PRACTICE ADVISORY[1]
Updated February 27, 2019

NOTICES TO APPEAR: LEGAL CHALLENGES AND STRATEGIES

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[1] This Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. Originally drafted in 2014 by Penn State Law's Center for Immigrants' Rights students Lauren Hartley and James Gilbert under the supervision of Professor Shoba Sivaprasad Wadhia, the Center's director, this Advisory was updated in 2019 by the American Immigration Council. Questions regarding this Advisory should be directed to clearinghouse@immcouncil.org.

I. BACKGROUND

The Notice to Appear ("NTA") is the charging document issued by an authorized agent of the United States Department of Homeland Security ("DHS") to persons who will face removal in adversarial proceedings. This Practice Advisory provides guidance to attorneys representing noncitizens who: 1) likely will be issued an NTA; 2) have been issued an NTA which has been filed with EOIR; or 3) have been issued an NTA which has not yet been filed with EOIR. It provides an overview of the legal requirements for an NTA and strategies to cancel, mitigate, or challenge the contents of the NTA. It also sets forth scenarios when an attorney might petition the government to issue an NTA.

The Advisory has been updated to reflect changes to NTA policies by DHS.[2] Though the Advisory touches on the impact of the June 2018 *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), please refer to the Practice Advisory, Strategies and Considerations in the Wake of *Pereira v. Sessions* for an overview of that decision and related strategies.

A. Who Is Subject to an NTA and Who Will Issue It?

The NTA is a document issued to noncitizens who the government believes are inadmissible or removable, and who will not be subjected to a summary form of removal such as reinstatement of removal[3] or expedited removal.[4] It places an individual in removal proceedings where an immigration judge ("IJ") will determine whether the noncitizen is to be removed or allowed to remain in the United States. Various officials within three DHS components are empowered to issue NTAs in a variety of circumstances: U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS).

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2 United States Citizenship and Immigration Services, Policy Memo, 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.

3 *See* INA § 241(a)(5).

4 *See* INA § 235(b)(1)(A)(i).

1. ICE

ICE agents issue NTAs,[5] and ICE trial attorneys represent the government in removal proceedings.[6] Though ICE agents historically have exercised considerable enforcement discretion, this discretion has been severely curtailed under the Trump Administration pursuant to Executive Order 13768 and agency guidance.[7] In a February 20, 2017 memorandum, the administration rescinded previous guidance regarding immigration enforcement and priorities for removal. ICE priorities for removal now include almost anyone with a criminal history and those with unexecuted removal orders.[8]

Unlike previous guidance, the February 20 memo lacks any specific language on the importance of exercising prosecutorial discretion or a reminder that such discretion may be exercised before an NTA is issued, served or filed with EOIR. Instead, it states, "prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of aliens from enforcement of the immigration laws." DACA recipients are the only persons specifically excluded from removal priorities.[9]

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[5] 8 C.F.R. § 239.1.

[6] *Office of the Principal Legal Advisor*, ICE, http://www.ice.gov/about/offices/leadership/opla/ (last visited February 26, 2019). OPLA is the Office of Principal Legal Advisor for ICE. Every ICE jurisdiction has a Chief Counsel. For a list of OPLAs, see *About ICE: Office of the Principal Legal Advisor*, ICE, http://www.ice.gov/contact/opla/ (last visited February 26, 2019).

[7] *See* Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf; *see also* American Immigration Council Fact Sheet, *The End of Immigration Enforcement Priorities Under the Trump Administration* (March 7, 2018) (providing an overview of enforcement priorities from 1996 through February 2017), https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration.

[8] ICE priorities include those who have been convicted of any criminal offense; who have been charged with any criminal offense that has not been resolved; who committed acts which constitute a chargeable criminal offense; who engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; who abused any program related to receipt of public benefits; who are subject to a final order of removal but have not left the United States; and who an immigration officer believe pose a risk to public safety or national security. *See* Memorandum from Dep't Homeland Sec. (DHS) Secretary John Kelly, "Enforcement of the Immigration laws to Serve the National Interest" (February 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

[9] *Id*. at 2.

2. USCIS

The Trump Administration has expanded significantly the reach of USCIS' enforcement authority, including when it will issue an NTA or refer a case to ICE.[10] In June 28, 2018 guidance, USCIS reasserted its authority to issue NTAs in national security cases and when required by statute and regulation, but broadened that authority to include when applications for immigration benefits are denied. [11] The memo impacts the following types of cases:

- ***Cases involving fraud, misrepresentation or evidence of abuse of public benefit programs***

When there is evidence of fraud, misrepresentation or abuse of public benefits and the noncitizen is removable, USCIS will issue an NTA if it denies a petition or application or makes another "negative eligibility determination," such as withdrawal, termination or rescission of the application or petition. If there is evidence of the fraud and the individual is removable, USCIS will issue an NTA even if the petition or application is denied on other grounds, such as lack of prosecution, abandonment, termination based on withdrawal, or revocation.

If there is suspicion of fraud prior to USCIS adjudication, USCIS may refer groups of cases to ICE, but will not refer individual cases, except as "agreed upon by USCIS and ICE."[12] USCIS is not required to list fraud or misrepresentation as a charge on the issued NTA, though the guidance states that "efforts should be made to include these charges whenever evidence in the record supports such a charge."

