PRACTICE ADVISORY[1]
June 28, 2012

DEFERRED ACTION FOR CERTAIN YOUNG PEOPLE WHO CAME TO THE UNITED STATES AS CHILDREN

On June 15, 2012, Department of Homeland Security (DHS) Secretary Janet Napolitano issued a new memorandum to U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE) explaining how prosecutorial discretion should be used with respect to individuals who came to the United States as children. Specifically, the memorandum directs that certain young people who do not present a risk to national security or public safety and meet specified criteria will be eligible to receive deferred action for two years, subject to renewal, and to apply for work authorization. Requests for relief are to be decided on a case-by-case basis, and applicants must pass a background check before they can receive deferred action. The memorandum, which was accompanied by a list of Frequently Asked Questions (FAQ), builds on prior DHS guidance regarding the exercise of prosecutorial discretion in low priority cases.[2]

Some provisions of the memorandum took effect immediately. Notably, ICE and CBP were instructed to exercise their discretion to refrain from placing individuals who meet the eligibility criteria into removal proceedings or being removed from the United States. ICE further was instructed to grant deferred action to anyone who meets the eligibility criteria and was offered prosecutorial discretion under DHS's ongoing review of pending removal cases first announced in August 2011, regardless of whether the offer was accepted or declined. If you have clients

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[2] For information on prior prosecutorial discretion guidance, see the Legal Action Center's Practice Advisories, *DHS Review of Low Priority Cases for Prosecutorial Discretion* (updated February 13, 2012) and *Prosecutorial Discretion: How to Advocate for Your Client* (June 24, 2011).

who will be affected immediately by the new guidance, please complete this survey to assist AILA and the Legal Action Center in monitoring implementation of the new policy.

Individuals who meet the eligibility criteria and are not currently in removal proceedings, including those subject to final orders of removal, will be able to submit affirmative applications for deferred action to USCIS. USCIS must establish an application process within 60 days of the date of the memorandum, i.e., on or before August 14, 2012. Applicants should not submit applications to USCIS before this process has been established, as they will be rejected.

ICE will review cases of individuals in removal proceedings to determine whether they meet the eligibility criteria. ICE's process for review is evolving. Currently, ICE Headquarters appears to be granting deferred action to individuals known to meet the eligibility criteria without requiring any further action on their part. Attorneys who represent individuals in removal proceedings who appear to qualify for deferred action, but have not yet heard from ICE, should supplement the record with indicia of eligibility. Further, there are reports that since the June 15 memorandum, ICE has granted deferred action in a number of pending removal cases where the noncitizen was older than 30. Therefore, even individuals who, as technical matter, do not meet the criteria set forth in the memorandum may wish to supplement the record and request or renew a request for prosecutorial discretion.

Importantly, the new policy does not supersede ICE's previously issued prosecutorial discretion guidance outlined in the June 17, 2011 Morton memo. For clients who do not meet the narrow eligibility criteria, attorneys should continue to assess the viability of deferred action requests or other requests for prosecutorial discretion based on the prior guidance.

What is deferred action?

Deferred action is a discretionary DHS decision not to pursue enforcement against a person for a specific period. A grant of deferred action does not confer lawful immigration status or alter an individual's existing immigration status.[3] While deferred action does not cure any prior period of unlawful presence, time in deferred action status is considered a period of stay authorized by the Secretary of DHS. An individual does not accrue unlawful presence for purposes of INA §§ 212(a)(9)(B) and (C)(i)(I) while in deferred action status.[4] However, deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status. A grant of deferred action can be renewed or terminated at any time.

What are the eligibility criteria for deferred action?

To establish their eligibility for deferred action under the new memorandum, individuals must provide "verifiable documentation" showing that they:

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[3] *See* ICE Detention and Removal Operations Policy and Procedure Manual §§ 1.2, 20.8(a) (2006).

[4] *See* Donald Neufeld, Acting Assoc. Dir., USCIS, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* (May 6, 2009) at 7.

