Citizenship and Immigration Services Ombudsman

Improving the Quality and Consistency in Notices to Appear

June 11, 2014

These recommendations are the result of an in-depth review of USCIS's policy and practice in issuing Notices to Appear (NTAs). As the charging document used to place an individual in administrative removal proceedings, NTAs are critical legal documents containing the factual allegations made by the government and the corresponding charges of removability. NTAs put individuals on notice about the charges lodged against them, as well as of the date, time, and place of their upcoming removal hearing.

As a former Assistant District Counsel for the Immigration and Naturalization Service, I have seen firsthand the inefficiencies created by inadequately drafted or improvidently issued NTAs. As a former private practitioner and Executive Director of a national network of nonprofit service providers, I have seen the hardship caused to individuals and families due to charging documents containing errors or charges not supported by evidence. I also know the importance of access to the immigration courts for individuals whose only relief is available before an Immigration Judge.

USCIS's policy guidance has proven to be effective in allocating resources and prioritizing cases for removal. However, its implementation has revealed gaps that prevent certain individuals from accessing the immigration courts, and these recommendations call for new guidance to address this. These recommendations also call for the uniform review by USCIS legal counsel of all NTAs issued by the agency. This review will ensure that the document is not only legally sufficient, but also that its contents and delivery meet all requirements of due process afforded under the law.

I believe these recommendations will strengthen USCIS's practices in NTA issuance and will lead to a more fair process for those who seek immigration relief before the immigration courts.

Sincerely,

Maria Odom
Citizenship and Immigration Services Ombudsman

RECOMMENDATIONS

The Ombudsman recommends that USCIS:

1) Provide additional guidance for NTA issuance with input from ICE and EOIR;

2) Require USCIS attorneys to review NTAs prior to their issuance and provide comprehensive legal training; and,

3) Create a working group with representation from ICE and EOIR to improve tracking, information-sharing, and coordination of NTA issuance.

REASONS FOR THE RECOMMENDATIONS

- Stakeholders report that the process of requesting NTA issuance is sometimes unclear and inconsistent across field offices, often resulting in denial of a request for an individual to be placed in removal proceedings.

- Legal sufficiency review and training would promote among USCIS officers a better understanding of the relationship between charges and allegations; the evidence required to substantiate specific charges; case analysis in light of the Department's stated enforcement priorities; and how to evaluate whether an individual who appears to be removable or who has already been ordered removed may also be eligible for affirmative relief before USCIS.

Homeland Security

Citizenship and Immigration Services Ombudsman

Improving the Quality and Consistency in Notices to Appear (NTAs)

June 11, 2014

The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

EXECUTIVE SUMMARY

Under the Immigration and Nationality Act (INA), three agencies within the Department of Homeland Security (DHS) may initiate a removal proceeding by preparing and serving Form I-862, *Notice to Appear* (NTA), on a respondent and the immigration court. These agencies include U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP). While statutory and regulatory provisions outline the initiation, nature and potential outcome of removal proceedings, agency guidance in the form of policy memoranda makes clear enforcement priorities, procedures for drafting and reviewing NTAs, and the proper exercise of prosecutorial discretion.

In November 2011, USCIS released revised guidance on the issuance of NTAs and referral of certain cases to ICE. The guidance focuses on established enforcement priorities and is an essential mechanism to promote efficiency while enhancing national security and public safety. Its implementation has streamlined NTA issuance resulting in fewer NTAs, but also revealed inefficiencies that impact procedural safeguards. Securing feedback from ICE and EOIR and establishing a clear process for issuing NTAs upon request[1] pursuant to current USCIS policy will promote increased quality and consistency in NTA issuance.

In USCIS, a wide range of officials in asylum, field and service center locations may draft and issue NTAs. There is no requirement that NTAs be reviewed and approved by attorneys in the USCIS Office of the Chief Counsel (OCC), or in any other DHS legal program. Additionally, OCC only provides legal training on NTA's when requested by USCIS offices. It does not provide active and consistent oversight of ongoing or emerging training needs. Stakeholder and case assistance information brought to the attention of the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman) shows that certain USCIS-generated NTAs are legally insufficient.[2] Those cases demonstrate that consistent oversight by OCC could prevent the issuance of unnecessary and inaccurate charging documents. USCIS legal counsel should review NTAs to ensure that a charging document is legally sufficient, comports with agency guidance, and is aligned with DHS enforcement priorities. Unnecessary and inaccurate charging

[1] NTAs issued upon request, hereinafter, will be referred to as discretionary NTAs.

[2] For the purpose of this recommendation, a "technically insufficient" NTA includes one or more administrative errors, such as an inaccurate A-number, name, address or date to appear in court. On the other hand, a "legally insufficient" NTA includes one or more erroneous or unsupportable allegations or removal charges. In either category, the NTA may result in termination of the proceedings unless cured by ICE through the issuance of Form I-261, *Additional Charges of Inadmissibility/Removability*.

documents create additional work for ICE, the immigration courts, and often cause undue hardship to individuals and families.

In addition, the Ombudsman's evaluation has also revealed that USCIS does not track the number of NTAs that are returned as undeliverable, rejected by ICE, or terminated by the immigration court, making it difficult to evaluate the agency's overall performance in this area. NTAs may be rejected for these reasons because of technical and/or legal insufficiency. The Ombudsman has, therefore, identified a need for greater coordination within USCIS, and between USCIS, ICE and the Executive Office for Immigration Review (EOIR) in order to improve administrative and procedural safeguards.

The recommendations below seek to ensure that those placed into removal proceedings receive a full and fair hearing, including proper notice of all charges and a meaningful opportunity to be heard. To improve the quality and consistency of NTAs, and to ensure they are in compliance with DHS and USCIS policies, the Ombudsman recommends that USCIS**:**

1) **Provide Additional Guidance for NTA Issuance with Input From ICE and EOIR;**

2) **Require USCIS Attorneys To Review NTAs Prior To Their Issuance and Provide Comprehensive Legal Training; and**

3) **Create a Working Group with Representation From ICE and EOIR To Improve Tracking, Information-Sharing, and Coordination of NTA Issuance.**

METHODOLOGY

In conducting this review, the Ombudsman met with USCIS staff in headquarters, service centers, and district offices to discuss protocols for the drafting, review, and issuance of NTAs. The Ombudsman requested and received information and data from ICE and EOIR. From November 2012 to December 2013, the Ombudsman also studied specific case assistance requests, conducted outreach and collected feedback from stakeholders on NTA issues and concerns.