- ***Criminal Cases - egregious and non-egregious public safety cases***

In addition to the criminal cases prioritized for enforcement by Executive Order 13768, the new guidance indicates USCIS will issue an NTA against all removable noncitizens whose records show that there is a current investigation, an arrest or a conviction that meets the egregious public safety definition.[13] USCIS also may issue an NTA when the application is denied or

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[10] Previously, USCIS' policy was to issue an NTA only 1) when required by statute or regulation and 2) in fraud cases, with a statement of findings substantiating fraud. *See* USCIS Policy Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear in cases Involving Inadmissible and Removable Aliens (November 7, 2011), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf.

[11] *See* United States Citizenship and Immigration Services, Policy Memo, 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; *see also* USCIS website, https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum.

[12] If cases are referred prior to adjudication, USCIS will suspend adjudication for 60 days, but may continue adjudication if ICE doesn't respond within 60 days or provide a Case Closure Notice or case status report within 120 days after accepting the referral. *Id*. at 5.

[13] *Id.* at 6.

abandoned and may refer the case to ICE prior to adjudication "if there are circumstances that warrant such actions." There is no explanation in the guidance regarding what circumstances would support a decision to refer the case to ICE.

Non-egregious public safety cases are defined by USCIS as cases "where information indicated the [noncitizen] is under investigation for, has been arrested for (without disposition), or has been convicted of any crime" not considered an egregious public safety crime. USCIS will issue NTAs in all non-egregious public safety criminal cases if the application or petition is denied or abandoned and the noncitizen is removable. USCIS "should" refer cases to ICE prior to adjudication if USCIS determines the applicant or petitioner appears to be inadmissible or deportable based on a criminal offense not included on the egregious public safety list.

- ***Cases where USCIS denied a Form N-400, Application for Naturalization, on good moral character grounds because of a criminal offense.***

USCIS will issue an NTA if a naturalization application is denied or abandoned on good moral character grounds because of an underlying criminal issue and if the applicant is removable. In addition, USCIS may issue an NTA when 1) the individual is eligible to naturalize, but deportable, or 2) when the applicant was inadmissible at the time of adjustment or admission and thus deportable. The guidance concedes that law in different jurisdictions will prevent USCIS from uniformly issuing NTAs in these circumstances.[14]

- ***Cases where an individual will be unlawfully present in the United States when USCIS denies the petition or application.***

Since the issuance of the June 28 guidance, USCIS has specifically indicated it will issue NTAs on the following denied applications and petitions:[15]

(1) Adjustment of status applications (Form I-485) and applications to extend or change nonimmigrant status (Form I-539);
(2) Applications for nonimmigrant status for trafficking victims (T visas) (Form I-914/I-914A);
(3) Petitions for victims of crimes (U visas) (Form I-918/I-918);

[14] *See* United States Citizenship and Immigration Services, Policy Memo, Updated guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens 8-9 (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 (discussing when NTA cannot be issued within the Third Circuit under *Garcia v. Att'y Gen.*, 553 F.3d 724 (3d Cir. 2009)); *see also Yith v. Nielsen*, 881 F.3d 1155 (9th Cir. 2018) (finding a NTA did not constitute a "warrant of arrest" that would bar consideration of an application for naturalization under 8 U.S.C. 1429).

[15] *See* USCIS Website Update, Notice to Appear Policy Memorandum, at https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum.

(4) Violence Against Women Act self-petitions and special immigration juvenile petitions (Form I-360);[16]
(5) Family members of U petitioners (Form I-929); and
(6) Petitions for refugee family members who live in the United States (I-730 Refugee/Asylee Relative Petitions).

USCIS has stated that it will adhere to confidentiality protections required by 8 U.S.C. § 1367(a)(2) and will not issue an NTA immediately upon denial of the humanitarian forms to allow motion and appellate processes to continue.[17]

- ***Employment-based petitions***

USCIS has stated that it will not apply the NTA memo to employment-based petitions at this time and that existing guidance for these types of cases remains in effect.[18] USCIS will issue an NTA following a denial of an employment-based adjustment application, Form I-485, and a denial of Form I-539, Application to Extend/Change Nonimmigrant Status.

- ***Temporary Protected Status (TPS) Cases***

Per the June 28, 2018 guidance, NTA and notification procedures for TPS holders will not change. If USCIS denies a TPS application or re-registration or withdraws TPS, and the individual is not otherwise authorized to remain in the United States, officers should issue an NTA in accordance with the applicable regulations at 8 C.F.R. part 244. The guidance notes that when a country's TPS designation is terminated, USCIS should "defer to ICE and CBP regarding the appropriate timing of any NTA issuances to former TPS beneficiaries." If USCIS issues an unfavorable decision, however, on a benefit request from a former TPS beneficiary who is not lawfully present in the U.S., officers will issue an NTA.

June 28, 2018 NTA Guidance Impacting DACA Requestors/Recipients

USCIS separately issued NTA guidance on June 28, 2018 indicating that the November 7, 2011 NTA guidance will continue to govern when an NTA will be issued or a referral to ICE made in cases involving 1) an initial or renewal DACA request or a DACA-related benefit request and 2)

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[16] *See* ILRC Practice Advisory, Risks of Applying for Special Immigrant Juvenile Status (SIJS) in Affirmative Cases, at https://www.ilrc.org/risks-applying-special-immigrant-juvenile-status-sijs-affirmative-cases (explaining the new risks associated with a denial of an application for SIJS or SIJS-based adjustment of status).

[17] USCIS stated it will comply with § 1367 protections, for example, by issuing an NTA in these cases upon the attorney of record or safe mailing address, but not "serv[ing] the NTA on the physical address of the applicant or petitioner unless Section 1367 protections have been terminated." *See* USCIS Notes on November 15, 2018 Teleconference on NTA guidance, https://www.uscis.gov/sites/default/files/files/nativedocuments/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA_11.15.18.pdf.