- Arrived[5] in the United States when they were under the age of 16;

- Have continuously resided in the United States for at least five years prior to June 15, 2012, and were present in the United States on June 15, 2012 (the date of the memorandum);

- Are currently in school, have graduated from high school, have obtained a general education development (GED) certificate, or are honorably discharged veterans of the U.S. Coast Guard or the U.S. Armed Forces;

- Have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanors, or otherwise pose a threat to national security or public safety; and

- Are not above the age of 30.[6]

All individuals must submit biographic information and undergo a biometric background check prior to receiving deferred action.

What documentation can be used to establish physical presence and continuous residence in the United States?

Applicants for deferred action must document three aspects of their physical presence and residence in the United States, namely, that they:

(1) entered the United States before they reached age 16;

(2) have continuously resided in the country for at least five years preceding the date of the memorandum;[7] and

(3) were physically present in the U.S. on June 15, 2012.

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[5] In preliminary discussions with stakeholders, DHS has said that the new policy applies regardless of whether an individual's initial entry was lawful. Thus, the policy should apply to those who remained in the United States beyond their periods of authorized stay or violated their immigration status, in addition to those who entered without being admitted or paroled.

[6] DHS clarified in a stakeholder call on June 18, 2012, that the individual's age on June 15, 2012, will determine eligibility. Thus, even individuals who are 31 or older when they submit their deferred action requests or have their requests adjudicated will be eligible as long as they were *under 31* on June 15. It also is assumed that those individuals initially granted deferred action will be able to seek renewal of deferred action even after their 31st birthdays.

[7] On a June 18 national stakeholder call, ICE was unable to clarify whether individuals must have continuously resided in the United States since June 16, 2007 (which is technically five years prior to the date of the memorandum if a year is counted as 365 days) or June 15, 2007.

It should be noted that the memorandum does not require *uninterrupted* physical presence for five years—only continuous *residence*. Brief and innocent absences undertaken for humanitarian purposes will not violate this requirement.[8]

According to the FAQ issued by DHS, documentation of presence and residence may include, but is not limited to, financial records, medical records, school records, employment records, and military records. It is unclear what level of documentation will be required. Presumably, DHS will issue additional guidance about acceptable documentation in the coming weeks.

In the meantime, attorneys may want to review the list of documents applicants for relief under the Nicaraguan Adjustment and Central American Relief Act (NACARA), the Haitian Refugee Immigration Fairness Act (HRIFA), and the Temporary Protected Status (TPS) program may use to establish physical presence and continuity of residence.[9] *See* 8 C.F.R. §§ 244.9(a)(2); 245.13(e) and (f); 245.15(i) and (j); and 245.22. These documents included immigration court records, applications for immigration benefits, correspondence with immigration agencies, I-94 cards, driver's licenses, birth certificates of children born in the United States, marriage certificates, hospital records, school records, utility bills, tax returns, rental receipts, other dated receipts, bank statements, personal checks bearing a dated bank cancellation stamp, employment records, and credit card statements, among other documents. In cases where primary evidence was unavailable, NACARA applicants were permitted to submit affidavits attesting to an individual's presence. Likewise, TPS applicants may provide letters from employers and attestations from churches, unions and other organizations to show continuous residence.

Attorneys also may find it useful to review any prior applications that their clients have filed to ensure that all the information included in a request for deferred action is consistent. Such applications may be obtained through a Freedom of Information Act request, if necessary. Some of these applications may have been supported by additional evidence of residence or entry, such as letters, affidavits or declarations from third parties.

With respect to documenting that an individual was physically present in the United States on June 15, 2012, it is hoped that DHS will apply a presumption of presence for those individuals who can show presence on days near June 15, 2012, but not necessarily on that day. This is similar to the approach employed for adjustment applications under INA § 245(i), in which an applicant needs to demonstrate presence on December 21, 2000. In those cases, the agency

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[8] This provision is similar to the *Fleuti* doctrine, under which a trip abroad did not break the continuity of residence if it was "innocent, casual, and brief." *See Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963). It is not yet clear if the added element of a "humanitarian purpose" will alter the common understanding of *Fleuti*-type absences. Nor is it clear what will constitute a "humanitarian purpose."

