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Legal, Factual, and Procedural Challenges to the NTA

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The Notice to Appear (NTA) is the charging document DHS issues to place a person in removal proceedings.[1] It provides the factual allegations and legal charge(s) that, if taken as true, establish removability against your client. But because it is a charging document issued by a prosecuting agency, and not a court order, the factual allegations and legal charges as stated are neither proven nor binding. DHS has the burden to prove that what it has alleged and charged in the NTA is accurate and true.[2]

By challenging an NTA for legal, factual, or procedural deficiencies, you are doing your job as an immigration attorney and advocate, and, perhaps more importantly, you are forcing chief counsel (OCC) to do its job by holding it accountable to the requirements in the statute and regulations. However, the decision whether to challenge a deficient NTA (just like the decision to admit all allegations and concede the charge) should not be made flippantly. Attorneys should thoughtfully weigh the potential costs and benefits of challenging an NTA, and discuss those with her client. While rolling over and not putting up a fight just to not ruffle feathers is a dereliction of your duty to your client, there are some instances where not holding DHS to its burden of proof may be in your client's best interest. For example, if your client is eligible for relief and has a strong case, and you know that the allegations and charge as stated are accurately laid out in the NTA, you may stand to lose more than you gain by denying everything. Further, making weak deficiency arguments that deal with trivial issues may just serve to delay proceedings unnecessarily, all while garnering ill will with the immigration judge (IJ) and OCC. And, many times, even with legitimate challenges to the NTA, DHS just quickly reissues a new NTA with all defects cured. Still, maybe the time gained during that reissuance could serve to extend the stop-time rule trigger date to make your client eligible for relief, or it could serve to get your case in front of a different IJ or with a different assistant chief counsel (ACC). It is also not unheard of that DHS will just not refile, maybe because the case slipped through the cracks, and it will all have been worth it. That said, there are seasoned, highly regarded (and with good reason) immigration attorneys whose motto is "deny, deny, deny" and deny the allegations and the charge in every single case as a matter of course, for legitimate reasons. As you, I hope, can gather by now, the decision of whether to deny allegations and charges and/or challenge the NTA involve a multitude of considerations that you should carefully contemplate. The only clear answer here is that under no circumstances should you admit and concede without investigating the allegations and charges and weighing the pros and cons, nor should you ever plead to the NTA without first reviewing it for deficiencies.

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[1] 8 C.F.R. §239.1 limits the issuance of a NTA to ICE, USCIS, and CBP. Note, Office of the Chief Counsel and EOIR/IJs are not authorized to issue a NTA.

[2] Burden of proof in immigration proceedings, including what party has it, what the standard is, and when it shifts is a complex and confusing world of its own. For example, DHS has the burden to prove alienage in INA § 212 proceedings by establishing foreign birth by clear, convincing, and unequivocal evidence, and once it has done that, there is a presumption of alienage. *See Woodby v. INS*, 385 U.S. 276, 277 (1966); 8 C.F.R. § 1240.8. In § 237 proceedings, the burden to prove removability is on DHS. The burden to prove eligibility for any form of relief is always on the noncitizen. For a more detailed explanation, please see https://www.ilrc.org/sites/default/files/sample-pdf/removal_defense-1st-2015-ch_01.pdf.

The Trump Administration has severely limited the availability of defensive strategies for immigration attorneys to get their clients out of removal proceedings. Prosecutorial discretion has been all but obliterated, as has administrative closure. *See Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). And, in *Matter of S-O-G-*, I&N Dec. 462 (A.G. 2018), the Attorney General restricted the availability of termination and dismissal, stating they are appropriate only when DHS cannot sustain the charges of removability or when the statute and regulations permit. *See id.* at 466. Therefore, unless you find yourself in the unlikely scenario of convincing the ACC to dismiss the NTA under the enumerated grounds in 8 C.F.R. §§ 239.2(a) and 1239.2(c), your options to end removal proceedings against your client are limited to legal, factual, and procedural challenges to the NTA.

Legal and Factual Challenges to the NTA

Sit down with your client and go through the factual allegations DHS set out in the NTA. Make sure they are accurate. Review the charge(s) of removability, and make sure the charge(s) is/are supported by the allegations. Even in cases where it seems like the better move is to concede everything in order to pursue relief, conceding factual or legal allegations where you haven't made sure they're correct or where they are written incorrectly is a mistake. There is a way to challenge the NTA without rocking the boat, by gently pointing out the error and being amenable to ACC correcting the deficiency in the most convenient way possible. But, if your client has no relief and there is a deficiency, or your client has an argument for suppression, or, if the government has, for example, charged your client with removability when your client is not, in fact, removable on that basis, you should challenge the NTA vigorously. Below are some examples of legal and factual challenges to the NTA:

- Claim to citizenship: the government has the burden to establish alienage in removal proceedings by proving foreign birth. If your client was born in the U.S., or if your client has a derivative citizenship claim based on U.S. citizen family members (something you should investigate thoroughly regardless), challenge the NTA.

- Failure to prove alienage: conceding alienage may be the way to go when discretionary relief is available and especially if your client has a strong case, but, if not, it may be wise to force the government to meet its burden of proof and admit and concede nothing.

- Inadmissibility or deportability not established prima facie in NTA: if the NTA fails to allege sufficient facts to establish removability and sustain the charge, then on its face the NTA is insufficient to support removal proceedings and those proceedings should be dismissed. For example, the allegations may include a conviction that your client's record of conviction does not reflect, or perhaps the NTA includes a criminal charge of removability but includes no factual allegation regarding any conviction.

- Improper charges under INA §§ 212 and 237: as mentioned above, the factual allegations must support every element in the charged removability ground. It is common for the government to overcharge crimes involving moral turpitude (CIMTs), aggravated felonies, and other criminal classifications. They will call criminal convictions CIMTs, or aggravated felonies, or controlled substances offenses when they're not, and if you don't

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