[18] *See* USCIS Website Update, Notice to Appear Policy Memorandum, at https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum.

DACA recipients where the government is seeking to terminate DACA.[19] The guidance also notes that USCIS will continue to adhere to information-sharing policies that determine when information submitted by a DACA requester in a DACA request or associated DACA-benefit request "may be included in or relied upon to generate NTAs or [Referrals to ICE]."

3. CBP

CBP may issue an NTA if an individual is deemed inadmissible, does not withdraw her request for admission, is not placed in expedited removal proceedings, and does not make an asylum claim.[20] Among other reasons, CBP may issue an NTA if a person refuses voluntary return, makes a non-frivolous claim to asylum, or possesses false documentation.

B. What Are the Requirements of an NTA?

INA § 239 sets forth the key elements an NTA should include. While the related regulation states that "omission of any of these items shall not provide the alien with any substantive or procedural rights, the Supreme Court, in *Pereira*, has demonstrated that this is not true in at least one instance."[21]

1. Establishing the Prima Facie Case for Inadmissibility or Deportability of a Noncitizen in Removal Proceedings

Under INA § 239(a)(1), an NTA should include: the nature of the proceedings, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, the charges against the noncitizen and the statutory provisions alleged to have been violated.

- **Nature of the Proceeding**

A DHS officer must check one of three alternatives at the top of the NTA, indicating whether the individual is an "arriving" noncitizen, is present in the United States without admission or paroled, or was admitted to the United States but now is deportable "for the following reasons

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19 *See* PM-602-0161, 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.

20 *See* Center for Immigrants' Rights, Pennsylvania State University Dickinson School of Law, *To File or Not To File* 16-17 (Oct. 2013), https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/NTAReportFinal.pdf.

21 8 C.F.R. § 1003.15; *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (NTA that does not specify the time and place of removal proceedings does not meet the statutory definition of a Notice to Appear (NTA) and, therefore, does not cut off a noncitizen's ability to accrue the time in the United States required to qualify for cancellation of removal).

stated below." Option one, "arriving aliens," designates applicants for admission arriving at a port of entry or intercepted at sea. Option two designates those who have entered the United States and allegedly have not been admitted or paroled. The INA defines "admitted" as a lawful entry after inspection and authorization by an immigration officer.[22] If either of the first two boxes is checked, the noncitizen will be charged with inadmissibility under a ground listed in INA § 212. The last option designates noncitizens who were admitted but who are now alleged to be deportable under a ground listed in INA § 237.

A noncitizen who believes she has been improperly designated as either arriving or present without having been admitted or paroled must prove she was admitted.[23] Because fewer avenues for relief are available to noncitizens falling within these categories, an incorrectly marked box may limit a noncitizen's options for relief.

- **Allegations of Acts or Conduct in Violation of the Law**

In the next section of the NTA, the issuing officer must state the factual allegations supporting removability. DHS is required to allege and prove that the individual is not a U.S. citizen. The government's allegations may be derived from interviews with the noncitizen or from documents, such as records of conviction or an immigration benefit application submitted by the noncitizen to USCIS. The NTA allegations may be factually inaccurate, so it is important to verify the alleged facts with the client.

- **Charges Against the Noncitizen**

The issuing officer is required to list the section of the INA which gives rise to the charge of removability. While the government is required to list a charge, lack of specificity may not doom an NTA.[24] Additionally, there is no requirement to list every charge against the noncitizen, and the government may add or substitute charges at any time during a proceeding.[25]

2. Time and Place of the Proceedings

The NTA not only provides notice of the charges against the noncitizen but also serves as notification of the time and place of his hearing before an IJ. The INA states that an NTA shall

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22 INA § 101(a)(13)(A). *See* American Immigration Council Practice Advisory, *Inspection, Entry and Admission* (updated October 2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/inspection_entry_and_admission_final_10-22-2015_0.pdf (A person who was "waved through" at border entry is considered to have been admitted, regardless of her possession of proper entry documents at the time, and may need to prove the admission through her own testimony or that of a fellow passenger.).

23 *See Matter of Quilantan*, 25 I. & N. Dec. 285 (BIA 2010).

24 *See, e.g., Lazaro v. Mukasey*, 527 F.3d 977, 980 (9th Cir. 2008) (The NTA was found not to be legally deficient even though DHS failed to include the subsection of INA § 101(a)(43) the noncitizen was alleged to have violated).

25 8 C.F.R. § 1240.10(e); *see also KaCheung v. Holder*, 678 F.3d 66, 70 (1st Cir. 2012).

specify the time and place of the removal proceedings.[26] In *Pereira*, the Supreme Court held that NTAs failing to specify the time and place of removal proceedings cannot trigger the stop-time rule for non-LPR cancellation.[27] Following this, the Board of Immigration Appeals held, in *Matter of Burmudez-Cota*, 27 I&N Dec. 441 (BIA 2018), that a later issued notice from EOIR containing the time and place of the removal hearing met the statutory requirements for an NTA even if the initial notice to appear did not contain that information. Courts of appeals are beginning to interpret *Burmedez-Cota*, so practitioners should review case law developments to assess potential challenges based on NTAs that are missing time and place designations or contain inaccurate information.