BACKGROUND

Due Process in Immigration Proceedings

Courts have long acknowledged the serious consequences of deportation from the United States.[3] Noncitizens now face such consequences in removal proceedings, with restricted avenues of

[3] *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948); *Jordan v. DeGeorge*, 341 U.S. 223 (1951); and *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) ["The impact of deportation… is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends, and his livelihood forever. Return to his native land may result in poverty, persecution and even death."]

relief.[4] Immigration proceedings are civil,[5] not criminal, and therefore exempt from the full range of constitutional protections.[6] Proceedings must, however, assure due process under the Fifth Amendment.[7] This assurance means a respondent is entitled to a fair hearing, notice of the charges, an opportunity to defend, to examine and cross-examine witnesses and to be represented by counsel, and the decision must be made by an unbiased tribunal on the basis of substantial evidence in the record.[8]

Statutory and Regulatory Provisions Related to Initiation of Removal Proceedings

Since 1996, the INA provides for a single, "removal" proceeding wherein an immigration judge may decide the inadmissibility or deportability of a noncitizen.[9] Under the INA, agencies within DHS may initiate a removal proceeding by preparing and filing an NTA with EOIR.[10] These agencies include USCIS, ICE, and CBP.[11] Under the regulations at 8 Code of Federal Regulations (CFR) Section 239.1(a), over 40 classes of officers within USCIS, ICE and CBP may issue NTAs.[12] The filing of an NTA by these officers vests jurisdiction with EOIR to

[4] *Padilla v. Kentucky*, 130 S.Ct. 1473, 1478 (2010). ["The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation."]

[5] The Supreme Court in *Padilla* noted, "We have long recognized that deportation is a particularly severe 'penalty,' but is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process." *Padilla*, 130 S. Ct. at 1481-82.

[6] These constitutional protections include the Sixth Amendment right to appointed counsel, the prohibition against double jeopardy, the right to Miranda warnings, and the Eighth Amendment protection against cruel and unusual punishment. *See* Markowitz, Peter, L., "Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings," Harvard Civil Rights-Civil Liberties Law Review (CR-CL), Vol. 43, No. 2, 2008; http://ssrn. com/abstract=1015322 (accessed Jan. 12, 2014). By statute, noncitizens in deportation proceedings do have a right to be represented by counsel, but at no expense to the government. 8 U.S.C. 1229a (b)(4)(A), 1362 (2006). INA 240(b)(4)(A).

[7] *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903).

[8] Gordon, Charles, *Due Process of Law in Immigration Proceedings*, 50 A.B.A. J. 34 (1964), citing *Whitfield v. Hanges*, 222 Fed. 745 (8th Cir. 1915). Since President Clinton signed the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA 96), non-citizens are now afforded less substantive and procedural due process. This is most obvious in the area of expedited removal.

[9] INA § 240(a).

[10] INA § 239(a); 8 U.S.C. § 1229(a) (2006); 8 C.F.R. § 1003.14(a).

[11] This recommendation does not address the issuance of Notices to Appear by Customs and Border Protection (CBP) agents. It does discuss ICE's enforcement priorities and legal review related to NTAs.

[12] 8 CFR 239.1(a) states, "…Any immigration officer, or supervisor thereof, performing an inspection of an arriving alien at a port of entry may issue a notice to appear to such alien. In addition, the following officers, or officers acting in such capacity, may issue a notice to appear: (1) District directors (except foreign); (2) Deputy district directors (except foreign); (3) Chief patrol agents; (4) Deputy chief patrol agents; (5) Assistant chief patrol agents; (6) Patrol agents in charge; (7) Assistant patrol agents in charge; (8) Field operations supervisors; (9) Special operations supervisors; (10) Supervisor border patrol agents; (11) Service center directors; (12) Deputy service center directors; (13) Assistant service center directors for examinations; (14) Supervisory district adjudications officers; (15) Supervisory asylum officers; (16) Officers in charge (except foreign); (17) Assistant officers in charge (except foreign); (18) Special agents in charge; (19) Deputy special agents in charge; (20) Associate special agents in charge; (21) Assistant special agents in charge; (22) Resident agents in charge; (23) Supervisory special agents; (24) Directors of investigations; (25) District directors for interior enforcement; (26) Deputy or assistant district

determine whether the respondent shall be removed from the United States.[13] All officers with the authority to issue NTAs may also choose to cancel[14] or not to file an already issued NTA.[15] Likewise, once an NTA has been filed with EOIR, ICE may move to terminate or administratively close removal proceedings.[16]

In addition to explaining who can issue or alter the course of an NTA, the regulations also provide the basic framework of this charging document. The NTA must include administrative information regarding the respondent's name, address, alien registration number, alleged nationality and citizenship, and primary language.[17] It must also indicate the nature of the proceedings, the legal authority under which the proceedings are to be conducted, acts or conduct alleged to be in violation of the law, the charge(s) against the respondent in removal, and the statutory provision(s) alleged to have been violated.[18] Finally, the NTA must specify that the respondent may be represented, at no cost to the government, by counsel or another representative authorized to appear under 8 CFR § 1292.1; the time and place at which the proceedings will be held; and that failure by the respondent to advise the immigration court having jurisdiction over the proceedings of his or her current address and telephone number may result in an *in absentia* hearing in accordance with 8 CFR § 1003.26.[19] Once the NTA is written and served on the respondent by DHS officers, ICE attorneys are responsible for representing DHS before EOIR.[20] INA § 240(c)(3)(A) places the initial burden on ICE attorneys to prove by clear and convincing evidence that the respondent, if admitted to the United States, is deportable as charged; if the alien is an applicant for admission, the burden is on the alien to show that he or she is clearly and beyond doubt entitled to be admitted under INA § 240(c)(2).[21] The burden then shifts (if originally on ICE) to the respondent to show that he or she is eligible for relief.[22]

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directors for interior enforcement; (27) Director of detention and removal; (28) Field Office directors; (29) Deputy Field Office directors; (30) Supervisory deportation officers; (31) Supervisory detention and deportation officers; (32) Directors or officers in charge of detention facilities; (33) Directors of field operations; (34) Deputy or assistant director of field organizations; (35) District field officers; (36) Port directors; (37) Deputy port directors; (38) Supervisory service center adjudications officers; (39) Unit Chief, Law Enforcement Support Center; (40) Section Chief, Law Enforcement Support Center; (41) Other officers or employees of the Department or of the United States who are delegated the authority as provided by 8 CFR 2.1 to issue notices to appear."

