PRACTICE ADVISORY[1]

June 2014

NOTICES TO APPEAR: LEGAL CHALLENGES AND STRATEGIES

The Notice to Appear ("NTA")[2] 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.[3] Once an NTA is filed with the Executive Office for Immigration Review ("EOIR" or "immigration court"), jurisdiction vests with the immigration court and noncitizens enter into proceedings that will determine whether they may be removed from the United States.[4]

This practice advisory provides guidance regarding NTAs to attorneys representing noncitizens who: 1) likely will be issued an NTA; 2) have been issued an NTA which has not yet been filed with EOIR; or 3) have been issued an NTA which has been filed with EOIR. The advisory provides an overview of the legal requirements for an NTA and strategies available to attorneys to cancel, mitigate, or challenge the contents of the NTA. It also sets forth scenarios when it might be beneficial to petition the government to issue an NTA against a noncitizen. In addition to presenting possible legal and procedural arguments, the advisory presents possible strategies for attorneys wishing to seek prosecutorial discretion in connection with NTA issuance and filing.

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[1] Copyright 2014. This practice advisory was drafted by Penn State Law's Center for Immigrants' Rights students Lauren Hartley ('15) and James Gilbert ('14) under the supervision of Professor Shoba Sivaprasad Wadhia, the Center's director. The authors thank ABA Commission on Immigration members Professor Denise Gilman, Cyrus D. Mehta, and Michelle Lamar Saenz-Rodriguez and American Immigration Council staff Mary Kenney and Emily Creighton for their invaluable editorial feedback, in addition to the other staff members of those organizations who participated in the project, including Melissa Crow, Beth Werlin, Tanisha Bowens-McCatty, and Seth Garfinkel.

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[2] Following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, former exclusion and deportation proceedings were merged into removal proceedings and the prior charging document, titled an Order to Show Cause, was replaced with the Notice to Appear. *See Vartelas v. Holder*, 132 S.Ct. 1479, 1480-81 (2012).

[3] *See* INA § 239.

[4] 8 C.F.R. § 1003.14(a) (2014); 8 C.F.R. § 1239.1 (2014); *see also* INA § 240 (2012).

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I. BACKGROUND

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[5] or expedited removal.[6] In other words, it is issued to place an individual in a full removal proceeding before an immigration judge, which will determine whether the noncitizen is to be removed or allowed to remain in the U.S. Various officials within DHS are empowered to issue NTAs in a variety of circumstances.[7] This section describes the three major components within DHS responsible for issuing most NTAs.

1. ICE

U.S. Immigration and Customs Enforcement ("ICE") is an arm of DHS which conducts investigations and enforcement and removal operations.[8] ICE officers may issue NTAs,[9] and ICE trial attorneys represent the government in removal proceedings against noncitizens before immigration judges.[10] Agents authorized to issue NTAs exercise considerable discretion in cases originating from their own offices and in cases referred to them by other agencies.[11] ICE

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[5] *See* INA § 241(a)(5). Reinstatement of removal is a summary removal procedure that generally applies to noncitizens who return to the U.S. after a prior removal. For an overview of reinstatement of removal, see TRINA REALMUTO, REINSTATEMENT OF REMOVAL, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND AMERICAN IMMIGRATION COUNCIL'S LEGAL ACTION CENTER (April 29, 2013) *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/2013-4-29%20Reinstatement%20of%20Removal.pdf.

[6] *See* INA § 235(b)(1)(A)(i). Expedited removal is a form of summary removal that may apply to noncitizens seeking entry or who have recently entered the country. By statute, they can be removed without any further proceedings.

[7] Regulations identify over 40 categories of immigration officials authorized to issue an NTA. 8 C.F.R. § 239.1 (2014). In 2012, ICE issued 60.1% of all NTAs, USCIS issued 17.1%, CBP's Office of Border Patrol issued 13.5% and CBP's Office of Field Operations issued 9.3%. OFFICE OF IMMIGRATION STATISTICS, POLICY DIRECTORATE, ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS, DEPARTMENT OF HOMELAND SECURITY (Dec 2013), *available at* https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf.

[8] *Overview*, ICE, http://www.ice.gov/about/overview/ (last visited April 4, 2014).

[9] 8 C.F.R. § 239.1 (2014).

[10] *Office of the Principal Legal Advisor*, ICE, http://www.ice.gov/about/offices/leadership/opla/ (last visited March 23, 2014). OPLA is the Office of Principal Legal Advisor for ICE. In every ICE jurisdiction there is a Chief Counsel, who supervises staff in the main office and may supervise additional sub-offices in the jurisdiction. For a list of OPLAs, see *About ICE: Office of the Principal Legal Advisor*, ICE, http://www.ice.gov/contact/opla/ (last accessed February 28, 2014).

[11] *See, e.g.*, Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and

categorizes cases in terms of what it considers as its three highest priorities: 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."[12] ICE, however, is not limited to issuing NTAs for cases in these three priority categories.[13]

2. USCIS

U.S. Citizenship & Immigration Services ("USCIS") is tasked with overseeing lawful migration to the U.S.,[14] and may issue an NTA when it finds a noncitizen has not complied with regulations governing admission or maintaining lawful status after admission. USCIS often encounters such cases when an individual applies for an immigration benefit, such as adjustment of status or naturalization, and the benefit is denied.

On November 7, 2011, USCIS issued a policy memorandum providing guidance on issuance of NTAs and referral to ICE.[15] USCIS *will* issue an NTA in two types of cases:

- when required by statute or regulation[16]; and
- fraud cases, with a statement of findings substantiating fraud.[17]

USCIS *may* issue an NTA in the following types of cases:

- national security cases, which are governed by guidance from the Fraud Detection and National Security Directorate;
- cases involving fraud on Form N-400, the Application for Naturalization;[18] and

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Removal of Aliens (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [hereinafter Morton Priorities Memo].

[12] *Id.*

[13] CENTER FOR IMMIGRANTS' RIGHTS, PENNSYLVANIA STATE UNIVERSITY DICKINSON SCHOOL OF LAW, TO FILE OR NOT TO FILE 16 (OCT. 2013), *prepared for* the American Bar Association's Commission on Immigration, *available at* https://law.psu.edu/sites/default/files/documents/pdfs/NTAReportFinal.pdf [hereinafter TO FILE OR NOT TO FILE] (noting anecdotal evidence that a significant number of noncitizens who do not fall into the three priority categories have also been issued NTAs).

[14] *See About Us*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/aboutus (last visited March 22, 2014).

[15] *See* USCIS Policy Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (November 7, 2011), *available at* USCIS.gov/NTA [hereinafter USCIS Policy Memo].

[16] Instances where NTA issuance is required by statute or regulation include: termination of Conditional Residence Status; denial of Petition to Remove the Conditions of Residence; denial of Petition of Entrepreneur to Remove Conditions; termination of refugee status by the District Director; certain denials of adjustment of status under the Nicaraguan Adjustment and Central American Relief Act and the Haitian Refugee Immigration Fairness Act; and certain actions in asylum and related cases. USCIS Policy Memo, *supra* note 13, at 2-3, 7-8.

[17] *See id.*, at 2-3.

[18] *See id.*, at 7.

- a limited category of "other" cases, *e.g.*, where applicants request NTA issuance either in order to renew adjustment of status or denied N-400 applications, or where asylum applicants seek NTA issuance to a non-dependent relative for family reunification purposes.

USCIS will refer to ICE all cases involving criminal convictions that appear to render the noncitizen inadmissible or removable[19] and National Security Entry Exit Registration System (NSEERS) violator cases; if ICE declines to issue an NTA , USCIS will not do so.[20]

3. CBP

U.S. Customs and Border Protection ("CBP") operates primarily at designated ports of entry and manages customs, immigration, security, and agricultural inspection duties.[21] CBP makes thousands of determinations daily concerning the admissibility of arriving noncitizens.[22] It also operates in the interior of the country, primarily through its component, the U.S. Border Patrol. If an arriving noncitizen[23] is deemed inadmissible, does not withdraw her request for admission, is not placed in expedited removal proceedings, and does not make an asylum claim, then CBP will issue an NTA.[24] The Border Patrol made 364,768 apprehensions in 2012,[25] but issued only 31,506 NTAs in that same year.[26]

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[19] *See,* USCIS Policy Memo, *supra* note 13. Some of the egregious public safety [EPS] cases listed in the memo include: murder, rape or sexual abuse of a minor under INA § 101(a)(43)(A); offenses relating to explosive materials or firearms under INA § 101(a)(43)(E); crimes of violence for which the term of imprisonment imposed, or where the penalty for a pending case, is at least one year under INA § 101(a)(43)(F); offenses relating to child pornography under INA § 101(a)(43)(I); offenses relating to peonage, slavery, involuntary servitude, and trafficking in persons under INA § 101(a)(43)(K)(iii); offenses relating to alien smuggling under INA § 101(a)(43)(N). *Id.* at 3-4. The policy memo does not provide similar examples of non-egregious public safety cases, but simply refers to "criminal offense[s] not included on the EPS list." *Id*. at 5.

