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HEIGHTENED ETHICAL AND STRATEGIC CONSIDERATIONS FOR BUSINESS IMMIGRATION ATTORNEYS UNDER USCIS'S NEW REMOVAL POLICY

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U.S. Citizenship and Immigration Services (USCIS) issued updated policy guidance on July 5, 2018, PM-602-0050.1, that aligns its policy for issuing Form I-862, Notice to Appear, with the immigration enforcement priorities of the Department of Homeland Security (DHS).

A Notice to Appear (NTA) instructs a person to appear before an immigration judge on a certain date. The issuance of an NTA starts removal proceedings against the person. Under the new guidance, USCIS notes that its officers will now issue NTAs "for a wider range of cases where the individual is removable and there is evidence of fraud, criminal activity, or where an applicant is denied an immigration benefit and is unlawfully present in the United States."

Although it has always been possible for the USCIS to issue an NTA when an applicant is denied a benefit, it has generally not done so in the past for a number of sensible and practical reasons. Many applicants choose to leave the United States on their own upon the denial of the benefit, or delay their departure, if they legitimately seek to appeal the denial or seek reconsideration. It therefore makes no sense to further burden the already overburdened immigration courts with new cases, especially involving people who may already be departing on their own volition.

While David Isaacson's excellent blog "Another Brick in the (Virtual) Wall: Implications of USCIS's Policy Regarding Removal Proceedings Against Denied Applicants Who Are Not Lawfully Present" gets into the implications behind the new policy, including its malicious intent, as "the new guidance implies that it will not matter if the person issued the NTA was lawfully present until just prior

to the unfavorable decision," I highlight some of the ethical considerations for attorneys arising under the new NTA policy.

As denials of H-1B extension requests have been happening more frequently under the Trump administration, I will use the H-1B to illustrate some of the ethical conundrums that may arise. Routine requests that were previously approved for H-1B occupations such as systems analyst or financial analyst are now frequently being denied. The new policy exacerbates this problem by now requiring that an NTA be issued upon the denial of such a request and the prior H-1B status has expired. Sure enough, the USCIS policy does not change any law. Prior to the issuance of the policy, attorneys representing an employer and an employee in a request for an extension of H-1B status were mindful of the consequences when an H-1B extension request was denied. The issuance of an NTA has always been factored in as a worst case scenario in the event of a denial. But now this will become a new reality and no longer a theoretical possibility. Petitioners should consider filing extension requests on behalf of the beneficiary well in advance of the expiration date of the underlying status - the law allows one to so up to six months prior- and should also consider doing so via premium processing. In the event that the extension request is denied, it will happen while the beneficiary is still in status thus obviating the NTA.

The H-1B worker is considered unlawfully present when the request for an H-1B extension is denied, and the prior H-1B status has already expired. The issuance of an NTA does not stop the accrual of unlawful presence, and it is now important to deal with unlawful presence in the context of a removal proceeding. Any accrual of unlawful presence that exceeds 180 days will trigger a 3 year inadmissibility bar under INA 212(a)(9)(B)(i)(I) once the individual departs the United States prior to the commencement of removal proceedings. If this individual accrues one or more than one year of unlawful presence and then departs the United States, she or she will be inadmissible for 10 years. Attorneys have been mindful of this eventuality especially when the employer chooses to appeal the decision or file a motion to reopen or reconsider. In the event that the decision is not rendered prior to the accrual of 180 days of unlawful presence, and the foreign national still remains in the United States beyond 180 days and then departs, in the event of an unfavorable decision, he or she will be precluded from reentering the United States for a 3 year period.

A business immigration attorney who may understandably not be knowledgeable about the ins and outs of a removal proceeding will need to

come up to speed. After all, one of the cardinal ethical obligations of an attorney is to competently represent the client. Under ABA Model Rule 1.1 "a lawyer shall provide competent representation to a client." The model rule goes on to state, "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." . One way for an attorney to become competent is to associate with a lawyer who is competent in the removal matters. Alternatively, the lawyer who chooses to restrict her expertise to business immigration, thus limiting the scope of representation under ABA Model Rule 1.2(c), may refer the matter out to another competent lawyer who knows removal proceedings when the NTA is issued.

Once removal proceedings have been instituted, the foreign national may no longer leave even if he wants to. Moreover, the first master calendar hearing is scheduled after several weeks or months. Indeed, it is becoming more obvious that the goal of this Trump Administration is to harass non-citizens in light of yet another more recent policy that gives authority to USCIS officials to deny applications based on lack of "sufficient initial evidence" without a request for evidence or notice of intent to deny. This could be viewed subjectively resulting in more denials followed by NTAs. If the foreign national leaves in the middle of the proceeding, it would trigger a new ground of inadmissibility under INA 212(a)(6)(B), which provides that "Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible."