[13] 8 C.F.R. § 1003.14.

[14] 8 C.F.R. § 239.2(a).

[15] *See* Center for Immigrants' Rights, Penn State, The Dickinson School of Law, *To File or Not to File a Notice to Appear: Improving the Government's Use of Prosecutorial Discretion* (Oct. 2013); https://law.psu.edu/news/new-report-calls-improvements-dhs-notice-appear-procedure (accessed Jan. 12, 2014) (*hereinafter* "To File or Not to File").

[16] *Id.*

[17] 8 C.F.R. § 1003.15.

[18] *Id.*

[19] *Id.*

[20] ICE may amend the NTA to correct shortcomings, or correct or lodge additional charges "at any time during the hearing," by properly filing with the court and serving on the respondent Form I-261, *Additional Charges of Inadmissibility/Deportability*. *See* 8 C.F.R. § 1003.30.

[21] *Id.*

[22] INA § 240(c)(4)(A).

DHS Guidance

On July 11, 2006, USCIS issued Policy Memorandum No. 110 (*hereinafter* PM 110) to govern procedures for determining when NTAs should be drafted in-house, and when cases should be referred to ICE. [23] PM 110 states: "Since not only USCIS, but also Immigration and Customs Enforcement and Customs and Border Protection (CBP) have authority to issue NTAs, USCIS must assure that its issuance of NTAs fits within and supports the Government's overall removal priorities."[24]

After the issuance of PM 110, ICE established revised priorities for removal on March 2, 2011, categorizing from highest to lowest: "(1) aliens who pose a danger to national security or a risk to public safety, (2) recent illegal entrants, and (3) aliens who are fugitives or otherwise obstruct immigration controls."[25] On June 17, 2011, ICE released objectives for exercising prosecutorial discretion in line with these priorities.[26]

USCIS subsequently released Policy Memorandum No. 602-0050, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* (*hereinafter* PM 602-0050) on November 7, 2011. This guidance seeks "to enhance national security, public safety, and the integrity of the immigration system."[27] It also complements earlier DHS directives regarding prosecutorial discretion and docket efficiency.[28]

PM 602-0050 identifies "the circumstances under which USCIS will issue an NTA, or will refer the case to ICE for NTA issuance, in order to effectively handle cases that involve public safety threats, criminals, and aliens engaged in fraud."[29] It further states that USCIS will issue an NTA when required by statute or regulation, or "when a Statement of Findings (SOF) substantiating fraud is part of the record."[30]

NTAs required by statute or regulation include five general scenarios:

1) Termination of Conditional Permanent Resident Status and Denials of Form I-751, *Petition to Remove Conditions on Residence* (8 CFR §§ 216.3, 216.4, 216.5);
2) Denials of Form I-829, *Petition by Entrepreneur to Remove Conditions* (8 CFR § 216.6);

[23] USCIS Policy Memorandum No. 110, "Disposition of Cases Involving Removable Aliens" (Jul. 11, 2006).
[24] *Id.* at 1.
[25] ICE Memorandum, *Civil Immigration Enforcement: Priorities for Apprehension, Detention and Removal of Aliens* (Mar. 2, 2011).
[26] ICE Memorandum, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens* (June 17, 2011).
[27] PM 602-0050 at 1.
[28] *See* ICE Memorandum, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (Aug. 20, 2010), and USCIS Memorandum, *Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11-16* (Feb. 2, 2011).
[29] PM 602-0050 at 1. The guidance does not impact the handling of cases involving national security concerns, which remain controlled by Fraud Detection and National Security Directorate instructions.
[30] *Id.* at 3.

3) Termination of refugee status by the District Director (8 CFR § 207.9);
4) Denials of Nicaraguan Adjustment and Central American Relief Act (NACARA) 202 and HRIFA adjustments (8 CFR §§ 245.13(m), 245.15(r)(2)(i)); and
5) Asylum, NACARA 203, and Credible Fear cases (8 CFR §§ 208.14(c)(1), 208.24(e), 208.30(f), 240.70(d)).

The 2011 USCIS guidance identifies other cases requiring NTA issuance, including those involving fraud. Fraud-based NTAs are issued by USCIS upon final adjudicative action on the petition and/or application, or other appropriate eligibility determination. According to PM 602-0050, the NTA should include a charge of fraud or misrepresentation, if possible, which will be determined on a case-by-case basis, and "[c]onsultation with local USCIS counsel to determine the appropriate charge(s) is recommended."[31]

PM 602-0050 also identifies criminal cases to be referred to ICE for NTA issuance. These cases are known as "Egregious Public Safety" (EPS) and "Non-Egregious Public Safety" (Non-EPS) cases. An egregious public safety case presents information that indicates "the alien is under investigation for, has been arrested for (without disposition), or has been convicted of" any of ten enumerated offenses.[32] Where ICE declines to issue an NTA in these referred cases, USCIS is instructed to "resume its adjudication of the case" unless "some other basis unrelated to the EPS concern becomes apparent during the course of the adjudication, [such that] an NTA may be issued in accordance with [the] memo."[33]

PM 602-0050 also addresses the issuance of NTAs in two general situations related to Forms N-400, *Application for Naturalization*. The first involves applicants who may be eligible to naturalize, but are also deportable under INA Section 237. The second pertains to applicants found during the naturalization interview to be inadmissible at the time of adjustment or admission to the United States, and therefore ineligible to naturalize under INA section 318. In both situations, USCIS guidance requires Immigration Services Officers (ISOs) to make a recommendation regarding issuance of an NTA based on the totality of the circumstances, and forward the case to a Review Panel consisting of a local Supervisory ISO (SISO), a local USCIS OCC attorney, a district representative, and a local ICE counsel. The Review Panel is charged with deciding whether an NTA should be issued. If the Review Panel is unable to do so, the case shall be elevated to the District Director for a final decision.

PM 602-0050, at Section VI "Other Cases," allows a foreign national to request NTA issuance to renew an application for adjustment of status, or in "certain cases with a denied N-400."[34] Also, an asylum applicant in removal proceedings may request NTA issuance for family members not included on the asylum application as dependents for family unification purposes. USCIS retains discretion to deny such requests. The policy memorandum does not require participation by ICE.