[20] USCIS Policy Memo, *supra* note 13, at 3-6.

[21] *See About CBP*, U.S. CUSTOMS AND BORDER PROTECTION, http://www.cbp.gov/about (last visited March 22, 2014).

[22] *Id.*

[23] 8 C.F.R. § 1.1(q) (2014) defines "arriving aliens" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry" or one who is in transit or interdicted at sea.

[24] Just a few reasons CBP may issue an NTA include: noncitizen refuses voluntary return, noncitizen makes a non-frivolous claim to asylum, or noncitizen possesses false documentation. TO FILE OR NOT TO FILE, *supra* note 13, at 17 (citing Letter from Martha Terry, U.S. Customs & Border Protection FOIA Division, to Shoba Sivaprasad Wadhia 2 (July 10, 2013), *available at* http://law.psu.edu/_file/Immigrants/FOIA-CBP-NTA.pdf).

[25] OFFICE OF IMMIGRATION STATISTICS, *supra* note 7, at 3, table 1.

[26] *Id*. at 5, table 4.

B. What Are the Requirements of an NTA?

INA § 239 sets forth the elements an NTA should include.[27] Below is a description of the four key elements of an NTA, how they relate to removal proceedings, and where they are found on the NTA.[28] Practitioners should note that related regulatory language states that "omission of any of these items shall not provide the alien with any substantive or procedural rights."[29] Whether this regulation imposes a valid restriction on the statute is beyond the scope of this practice advisory.

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

Under INA § 239(a)(1) (2012), 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.[30]

- **Nature of the Proceeding**

The nature of the proceedings is represented on the NTA by three checkable boxes labeled: 1) "You are an arriving alien", 2) "You are an alien present in the United States who has not been admitted or paroled", or 3) "You have been admitted to the United States, but are deportable for the following reasons stated below." Option one, "arriving aliens," designates applicants for admission arriving at a port of entry or intercepted at sea.[31] 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.[32] The Attorney General may grant "parole", or conditional entry, to certain noncitizens on a discretionary case-by-case basis for "urgent humanitarian reasons or significant public

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27 INA § 239.

28 *See* Part V. Appendix, sample NTA form.

29 8 C.F.R. § 1003.15 (2014) is an accompanying regulation promulgated by EOIR further defining the administrative information that must be included for the immigration court in the NTA.

30 INA § 239(a)(1).

31 8 C.F.R. § 1.1(q) (2014).

32 INA § 101(a)(13)(A). *See also, Matter of Quilantan,* 25 I&N Dec. 285 (BIA 2010) (holding that a noncitizen seeking to prove she has been admitted under INA § 101(a)(13)(A) need prove only procedural regularity in her entry; she is not required to prove that she was questioned by immigration authorities or admitted in a particular status); INSPECTION AND ENTRY AT A PORT OF ENTRY: WHEN HAS THERE BEEN AN ADMISSION?, AMERICAN IMMIGRATION COUNCIL, LEGAL ACTION CENTER, (Jan 19, 2013) *available at* http://www.legalactioncenter.org/sites/default/files/inspection_and_entry_at_a_port_of_entry_4-11-13_fin_0.pdf (A person who was simply "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.).

benefit."[33] 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 present in the country in violation of the conditions under which they were admitted, which includes the grounds listed in INA § 237. If the third box is checked, it indicates that the noncitizen has been admitted, but will be charged with deportability under a ground listed in INA § 237.

A noncitizen who believes she has been improperly designated as either an arriving alien or an alien present without having been admitted or paroled must prove she was admitted.[34] Because fewer avenues for relief are available to noncitizens deemed arriving aliens and to noncitizens deemed present but not admitted or paroled, an incorrectly marked box may limit a noncitizen's options for relief.

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

The next section of the NTA is where the issuing officer lists the allegations against the noncitizen which the government alleges give rise to the prima facie case of removability. DHS is required to allege and prove that the individual is not a U.S. citizen, as U.S. citizens are not deportable.[35] The government's allegations may be derived from interviews with applicants themselves or from documents, such as records of conviction or an application for asylum or lawful permanent residence, submitted by the noncitizen to USCIS. These applications or records may be factually untrue or the applicable facts may have been transcribed incorrectly by the issuing officer, 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.[36] 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.[37]

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 the immigration judge ("IJ"). It is possible to change venue after the NTA has been filed by filing a motion to change venue and

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[33] INA § 212(d)(5).

[34] *See Matter of Quilantan*, *supra* note 32.

[35] *See* Section II.A.2 *infra*, which notes that once the government proves birth outside the country, the burden shifts to the noncitizen to rebut a presumption of non-citizenship.

[36] *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).

[37] 8 C.F.R. § 1240.10(e) (2014); *see KaCheung v. Holder*, 678 F.3d 66, 70 (1st Cir. 2012) (affirming federal regulations and court precedent that the government may substitute or add charges at any time during removal proceedings).

demonstrating good cause.[38] Although the statute states that the NTA should include the time and place of the removal proceedings,[39] the regulations require only that DHS provide this information "where practicable."[40] If DHS fails to provide this information, then the immigration court is responsible for providing notice of the time and place for the hearing.[41]

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.[42] 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.[43] 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. The noncitizen is now on notice, for example, that proceedings are being initiated and that he or she has a duty to report all address changes to the immigration court.[44] It also can lead to invocation of the stop-time rule, meaning it ends periods of presence or residence in the U.S., which can make individuals ineligible for certain forms of immigration relief.[45]

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[38] 8 C.F.R. § 1003.20 (2014).

[39] INA § 239(a)(1)(G)(i).

[40] 8 C.F.R § 1003.18(b) (2014).

[41] *Id.* At least three circuits have held that the notice requirement is satisfied when an NTA is issued without a date or time for removal proceedings but is followed up by a hearing notice, issued by the immigration court, which includes such information. *See Popa v. Holder*, 571 F.3d 890, 894-96 (9th Cir. 2009); *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009); *Dababneh v. Gonzales*, 471 F.3d 806 (7th Cir. 2006).

[42] INA § 239(b)(1).

[43] INA § 239(b)(2); 8 C.F.R. § 1003.61(a) (2014).

[44] 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) (2014)); 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) (2014)); 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)).

[45] The statute states that service of an NTA ends the accrual of continuous physical presence or continuous residence needed to qualify for cancellation of removal, INA § 240A(d)(1)(a), and the BIA has called this the "stop-time rule." *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011).

Service by mail is sufficient if there is proof the government attempted to deliver the NTA to the last address provided by the noncitizen.[46] 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.[47] 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. 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, the regulation states that DHS should serve only the person in charge of the institution in which they are confined.[48] For those who are deemed mentally incompetent, whether or not they are confined in an institution, and minors under the age of 14, the regulation states that DHS should serve the NTA upon the person with whom they reside, and when possible, serve a near relative, guardian, committee or friend.[49]

C. How Does DHS's Filing of the NTA with EOIR Affect My Case?

The filing of the NTA with the immigration court is a significant step in the removal process. Filing vests jurisdiction with the immigration court,[50] and impacts the availability of prosecutorial discretion. Prior to filing, various DHS agencies have significant discretion to decide whether to issue an NTA. After issuance, DHS continues to have discretion to proceed with removal proceedings by filing the NTA with the court or cancelling the NTA altogether – and thus cancelling removal proceedings.[51] In the post-filing stage, the scope of the discretion narrows, most often consisting of joint motions to administratively close or terminate proceedings which must be granted by the IJ.[52] Nonetheless, some practitioners feel that prosecutorial discretion is easier to obtain after the NTA is filed. In addition, there is a higher prevalence of training and awareness regarding prosecutorial discretion among IJs and ICE trial attorneys as compared to most NTA-issuing officers.[53] Also, in practical terms, counsel is often not retained until after the filing of the NTA, which precludes an attorney from seeking a positive exercise of prosecutorial discretion – for example, by persuading DHS to cancel an issued NTA or not to file the issued NTA with EOIR – during the pre-filing stage.[54]

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[46] INA § 239(c); 8 C.F.R. § 1003.15 (2014).