[9] Attorneys may also wish to review the instructions to other application forms from immigration benefits that require a showing of continuous residence or physical presence, including EOIR-40 (Suspension of Deportation), EOIR-42A (Cancellation for Lawful Permanent Residents), EOIR-42B (Cancellation for Non-Lawful Permanent Residents), I-687 (Application for Temporary Residence under 245A), and I-881 (Special Rule Cancellation).

typically considers evidence of presence both before and after the qualifying date to be sufficient to meet the applicant's burden.

What documentation can be used to establish that an individual has fulfilled the educational or military service requirements?

The FAQ also provides non-exclusive lists of documents that can be used to prove compliance with the educational or military service requirements. Individuals may demonstrate that they currently are enrolled in school,[10] have graduated from high school, or have obtained a GED certificate by presenting high school diplomas, GED certificates, report cards, and school transcripts. The government may entertain exceptions to the education requirement for individuals who are not currently enrolled in school because of emergent circumstances, but who do intend to return to school. Individuals may demonstrate that they have been honorably discharged from the U.S. Coast Guard or U.S. Armed Forces by presenting reports of separation forms, military personnel records, and military health records.

Initial consideration of the military provisions suggests that they will benefit a very small number of people since most noncitizens who entered the United States without being admitted generally are not allowed to enlist in the U.S. Armed Forces. Under the military enlistment provisions, 10 U.S.C. § 504(b)(1), enlistment is limited to U.S. citizens and nationals, lawful permanent residents, certain persons from Palau, Micronesia, and the Republic of the Marshall Islands, and certain other persons whose enlistment has been determined by a Service Secretary to be "vital to the national interest." Among the small handful of individuals who are "honorably discharged veterans" under age 31, and otherwise eligible for deferred action under the June 15 memorandum, most also would be eligible for naturalization under INA § 329 and therefore not in need of deferred action.

Further, the June 15 memorandum did not alter the enlistment rules for those individuals who receive deferred action. To date, no Service Secretary has authorized the enlistment of undocumented noncitizens or of individuals who have been granted deferred action. *See* 10 U.S.C. § 504(b)(2) (providing that the Secretary may authorize the enlistment of individuals not typically permitted to enlist). Attorneys should ensure that their clients are aware that the new policy did not expand the categories of noncitizens eligible for enlistment.

How can I determine whether my client has been convicted of any disqualifying crimes?

Attorneys should question their clients in detail about their criminal histories and take steps to obtain copies of all police reports and records of disposition of any criminal charges, including any juvenile adjudications, no matter how minor or how long ago they occurred. A relatively simple way to obtain an individual's arrest record is through an FBI criminal background check, which requires the submission of an application form, fingerprints, and an $18 fee. More information is available at

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[10] Early indications are that enrollment in GED classes will qualify as being "in school."

http://www.fbi.gov/about-us/cjis/background-checks/submitting-an-identification-record-request-to-the-fbi. Many states have web-based systems that enable individuals and their attorneys to access criminal records.

What crimes render an applicant ineligible for deferred action?

Individuals are not eligible for deferred action if they have been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety. The FAQ issued by DHS provides important information regarding how these categories will be defined.

A "felony offense" includes any federal, state or local criminal offense punishable by imprisonment for more than one year. Thus, some state misdemeanor offenses may be characterized as felonies for purposes of the new memorandum.

A "significant misdemeanor"[11] includes any federal, state or local criminal offense punishable by up to one year of imprisonment *or even no imprisonment* and involving violence, threats, or assault, including domestic violence; sexual abuse or exploitation; burglary, larceny, or fraud; driving under the influence of alcohol or drugs; obstruction of justice or bribery; unlawful flight from arrest, prosecution, or the scene of an accident; unlawful possession or use of a firearm; drug distribution or trafficking; or unlawful possession of drugs. This definition potentially encompasses a wide range of conduct, including many offenses that would not impact a person's immigration status under current immigration law. However, it is unclear how decision makers ultimately will determine whether a misdemeanor disqualifies a person for deferred action. It is also unclear whether the circumstances of an offense, how long ago it occurred, or other considerations will have any impact on this analysis. As a result, attorneys with clients who have any type of criminal history should proceed with caution, particularly with respect to those clients who currently are not in removal proceedings, but might be viewed as a high enforcement priority.