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[31] *Id.*
[32] *Id.* at 3-6. A Non-EPS case presents information indicating that the alien is inadmissible or removable for a criminal offense not included on the EPS list, to include N-400 cases if the N-400 has been denied on good moral character grounds based on a criminal offense.
[33] *Id.* at 4.
[34] PM 602-0050 at 8.

Instead, it explains, "USCIS should consider ICE actions and determinations when making an NTA issuance decision under this section."[35]

Finally, Section VII of PM 602-0050 includes an overarching caveat for exceptions to the guidance. This caveat explicitly cites a role for ICE. It states, "Exceptions to the guidance in this PM require concurrence from the Regional or Center Directors, who will consult with ICE before issuing an NTA."[36]

USCIS Review and Issuance of NTAs

Consistent with 8 CFR §239.1(a), USCIS designates a wide range of officials who may issue NTAs. For example, Asylum Officers (AOs) draft NTAs, but Office Directors, Deputy Directors and Supervisory AOs must review and sign them. NTAs issued by USCIS field offices also require review by a supervisor or designee. Field Office District Directors, Deputy District Directors, Field Office Directors, SISOs and ISOs are authorized to sign and approve NTAs. For the Service Center Operations Directorate, guidance requires that Level 2 and Level 3 ISOs draft NTAs, and an SISO, or more senior officer, must review and sign the NTA.[37]

USCIS guidance does not require substantive review of NTAs by OCC attorneys. Various sections of PM 602-0050 only recommend consultation with OCC attorneys to determine the appropriate charge(s). Local OCC attorneys, as discussed above, are also instructed to sit on Review Panels that consider whether an NTA should be issued in certain naturalization cases.

There is no other guidance related to OCC headquarters or field attorneys evaluating for legal sufficiency USCIS-generated NTAs.[38] Nor is OCC (or USCIS) required under any DHS Office of the General Counsel (OGC) directive to coordinate review for legal sufficiency of NTAs with the ICE Office of the Principal Legal Advisor (ICE OPLA) or CBP Office of the Chief Counsel (CBP OCC). USCIS OCC does not have any separate guidance related to legal sufficiency review of NTAs by its headquarters or field OCC attorneys. It is estimated that OCC attorneys spend between one to eight hours per month reviewing NTAs.[39] OCC attorneys review NTAs for legal sufficiency in some offices, but in most offices, NTA review only occurs upon request.[40] According to USCIS, "ICE OPLA will contact USCIS OCC to discuss NTAs already issued, or to explain why an NTA issued by USCIS was not filed or withdrawn, but there is no standard process in these circumstances."[41]

USCIS OCC plays a limited role in the training of USCIS officials designated to write and review NTAs. OCC does not have a fixed schedule to provide NTA training in USCIS field

[35] *Id.*
[36] *Id.*
[37] Information provided by USCIS (Mar. 22, 2013).
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Information provided by USCIS (Oct. 1, 2013).

offices. It has one module for NTA training titled, *How to Issue a Notice to Appear*.[42] Until December 2013, USCIS had not yet approved this module for national presentation and attorneys could only use it for the offices they support after receiving permission through supervisory channels.[43] This OCC training comprehensively addresses circumstances in which USCIS will issue an NTA or will refer a case to ICE for NTA issuance, and it integrates the exercise of prosecutorial discretion. In doing so, the training provides a meaningful framework for implementation of PM 602-0050. It further describes the removal process including the roles of USCIS, ICE and EOIR, and offers hypothetical examples.

The USCIS Academy Training Center (Academy) provides NTA training to new ISOs and Asylum Officers who attend the residential BASIC Training Course, which normally occurs at the beginning of an officer's career with USCIS. According to the Academy, ISOs and Asylum Officers receive one three-hour overview session focused on NTA issuance.[44]

Apart from this, USCIS offices and directorates have developed their own protocols and training for the procedures related to NTA issuance.[45] Asylum Offices "use procedures and users manuals, memoranda and locally developed materials," with training conducted by Supervisory AOs, Quality Assurance/Training Officers, or experienced AOs.[46] Likewise, field offices conduct "NTA and ENFORCE training locally as needed."[47] Each office operates independently and schedules its training to meet the needs of the particular office.[48]

The USCIS Field Operations Directorate (FOD) is in the process of revising its September 8, 2006, "Domestic Operations Standard Operating Procedure Form I-862, Notice to Appear"

[42] Information provided by USCIS (May 14, 2014). In addition, OCC presents other NTA related trainings. These trainings include "Inadmissibility, Deportability and Waivers" and "Inadmissibility, I-601 Waivers and Extreme Hardship."
[43] *Id*. According to USCIS, "(t)here were approximately 9 presentations of OCC cleared trainings related to NTAs in FYs 12-13 with about 370 attendees, and in FY 14 approximately 4 with 186 attendees. A handful of sessions occurred either without training materials or using non-cleared materials with a total attendance of about 25. In FY14 there have been approximately 4 presentations of OCC cleared trainings on NTA issuance."
[44] *Id*. Instruction covers "general circumstances and exceptions under which an NTA is issued…preparatory concepts to the initiation of the removal process…the mechanics of preparation of an NTA consistent with the policies outlined in the Domestic Operations Standard Operating Procedures as well as the National SOP."
[45] *See supra* note 15 at page 33. In response to a FOIA request by the authors of "To File or Not to File," USCIS provided internal policy guidance on the implementation of PM 602-0050, Standard Operating Procedures on NTA Referrals by the Vermont Service Center, an NTA Instructor Guide created by the Nebraska Service Center, internal correspondence about NTAs within USCIS, and other policy documents.
[46] Information provided by USCIS (Mar. 22, 2013).
[47] *Id.* The Enforcement Case Tracking System (ENFORCE) is the DHS-wide electronic program used to generate NTAs. It supports all enforcement case processing and management functions of DHS and stores data in a single data structure.
[48] Information provided by USCIS (May 14, 2014).