[47] *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003); *In re Grijalva*, 21 I&N Dec. 27 (BIA 1995).

[48] 8 C.F.R. § 103.8(c)(2)(i) (2014).

[49] 8 C.F.R. § 103.8(c)(2)(ii) (2014).

[50] 8 C.F.R. §§ 1003.14(a), 1239(a) (2014).

[51] TO FILE OR NOT TO FILE, *supra* note 13, at 12-17.

[52] *Id.* at 18.

[53] Survey Response, New York Practitioner (on file with authors). Notes from the Field were gathered via a survey prepared and distributed by the authors, titled, "A Questionnaire for Attorneys and Advocates: Legal Challenges and Strategies Related to Notices to Appear." *See* appendix for survey form. All survey responses are on file with the authors. Hereinafter we will designate the survey responses as "Survey Response, [Geographic Designator] Practitioner." A number follows where more than one survey respondent shared geographic locations.

[54] *See, e.g.*, 8 C.F.R. § 239.2 (2014).

Note from the Field: "As a practical matter, it is after the NTA is filed that there is a better opportunity to invoke discretion with a more receptive [trial attorney] who is conversant with prosecutorial discretion rather than an ICE [enforcement and removal operations officer]. The [trial attorney] will be more amenable to join in a motion to administratively close or terminate a removal case in order to reduce caseload."

- New York Practitioner[55]

D. What Practical Concerns Should I Consider in Response to an NTA?

Immigration attorneys must consider the risks of challenging NTAs and/or seeking prosecutorial discretion, just as they would weigh the risks of any course of legal action for a client. They should educate their clients on the possible outcomes and relative likelihood of success of various options after carefully evaluating 1) whether viable relief would be available in removal proceedings or outside of removal proceedings, before USCIS, if proceedings are terminated; 2) what options would result in the most permanent form of relief for the client; 3) whether more time or more information is needed to utilize a particular strategy; 4) whether contesting removal would have any impact on the ultimate goal of discretionary relief; 5) whether a particular strategy would negatively impact an existing relationship with local DHS immigration judges, incur ill will at the expense of the client or bring attention to negative facts about the client that might not otherwise have been known.[56] Immigration lawyers also should ensure their clients understand the financial, procedural, temporal and legal ramifications of certain strategies; some clients may simply want to wrap up their cases as soon as possible without incurring further expense or, for detained clients especially, enduring the additional psychological and emotional toll any additional time in detention may take.[57]

E. When Should I Consider and How Should I Pursue Prosecutorial Discretion?

In the immigration context, when an agency favorably exercises prosecutorial discretion, "it essentially decides not to assert the full scope of [enforcement] authority available to the agency in a given case."[58] Prosecutorial discretion can be considered as a strategy to pursue in connection with NTAs, along with other legal or procedural strategies.

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[55] Survey Response, New York Practitioner.

[56] National Immigration Project, Presentation at the Seattle Seminar: Fundamentals of Evidence (Oct. 14, 2009) (on file with authors).

[57] At the end of FY 2013, the national average number of days between recorded filing date and the date a case was closed was 562 days. *Immigration Court Backlog Up 85% from Five Years Ago*, TRAC (Oct 25, 2013), http://trac.syr.edu/whatsnew/email.131025.html.

[58] 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) available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [hereinafter Morton Prosecutorial Discretion Memo]. For a general discussion of prosecutorial discretion strategies, see MARY KENNEY, LEGAL ACTION CENTER, AMERICAN IMMIGRATION

> **Note from the Field:** "In some cases, we charge our clients based on the amount of time we spend on the case. As a cost-benefit analysis, many times prosecutorial discretion techniques appear to have so little chance of succeeding, the clients tell us not even to try."
>
> - New Jersey Practitioner[59]

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.[60] In some jurisdictions, there are specific individuals or email addresses designated to receive requests for prosecutorial discretion and joint motions.[61] Attorneys should check with local immigration law practitioners and professional organizations, such as AILA or ABA chapters, for relevant information and tips.

> **Note from the Field:** "We do pursue prosecutorial discretion in cases where it seems like the best strategy, usually because the client is not eligible for any form of relief that would be more permanent. The process can often be extremely time-consuming, because ICE is not always responsive and there are no firm guidelines

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COUNCIL, PRACTICE ADVISORY, PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT (updated June 24, 2011) *available at* http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf. For a concise history of DHS internal memos urging the exercise of prosecutorial discretion, see TO FILE OR NOT TO FILE at 24-33, (citing most importantly Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, on Prosecutorial Discretion (Oct. 24, 2005); Morton Priorities Memo, *supra* note 13; John Morton, Director, U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf; John Morton, Director, U.S. Immigration & Customs Enforcement, on Prosecutorial Discretion: Certain Crime Victims, Witnesses and Plaintiffs (Jun. 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf).

[59] Survey Response, New Jersey Practitioner.

[60] AMERICAN IMMIGRATION LAWYERS ASSOCIATION, REPRESENTING CLIENTS IN IMMIGRATION COURT 103 (2009-2010). For a fuller discussion of how to make a request for prosecutorial discretion, see MARY KENNEY, *supra* note 58.

[61] A joint motion is a form of prosecutorial discretion in which 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. 8 C.F.R. § 1003.23(b)(4)(iv) (2014). As a practical note, joint motions typically arise after the filing of the NTA with the immigration court.

> that we can invoke to insist on consideration of our requests. We have found that it is much easier to deal with ICE Office of Chief Counsel than ICE ERO in discussing prosecutorial discretion. As a result, it is often easier to reach an agreement after the NTA is filed and more difficult to discuss prosecutorial discretion in connection with the NTA issuance process, which is usually conducted by ICE ERO."
>
> - Texas Practitioner 1[62]

II. PRE-FILING STRATEGIES

While it is not always possible to address an NTA before it is filed with the court, attorneys should consider the possibility of seeking prosecutorial discretion during this pre-filing stage in appropriate cases. Prosecutorial discretion at this stage includes the decision whether or not to file an NTA, what charges to include in an NTA, whether to cancel an issued NTA, and whether to amend an NTA that has been issued before it is filed.[63] Nationally, DHS has issued internal memos and policies encouraging the exercise of prosecutorial discretion as early as possible in the context of immigration proceedings, especially before removal proceedings begin.[64] National DHS policy discourages filing NTAs against noncitizens who do not fit stated "priority" enforcement categories: "aliens who pose a threat to national security or a risk to public safety;" "recent illegal entrants;" and "fugitive aliens."[65] A noncitizen outside of these three categories may obtain a favorable exercise of prosecutorial discretion to avoid filing of an NTA with the immigration court if she can convince the appropriate immigration official of the strength of the equities in her case.

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 contents of the NTA, postpone service of the NTA, or convince the issuing officer not to file or to cancel the NTA.

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62 Survey Response, Texas Practitioner 1.

63 Morton Prosecutorial Discretion Memo, *supra* note 58. This section draws upon the detailed description of prosecutorial discretion and NTAs found in TO FILE OR NOT TO FILE, *supra* note 13. In most cases, there is no meaningful difference between the time an NTA is issued and when it is filed, meaning there is not time for an attorney to intervene post-issuance but pre-filing.

64 *See* TO FILE OR NOT TO FILE, *supra* note 13, at 19-20.

65 *See* Morton Priorities Memo, *supra* note 58.

Note from the Field: "I could see this possibility [knowing an NTA will be issued] existing where you learn of an immigrant who has been arrested by local law enforcement and who will almost certainly be served with an NTA as a result of Secure Communities."[66]

- Texas Practitioner 1[67]

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?