Since *Pereira*, EOIR and DHS have begun working together to determine dates and times for hearings to be placed on NTAs. According to a December 2018 memo, EOIR has provided DHS access to its Interactive Scheduling System (ISS), allowing "DHS to control scheduling on EOIR's dockets and to determine which cases are scheduled for particular dates and times" in non-detained cases.[28] In detained cases, EOIR has indicated it will provide dates and times directly to DHS to use when issuing NTAs. DHS' ability to directly access EOIR's scheduling system potentially introduces a host of issues. It is currently unknown, for example, to what extent DHS may influence the scheduling of hearings on dates advantageous to DHS.

Per the December 2018 memo, EOIR has indicated it will reject NTAs where the time and date are "facially incorrect – e.g. a hearing scheduled on a weekend or holiday or at a time when the court is not open," practitioners report that post-*Pereira*, numerous NTAs filed with EOIR contain dates when EOIR will not actually be able to hold a hearing. For example, DHS issued NTAs ordering individuals to appear at immigration courts across the country on October 31, 2018 and January 31, 2018 and these NTAs were never properly filed with the immigration courts or with enough advance notice for the immigration courts to reschedule the hearings, so the hearings were not actually on the courts' schedules.

3. Securing Counsel

In order for the noncitizen to have the opportunity to secure counsel, the INA requires 10 days to elapse between service of the NTA and the first removal hearing, unless the noncitizen requests an earlier hearing date in writing.[29] The government is required to provide a list of individuals willing to represent noncitizens in proceedings on a pro bono basis, which is updated quarterly.[30]

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26 INA § 239(a)(1)(G)(i).

27 *See* American Immigration Council and CLINIC Practice Advisory, *Strategies and Considerations in the Wake of Pereira v. Sessions* (Dec. 21, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_pereira_advisory_-_7.20.2018_-_aic_clinic.pdf

28 Executive Office for Immigration Review, Memorandum, Acceptance of Notices to Appear and Use of the Interactive Scheduling System 1-2 (Dec. 21, 2018), https://www.justice.gov/eoir/file/1122771/download.

29 INA § 239(b)(1).

30 INA § 239(b)(2).

Once the 10 days have elapsed, the government is free to pursue a removal hearing regardless of whether the noncitizen has legal representation.

4. Service of the NTA

Service of the NTA provides a noncitizen with notice regarding certain rights and responsibilities, including that proceedings are being initiated and that he or she has a duty to report all address changes to the immigration court.[31] It also can lead to invocation of the stop-time rule—ending periods of presence or residence in the U.S.—which can make individuals ineligible for certain forms of immigration relief.[32]

Service by mail is considered sufficient if there is proof the government attempted to deliver the NTA to the last address provided by the noncitizen.[33] DHS may invoke a presumption of service if it can prove the mailing was 1) properly addressed, 2) had sufficient postage, and 3) was properly deposited in the mail.[34] Noncitizens confined, for example, in prison, a mental institution, or a hospital, and who are competent to understand the nature of the proceedings against them must be served personally.[35] In addition, service must be made upon the person in charge of the institution. For those who are confined and unable to understand the nature of the proceedings against them, DHS should serve only the person in charge of the institution in which they are confined.[36] For those who are deemed mentally incompetent, whether or not they are confined in an institution, and minors under the age of 14, DHS must serve the NTA upon the person with whom they reside, and when possible, a near relative, guardian, committee or friend.[37]

5. Filing of the NTA

The filing of the NTA with the immigration court is a significant step in the removal process and impacts the availability of prosecutorial discretion. Prior to filing, various DHS agencies have discretion to decide whether to issue an NTA and later, whether to file the NTA with the court or cancel the NTA altogether – and thus cancel removal proceedings.

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31 The respondent must receive: notice of the right to counsel or authorized representative at no expense to the government (8 C.F.R. § 1003.15(b)(5)); notice of the responsibility to inform the court of any changes to address or telephone number and that failure to provide such information may result in an in absentia hearing (8 C.F.R. § 1003.15(b)(7)); notice that failure to appear at a hearing in the absence of exceptional circumstances may result in an in absentia hearing in accordance with INA § 240(b)(5) (INA § 239(a)(2)(A)(ii)).

32 *See Strategies and Considerations in the Wake of Pereira v. Sessions* (Dec. 21, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_pereira_advisory_-_7.20.2018_-_aic_clinic.pdf.

33 INA § 239(c); 8 C.F.R. § 1003.15.

34 *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003); *Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995).

35 8 C.F.R. § 103.8(c)(2)(i).

36 *Id*.

37 8 C.F.R. § 103.8(c)(2)(ii).

II. POST-FILING STRATEGIES

After the NTA is filed with the court, jurisdiction vests with EOIR.[38] Although discretion is reduced in post-filing proceedings, an attorney for the respondent may continue to attempt to persuade ICE attorneys to exercise what discretion is still available, and may attempt to pursue other legal and procedural means of challenging an NTA or seeking termination of proceedings once the NTA has been filed with the immigration court. ICE's discretion has typically taken the form of dropping charges or joining the respondent in a motion to administratively close or terminate removal proceedings (or not opposing the respondent's motion). These options are still available but are limited under this Administration.

A. Administrative Closure

"Administrative closure" is a procedure that suspends immigration proceedings by removing the case from the immigration court's active docket.[39] When an IJ administratively closes a case, the government need not issue or file a new NTA to renew proceedings, as the case is still on the immigration court's docket and proceedings may resume if a motion to recalendar is filed with the court by either party.