(2006 NTA SOP) to incorporate PM 602-0050.[49] USCIS originally expected a revised SOP to be released in the spring of 2013, but it has yet to be finalized.[50]

On October 1, 2013, USCIS responded to questions posed by the Ombudsman regarding current SOPs for NTA issuance. USCIS distinguished the processes of service centers and field offices in the following manner. First, service centers and field offices serve an NTA on respondents via regular mail; a field office can serve the NTA in person "if time permits and the respondent is still present at the local office..."[51] On the other hand, asylum offices issue a "Pick-Up Notice" to asylum applicants at their interview, "which tells them the date and time to return to the asylum office to receive and acknowledge the decision in their case, at which time USCIS would serve the NTA in person, if applicable."[52]

The October 1, 2013 USCIS response also explains that, after serving the NTA, field offices transfer A-files to the ICE mailroom for service of the NTA on EOIR by ICE. Service centers transfer the A-file to the ICE Enforcement and Removal Office connected to the location of the removal proceeding, and they mail the NTA to the immigration court with jurisdiction. Finally, asylum offices transfer the A-file, with a copy of the NTA, to the ICE OPLA office with jurisdiction over the immigration court, and "the NTA is filed with EOIR either by mail or in person, depending on the location of the court."[53]

When an NTA is returned as undeliverable, USCIS explains that field offices and service centers have established procedures[54] to check systems for an address change.[55] However, they do not request return of the A-File, and they "do not specifically notify ICE that an NTA was returned as undeliverable."[56] Failure to notify ICE of an ensuing change of address may result in an *in absentia* order of removal against an individual in removal proceedings. When ICE/OPLA has the A-file, field offices do not reissue the NTA, but service centers will resend the NTA to the new address, and they will notify ICE of the new NTA by forwarding a copy to them.[57]

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[49] Information provided by USCIS (Mar. 22, 2013), citing, Michael Aytes, "Amendment to Standard Operating Procedures for Form I-862, Notice to Appear" (April 4, 2007), and "Form I-862, Notice to Appear SOP" (Sept. 8, 2006).

[50] Information provided by USCIS (Mar. 22, 2013). USCIS most recently informed the Ombudsman that, "OCC reviewed a FOD-created PowerPoint training on the NTA SOP," which is still being revised. Information provided to the Ombudsman (May 14, 2014).

[51] Information provided by USCIS (Oct. 1, 2013).

[52] *Id.* "Setting aside credible fear cases, USCIS does not serve NTAs on respondents detained by ICE."

[53] *Id.*

[54] *Id.* In regard to the Asylum Division, USCIS states that it "has no national procedures to address returned NTAs. Each Asylum Office follows locally developed procedures. Some offices request the A-file and check the file, CLAIMS and AR-11 for new addresses, before issuing a corrected NTA. Other offices send the returned NTA to the ICE OPLA office with the A-file for issuance of a corrected NTA."

[55] *Id.* USCIS's response specifically states that field offices will check "the appropriate systems" for a change of address, and service centers will review "the AR11 (change of address) and National Claims for an updated address."

[56] *Id.*

[57] *Id.*

RECOMMENDATIONS

To improve the quality and consistency of NTAs issued by USCIS, and to ensure that USCIS-generated NTAs are aligned with DHS guidelines, policies and procedures, the Ombudsman recommends that USCIS:

1) Provide Additional Guidance for NTA Issuance with Input From ICE and EOIR.

Since 2011, DHS, particularly through ICE and USCIS, effectively articulated priorities for removal through the issuance of policy memoranda. The guidance established enforcement priorities and is an essential mechanism to streamline the NTA issuance process to promote efficiency while enhancing national security and public safety. Guidance issued by ICE and USCIS significantly limits the number and types of NTAs that USCIS may issue, resulting in the latter issuing fewer NTAs since implementation of the new guidance.[58] Despite this and other positive developments, the Ombudsman's evaluation has revealed gaps in USCIS processes that impact procedural safeguards.[59] The agency has an opportunity to identify and address gaps in existing guidance, communication, and coordination that remain unaddressed and create inefficiencies in NTA issuance.

For example, PM 602-0050 clearly identifies when a statute or regulation requires an NTA, but this policy memorandum is ambiguous with regard to the evidence needed to support the Statement of Findings (SOF) required for a fraud-based NTA. As indicated earlier, PM 602-0050 instructs USCIS officers to issue an NTA "even if the petition and/or application is denied for a ground other than fraud, such as lack of prosecution or abandonment, is terminated based on a withdrawal by the petition/applicant, or when an approval is revoked, *so long as an SOF substantiating the fraud is in the record*." [emphasis added]. In meetings with the Ombudsman, USCIS staff noted that establishing fraud as part of the record requires an SOF from the USCIS Fraud Detection and National Security Directorate (FDNS). However, even if FDNS establishes a record of fraud with an SOF, and USCIS subsequently issues the NTA, ICE attorneys can still choose to terminate the NTA based on their finding that the fraud charge is not supported by sufficient evidence. EOIR can also terminate for the same reason.[60]

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[58] For data related to NTA issuance, *see* DHS "Immigration Enforcement Actions: 2012" (Dec. 2013); http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_0.pdf (accessed Feb. 18, 2014).

[59] The new DHS priorities have led to positive developments, including the implementation of a process whereby USCIS will accept cases back from EOIR (with ICE's consent) that involve respondents for whom relief before USCIS appears viable. DHS and the Department of Justice (DOJ) have coordinated to increase docket efficiency, and ensure that limited enforcement and other resources are devoted to enhancing national security, public safety, and the integrity of the immigration system. In July, 2009, approximately 50 leaders from DHS and the DOJ participated in a two-day Design Session at Capgemini's Accelerated Solutions Environment in Herndon, VA, to identify opportunities to increase efficiency and effectiveness from issuance of an NTA through issuance of a final order. The group considered more efficient and effective docket management in immigration court. The Design Session resulted in the formation of several working groups with detailed action plans to address gaps in the areas of technology, processes, and resources. Guidance such as PM 602-0050 resulted in large part from this collaboration.

[60] Stakeholders point out that, where USCIS drafts and forwards NTAs recommended by a Review Panel to ICE, many are never served on EOIR. This practice creates uncertainty and confusion for stakeholders.

Despite the authority of ICE attorneys or EOIR judges to terminate an NTA, PM 602-0050 only recommends that USCIS consult with "local USCIS counsel to determine the appropriate charge(s)" for fraud-based cases.[61] USCIS is not required to obtain feedback from ICE regarding a fraud charge before issuing and filing an NTA under this section.[62] Consistent consultation with ICE prior to the issuance of an NTA containing a fraud charge would enhance efficiency and minimize the need for ICE to amend NTAs subsequent to filing with EOIR. It would also prevent improvidently issued NTAs in cases in which ICE will not pursue a fraud charge and the individual is otherwise not an enforcement priority. While PM 602-0050 recommends an advisory role for ICE attorneys in other cases, the guidance could be amended to require an effective feedback process in which ICE would inform USCIS when a case does not meet standards of evidence to substantiate a finding of fraud for removal purposes.