One argument ICE officials have presented for not utilizing prosecutorial discretion before filing an NTA is that they often do not see details of a noncitizen's case until after they issue an NTA.[68] A client may have strong positive equities, but these are largely unknown to ICE prior to the commencement of removal proceedings.[69] Therefore, attorneys might use pre-filing negotiations as an opportunity to provide ICE with more client information. Different attorneys will make different decisions about what information to disclose at this stage; some will decide to disclose all relevant client information, while others may choose to present only client equities and minimize potentially negative facts. When determining what information should be shared, attorneys should consider the practical and strategic considerations mentioned above.[70]

1. Urging the Government Not to File an NTA or to Cancel an NTA that has been Issued but Not Filed

The decision to exercise prosecutorial discretion to decline to issue or file an NTA is particularly relevant where the noncitizen is eligible and has applied for another form of relief before USCIS – such as VAWA relief,[71] a U visa,[72] DACA,[73] adjustment of status,[74] or naturalization.[75] When

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[66] Secure Communities is a program established in 2008. Under the program, the FBI checks fingerprints sent taken by local and state law enforcement agencies are automatically checked against DHS immigration databases. If ICE suspects an arrestee is removable, an arrestee's fingerprints match a record in the immigration databases, ICE will often either take the individual into custody and then issue an NTA, or issue an NTA against individuals who have already been released by local law enforcement. The program has been criticized as an overly broad "dragnet." *See e.g.*, Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil Criminal Line*, 58 UCLA L. REV. 1819 (Aug. 2011) (describing the role and effect of the program in its interaction with state, local, and federal policies and the impact of criminal arrest on civil immigration issues).

[67] Survey Response, Texas Practitioner 1.

[68] Notes from Meeting between ICE-OPLA and Immigration Attorneys Following Up on the To File or Not to File Report 2 (November 21, 2013) (on file with the authors) [hereinafter ICE-OPLA Meeting Notes]. In the words of one ICE official, the government has a "thin" file before receiving the information elicited after filing the NTA.

[69] *See id.*

[70] *See supra* Section I.D ("What Strategic and Practical Concerns Should I Consider in Response to an NTA?").

[71] *See* INA §§ 204(a)(1)(A) (iii), (iv), or (vii) and §204 (a)(1)(B)(ii) or (iii);

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 the application is adjudicated.[76] 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.[77]

Officials authorized to *issue* an NTA may also cancel that 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 in fact 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.[78] 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, if there are compelling

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§ 245(a) and (c). VAWA relief (which stands for Violence Against Women Act) is an immigration benefit similar to an I-130 visa petition for a noncitizen relative, but is meant to allow the petitioner to seek status independently, without the involvement of their abusive U.S. citizen or LPR spouse or family member. For more information and the relationship between VAWA, U visas, and T visas, see *Violence Against Women Act (VAWA) Provides Protection for Immigrant Women and Victims of Crime*, AMERICAN IMMIGRATION COUNCIL, LEGAL ACTION CENTER, http://www.legalactioncenter.org/just-facts/violence-against-women-act-vawa-provides-protections-immigrant-women-and-victims-crime (last visited March 24, 2014).

[72] INA § 101(a)(15)(U) (definition and requirements). U visas are available to victims of crimes who agree cooperate with law enforcement in the prosecution of crimes. *See also* INA §§ 212(d)(14) (inadmissibility waiver), 214(p) (requirements), and 245(m) (adjustment of status applications).

[73] *See* Memorandum from Janet Napolitano, Secretary, Department of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), *available at* http://1.usa.gov/M5MZhH. DACA, or Deferred Action for Childhood Arrivals, is a program that allows certain noncitizens who arrived in the U.S. under age sixteen to obtain deferred action for two years, subject to renewal. *See also* USCIS Frequently Asked Questions Regarding DACA, USCIS, http://1.usa.gov/TJysu6.

[74] INA § 245.

[75] *See* INA §§ 312(a), 316(a), 318, 319(a), 334(b).

[76] *See* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 60, at 106; *see also* PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT, *supra* note 58.

[77] *Id*. See also the sample motion and practice advisories referenced in the index.

[78] 8 C.F.R. § 239.2 (2014). 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). *See also* Shoba S. Wadhia, Letter from Martha Terry, *supra* note 24.

humanitarian reasons to cancel the NTA or if the noncitizen does not fit within the DHS priority enforcement categories.

2. Negotiating With the Government on the Charges to Include/Exclude from the NTA and the Timing of Filing

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.[79] 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.[80] 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.[81]

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;[82] thus, a later service date might allow the noncitizen to accumulate the necessary period of residence for this type of relief.[83]

B. Can I Ensure an ICE Attorney Has Reviewed the NTA Before It is Filed?

The short answer to the question of whether an ICE attorney must review each NTA is: not at this time. In fall of 2013, the "To File or Not to File" report used a qualitative study of NTA filings as the basis for a recommendation that ICE consistently implement a program for attorney

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79 INA § 240(c)(2)(B).

80 INA § 240(c)(2)(A).

81 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* INSPECTION AND ENTRY AT A PORT OF ENTRY, *supra* note 32.

82 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. Note the stop-time rule does not apply to counting five years of permanent residence for LPRs.

83 AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 60, at 107.

review of NTAs.[84] In a follow-up meeting with ICE representatives, an ICE-OPLA official stated that ICE has adopted an internal attorney review program in most ICE offices.[85] According to ICE, in offices that have implemented the attorney review program, every NTA should be reviewed by an ICE attorney before it is filed.[86] This measure is meant to improve the factual and legal sufficiency of NTAs and to ensure that ICE does not issue NTAs as a matter of routine, but considers prosecutorial discretion for all cases. Anecdotal evidence suggests that this policy has not been implemented by all ICE offices.[87] A practitioner might consider making an inquiry about the attorney review program; however, attorneys should note that there is no public policy memorandum by ICE officially conveying its intent to establish an agency-wide attorney review program.

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

In some cases, there may be a benefit to placing a non-citizen client into 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,[88] administrative removal,[89] or reinstatement of removal orders[90] 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 far greater procedural protections as well.[91] Of course, the attorney must verify the client's willingness to undergo the

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[84] TO FILE OR NOTE TO FILE, *supra* note 13. In 2011, OPLA conducted a two-month program to review certain categories of cases for prosecutorial discretion, including cases where an NTA had not yet been filed with EOIR. Data on the cases of NTAs that were not filed because of the program has not been made publicly available, but the program shows ICE is aware of the desirability of attorney review of NTAs with an eye to prosecutorial discretion possibilities. *See* TO FILE OR NOT TO FILE, *supra* note 13, at 60-62 (citing Peter Vincent, Principal Legal Advisor, U.S. Immigration & Custom Enforcement, on Case-By-Case Review of Incoming and Certain Pending Cases 1 (Nov. 17, 2011); *Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities,* U.S. Immigration & Customs Enforcement (Nov. 17, 2011)).

[85] ICE-OPLA Meeting Notes, *supra* note 67.

[86] *See* TO FILE OR NOT TO FILE, *supra* note 13, at 60-62 (recommending the attorney review program); ICE-OPLA Meeting Notes, *supra* note 67 (noting ICE adoption of the program).

[87] ICE-OPLA Meeting Notes, *supra* note 67; *see also* TO FILE OR NOT TO FILE, *supra* note 13, at 51-52 (including a former IJ's opinion that lack of attorney review was a primary contributor to the inconsistent and sloppy NTAs he frequently encountered, with non-attorney filing authorities often relying on boilerplate forms.

[88] INA § 235.

[89] INA § 238.

[90] INA § 241(a)(5).

[91] *Compare* INA § 238(b) (expedited removal procedures) *with* INA § 241(a)(5) (regular or formal removal procedures). *See also* TO FILE OR NOT TO FILE *supra* note 13, at 7 n.9 (citing

formal, and often lengthy, removal process, especially if the client is facing a long period of detention.[92] If a client simply wishes to return home as quickly as possible, it might be inadvisable to seek an NTA and full removal proceedings.