On May 17, 2018, the Attorney General issued an opinion in *Matter of Castro-Tum*, ruling that IJs and the BIA lack general authority to administratively close cases and limiting administrative closure to circumstances where it is explicitly provided for by regulation or settlement agreement.[40] Therefore, the availability of administrative closure has been greatly reduced. For additional information on *Castro-Tum*, suggested arguments challenging the decision and alternative tools to dispose of proceedings when appropriate, see the American Immigration Council and ACLU's Practice Advisory, "Administrative Closure Post-*Castro-Tum.*"[41]

B. Motions to Terminate

"After commencement of the hearing, only an IJ may terminate proceedings upon request or motion by either party."[42] If a motion to terminate is granted, dismissal of the matter is generally without prejudice and the agency may file the same charges at a later time.[43]

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38 8 C.F.R. § 1003.14(a).

39 *See Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).

40 *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

41 *See* American Immigration Council and ACLU Practice Advisory, *Administative Closure Post-Castro Tum* at 2-7 (June 14, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf.

42 8 C.F.R. § 1239.2(f).

43 8 C.F.R. § 1239.2(c).

The Attorney General limited the availability of termination and dismissal in *Matter of S-O-G-*, 27 I&N Dec. 462 (A.G. 2018), by stating that termination is appropriate only when DHS cannot sustain the charges of removability or when permitted under the statute and regulations.[44] Otherwise, "the removal hearing shall be completed as promptly as possible."[45] However, attorneys for respondent still may seek termination by arguing that the government has issued a legally deficient NTA.

Challenging an NTA for legal deficiency holds DHS accountable to the procedural and substantive guarantees provided under the immigration statutes and regulations. However, practitioners should carefully weigh and discuss with the client the possible costs and benefits of a motion to challenge a legally deficient NTA. In some cases, a weak deficiency argument touching only on relatively trivial matters may delay proceedings that could result in permanent relief or engender disfavor with the ICE trial attorney or the IJ, with possible negative consequences for the client. Even successful challenges may sometimes be met with a quick re-issuance of an NTA including the same charges as before, but free from the errors which sustained the initial challenge. In other cases, termination may benefit the client—for example, by allowing the opportunity to seek relief affirmatively before USCIS or extending the date on which the stop-time rule is triggered so that the client is eligible for additional forms of relief.

Another consideration is that a successful challenge, which requires reissuance of the NTA, may result in the respondent appearing before a different IJ or DHS trial attorney. Therefore, depending on the IJ assigned to the case, it may be more advantageous not to challenge the faulty NTA and to proceed with the merits.

In cases where termination is obtained based on a simple legal deficiency in the NTA, removal proceedings generally may start anew once the defective NTA is cured and a new one is filed. On the other hand, if termination is obtained for a more robust reason, then DHS may be foreclosed from re-litigating the same issues that led to the termination of the prior proceeding.[46]

The following are common grounds for seeking a motion to terminate:

1. Legal and Factual Challenges to the NTA

The Notice to Appear (NTA) is a charging document issued by the prosecuting agency, not an order of an administrative court. As such, factual allegations in the NTA are not evidence, and the legal conclusions concerning inadmissibility or deportability are not binding. After receiving the NTA it is important to meet with the client and discuss the factual allegations presented in

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44 *Matter of S-O-G-*, 27 I&N Dec. 462, 466 (A.G. 2018) (dismissal appropriate where the NTA was "improvidently issued" or the "[c]ircumstances of the case have changed after the [N]otice to [A]ppear was issued to such an extent that continuation is no longer in the best interest of the government," citing 8 C.F.R. §§ 239.2(a)(6), (7), § 1239.2(c)).

45 *Id*.

46 *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1359 (9th Cir. 2007) (after proceedings were terminated, res judicata prevented the government from bringing another case based on evidence – a birth certificate – that could have been submitted in the first case).

the NTA. At times, it may appear advantageous to concede factual and legal allegations in order to pursue relief from removal; however, it might be a mistake to concede any point of fact or law made on the NTA without being sure that the government is correct and can meet its burden where applicable. It is possible that the government may have overreached in its charges or alleged a fact that was not accurate. In addition, if your client has arguments to prohibit the use of evidence unlawfully obtained by the government with a motion to suppress, it may be crucial to deny the charges and relevant allegations in the Notice to Appear (NTA) and not to concede alienage. [47]

- **Defensive Claim to Citizenship**

DHS is prohibited from deporting United States citizens.[48] In some instances, citizens are detained by ICE and issued an NTA. In removal proceedings, the government has the burden to prove "alienage" by "clear, convincing, and unequivocal evidence of foreign birth."[49] If the government is able to establish that the respondent was born abroad, then there is a presumption of alienage unless the respondent's claim of citizenship is supported by a preponderance of credible evidence.[50] A respondent who was born abroad still may be a citizen either because she acquired the status or she derived it from a relative.[51] Some clients are unaware of their status as United States citizens; in such cases, it may be necessary to research the citizenship of past generations to make this determination.

- **Failure to Prove Alienage**

If the respondent concedes that he is not a citizen, the government is relieved of the sometimes-difficult hurdle of proving alienage. If it is clear that there is no claim to U.S. citizenship, but discretionary relief likely is available, it may be preferable to concede alienage or removability and move on to demonstrating that discretion should be favorably exercised. If no such relief is available, the respondent may choose instead to respond to the allegations by neither admitting nor denying the charges but instead calling on the government to prove its allegations.

While IJs may terminate proceedings based on DHS's failure to carry its burden of proving alienage, this termination does not recognize a respondent's citizenship or bestow citizenship. It simply means *alienage* is not established. If the person is in fact a citizen, it will generally still be necessary to obtain a finding of citizenship with supporting documentation.

