion, which should not be surrendered through a policy such as the one being proposed by the Ombudsman. The proposal does try to address the issue of prosecutorial discretion under such an "automatic" NTA system, but fails to fully and convincingly reconcile the two concepts. It characterizes the previously issued "Meissner memo" as being aimed at and limited to legacy INS enforcement actions, and not necessarily applicable to USCIS. This assertion is misplaced inasmuch as USCIS does maintain prosecutorial discretion, and has the authority to exercise such discretion. There will be a number of cases where USCIS will decide not to issue an NTA upon a finding that to do so would be against the public interest or contrary to humanitarian concerns.

The proposal fails to take into account situations where it would not be logistically appropriate to issue an NTA. For instance, in cases where an I-485 was denied simply because it was filed prior to the preference category priority date had become current, and CIS instructed the beneficiary to re-file the I-485 once the priority date is reached. Instead of issuing an NTA upon the denial of the I-485, it would better serve DHS resources to allow the alien to re-file the application in circumstances where appropriate.

In the context of national security cases, the proposal states that it would be a benefit to the national security of the United States if USCIS issued a denial of an adjustment application along with an NTA before the applicant leaves the office after their interview. This reasoning is misplaced. Decisions where USCIS is going to deny an adjustment application for national security reasons cannot be drafted in a moment's notice before the alien leaves the interview. These cases involve several levels of agency review and the decisions must be drafted accurately and in such a manner to withstand any future legal challenge. Also, decisions on the appropriate removal charge and corresponding allegations on the NTA require time to consider and draft. In cases involving national security issues, the determination of when to place an alien in proceedings should done on a case-by case-basis. There does not appear to be any national security benefit to drafting a denial and issuing an NTA immediately following the alien's interview just to meet this proposed "automatic" NTA issuance policy.

The proposal discusses how the "automatic" issuance of NTAs would assist in overall processing of applications since the aliens would not file for employment authorization once the adjustment was denied and they were placed in proceedings. This is not correct. Once an alien is placed in removal proceedings and renews his/her application for adjustment before the Immigration Judge, the alien can (and does) apply for employment authorization. 8 C.F.R. 274a.12(c)(9). The alien is eligible for employment authorization as long as that application is pending, which includes any appeal to the BIA. This proposed "automatic" NTA issuance policy would not impact the alien's eligibility and capability to apply for an EAD.

Section IV of the proposal dealing with the "benefits" of this proposed process is not accurate. For instance, the premise that "this process would remove unapprovable cases from the system to give more time to handle other pending matters" (p.3) is misplaced since it is the cases requiring a denial that are the most time-consuming to prepare for, interview, and draft an appropriate denial. A clearly approvable case takes a fraction of the time to adjudicate in comparison to a denial.