In rare cases, a client who is not facing removal proceedings at all may wish to receive an NTA if he or she has a particularly strong case for a form of relief that is only available in formal removal proceedings – such as non-LPR cancellation of removal under INA § 240A(b).[93] DHS has the discretion to issue an NTA and place a person potentially eligible for non-LPR cancellation of removal into formal removal proceedings governed by INA § 240.[94] Since a grant of cancellation of removal results in LPR status, practitioners whose clients have particularly strong cases might consider requesting that DHS initiate removal proceedings as a means to obtain cancellation. There are reports that some DHS offices have been willing to issue an NTA in this manner; however, other offices have been unwilling to do so.[95]

> **Note from the Field:** "In Chicago, [it] is virtually impossible [to get DHS to agree to issue an NTA]. There have been rumors of one or two NTA's filed upon request over the past several years, but generally speaking DHS is not interested in entertaining a request to issue an NTA because of compelling cancellation of removal facts."
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> \- Chicago Practitioner[96]

David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012), *available at* http://www.yalelawjournal.org/images/pdfs/1119.pdf; KATE M. MANUEL AND TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES (2013), *available at* http://www.fas.org/sgp/crs/misc/R42924.pdf).

92 At the end of FY 2013, the national average number of days between recorded filing date and the date a case was closed was 562. *Immigration Court Backlog Up 85% from Five Years Ago*, TRAC (Oct 25, 2013), http://trac.syr.edu/whatsnew/email.131025.html.

93 INA § 240A(b). Importantly however, attorneys with clients who entered on a visa waiver program should note that the noncitizen would have waived the right to a full removal hearing, and would therefore be ineligible for a formal removal hearing. *See* INA § 217 (establishing the visa waiver program); 8 C.F.R. § 235.3(b)(10) (2014) (listing those who have entered on a visa waiver as a category of noncitizens subject to expedited removal procedures outlined in the same section, unless subject to one of several exemptions including asylum claims and claims of US citizenship).

94 *See, e.g., Matter of E-R-M & L-R-M*, 25 I. & N. Dec. 520 (BIA 2011).

95 Survey Response, Chicago Practitioner.

96 *Id.*

Note from the Field: "We would be extremely cautious about suggesting that a client can be placed into removal proceedings in order to apply for cancellation…Cancellation cases are extremely difficult to win, and it may be better for individual respondent to continue without papers under the radar rather than risk the possibility of losing the cancellation case and getting deported. Of course, when you seek to place your client into removal proceedings, you do not know which judge you might draw."

- Texas Practitioner 1[97]

Note from the Field: "One of the AFODs [Area Field Office Directors] has instructed us that [USCIS issuing an NTA in order to initiate removal proceedings and apply for cancellation] is the procedure for initiating proceedings. Our client has an extremely strong case for cancellation, so we sent a brief and a packet of corroborating evidence to the AFOD of USCIS in Philadelphia, requesting that USCIS issue our client a Notice to Appear. We are now waiting to hear back from USCIS."

- Pennsylvania Practitioner 2[98]

Note from the Field: "I have taken clients to ICE to have NTAs issued to proceed with cancellation. But, never through USCIS."

- Pennsylvania Practitioner 3[99]

III. POST-FILING STRATEGIES

After the NTA is filed with the court, jurisdiction vests with EOIR and the interest of the United States is represented through a trial attorney from ICE.[100] DHS has a greatly diminished discretionary role in post-filing proceedings.[101] Although discretion is reduced, an attorney for

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97 Survey Response, Texas Practitioner 1.

98 Survey Response, Pennsylvania Practitioner 2.

99 Survey Response, Pennsylvania Practitioner 3.

100 8 C.F.R. § 1003.14(a) (2014).

101 *See* Daniel M. Kowalski, *BIA Offers New Standard for Administrative Closure, Highlights Importance of Decisional Independence*, LEXISNEXIS LEGAL NEWSROOM IMMIGRATION LAW, http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2012/02/02/bia-offers-new-standard-for-administrative-closure-highlights-importance-of-decisional-independence.aspx (last visited on March 4, 2014) (citing Shoba Sivaprasad Wadhia, AILA InfoNet Doc. No. 12020259 (posted Feb. 2, 2012)).

the respondent may continue to attempt to persuade ICE attorneys to exercise what discretion is still available.[102] In most cases, at this stage, ICE's exercise of discretion takes 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). In addition, an attorney for the respondent may 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.

> **Note from the Field:** "It should first be noted that protocol for requesting a joint motion to terminate or other type of motion after the NTA has been filed varies greatly. In most jurisdictions, the best way to make an initial request for a review of a joint motion is either through email or phone contact with the ICE Office of Chief Counsel. Once contact has been made, a lawyer should review the facts of the case and make a "pitch" on behalf of the client. This is the one opportunity where the lawyer can tell the story for the client making the request more personal and not just a formal written request with no background information. Many times the ICE trial attorney will request evidence or ask for time to review the file before making a decision on the request. There may be negative information that is contained in the file that can be overcome based on recently acquired equities or other policy considerations. In any situation, it can only work to your client's advantage to make personal contact before filing the motion. Like in any professional situation, personal relationships can be very helpful when negotiating with opposing counsel. Some jurisdictions will ask counsel to prepare the motion and others will require counsel to use language that has been deemed "acceptable" to the office of chief counsel. Attorneys should speak to local counsel when filing a request outside of their normal jurisdiction."
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> \- Texas Practitioner 2[103]

> **Note from the Field:** "We were able to negotiate with ICE to drop one of the charges on the NTA after it was filed. As a result, we were able to apply for relief for which our clients would have otherwise been ineligible and to narrow the scope of the merits proceedings."
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> \- Texas Practitioner 1[104]

A. Administrative Closure

"Administrative closure" is a procedure that suspends immigration proceedings by removing the case from the immigration court's active docket.[105] When an IJ administratively closes a case,

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[102] Once the NTA has been filed and proceedings initiated, the noncitizen named in the NTA is generally referred to as the respondent.

[103] Survey Response, Texas Practitioner 2.

[104] Survey Response, Texas Practitioner 1.

the government need not issue or file a new NTA to renew proceedings, as the case is still on the immigration court's docket.[106] Proceedings may resume if a motion to recalendar is filed with the court by either party.[107] If there is an application pending before the immigration court that provides a basis for work authorization at the time of administrative closure, work authorization will continue to be available after administrative closure.[108] Administrative closure does not result in a final order of removal.

Note from the Field: "Attorneys must strategize under what circumstances they should seek administrative closure. AC is beneficial if the respondent is subject to an I-130 or I-485 petition, but the priority date has not become current. The advocate can also make a judgment call whether to seek administrative closure when the underlying relief application is not so strong, such as a weak asylum claim or when the asylum application has been filed beyond the 1 year deadline, and the withholding standard may not be met. In such cases, AC may be preferable especially if the respondent can continue to seek employment authorization. The same decision should be made between AC and a weak cancellation of removal case."

- New York Practitioner[109]

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105 *Matter of Avetisyan,* 25 I&N Dec. 688, 692 (BIA 2012); *see* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 60, at 104-05; *see also* Debbie Smith, *Administrative Closure: New BIA Standards*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., https://cliniclegal.org/February2012Newsletter/Admin (last visited Feb. 25, 2014, 10:08 AM); *see also* Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions* 16 HARV, LATINO L. REV. 32 (2013) ("Administrative closure" is a procedure by which an IJ or the BIA removes a case from its docket as a matter of "administrative convenience.").

106 *Matter of Avetisyan,* 25 I&N Dec. at 695; *Matter of Gutierrez,* 21 I&N Dec. 479 (BIA 1996) (overruled on other grounds); *Matter of Lopez-Barrios*, 20 I&N Dec. 203, 204 (BIA 1990).

107 *See* EOIR Policy Memorandum, Operating Policies and Procedures Memorandum 13-01 Continuances and Administrative Closure (March 7, 2013), *available at* http://www.justice.gov/eoir/efoia/ocij/oppm13/13-01.pdf, (March 25, 2014, 10:13 AM); see e.g., Template: Joint Motion to Administratively Close Proceedings, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/doclib/foia/prosecutorial-discretion/template-joint-motion-admin-close-proceedings.pdf, (last visited March 2, 2014); *see also, e.g., Matter of Cervantes-Torres*, 21 I&N Dec. 351, 352 (BIA 1996).

108 *See e.g.*, 8 C.F.R. § 274.a.l2(c)(8) (When an application for asylum has not been decided and 150 days have elapsed, an asylum applicant may apply for employment authorization). The DHS Administrative Appeals Office has explained that an asylum applicant remains eligible for employment continues after the case is administratively closed. *See* Application for Employment Authorization (Form I-765) pursuant to 8 C.F.R. § 274a.12(c)(8) from the Administrative Appeals Office (Dep't of Homeland Security Sept. 6, 2013) (non-precedent decision), available at http://www.aila.org/content/default.aspx?bc=9418|10567|45915.