The Ombudsman has also identified problems with PM 602-0050 whereby USCIS declines NTA issuance based on denied Forms N-400, *Application for Naturalization*. For example, during the naturalization interview, an ISO may find that USCIS accorded lawful permanent resident (LPR) status in error to the naturalization applicant. USCIS would then deny the Form N-400, even if the faulty status was originally due to USCIS error. The applicant can appeal this decision by filing a Form N-336, *Request for a Hearing in a Decision in Naturalization Proceedings*, or by appealing the decision in federal district court. But, neither course of action will result in overturning the N-400 denial because the individual's LPR status was accorded in error; he or she is now left with no recourse to rectify the error by obtaining lawful status, and a path to citizenship. A USCIS review panel's refusal to issue an NTA under these circumstances could then leave an individual in a state of legal limbo as they are now unable to seek relief only available before the immigration court.[63]

PM 602-0050, at Section VI "Other Cases," allows a foreign national to request NTA issuance under certain circumstances. In practice, however, stakeholders report that the process of requesting NTA issuance under this section is unclear and inconsistent across field offices, and often results in denial of a request to be placed in removal proceedings under this section. Moreover, the Ombudsman notes that the policy memorandum fails to address exceptions for some circumstances where the only form of relief available to other USCIS customers may be with the immigration court. While some in USCIS interpret PM 602-0050 to permit the discretionary issuance of NTAs upon demand, stakeholders report frustration over being denied access to the immigration courts. Stakeholders report that USCIS often declines to issue an NTA upon request to USCIS customers who have been denied an immigration benefit, even in cases

[61] PM 602-0050 at 3.
[62] PM 602 0050 provides an exception for N-400 (naturalization) applications involving fraud which is documented in the SOF. Those NTAs will be reviewed through the NTA Review Panel, in which ICE is invited to participate and will have an advisory role.
[63] Relief before the immigration court, for example, could take the form of a request for a waiver under INA Section 237. This section of law "provides a discretionary waiver in removal proceedings for certain misrepresentations and fraud at admission that would otherwise render deportable a lawful permanent resident (LPR) or a self-petitioner under the Violence Against Women Act (VAWA)." American Immigration Council Practice Advisory, "The § 237(a)(1)(H) Fraud Waiver" (June 24, 2009) at 1. Invoking this waiver for fraud and misrepresentation issues restores status, forgives the problem and positions individuals to return to USCIS and become citizens.

described in Section VI.[64] Some individuals also report that USCIS instructs them to ask ICE to issue the NTA instead.[65] ICE, however, often declines to file charging documents if the case does not fall within the DHS stated enforcement priorities.[66] While the USCIS policy memorandum contemplates issuance of NTAs upon request, ICE policy focuses on enforcement priorities due to limited resources and provides no process for those potentially eligible respondents who are outside the priorities to seek relief in immigration court. ICE may decline filing an NTA issued upon request pursuant to Section VI because it does not meet its enforcement priorities. Current docket considerations may also limit the number of NTAs filed.

In order to help resolve this issue, USCIS should revise PM 602-0050 and create a standardized process for those seeking benefits before USCIS to access the immigration courts. PM 602-0050 should explain the requirements for requesting the issuance of an NTA, such as listing requirements for evidence and supporting documentation. Standardizing a process for applicants seeking access to EOIR may also involve Review Panels currently utilized for naturalization cases. The Ombudsman also recommends that USCIS revise PM 6002-0050 to expand access to the courts to USCIS customers who wish to be placed in removal proceedings but whose cases do not otherwise fall under PM 602-0050 Section VI or other sections of the guidance. Finally, PM 602-0050 should mandate communication and coordination between USCIS and ICE to ensure that USCIS-generated NTAs upon request are filed by ICE with EOIR. Resolving the apparent conflict between USCIS guidance (allowing for discretionary issuance of NTAs upon demand) and ICE's enforcement priorities is also necessary.

Feedback from ICE and EOIR and a clear process for requesting issuance of NTAs pursuant to Section VI of PM 602-0050 will enhance USCIS NTA guidance and ultimately promote increased quality and consistency in NTA issuance.[67]

2) Require USCIS Attorneys To Review NTAs Prior To their Issuance, and Provide Comprehensive Legal Training.

USCIS officials may bring in-depth knowledge of and experience to the task of issuing NTAs, but they are not licensed attorneys under the direction of OCC or DHS OGC per their position descriptions. Attorney review differs from review by USCIS officers because DHS attorneys bear ethical constraints and a heightened duty to obey the court.[68] OCC attorneys, therefore, bear a responsibility to provide legal advice to the issuing USCIS officials.

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[64] *Id.* The PM 602-0050 language cited earlier would appear to support imposition of this restriction by USCIS offices. Stakeholders further report that some USCIS offices do not issue NTAs unless doing so is required under PM 602-0050. Stakeholders have been advised that this local policy is the result of limited resources.

[65] *Id.*

[66] *Id.* Stakeholders have commented that, "USCIS only issues NTAs when it believes doing so will result in an order of removal as opposed to a grant of relief."

[67] *See supra* note 15. The recently released report, "To File or Not to File," recommends that DHS amend the NTA form to require new "fields" related to issuance, cancellation and filing, and to exercise prosecutorial discretion at the earliest possible point in the removal process.

[68] *See supra* note 15 at page 51, quoting retired Immigration Judge Bruce Einhorn, who considers the lack of mandatory attorney review of NTAs, "one of the great regulatory flaws."

The USCIS Asylum Division coordinates efforts for legal review. But, USCIS service centers and field offices have minimal contact with OCC attorneys during the drafting and issuance of NTAs.[69] When asked to explain whether USCIS OCC or ICE OPLA attorneys review NTAs for legal sufficiency, USCIS responded as follows:

> In the Baltimore District Office, Buffalo District Office, Albany Field Office, and St. Albans Field Office, NTAs issued by USCIS are reviewed by ICE OPLA for legal sufficiency; USCIS OCC reviews NTAs only when requested to do so by USCIS by the local operational client. In the Hartford Field Office, all NTAs issued by USCIS are reviewed by USCIS OCC before filing; ICE OPLA does not review these NTAs before they are filed. NTAs issued by the Arlington, New York, and Newark Asylum Offices are reviewed for sufficiency by ICE OPLA. NTAs issued by the Vermont Service Center are reviewed by ICE OPLA after the NTAs are filed.[70]

USCIS submitted a similar explanation of legal sufficiency reviews[71] for offices located in other areas of the country. There appears to be no uniformity of review by USCIS attorneys.