If the foreign national remains in the US and receives a removal order, it would trigger a ten year bar to inadmissibility under INA 212(a)(9)(A) after the individual leaves pursuant to this order. It may be worthwhile for the attorney to stave off a removal order, and instead try to get the Immigration Judge (IJ) to issue a voluntary departure order. If voluntary departure is issued prior to the accrual of unlawful presence of one year or more, then under INA 212(a)(9)(B)(i)(I), the 3 year bar does not apply to those who departed after the commencement of proceedings and before the accrual of 1 year of unlawful presence. If the voluntary departure order is not issued prior to the 1 year period then the ten-year bar for one year of unlawful presence under INA 212(a)(9)(B)(i)(II) would apply. Due to immense backlogs in the immigration

courts, there is a good likelihood that an IJ may not be able to get to the matter timely and could end up issuing a voluntary departure order after the accrual of one year of unlawful presence. Thus, an attorney representing such an individual in removal must creatively strategize to ensure that a voluntary departure order is rendered before the 1 year mark.

While the lawyer has been used to contesting the denial of an H-1B, it now has to also be done in the context of a removal proceeding. An IJ has no jurisdiction to hear an H-1B petition denial in a removal proceeding, and the denial must still be appealed to the AAO or through a motion to reopen or reconsider or potentially even challenged in federal court. While the denial is being appealed, it is important to try to seek a continuances in the event of another meritorious pending benefits application under *Matter of Hashmi* and *Matter of Rajah*. In the event that the denial is overturned, and the foreign national is still in removal proceedings, one can seek to terminate removal proceedings. Under *Matter of Castro-Tum* recently decided by AG Sessions, an IJ can no longer administratively close a case thus overruling *Matter of Avetisyan.* However, it may still be possible to terminate based on a joint motion with the government's attorney, but the ability to for the government attorney to exercise such discretion has also been limited. Note that Attorney General Sessions is also seeking to overturn *Hashmi* and *Rajah,* but until that happens one can seek a continuance for good cause based on a pending meritorious application at the USCIS. If the foreign national has already left, presumably under a voluntary departure order and has not triggered any ground of inadmissibility, he or she may be able to return if the denial is overturned, or if the appeal is not pursued or is unsuccessful, it may be prudent to re-file the H-1B petition, and have the individual return on a visa pursuant to the approval of the new petition.

All this raises another important ethical consideration - conflicts of interest. Most immigration attorneys represent both the employer and the employee as there is always a common goal, which is to obtain the visa benefit. Still, there is always potential for a conflict of interest in the event that the employer wishes to terminate the employment or the employee wishes to quit and seek greener pastures elsewhere. Under ABA Model Rule 1.7(b), notwithstanding the possibility of a conflict of interest, a lawyer may represent both clients if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client and the clients have

provided informed consent, confirmed in writing. The possibility of the foreign national being placed in removal proceedings heightens the potential for a conflict of interest. Will the employer client still be willing to hold out the job offer for the employee during a long drawn out removal hearing? In the event that the employer pulls out, then will the attorney be able to continue to represent the employee who is in removal proceedings or would this matter need to be referred out to another attorney and thus limit the scope of the representation under ABA Model Rule 1.2(c)? All these considerations need to be discussed preferably in advance between the employer and the employee. It may be possible to craft conflict waivers and get informed consent that would allow the attorney to deal with all these contingencies, including representation in removal proceedings.

The very issuance of the NTA will cause other problems. At the denial of the H-1B request, the USCIS could potentially serve the NTA on the attorney who is the attorney of record on the notice of entry of appearance that was submitted with the H-1B request. If the attorney represents both the employer and the foreign national employee in the H-1B matter, the attorney must at least notify the employee, although the attorney has no obligation to appear at the master calendar hearing. The attorney may need to explain what the master calendar hearing is, though. This is akin to being counsel in a lower court and receiving an appealable unfavorable decision: the existing counsel may not have to do the appeal, but would have to advise the client of the possibility so they can retain someone else to do the appeal if they want. In a case where the attorney only represents the employer, but receives the NTA on behalf of the foreign national employee, it would still be prudent to inform the employee. Of course, if the NTA is served on an attorney who has not yet made an appearance on behalf of the respondent in immigration court and not the respondent, that would be a basis to terminate a removal proceeding or to vacate an in absentia order. However, the attorney handling the H-1B matter must still advise the beneficiary upon receipt of an NTA and forward the NTA to the beneficiary and advise her to seek independent counsel if the H-1B attorney will not represent the beneficiary in the removal proceeding or may be conflicted from doing so.

In the event that the H-1B worker has already departed the United States prior to the issuance of the NTA, it can be clearly argued that jurisdiction does not vest when an NTA is issued when the foreign national is not present in the United States. INA 240(c)(3)(a) provides that “the Service has the burden of

establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable." INA 237(a) refers to "ny alien (including an alien crewman) in and admitted to the United States may be removed." Since the former H-1B worker is not in, and admitted to, the United States, she cannot fall under the literal text of the statute and, thus, is not deportable.

It remains to be seen whether the USCIS will be able to fully implement the NTA policy or whether this is just a wish list of the Trump administration. If the new policy is implemented as intended, an already overburdened immigration court system will face even further backlogs. Attorneys must be aware of the various heightened ethical and strategic considerations in representing a client who has received an NTA after a denial and this blog is an attempt to provide a preliminary overview.