The FAQ does not separately define a "non-significant misdemeanor." Presumably, this term includes federal, state, and local criminal offenses punishable by up to one year of imprisonment that do not qualify as "significant misdemeanors." Individuals with three or more non-significant misdemeanors not occurring on the same date and not arising out of the same act, omission or scheme of misconduct are ineligible for deferred action. It remains to be seen whether traffic violations—which are treated as criminal offenses in some jurisdictions, and non-criminal violations in others—will count as "non-significant misdemeanors." A strict reading of the memorandum would disqualify a large number of individuals in jurisdictions where minor offenses, like driving without a license, are treated as criminal misdemeanors.

DHS has not yet specified whether juvenile adjudications will be considered criminal convictions under the new policy. Even absent a criminal conviction, individuals are ineligible for deferred action if their background checks or other information reveal that they pose a threat to public

[11] This term does not appear in the Immigration and Nationality Act or elsewhere in the U.S. Code.

safety or national security. Relevant factors include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States.[12]

In preliminary discussions, DHS has indicated that it intends to adhere to the spirit of the memorandum and not apply it in an overly rigid manner. An applicant with a potentially disqualifying criminal offense, but with mitigating factors and other significant equities, might still have an application favorably considered. However, as discussed above, such an individual risks potential removal if he or she is determined to fit an enforcement priority. Practitioners are advised to follow trends in this area closely.

What will happen to individuals who meet the eligibility criteria but are stopped or arrested by ICE or CBP?

ICE and CBP have been instructed to immediately exercise their discretion, on a case-by-case basis, to prevent individuals who meet the eligibility criteria from being apprehended, held under ICE detainers, placed into removal proceedings, or removed from the United States. On a June 18 national stakeholder call, CBP announced that individuals who encounter CBP will be briefly detained for screening purposes. Following an interview and a background check, CBP will release individuals who are found to be prima facie eligible for deferred action. CBP will instruct eligible individuals to apply to USCIS for deferred action after the affirmative application procedure has been established.

If you believe that ICE or CBP has pursued enforcement action against your client in violation of this policy, you should contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours/day, 7 days/week) or the ICE Office of the Public Advocate at 1-888-351-4024 (staffed 9 am – 5 pm, Monday – Friday) or by e-mail at EROPublicAdvocate@ice.dhs.gov. Also, please complete this survey to assist AILA and the Legal Action Center in monitoring implementation of the new policy.

What steps should eligible individuals in removal proceedings take to apply for deferred action?

As discussed above, ICE Headquarters appears to be granting deferred action to individuals known to meet the eligibility criteria without requiring any further action on their part. However, until ICE standardizes its process, attorneys are advised to seek continuances in pending cases involving individuals who appear to meet the eligibility criteria to enable them to collect documentation for future presentation to ICE.

For those cases selected for deferred action, ICE appears more inclined to move to terminate proceedings than to move to administratively close the case. There may be strategic advantages

[12] Gang membership may prove to be an area of concern for potential applicants, given the reported difficulties former gang members face obtaining other immigration benefits or forms of prosecutorial discretion. One would hope that DHS will grant deferred action to individuals who renounce past gang affiliations, or whose prior involvement was coerced or limited, assuming the request reflects rehabilitation.

to termination or administrative closure, or even continuing on to the merits, depending on a particular respondent's situation. Attorneys should thoroughly weigh options before choosing a particular course of action.

It is not clear whether an individual offered termination or administrative closure can refuse the offer in order to proceed to a merits hearing. In light of the Board of Immigration Appeals' recent case regarding administrative closure, *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012)—holding that an immigration judge shall consider a party's opposition to administrative closure as one factor in determining whether to close the case—it seems likely that an individual in proceedings would have the opportunity to object to any motion for administrative closure or termination.