ICE has indicated that it finds USCIS Asylum Division NTAs to have the least amount of legal errors, even though ICE OPLA does not play a role in reviewing or filing such charging documents.[72] USCIS sought to explain this assertion by stating that: 1) Asylum Offices have more training; 2) asylum NTAs typically include only two possible charges; 3) asylum NTAs are subject to a comprehensive review; and 4) many attorneys work in the Asylum Division.[73] Also, USCIS has added more OCC attorneys to the Asylum Division.[74]

The Asylum Division does coordinate NTA issuance with ICE legal counsel. A 2012 Asylum Division policy memorandum instructs offices to request review of an NTA by local ICE OPLA where the Asylum Office cannot terminate asylum status of an individual who has adjusted to lawful permanent resident.[75] According to USCIS, the Asylum Division worked with USCIS OCC and ICE OPLA to establish a procedure for coordination and mutual review on complex cases that do not involve the two basic charges.[76] The Asylum Division produces the most legally sufficient NTAs due to attorney involvement.

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[69] Information provided by USCIS (Mar. 22, 2013).
[70] *Id*.
[71] *See supra* note 2.
[72] Information provided by ICE (May 16, 2013).
[73] Information provided by USCIS (Jul. 12, 2013). In Asylum Offices, "Asylum Office Directors and Supervisory Asylum Officers are authorized to review and sign NTAs. Asylum Officers are responsible for drafting NTAs." Information provided by USCIS (Mar. 22, 2013).
[74] Information provided by USCIS (Apr. 3, 2013). All eight asylum offices now have OCC attorneys co-located.
[75] Information provided by USCIS to the Ombudsman (Mar. 22, 2013), citing, USCIS Memorandum, "Termination and related Post-Adjudication Eligibility Review (PAER) procedures for cases in which the alien was granted asylum affirmatively and has already adjusted to lawful permanent resident status" (June 5, 2012).
[76] Information provided by USCIS (Mar. 22, 2013).

Similarly, active and consistent oversight from OCC to evaluate and address emerging training needs would likely improve the overall quality and delivery of USCIS NTA training. The only NTA training module for presentation by OCC, titled *How to Issue a Notice to Appear*, was updated and approved for national use in December 2013.[77] While Asylum Offices are required to have weekly training sessions that offer a forum for continuing instruction on NTAs, other USCIS offices and components lack regular training schedules. OCC led trainings occur upon request with each office operating independently and requesting OCC support based on the needs of a particular field office.[78] As such, this assessment is not conducted by OCC attorneys, but rather by field offices evaluating their own training needs as they arise. This practice primarily results in field office training focused on the entry and review of NTAs in ENFORCE to ensure technical compliance[79]—but not necessarily on legal sufficiency.

Consistent legal sufficiency training would promote among USCIS officers a better understanding of the relationship between charges and allegations; the evidence required to substantiate specific charges; case analysis in light of the department's stated enforcement priorities; and how to evaluate whether an individual who appears to be removable or who has already been ordered removed may also be eligible for affirmative relief before USCIS. Aside from the Asylum Division, it appears that USCIS offices do not communicate with ICE when developing and delivering NTA materials and training. In fact, USCIS confirmed that, "There is no formal process for USCIS attorneys or ICE OPLA attorneys to provide feedback on an NTA once it has been issued."[80] This type of information sharing, with a focus on feedback and training, would help avoid the issuance of unnecessary and inaccurate NTAs.[81] OCC attorneys could in turn share this knowledge through increased training of USCIS officers and review of NTAs prior to issuance by USCIS.

3) Create a Working Group with Representation From ICE and EOIR To Improve Tracking, Information-Sharing, and Coordination of NTA Issuance.

In addition to the issues discussed above in the areas of legal review of NTAs and legal training, the Ombudsman's evaluation also revealed the agency's current inability to properly track NTAs. The USCIS Office of Performance and Quality statistics lists the number of NTAs issued during Fiscal Year 2012 in four categories: 1) Regulatory or Statutory; 2) NTA Fraud; 3) Customer Request; and 4) NTA Other.[82] These generalized groupings do not track the current

[77] Information provided by USCIS (May 14, 2014).
[78] *Id*.
[79] Accurate data entry of the NTA into ENFORCE ensures technical sufficiency by eliminating administrative errors that could result in an inaccurate A-number, name, address or date to appear in court, which could result in the applicant not receiving the NTA or an automatic rejection of the NTA by EOIR, for example.
[80] Information provided by USCIS (Oct. 1, 2013). USCIS further acknowledges that, "In some offices, ICE OPLA will contact USCIS OCC to discuss NTAs already issued, or to explain why an NTA issued by USCIS was not filed or withdrawn, but there is no standard process in these circumstances."
[81] *See supra* note 15 at page 52, quoting retired Immigration Judge Bruce Einhorn, who points out that the absence of attorney review can result in substandard NTAs. He concludes, "Indeed, many ICE trial attorneys were as surprised as the Immigration Judges before whom they appeared regarding the sloppy and legally muddled contents of the NTAs they were assigned to prosecute."
[82] Information provided by USCIS (Mar. 22, 2013).

realm of NTA issuance by USCIS in terms of PM 602-0050, which designates specific instances in which USCIS can issue an NTA. Failing to track the specific categories of PM 602-0050 inhibits USCIS from evaluating its effect.[83]

USCIS also does not track the number of NTAs terminated for ineffective service.[84] ICE generally rejects NTAs that do not fall within its priorities, but similarly does not maintain any such data. ICE specifically stated that they do not track the number of NTAs rejected, terminated or modified through the filing of a Form I-261, *Additional Charges of Deportability/Removability*.[85]

Likewise, EOIR confirmed that they reject technically and legally insufficient NTAs, but they do not track these rejections. EOIR first explained that they enter termination information into their electronic case tracking system, but this system does not distinguish between NTAs generated by USCIS, ICE or CBP. Second, EOIR stated that they do not track the number of NTAs modified by ICE with a Form I-261. There is no mechanism for EOIR to communicate problems or issues to the agency that drafts and serves the NTA.[86]

