Congress of the United States
Washington, DC 20515

July 26, 2018

Director Francis L. Cissna
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue NW
Washington, DC 20529

Director Cissna,

I write to express deep concern with your agency's new guidance, dated June 28, 2018, governing the instances in which USCIS adjudicators will issue a Notice to Appear (NTA) to trigger removal proceedings, particularly as it concerns individuals who were maintaining lawful status at the time a petition or application was submitted on their behalf. The new guidance states that an adjudicator will issue an NTA whenever a benefit request is denied, if upon such denial the beneficiary is no longer lawfully present. This is a significant change from the agency's prior guidance in this area. And the consequences are profound. As you know, once an individual is removed he or she is barred from reentering the United States for five years, even as a visitor and even if fully qualified for another nonimmigrant classification.

I have many concerns with the guidance, including the fear and anxiety it will cause among both documented and undocumented individuals who are eligible to apply for existing immigration benefits. But I write to focus your attention on the particular long-term impact the guidance is likely to have on many nonimmigrant beneficiaries of applications to extend or change status, as well as persons who are in the process of becoming permanent residents. According to the guidance, it will now be USCIS policy to issue NTAs when such applications are denied—even if the beneficiaries were in lawful nonimmigrant status when the applications were filed, have lived and worked here for years with the government's approval, and have never had any intent to violate our immigration laws.

Neither legacy INS nor USCIS has ever had a practice of issuing NTAs (previously Orders to Show Cause) to all beneficiaries of denied petitions or applications when adjudicators believe the beneficiaries are no longer lawfully present. Given the historical inability of USCIS to provide prompt adjudications on all nonimmigrant petitions, USCIS's new policy will create a large pool of individuals who are likely to lose status by the time petition adjudication is completed. In recognition of this fact, DHS regulations make clear that individuals seeking extensions may usually maintain work authorization for up to 240 days awaiting adjudication. Under current practice, it is common for the nonimmigrant's underlying status to expire during this period.

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Under the new guidance, many of these individuals will now be placed into removal proceedings—even if they promptly depart upon receiving notice of the denial. The consequences of this change would be severe. Among other things, the initiation of removal proceedings would create a legal nightmare for them. Barring massive changes to current procedures, many of these cases would likely result in the entry of *in absentia* removal orders, which would make the individuals inadmissible for at least 5 years.

Yesterday, several USCIS officials briefed my staff to discuss these and other concerns with the new guidance. Those USCIS officials explained that the agency intends to begin implementing the guidance on Monday, July 30. They also provided several indications of how the policy may be operationalized on Monday, although they were clear that final decisions have not yet been made. Among other things, they explained that:

1. USCIS may provide a 33-day grace period for any denials of a petition, application, or other benefit request that involves the right to appeal or file a motion.
2. For such benefit requests, USCIS will likely require the issuance of an NTA at the end of the grace period unless: (a) USCIS receives a timely-filed appeal or motion or (b) the individual has registered his or her timely departure from the United States.
3. As currently contemplated, registration of a departure would likely require the individual to visit a U.S. embassy or consulate overseas to physically prove his or her departure.
4. USCIS will look into and consider use of DHS automated systems that compare entry and exit manifests to register departures, but such systems might not provide the level of certainty the agency seeks.
5. USCIS has not yet considered other ways to prevent the issuance of NTAs or *in absentia* removal orders in cases involving individuals who have departed the United States after receiving notice of an agency denial.

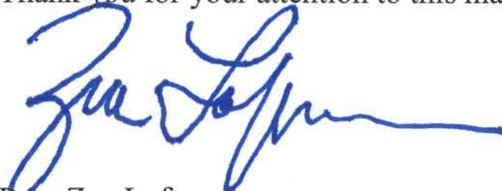
I appreciate that your staff discussed these possibilities with our office. But based on that discussion, I remain concerned that the new USCIS policy will result in the issuance of NTAs to, and the entry of *in absentia* removal orders against, individuals who fully complied with our laws, including by promptly departing the United States upon receiving notice of a denial.

I am deeply concerned, for example, that the new guidance would require individuals who have departed the United States to register their departure at a U.S. embassy or consulate overseas. Foreign nationals often face extreme difficulty and long wait times in obtaining appointments to visit such facilities. It is, in my belief, unreasonable to expect individuals to do so within 33 days of the issuance of a denial notice, especially when they must also use this period to resolve their affairs and arrange their departure. The ability of such individuals to obtain an appointment at a U.S. embassy or consulate on a timely basis is both unlikely and entirely beyond their control. It is not even clear that there is a reasonable and established process to obtain such appointments, which are typically made available only to U.S. citizens and visa applicants. I am also troubled that USCIS might employ this as the lone solution when DHS has automated systems used by other components to register departures with a sufficiently high degree of certainty.

I have been provided with no indication, either in that telephone briefing or otherwise, that USCIS has internally identified all of the relevant issues or made adequate plans for implementation. Nor do I have reason to believe that USCIS adequately coordinated with other relevant agencies, including the State Department, ICE, or EOIR, whose already extreme backlog stands to swell as a result of this new policy. In the absence of such internal and external coordination, the implementation of this new policy promises to be extremely problematic, and the concerns above magnified substantially.

Based on these concerns, and the deleterious impact the new policy may have on employers and employees in my district and across the country, I request that USCIS delay implementation of the new NTA policy until adequate implementation plans can be made, including reasonable accommodations for affected individuals. I also ask that any changes be effective only for petitions or applications received at USCIS after the effective date. USCIS regularly uses prospective effective dates, and the opportunity for public comment, for significant policy changes. Given the grave consequences at issue here, I see no reason to deviate from this practice.

Thank you for your attention to this matter,



Rep. Zoe Lofgren
Ranking Member
Subcommittee on Immigration and Border Security

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

August 17, 2018

The Honorable Zoe Lofgren
U.S. House of Representatives
Washington, DC 20515

Dear Representative Lofgren:

Thank you for your July 26, 2018 letter requesting that U.S. Citizenship and Immigration Services (USCIS) delay the implementation of the Notice to Appear (NTA) Policy Memorandum.

As your letter notes, USCIS officials briefed your staff on the NTA memo in July. On July 30, 2018, USCIS announced that implementation of the NTA memo has been postponed until operational guidance is issued. USCIS officials informed your staff of this decision on July 27, 2018.

We appreciate your concerns and the input you provided, and we are working to ensure that implementation goes smoothly for both adjudicators as well as the public. While USCIS cannot comment further on internal agency deliberations or the policy development process, we will make every effort to keep your office updated as it becomes effective.

Thank you for your letter and interest in this important issue. Should you require any additional assistance, please have your staff contact the USCIS Office of Legislative and Intergovernmental Affairs at (202) 272-1940.

Respectfully,

L. Francis Cissna
Director