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47 *See* American Immigration Council Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview* (updated August 2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/motions_to_suppress_in_removal_proceedings_a_general_overview.pdf. .

48 INA § 240(c)(3)(A); 8 C.F.R. § 1240.8.

49 *See Woodby v. INS*, 385 U.S. 276, 277 (1966); 8 C.F.R. § 1240.8.

50 *See Matter of Rodriguez-Tejedor*, 23 I. & N. Dec. 153, 164 (BIA 2001).

51 *See* INA §§ 301, 309, 320; *see also Scales v. INS*, 232 F.3d 1159 (9th Cir. 2007).

- **Prima Facie Case of Inadmissibility or Deportability Not Established in the NTA**

The government is required to provide allegations in the NTA that, if proven, demonstrate that the noncitizen is removable under an applicable provision of the INA. If the NTA fails to allege sufficient facts to establish removability, then, even if all the allegations are true, the proceedings should be dismissed. Additionally, because the allegations on the NTA are not facts, unless conceded or proven by clear and convincing evidence, dismissal should be sought if the respondent has denied the allegations and the agency has failed to meet its burden. For example, an attorney might seek dismissal if the record of conviction does not reflect a ground of removability or ICE fails to provide sufficient evidence that a particular crime is a ground of removability under INA § 237.

- **Improper Charges Under §§ 212 and 237**

The allegations in an NTA must support all elements of the ground of removal that is charged. The government may overreach concerning charges and allegations involving crimes of moral turpitude or crimes they believe to be aggravated felonies. Additionally, charges may include convictions that have not yet become sufficiently final for immigration purposes.[52] The government may charge a properly admitted noncitizen with inadmissibility under INA § 212, but then make an inconsistent allegation that he or she is deportable under INA § 237.

2. Procedural Challenges to the NTA

The government does not always follow proper procedures in issuing and filing an NTA. Procedural errors can sometimes form the basis for a challenge to an NTA.

- **Improper Service**

Under the INA, "[s]ervice by mail… shall be sufficient if there is proof of attempted delivery to the last address provided. . . in accordance with [INA § 239](a)(1)(F)."[53] The BIA has held that termination may be proper when DHS mails the NTA to the last address it has on file when the record reflects that the noncitizen did not see the NTA and therefore was never notified of the proceedings or the obligation to provide updated address information under INA § 239.[54] At least one circuit has held notice is not proper if: 1) it was not proven that the noncitizen received actual notice, 2) the noncitizen proved that he was represented by an attorney who had filed a notice of appearance with the immigration court prior to the sending of the notice, and 3) DHS failed to prove it had sent notice to the attorney of record.[55] It is necessary to consult the case law in your jurisdiction to understand what may constitute proper notice.

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52 INA § 101(a)(48)(A); *Matter of Acosta*, 27 I & N. Dec. 420, 432 (BIA 2018) (conviction is not sufficiently final until direct appellate review is exhausted or waived); *Orabi v. AG of the United States*, 738 F.3d 535, 540 (3d Cir. 2014).

53 INA § 239(c).

54 *See Matter of G-Y-R*, 23 I. & N. Dec. 181, 192 (BIA 2001);

55 *Hamazaspyan v. Holder*, 590 F.3d 744 (9th Cir. 2009); *see also Kozak v. Gonzales*, 502 F.3d 34, 37 (1st Cir. 2007) (*Matter of G-Y-R* carved out an exception when an individual does

- **Failure to include date and location**

In June 2018, the Supreme Court held in *Pereira v. Sessions* that the stop-time rule[56] for non-LPR cancellation of removal[57] is not triggered if the NTA does not include the date and time of the hearing. The holding applies to anyone who is currently or has been in removal proceedings and has received a deficient notice, meaning even those with past proceedings may be newly eligible for cancellation of removal.

Subsequently, in *Matter of Burmudez-Cota,* the BIA held that termination based on a defective NTA is not appropriate if an initial defective NTA is cured by service of a later hearing notice that includes the date and place of proceedings.[58] The issue of whether a defective NTA deprives an immigration court of jurisdiction will continue to be litigated in the circuit courts and practitioners can continue to make and preserve jurisdictional arguments under *Pereira*. Unless and until a circuit court rules otherwise, however, IJs and the BIA remain bound by *Bermudez-Cota*.[59]

- **Lacking a Signature**

NTA filed with the court should bear the original signature of an officer with the authority to issue the NTA under the regulations.[60] However, at least one circuit has held there is no requirement that the name and title of the issuing officer be included on the NTA or that the signature be legible.[61]

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not see the mailing because of a "failure in the internal workings of the household" but cited *G-Y-R*'s general holding that "the notice requirement leading to an in absentia order cannot be satisfied by mailing the Notice to Appear to the last known address of the alien when the alien does not receive the mailing") .

[56] The stop-time rule is the provision that allows the government to stop counting continuous physical presence once an NTA is served. INA § 240A(d).

[57] Cancellation of removal for legal permanent residents and non-legal permanent residents is a form of relief available to noncitizens in removal proceedings. INA § 240A.

[58] *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018).

[59] *See* American Immigration Council and CLINIC Practice Advisory, *Strategies and Considerations in the Wake of Pereira v. Sessions* 7 (Dec. 21, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_pereira_advisory_-_7.20.2018_-_aic_clinic.pdf

[60] *See e.g.*, Jurisdiction, 65 Fed. Reg. 76,121 (Dec. 6, 2000) (to be codified in 8 C.F.R. § 208.2(b)) (explaining that "…in general, only the charging document with the original signature of the Service officer who issued the charging document may be filed with the Immigration Court.")