Assuming an individual can decline an offer of termination or administrative closure, it remains to be seen whether the offer then expires or can be accepted at a later time (e.g., after an adverse determination by an immigration judge). Under the ongoing review of pending cases for prosecutorial discretion, individuals in removal proceedings have frequently faced a "take it or leave it" dilemma, with administrative closure offers not offered a second time if initially declined. However, if DHS determines that an individual meets the eligibility criteria for deferred action, this determination should not be affected if the individual opts to pursue other forms of relief first. Further, given that the June 15 memorandum specifies that deferred action is available to those with final orders of removal, it is reasonable to expect that offers would be "renewed" at the end of removal proceedings if a more favorable outcome were not achieved.

Are individuals with final orders of removal eligible for deferred action?

Yes. Individuals subject to final orders of removal will be able to submit an affirmative application to USCIS regardless of whether they have reached the age of 15. This process is not yet in effect, and no applications for deferred action should be submitted to USCIS at this time. If your client meets the eligibility criteria and is in danger of imminent removal, you should immediately contact the Law Enforcement Support Center hotline at 1-855-448-6903 (24 hours/day, 7 days/week) or the ICE Office of the Public Advocate at 1-888-351-4024 (9:00 am – 5:00 pm, Monday-Friday) or by e-mail at EROPublicAdvocate@ice.dhs.gov.

Individuals who recently received a final order of removal and are still within the statutory time period for seeking reopening (within 90 days of the entry of a final order of removal under INA § 240(c)(7)(C)), may want to consider filing a motion to reopen based on the new memorandum. Even though such individuals are eligible for deferred action with a final order removal, they likely would be in a better posture with an administratively closed or terminated case if and when the policy is rescinded or a renewal application is denied.

What will happen to an individual's voluntary departure if DHS grants deferred action?

Individuals who are within the voluntary departure period or were within the departure period when DHS announced its new policy may choose to remain in the United States while the application process is developed and implemented. Presumably, the grant of voluntary departure would convert to a final order of removal if the individual fails to depart at the end of the period,

and those individuals may be subject to the very severe consequences of overstaying, including being ineligible for certain forms of relief for ten years.[13]

To date, DHS has issued no guidance on whether a grant of deferred action would be construed as a justifiable basis for not abiding by the terms of a voluntary departure grant. Attorneys should consider advising their clients to file a motion to reopen to withdraw a request for voluntary departure *prior* to their designated departure dates.[14] The motion also may seek administrative closure or termination of proceedings. DHS may be willing to join in such motions.

How can eligible individuals who are *not* in removal proceedings or subject to a final order of removal apply for deferred action?

USCIS will adjudicate deferred action requests for individuals who are not currently in removal proceedings or subject to a final order of removal. In addition to the eligibility criteria discussed above, applicants who fall within this category must be at least fifteen years old. Individuals who are under fifteen but who otherwise meet the eligibility criteria can apply for deferred action once they turn fifteen. This process is not yet in effect, and no applications for deferred action should be submitted to USCIS at this time.

Will individuals who receive deferred action be eligible to work?

Yes. Under 8 C.F.R. § 274(a).12(c)(14), individuals who receive deferred action may apply for and obtain employment authorization if they can establish an economic necessity[15] for employment. Form I-765 (Application for Employment Authorization) should be filed with USCIS after deferred action is granted. An individual who applies for and receives a renewal of deferred action separately must request a renewal of his or her employment authorization.

Will individuals granted deferred action be able to travel abroad?

DHS has not yet decided whether individuals granted deferred action will be able to travel abroad. Until this issue has been resolved, individuals who meet the eligibility criteria should remain in the United States. Even if overseas travel is permitted, it may not be in your client's best interest. Although unlawful presence will not accrue during any deferred action period, prior periods of unlawful presence may render individuals who leave the United States subject to the three or ten year bars and resulting inadmissibility for immigration benefits.