109 Survey Response, New York Practitioner.

Note from the Field: "I have not yet been successful in terminating or closing a case over the objection of ICE counsel, but the fact that this is an option has, I think, made ICE counsel more willing to cooperate."

- Pennsylvania Practitioner 1[110]

Note from the Field: "In Chicago, we have had numerous agreements to administratively close for DACA and to pursue I-601A provisional unlawful presence waivers…Gaining administrative closure in Chicago requires clean facts for OCC to agree–no DUIs (unless perhaps a single simple misdemeanor DUI a long time ago) taxes in order, etc."

- Chicago Practitioner[111]

Prior to January 31, 2012, IJs were unable to grant a motion to administratively close if either party opposed the motion.[112] Following the BIA's decision in *Matter of Avetisyan,*[113] IJs may now close proceedings over the objection of an opposing party (usually the government).[114] IJs are required to consider and weigh six factors before exercising discretion: "1) the reason administrative closure is sought; 2) the basis for any opposition to administrative closure; 3) the likelihood the respondent will succeed on the petition, application, or other action that is being pursued outside the removal proceeding; 4) the anticipated time period of the closure; 5) the responsibility of either party in contributing to the delay; and 6) the expected outcome of removal proceedings when the case is finally re-calendared."[115] In addition, attorneys should be aware of the body of cases which developed prior to the Board's decision in *Matter of Avetisyan*, as they may continue to influence decisions today.[116]

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110 Survey Response, Pennsylvania Practitioner 1.

111 Survey Response, Chicago Practitioner.

112 *Matter of Gutierrez*, 21 I&N Dec. 479.

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

114 *Id.*, 25 I&N Dec. at 697; *see also* DEFERRED ACTION FOR CHILDHOOD ARRIVALS, AMERICAN IMMIGRATION COUNCIL, LEGAL ACTION CENTER, (July 25, 2013) *available at* http://www.legalactioncenter.org/practice-advisories/deferred-action-childhood-arrivals (Only the immigration judge may decide whether to terminate or administratively close proceedings.)

115 *Matter of Avetisyan,* 25 I&N Dec. at 696.

116 *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009); *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009).

B. Motions to Terminate

"After commencement of the hearing, only an IJ may terminate proceedings upon request or motion by either party."[117] 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, unless barred by res judicata.[118]

Counsel for the respondent may consider contacting the ICE trial attorney in order to persuade him to exercise favorable prosecutorial discretion and join with the respondent in a motion to terminate. When a joint motion to terminate is filed, the IJ will likely expect both the respondent and ICE to justify why the motion should be granted.[119]

The respondent may file a motion to terminate because, among other reasons, the NTA is defective, DHS has failed to meet its burden, or because the noncitizen has established a prima facie case for naturalization and has presented especially appealing humanitarian factors.[120]

An attorney for the respondent may also seek termination by arguing that the government has issued a legally deficient NTA.[121] Challenging an NTA for legal deficiency is holding DHS accountable to the procedural and substantive guarantees provided under the immigration statutes and regulations. However, as is the case when deciding to pursue any legal strategy, it is important to 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.[122]

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.

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[117] *In re G-N-C-*, 22 I&N Dec. 281 (BIA 1998).

[118] 8 C.F.R. § 1239.2(c) (2014); *see also* U.S. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE OF IMMIGRATION REVIEW, IMMIGRATION JUDGE BENCHBOOK, MOTIONS, http://www.justice.gov/eoir/vll/benchbook/tools/Motions%20to%20Reopen%20Guide.htm (last visited April 3, 2014).

[119] *In re G-N-C-*, 22 I&N Dec. at 284.

[120] 8 C.F.R. § 1239.2(f) (2014); *Matter of Acosta-Hidalgo,* 24 I&N Dec. 103 (BIA 2007).

[121] TO FILE OR NOT TO FILE, *supra* note 13, at 51-52.

[122] For discussion of the stop-time rule and its relation to cancellation, *see supra* note notes 45 and 81-82, and accompanying text.

In cases where termination is obtained based on a simple legal deficiency in the NTA, removal proceedings may generally 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.[123]

> **Note from the Field:** "We attempted to negotiate with ICE to terminate proceedings and then issue a new NTA ("repaper"). This was desirable, because the initial NTA had triggered the "stop-time rule" and made our client ineligible for cancellation of removal. With termination and a new NTA, our client would qualify for relief. We did not get [an] agreement with ICE."
>
> - Texas Practitioner 1[124]

Below are common grounds for seeking a motion to terminate, other than prosecutorial discretion.

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.[125] After receiving the NTA it is important to meet with the client and discuss the factual allegations presented in the NTA. At times, it may appear advantageous to concede factual and legal allegations in an effort 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 absolutely sure that the government is correct and can meet its burden where applicable.[126] 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.[127]

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[123] *Ramon-Sepulveda v. INS*, 824 F.2d 749 (9th Cir. 1987) (The court, in applying res judicata, ordered the termination of removal proceedings when the INS issued an Order to Show Cause based on a birth certificate which the court had previously found was not newly discovered evidence under 8 C.F.R. § 242.22 (1983)).

[124] Survey Response, Texas Practitioner 1.

[125] National Immigration Project, *supra* note 56.

[126] AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 60, at 106. Some practitioners find it strategically useful to not concede anything, and thereby force the government to meet its burden of persuasion without any "help" from the respondent. National Immigration Project, *supra* note 56.

[127] *See* AMERICAN IMMIGRATION COUNCIL, MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW (Nov. 13, 2013) *available at*

- **Defensive Claim to Citizenship**

DHS is prohibited from deporting United States citizens.[128] 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."[129] If the government is able to establish that the respondent was born abroad, then there is a presumption of alienage unless the respondent produces substantial credible evidence in support of his claim to citizenship.[130] A respondent who was born abroad still may be a citizen either because she acquired the status or she derived it from a relative.[131] Some clients are unaware of their status as United States citizens; in such cases, it may be necessary to research the citizenship of several 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.[132] 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.[133]

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.[134] 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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http://www.legalactioncenter.org/practice-advisories/motions-suppress-removal-proceedings-general-overview.

[128] INA § 240(c)(3)(A); 8 C.F.R. § 1240.8 (2014).

[129] AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 60, at 101; *see also Woodby v. INS*, 385 U.S. 276, 277 (1966); 8 C.F.R. § 1240.8 (2014).

[130] AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 60, at 100. *Matter of A-M-,* 7 I&N Dec. 322 (BIA 1965); *Matter of Leyva*, 16 I&N Dec. 118 (BIA 1977).

[131] *See* INA §§ 301-309, 320.

[132] AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 60, at 106.

[133] National Immigration Project, *supra* note 56.

[134] AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 60, at 100; Michael Wishnie, *Proportionality in Immigration Law: Does the Punishment Fit the Crime in Immigration Court?* AMERICAN IMMIGRATION COUNCIL, IMMIGRATION POLICY CENTER 12 (April 2012), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/wishnie_-_proportionality_in_immigration_041112.pdf ("There are many circumstances in immigration law in which immigration judges or the courts will dismiss a removal proceedings, restoring the respondent to the status quo ante—including, specifically allowing an apparently undocumented person to walk out of the courtroom at liberty. Such cases include those in which the government fails to carry its initial burden of proof to establish alienage…").

- **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. This dismissal should take place over any objection of the ICE attorney.[135] 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**

After analyzing the allegations in the NTA and comparing them to the charges listed, it is not unheard of to find that the charges are incongruent with the allegations. In particular, 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.[136] 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, "if personal service is not practicable…service by mail… shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with [INA § 239](a)(1)(F)."[137]

The BIA, however, has held that termination is proper when DHS mails the NTA to the last address it has on file when the record reflects that the noncitizen did not receive the NTA and therefore was never notified of the proceedings or the obligation to provide updated address information under INA § 239.[138] Additionally, 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.[139]

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[135] AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 60, at 105.

[136] INA § 101(a)(48)(A); *Orabi v. AG of the United States,* 738 F.3d 535 (3d Cir. 2014) (A conviction is not sufficiently final until direct appellate review is exhausted or waived).