[61] *Kohli v. Gonzales*, 473 F.3d 1061, 1067-68 (9th Cir. 2007).

3. Other Basis for Termination

- **Qualifies for Relief or Benefit**

As with administrative closure, if a respondent can demonstrate prima facie eligibility for an immigration benefit from USCIS, she may ask ICE to join in a motion to terminate to pursue an application for the benefit. For example, a noncitizen prima facie eligible for a U visa can request that DHS join a motion to terminate proceedings to permit USCIS to adjudicate the U visa application.[62] A noncitizen also may request termination to pursue VAWA, DACA, naturalization, a provisional unlawful presence waiver, or adjustment of status. While some forms of protection like deferred action may be pursued during removal proceedings, other applications, such as naturalization[63] or – in some circumstances – adjustment of status, require termination of proceedings before USCIS has jurisdiction to adjudicate the claim.[64]

- **Claim Preclusion (res judicata/collateral estoppel)**

As noted above, if proceedings are terminated or closed, the government may file a new NTA with the immigration court and begin new proceedings against the noncitizen. When the government brings the same charges or alleges the same facts as it did in prior proceedings, or charges or facts that could have been included in previous proceedings, the respondent may have grounds to terminate the proceedings based on the principle of res judicata.[65] "A party seeking to invoke res judicata must establish three elements: "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action.""[66]

III. WHEN SHOULD I CONSIDER AND HOW SHOULD I PURSUE PROSECUTORIAL DISCRETION?

Prosecutorial discretion is an agency's decision "not to assert the full scope of [enforcement] authority available to the agency in a given case."[67] Previously, prosecutorial discretion was, at

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62 8 C.F.R. § 214.14(c)(1).

63 *Matter of Acosta Hidalgo*, 24 I. & N. Dec. 103 (BIA 2007) (The basis for termination of removal proceedings for the purpose of pursuing naturalization is extremely limited and absent an affirmative communication by DHS regarding prima facie eligibility for naturalization, the IJ must give priority to the agency's decision to institute removal proceedings).

64 8 C.F.R. § 1245.2(a)(1)(i); *see also* American Immigration Council Practice Advisory, *"Arriving Aliens" and Adjustment of Status* (updated Nov. 2015), https://americanimmigrationcouncil.org/sites/default/files/practice_advisory/ar_alien.pdf.

65 *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1359 (9th Cir. 2007); *Ramon-Sepulveda v. INS*, 824 F.2d 749, 751 (9th Cir. 1987).

66 *Duhaney v. AG of the United States*, 621 F.3d 340, 347 (3d Cir. 2010) (citations omitted).

67 Memorandum from John Morton, Director, U.S. Immigration & Customs, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (July. 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

times, a viable strategy to pursue in connection with NTAs, along with other legal or procedural strategies. Under the Trump administration, DHS is much less likely to favorably exercise prosecutorial discretion.

Practically speaking, a formal request for the government to exercise prosecutorial discretion, whether pre- or post-filing, may be made in writing to the local director of the DHS component handling the case. A joint motion may also be filed where the ICE trial attorney joins with the noncitizen to move the court to take a particular action, for example, a joint motion to administratively close proceedings. In some instances, joint motions are incorporated into the regulations and may provide added benefits to a noncitizen, for example, providing an exception to a missed deadline for filing a motion to reopen.[68]

The USCIS guidance released in June 2018 states that prosecutorial discretion not to issue an NTA is still available on a case-by-case basis, but is subject to a review process under Prosecutorial Review Panels.[69] The guidance indicates that Prosecutorial Review Panels should now be maintained in all offices that have authority to issue an NTA and will convene when a recommendation not to issue an NTA is submitted. If the panel recommends prosecutorial discretion, a Field Office Director, an Associate Service Center Director, the Assistant Center Director of the National Benefits Center, or the Deputy Chief of International Operations must agree with the recommendation.

In many instances, a noncitizen does not know an NTA is being prepared before he receives it, and thus is unable to consult with an attorney before it is issued. In some cases, however, it may be clear that the government plans to file an NTA and possible to negotiate to modify the charges in the NTA, postpone service of the NTA, or convince the issuing officer not to file or to cancel the NTA.

A. How Can I Negotiate with the Government on Behalf of my Client to Obtain a Favorable Exercise of Prosecutorial Discretion Before the NTA is Filed?

A client may have strong positive equities, but these are largely unknown to ICE prior to the commencement of removal proceedings. Therefore, attorneys might use pre-filing negotiations as an opportunity to provide ICE with more client information.

The argument for prosecutorial discretion with respect to NTAs is particularly strong where the noncitizen is eligible and has applied for another form of relief before USCIS – such as VAWA relief, a U visa, DACA, adjustment of status, or naturalization. When a client has such an application pending, attorneys can request that USCIS adjudicate the application immediately, and that other DHS components refrain from placing the noncitizen in removal proceedings until

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68 8 C.F.R. § 1003.23(b)(4)(iv).