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[13] A person who overstays the voluntary departure period may be subject to a monetary fine of up to $5,000 and is barred for ten years from being granted cancellation of removal, adjustment of status, change of status, registry, and voluntary departure. INA § 240B(d).
[14] For more information about the consequences of overstaying voluntary departure and how a grant of voluntary departure can be terminated, see the Legal Action Center's Practice Advisory, *Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart* (July 6, 2009).
[15] Economic necessity, which also governs requests for employment authorization by U visa holders, does not require a showing of economic hardship.

Will immediate relatives of individuals who receive deferred action under this policy also be granted deferred action?

Only individuals who meet all the eligibility criteria will be granted deferred action under the new memorandum. Family members who do not independently qualify will not receive deferred action pursuant to this process. Although such family members may still be eligible for prosecutorial discretion pursuant to prior guidance issued by ICE on June 17, 2011,[16] or the ongoing review of pending removal cases announced in August 2011, there is no affirmative application process for such relief. Thus, if family members are not currently in removal proceedings, not likely to be placed into proceedings, and not under an imminent threat of deportation, they will not be able to apply for prosecutorial discretion. There is no indication that family members of individuals who receive deferred action will have a heightened risk of immigration enforcement.

How can I prepare my clients to apply for deferred action under the new memorandum?

Currently, there is no process for individuals to request deferred action under the new memorandum. However, individuals who qualify for relief should begin gathering the documents necessary to establish their eligibility. In addition to the documents discussed above, applicants should obtain certified copies of their birth certificates or passports to establish their identity and age.

Can individuals appeal a denial of deferred action under the new memorandum?

No. However, individuals in removal proceedings who believe their cases were not properly handled may contact the ICE Office of the Public Advocate either by phone at 1-888-351-4024 or by e-mail at EROPublicAdvocate@ice.dhs.gov. Also, please be sure to complete AILA's survey in order to help AILA and the LAC monitor implementation and advocate for improved policies and procedures.

What will happen to individuals whose requests for deferred action are denied?

Because it remains to be seen how USCIS will treat individuals who simply do not meet the eligibility criteria, but do not have other significant negative equities, attorneys are advised to warn their clients in writing that deferred action is not guaranteed. The warning should further explain that applicants will be revealing and, in most cases, documenting their removability to a government agency that can initiate removal proceedings. If USCIS denies deferred action to an applicant subject to a final order of removal, that individual may still request prosecutorial discretion pursuant to the prior guidance issued by ICE on June 17, 2011, or the ongoing review of pending removal cases announced in August 2011. Such requests may be submitted to the

[16]*See* John Morton, Director, ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011) and John Morton, Director, ICE, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011).

local Field Office Director or the ICE Office of the Public Advocate. In cases where ICE denies deferred action to individuals currently in removal proceedings, ICE will automatically consider whether they are eligible for prosecutorial discretion under the prior guidance and/or the ongoing review.

In cases where USCIS denies an individual's request for deferred action and the individual is not subject to a final order of removal, USCIS will apply its existing guidance governing referral of cases to ICE and issuance of notices to appear. This guidance prioritizes the prosecution of cases involving public safety threats, criminal convictions, and fraud.[17] In addition, DHS said in the FAQ that individuals who knowingly make a misrepresentation or knowingly fail to disclose facts in the deferred action application process "will be treated as an immigration enforcement priority to the fullest extent permitted by law, subjecting the individual to criminal prosecution and/or removal from the United States."

How will DHS convey new information about the implementation of the guidance in the memorandum?

Information about the new memorandum will be posted on USCIS's website (www.uscis.gov), ICE's website (www.ice.gov), or DHS's website (www.dhs.gov). Individuals can also call USCIS's hotline at 1-800-375-5283 (8 am to 8 pm) or ICE's hotline at 1-888-351-4024 (9 am to 5 pm).

[17] In accordance with its existing guidance, USCIS also will continue to issue notices to appear as required by statute or regulation, including in cases involving denials of Form I-751 (Petition to Remove the Conditions of Residence), denials of Form I-829 (Petition by Entrepreneur to Remove Conditions), terminations of refugee status, denials of NACARA 202 and HRIFA adjustments, asylum referrals, termination of asylum or withholding of removal, positive credible fear findings, and certain NACARA 203 cases.