[137] INA § 239(c); 8 C.F.R. § 1003.13 (2014).

[138] *See, In re G-Y-R* 23 I. & N. Dec. 181, 192 (BIA 2001).

[139] *Hamazaspyan v. Holder,* 590 F.3d 744 (9th Cir. 2009).

- **Lacking a Signature**

An NTA filed with the court must bear the original signature of an officer with the authority to issue the NTA under the regulations.[140] However, at least one circuit has held there is no requirement that the signature actually be legible.[141]

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.[142] A noncitizen also may request termination to pursue VAWA, DACA, naturalization, a provisional unlawful presence waiver, or adjustment of status.[143] While some forms of protection like deferred action may be pursued during removal proceedings, other applications, such as naturalization[144] or – in some circumstances – adjustment of status, require termination of proceedings before USCIS has jurisdiction to adjudicate the claim.[145]

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140 *See* U.S. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE OF IMMIGRATION REVIEW, IMMIGRATION JUDGE BENCHBOOK, TOOLS, http://www.justice.gov/eoir/vll/benchbook/tools/Purpose%20and%20History%20of%20MC.htm (last visited March 5, 2014); *see also* Jurisdiction, 65 Fed. Reg. 76,121 (Dec. 6, 2000) (to be codified in 8 C.F.R. § 208.2(b) (2014)) (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."); *see* also H. Raymond Fasano, *Litigating Technical Issues When There Is No Relief In Immigration Proceedings*, in 12TH ANNUAL NEW YORK CHAPTER HANDBOOK 3-4 (American Immigration Lawyers Association 2014).

141 *Kohli v. Gonzales*, 473 F.3d 1061 (9th Cir. 2007).

142 8 C.F.R. § 214.14(c)(1) (2014).

143 For a discussion regarding these types of relief, *see supra* section II.A. .

144 *In re Acosta Hidalgo*, 24 I. & N. Dec. 103 (B.I.A. 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).

145 8 C.F.R. § 1245.2(a)(1)(i) (2014); *Adjudicator's Field Manual* (AFM) ch. 23.2(b). For a more detailed discussion of adjustment for "arriving aliens" and those in removal proceedings, see the following practice advisories: MARY KENNEY, LEGAL ACTION CENTER, AMERICAN IMMIGRATION COUNCIL, PRACTICE ADVISORY, USCIS ADJUSTMENT OF STATUS OF "ARRIVING ALIENS" WITH AN UNEXECUTED FINAL ORDER OF REMOVAL (updated Nov. 6, 2008) *available at* http://www.legalactioncenter.org/sites/default/files/lac_pa_060308_arraliens.pdf; MARY KENNEY, LEGAL ACTION CENTER, AMERICAN IMMIGRATION COUNCIL, PRACTICE ADVISORY, "ARRIVING ALIENS" AND ADJUSTMENT OF STATUS: WHAT IS THE IMPACT OF THE GOVERNMENT'S INTERIM RULE OF MAY 12, 2006? (updated Nov. 5, 2008) *available at* http://www.legalactioncenter.org/sites/default/files/ar_alien.pdf.

Note from the Field: "I have gained administrative closure or termination in several cases involving hardship when cancellation was nonetheless doubtful or when ten-year residency requirement had not been reached. I've also received closure or termination for long term residents, with ten years presence or more, with no criminal record, when the hardship was not that great, but the alien was a productive member of society."

- Pennsylvania Practitioner 1[146]

Note from the Field: "I've had success procuring administrative closure or termination for several DACA-eligible or DACA approved kids."

- Pennsylvania Practitioner 1[147]

- **Claim Preclusion (res judicata/collateral estoppel)[148]**

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.[149] "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.""[150]

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146 Survey Response, Pennsylvania Practitioner 1.

147 Survey Response, Pennsylvania Practitioner 1.

148 Claim preclusion arguments, if successful, prevent parties from re-litigating issues that were settled in previous proceedings. One court illustrated this when it stated, "Res judicata bars the government from bringing a second case based on evidence (a birth certificate) that it could have presented in the first case." *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1359 (9th Cir. 2007).

149 AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 60, at 108; *see also Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007); *Medina v. INS*, 993 F.2d 499 (5th Cir, 1993), *Ramon-Sepulveda v. INS*, 824 F.2d 749 (9th Cir. 1987).

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

IV. CONCLUSION

Note from the Field: "I successfully convinced an ERO officer & his supervisors not to charge my client who had multiple tax convictions with an aggravated felony. But then, when we filed a 'when released' habeas motion, ERO was overruled and the NTA was amended to add the aggravated felony charge. Ultimately, I got DHS to drop the aggravated felony charge in exchange for waiving appeal on the IJ's manifestly incorrect aggravated felony holding and we did a 15-min LPR cancellation hearing to secure client's green card & release."

- Tennessee Practitioner[151]

Note from the Field: [Describing negotiations with ICE after an NTA was filed] "As for how we got DHS to drop the charges: it honestly was shockingly easy. We just called and asked her to drop the false claim [to U.S. citizenship] charge. We asked to speak with the attorney who would be working on our Master Hearing. We explained our argument to her (that we didn't think she had made a false claim under the law) and the fact that the charge would have draconian consequences on our client's life. We told her that our client had never been in trouble before and is a young woman. The attorney told us she had to think about it but then got back to us a few days later and said she and her supervisor decided to drop the two charges. We hadn't even asked her to drop the other one so it was a nice surprise! I think it was a combination of everything in our case, including that our client is married to a US citizen and could adjust based on that marriage. Going into the conversation, we were all pretty pessimistic but felt it was worth a try. We were very happy when we were successful. It was a great lesson for us that it doesn't hurt to ask and may actually help a lot."

- New York Practitioner 2[152]

NTAs are a basic element in the practice of immigration law. Practitioners representing noncitizens who may one day be in removal proceedings, or who are currently in removal proceedings, will provide a substantial benefit to their clients by gaining fundamental insights regarding the pre-filing and post-filing options available for challenging or modifying an NTA. While not every client will benefit from the strategies described in this advisory, it is our hope that noncitizens in a position to use them are afforded that opportunity. Practitioners should carefully examine an issued or filed NTA for factual deficiencies and legal defects in order to mount an effective challenge. If practicable, practitioners should strive to use the tool of prosecutorial discretion to better assist their clients in obtaining favorable results in their cases.

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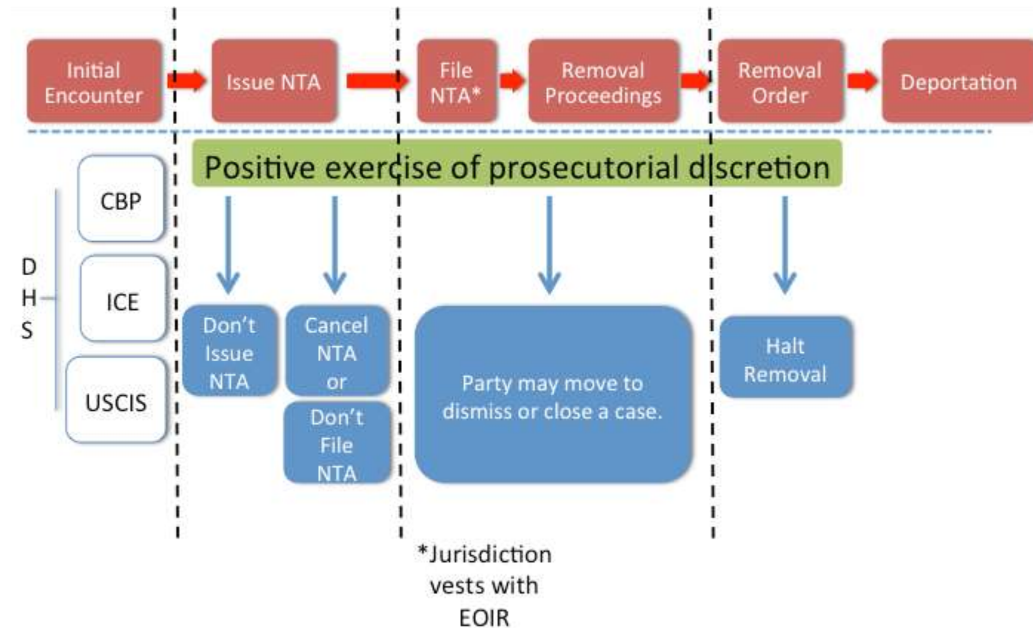
151 Survey Response, Tennessee Practitioner.
152 Survey Response, New York Practitioner 2.