Tracking insufficient NTAs should be a priority for the agency. Through tracking and proper classification, the agency would be able to collect and evaluate data to inform and guide efficiency and training efforts while protecting administrative safeguards, including proper service and notification to USCIS customers. According to USCIS, the agency properly serves NTAs in accordance with the 2006 NTA SOP by mailing to the last known address. However, current agency guidance does not explain how all USCIS offices should resolve the issue of an undeliverable NTA with EOIR or ICE. Undeliverable NTAs especially present a problem when a USCIS office receives the returned NTA, but no longer has the A-file in its possession. While USCIS service centers have national procedures and Asylum Office have some locally developed procedures to address the aforementioned issue, USCIS acknowledged that field offices do not take any further action to reissue the NTA.[87] The fact that Asylum Offices and field offices have no standard procedure in place for undelivered NTAs, such as notifying a contact point within ICE or requesting return of the A-file, leaves open the strong possibility that ICE will remain unaware of the issue. If not properly communicated to ICE and EOIR, this common error can result in dire consequences for the respondent, most notably an *in absentia* order of removal.[88]

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[83] *See supra* note 15 at page 46. The authors of "To File or Not to File" concluded that DHS lacks a mechanism to track NTA data. In the report, they state, "…the current system does not provide a mechanism for ensuring that the immigration agencies are consistently exercising favorable prosecutorial discretion in appropriate cases, as they decide whether to issue, cancel or file an NTA. As an initial matter, the NTA form itself does not explicitly and consistently indicate which agency issued the NTA."

[84] Information provided by USCIS (Mar. 22, 2013). USCIS further stated that the agency does not generally maintain a system to track the number of NTAs returned to USCIS by ICE, CBP or EOIR due to erroneous information or faulty drafting. The agency also does not track how many of these returned NTAs were mailed again or delivered in person to the same respondent. According to USCIS, the agency "does not track the number of NTAs returned as undeliverable on a national level." Information provided by USCIS (Oct. 1, 2013).

[85] Information provided by ICE (May 16, 2013).

[86] Information provided by EOIR (June 24, 2013).

[87] Information provided by USCIS (Oct. 1, 2013).

[88] Failing to notify ICE of an undelivered NTA also directly contradicts current DHS priorities to enhance national security, public safety, and the integrity of the immigration system.

Better coordination is also needed to notify individuals when ICE terminates a USCIS-issued NTA, particularly prior to its filing before EOIR. USCIS states that there are different procedures across the country regarding how and when agency staff communicates with ICE during the NTA issuance process. USCIS officials further explained that, if ICE decides to terminate the NTA, ICE attorneys usually place a note on the file stating "not served."[89] ICE officials have stated that upon terminating the NTA prior to its filing with EOIR, they do not notify the respondent.[90] Better coordination would ensure that the administrative safeguards are in place, ensuring proper notice to a respondent that he or she will no longer be placed in removal proceedings.

EOIR recognizes that insufficient NTAs result in costs to the court. While EOIR does not track or maintain records associated with the costs of returned or corrected NTAs, it explains that even the submission of a Form I-261 filed by ICE attorneys may result in "additional adjournments and/or delays in proceedings if issues are contested or respondents require additional time to review and prepare to contest such additional charges."[91] Also, EOIR generally explains that the termination or rejection of an NTA can lead to:

> ….wasted immigration judge time; wasted hearing slots; clerical time; and possibly interpreter time. In addition, a faulty NTA that contains errors as to the alleged charges of removability may cause an alien to remain detained unnecessarily, and creates hardships for the immigration court in adjudicating the case. Such errors adversely impact the timely adjudication of a particular case as well as other cases on the detained docket.[92]

Not only does the termination of insufficient NTAs affect the court, it also results in negative consequences for the individuals placed into removal proceedings. In one case example brought to the attention of the Ombudsman, an improperly issued NTA caused unnecessary harm to a mother and daughter who applied for adjustment of status together. Their attorney explained that, "[h]ad [USCIS] not issued a legally improper NTA the case would have been approved in 4 to 6 months. Instead, the removal proceedings made the process one that extended into approximately a year and a half."[93]

Administrative safeguards, through enhanced coordination and nationally standardized procedures, can help avoid the problems caused by legally and technically insufficient NTAs. USCIS has already recognized the need for coordination by responding to previous Ombudsman recommendations. The Ombudsman's 2010 Annual Report recommended that USCIS coordinate with ICE and EOIR to create one document specifying each agency's responsibilities

[89] Information provided by USCIS (Jul. 12, 2013).
[90] Information provided by ICE (May 16, 2013).
[91] Information provided by EOIR (June 24, 2013).
[92] *Id.*
[93] Information provided by stakeholders (Oct. 31, 2013).

within the removal process.[94] On November 9, 2010, USCIS issued a response concurring with the Ombudsman's recommendation.[95]

CONCLUSION

Federal courts have long recognized that deportation is a severe penalty that is not to be imposed without reliable procedural and due process protections. Perhaps the most basic of these protections is an individual's right to access due process through the immigration courts, and the right to understand, through receipt of a legally valid charging document, the nature and potential consequences of removal proceedings. When attorneys for the government are not required to play any role in the creation, review, or issuance of NTAs, there is a heightened risk that these charging documents may not conform to policy and operational directives, or even statutory or regulatory requirements. Improving DHS guidance and increasing attorney review will, therefore, ensure that a streamlined removal system affords fairness and due process.

The collective commitment of DHS through USCIS, ICE and CBP is also important to improving administrative and procedural safeguards. As these agencies have implemented key enforcement priorities to enhance national security, public safety, and the integrity of the immigration system, they must also seek to achieve efficiency and fairness through increased coordination and uniform implementation. Adoption by USCIS of the aforementioned recommendations will improve the quality and consistency of NTAs.

[94] Ombudsman Annual Report to Congress (June 30, 2010).
[95] USCIS Response to the Citizenship and Immigration Services Ombudsman's 2010 Annual Report (Nov. 9, 2010); http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Annual%20Reports/cisomb-2010-annual-report-response.pdf (accessed Feb. 13, 2013). USCIS first recognized the difficulty for unrepresented individuals to navigate through the highly complex immigration law and process of removal proceedings with ICE, USCIS and EOIR. USCIS then explained that a multi-agency docket efficiency working group was convened to focus, on among other issues, improving communications and processes related to removal proceedings, thereby, decreasing cases pending on the EOIR docket and ensuring expeditious adjudication by USCIS.