69 United States Citizenship and Immigration Services, Policy Memo, Updated guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens 10 (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.

the application is adjudicated. Written requests for prosecutorial discretion should include evidence of a noncitizen's expectation of obtaining a certain visa or status, such as visa petitions, approval notices, or other documentation of eligibility for relief.[70]

Officials authorized to issue an NTA may also cancel the NTA before it is filed with the immigration court, by regulation, where they are satisfied that: 1) the respondent is a U.S. citizen; 2) the respondent is not deportable or inadmissible under immigration laws; 3) the respondent is deceased; 4) the respondent is not in the U.S.; 5) the NTA was issued for failure to file a timely petition under 216(c) but that failure is excused by 216(d)(2)(B); 6) the NTA was improvidently issued; or 7) the circumstances of the case have changed to such an extent that continuation is no longer in the best interest of the government.[71] The last two scenarios allow some flexibility to argue for prosecutorial discretion. However, even where this regulation does not provide specific grounds for cancellation of the NTA, attorneys may still argue that an NTA should be cancelled as a matter of prosecutorial discretion; for example, based on compelling humanitarian reasons.

If local immigration officials are amenable, attorneys might be able to negotiate which charges are included in NTAs and thereby procure more favorable NTAs for their clients. One instance where attorneys might negotiate with DHS to include different charges is when a dispute arises about whether an individual is deportable or inadmissible. When the charges are based on deportation grounds under INA § 237, the government has the burden to establish that the respondent is deportable by "clear and convincing" evidence.[72] When the charges are based on grounds of inadmissibility under INA § 212, once the government has proven alienage (non-citizenship), the burden shifts to the respondent to present evidence that he or she is "clearly and beyond doubt" entitled to be admitted and is not inadmissible.[73] Therefore, an attorney for a noncitizen who can prove lawful admission might urge the preparing agency to issue an NTA charging removability under INA § 237, since the burden is more favorable to the noncitizen.[74]

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70 For practical suggestions for drafting a request for prosecutorial discretion, *see* American Immigration Council Practice Advisory, *Prosecutorial Discretion: How to Advocate for Your Client* (updated 2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/pd_overview_final.pdf.

71 8 C.F.R. § 239.2. Cases have been terminated for similar reasons. *See, i.e.*, *Matter of G-Y-R*, 23 I. & N. Dec. 181 (BIA 2001) (an in absentia order of removal was inappropriate where it could not be determined respondent did not receive and could not be charged with receiving NTA); *Matter of Rosa Mejia-Andino*, 23 I&N Dec. 533 (BIA 2001) (proper for IJ to terminate proceedings against minor where NTA failed to meet requirements of service).

72 INA § 240(c)(2)(B).

73 INA § 240(c)(2)(A).

74 As an example, if an attorney has evidence that her client was admitted via a "wave through", the attorney could advocate for charges under §237 instead of §212. *See* American Immigration Council Practice Advisory, *Inspection, Entry and Admission* (updated October 2015) *available at* https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/inspection_entry_and_admission_final_10-22-2015_0.pdf

Another possible benefit of negotiating with ICE is that prosecutorial discretion might be exercised to delay the filing of an NTA, which may result in a filing date more favorable to the client. As an example, the service of an NTA stops the accumulation of certain required periods of residency for purposes of LPR and non-LPR Cancellation of Removal;[75] thus, a later service date might allow the noncitizen to accumulate the necessary period of residence for this type of relief.

IV. Are There Any Scenarios in Which I might Urge the Government to File an NTA? What Risks Are Associated with This Strategy?

There are rare instances where it may benefit a noncitizen to be placed in formal removal proceedings triggered by the filing of an NTA. Attorneys should thoroughly explore the risks involved in seeking the filing of an NTA, in consultation with their clients.

Attorneys representing clients who are subject to expedited removal,[76] administrative removal,[77] or reinstatement of removal orders[78] may attempt to have NTAs issued in order to move their clients into full removal proceedings where they may apply for relief from removal rather than facing immediate deportation. Formal removal proceedings offer greater procedural protections as well.[79] Of course, the attorney must verify the client's willingness to undergo the formal, and often lengthy, removal process, especially if the client is facing a long period of detention. If a client simply wishes to return to his country of origin as quickly as possible, it might be inadvisable to seek an NTA and full removal proceedings.

USCIS stated in its June 28, 2018 guidance that in "limited and extraordinary circumstances" USCIS may issue an NTA so that a noncitizen may pursue relief in removal proceedings. The person must request the NTA in writing either before or after the adjudication of the application or petition. The guidance also indicates the Asylum Office may issue an NTA in certain circumstances, such as , in its discretion, when: (1) an asylum applicant who has been issued an NTA requests NTAs for family members not included on the asylum application as dependents, so the family remains unified; (2) an asylum applicant issued a denial while in lawful immigration status falls out of lawful immigration status; (3) an individual's asylum status is rescinded because USCIS did not have jurisdiction to grant asylum status, if there is no other

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75 INA § 240A. LPR Cancellation is only available to lawful permanent residents (LPRs). The statute stipulates that the LPR show he has been lawfully admitted in permanent residence status for five years and has had seven years of lawful, continuous residence in the U.S. INA § 240A(a). Non-LPR Cancellation of Removal is available to non-LPRs and requires showing ten years of continuous physical presence. INA § 240A(b). Under the stop-time rule, service of an NTA ends the accrual of continuous physical presence or continuous residence needed to qualify for cancellation, *Matter of Camarillo*, 25 I&N Dec. 644.

76 INA § 235.

77 INA § 238.

78 INA § 241(a)(5).

79 *Compare* INA § 238(b) (expedited removal procedures) *with* INA § 241(a)(5) (regular or formal removal procedures).

order of removal or the individuals is not already in removal proceedings; and (4) when a NACARA applicant falls out of lawful immigration status after the Asylum Office dismissed NACARA 203 because the applicant was not removable.