If you have questions or comments regarding this advisory or additional practice tips surrounding Notices to Appear, we would welcome your input. Please send your comments to **centerforimmigrantsr@law.psu.edu.**

V. APPENDIX

1) Timeline of NTAs and Exercises of Prosecutorial Discretion

From CENTER FOR IMMIGRANTS' RIGHTS, PENNSYLVANIA STATE UNIVERSITY DICKINSON SCHOOL OF LAW, TO FILE OR NOT TO FILE (OCT. 2013).



2) Glossary of Terms

- **Notice to Appear (NTA)**

An NTA is a charging document which includes information about the charges levied against him/her as the basis for removability. The NTA is also required to include the time and place the removal proceedings will be held.

- **Issue an NTA**

An immigration officer issues an NTA to a noncitizen who is believed to be removable. INA § 239(a)(1) (2012) uses the phrase "shall be given" and the term "service" to mean issuance of an NTA. On the other hand, 8 C.F.R. § 239.1 (2014) uses the terms "issuance" and "issue." Often, the terms "issue," "prepare," and "serve" are used interchangeably. In this report, the terms "issue," "prepare," and "serve" are used interchangeably unless quoted from other sources.

- **Cancel an NTA**

An immigration officer authorized to issue an NTA may cancel it before the NTA is filed with an immigration court.[153]

[153] *See* 8 C.F.R. § 239.2(a) (2014).

- **File an NTA**

An immigration officer files an NTA with an immigration court, and filing of the NTA officially commences a removal proceeding against a noncitizen.[154]

- **Dismiss a matter before the immigration court**

Once a removal proceeding is commenced, any party may move for dismissal of the matter.[155] Ultimately, the jurisdiction to dismiss a matter lies with the immigration judge. Often, the terms "dismiss" and "terminate" are used interchangeably.

- **Administratively close a matter**

Once removal proceedings are commenced, any party may move for administrative closure of the matter. Ultimately, the jurisdiction to close a matter lies with the immigration judge. Administrative closure is only a temporary resolution of the proceedings, as the case remains on the immigration court docket and additional hearings may be scheduled later.[156] In this report, the term "administrative closure" or "administratively closed" is used to mean "administrative closure," unless quoted from other sources.

3) List of Selected Related Practice Advisories and Sample Motions

- National Immigration Project, Termination or Administrative Closure of Removal Proceedings Based on Prima Facie Eligibility for DACA and Sample Motion (Jan. 29, 2014).

- American Immigration Council's Legal Action Center, American Immigration Lawyer's Association, and National Immigration Project, Deferred Action for Childhood Arrivals (updated April 22, 2013).

- National Immigration Project, Reinstatement of Removal (updated April 29, 2013).

- American Immigration Council's Legal Action Center, Prosecutorial Discretion: How to Advocate for Your Client (updated June 24, 2011).

- Immigration and Customs Enforcement, Template: Joint Motion to Administratively Close Proceedings, FOIA Library (last visited April 21, 2014).

[154] *See* 8 C.F.R. § 1003.14 (2014).
[155] *See* 8 C.F.R. §§ 239.2(c), 239.2(a) (2014).
[156] For more details on administrative closure, see Memorandum from Brian M. O'Leary, Chief Immigration Judge, U.S. Department of Justice Executive Office for Immigration Review, on Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure (Mar. 7, 2013), *available at* http://www.justice.gov/eoir/efoia/ocij/oppm13/13-01.pdf.

4) Sample NTA

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No: A055-555-555

In the Matter of:

Respondent: RAMOS, Jorge currently residing at:

Port Isabel, SPC, 27991 Buena Vista Blvd., Los Fresnos, TX 78566

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

[X] 2. You are an alien present in the United States who has not been admitted or paroled.

☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1) You are not a citizen of the United States.
2) You are a native of Mexico and a citizen of Mexico.
3) You entered the United States at or near Hidalgo, TX on or about 6/11/2010.
4) You did not then possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document.
5) You were not then admitted or paroled after inspection by an immigration officer.
6) You were, on August 18, 2009,, convicted in the Superior Court of Los Angeles for the offense of Receive Etc Known Stolen Property.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212(a)(7)(A)(i)(I)- of the Immigration and Nationality Act, as amended, as immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationaqlity as required under the regulations issued by the AG.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

Harlingen EOIR, 2009 West Jefferson, Ste. 300, Harlingen, TX 7855

(Complete Address of Immigration Court, including Room Number, if any)

on ~~to be set~~ (Date) at to be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

SDDO

(Signature and Title of Issuing Officer)

Date: 9/21/10 Harlingen, TX

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

5) Sample of Survey Used to Gather Notes from the Field

PENNSTATE

The Dickinson School of Law

Shoba Sivaprasad Wadhia
Samuel Weiss Faculty Scholar
Clinical Professor of Law and Director
Center for Immigrants' Rights

The Pennsylvania State University
329 Innovation Boulevard, Ste. 118
State College, PA 16803

Office: 814-865-3823
Fax: 814-865-9042
ssw11@psu.edu

A Questionnaire for Attorneys and Advocates:
Legal Challenges And Strategies Related to Notices to Appear

American Immigration Council's Legal Action Center, American Bar Association Commission on Immigration, and Penn State Law's Center for Immigrants' Rights Project on Notices to Appear, Spring 2014

Purpose: Building upon the report "To File or Not to File a Notice to Appear: Improving the Government's Use of Prosecutorial Discretion" (Click for Link to File or Not To File), the purpose of this survey is to gather experiences and practice tips from attorneys for possible inclusion in a practice advisory focused on Notices to Appear ("NTA"). We will not use any identifying information you provide here in any other venue without your prior consent.

1. Since January 31, 2012, have you negotiated with DHS to join in motions to administratively close or terminate a client's case after an NTA was filed?
   a. If yes, and you are willing to describe that experience, regardless of outcome, please share.

2. Since January 31, 2012, have you successfully obtained administrative closure or termination but then had the case repapered or filed at a later time?
   a. If yes, and you are willing to describe that experience, please share.

3. Since January 31, 2012, have you been successful in terminating or closing a case over the objection of ICE counsel?
   a. If yes, and you are willing to describe the techniques you used, please share.

4. Since January 31, 2012, have you negotiated with DHS to exercise prosecutorial discretion to ISSUE an NTA as an alternative to other forms of abbreviated removal processes such as an administrative removal order under 238(b)?
   a. If yes, and you are willing to describe that experience, regardless of outcome, please share.

5. Since January 31, 2012, have you negotiated with DHS to ISSUE an NTA because your client was eligible for cancellation of removal?
    a. If yes, and you are willing to describe that experience, regardless of outcome, please share.

6. Since January 31, 2012, have you negotiated with DHS on whether or not to file an NTA OR the substance of what the agency will include in an NTA that was under preparation?
    a. If yes, and you are willing to describe that experience, regardless of outcome, please share.

7. Since January 31, 2012, have you tried to defeat a charge or aspect of the NTA by arguing that the matter has already been, or could have been, adjudicated in an earlier proceeding (i.e. the res judicata or collateral estoppel doctrines)?
    a. If yes, and you are willing to describe that experience, regardless of outcome, please share.

8. Since January 31, 2012, have you negotiated with DHS for other forms of prosecutorial discretion pertaining to NTAs?
    a. If yes, and you are willing to describe that experience, regardless of outcome, please share.

9. If you considered utilizing prosecutorial discretion techniques, but did not, or did and were unsuccessful, what types of barriers prevented you from using those techniques or succeeding? (I.e., Resistance by DHS/ICE/IJs/other officials, difficulties in obtaining or communicating information regarding clients, personal lack of information regarding how to exercise prosecutorial discretion strategies, etc.)

10. May we contact you for additional information or to follow up on your answers? If so, please provide your name, telephone, number and email address. Again, we will not disclose any identifying information without your permission.

Please return the questionnaire by March 5th, 2014 to [redacted].
When responding, please title the subject heading as: Re: NTA Survey 2014.