THE NOTICE TO APPEAR (NTA)

By ILRC Attorneys

A Notice to Appear (NTA), Form I-862, is a charging document that the Department of Homeland Security (DHS) issues and files with the immigration court to start removal proceedings under section 240 of the Immigration and Nationality Act (INA) against an individual, known in removal proceedings as the "respondent." The NTA serves many functions in an immigration case, like explaining why the government thinks the respondent maybe deportable[1] and gives notice to the respondent.

This practice advisory will go over some of the information you should find on the NTA. This is a general introduction on issues to look out for when representing someone in immigration court.

I. What is the NTA?

The NTA lists the charges that DHS is bringing against the respondent, specifying the removability grounds and factual allegations to establish removability. The charging document must include a certificate documenting that DHS has served the NTA on the respondent.[2] Note that DHS's issuance of an NTA does not mark the commencement of proceedings – proceedings only officially commence when DHS files the NTA with an immigration court. DHS's issuance of the NTA simply gives notice to the individual that they may be placed in removal proceedings. Once an NTA[3] is filed with the immigration court and removal proceedings officially begin, an immigrant is on the path to potential removal from the United States.

II. Where in the law can I find information about the NTA?

When researching what type of information the NTA should contain, advocates can begin by reviewing the statutory requirements at INA § 239, 8 USC § 1229 as well as the regulatory requirements at 8 CFR §§ 1229 and 1239.1.

III. What information should I find on an NTA?

Every NTA should include the respondent's identifying information,[4] the nature of the proceedings, the charges of removability and supporting factual allegations, the date and place of removal proceedings, advisals of certain rights and responsibilities, and a certificate of service. The statute and regulations require DHS to include all this information in the NTA.[5]

The NTA will specify the nature of the proceedings in a series of three check boxes under the Respondent's name and address. The NTA will inform the individual if they are being charged as an "arriving alien," an individual present in the United States without having been admitted or paroled, or someone who was admitted but is removable for the reasons stated. It is important to make sure that the correct box is marked because it can determine what rights the individual has and the immigration relief they might be able to apply for.

If a person has not been lawfully admitted[6] to the United States, they should be charged as inadmissible under INA § 212. Note that many people who are present in the United States undocumented will be charged as inadmissible unless they previously entered the United States with a visa or immigration officers otherwise permitted them to enter through a port of entry (including individuals who may have been "waved through"). If the client has been admitted—regardless of any current lack of lawful status—DHS should charge them as being deportable under INA § 237.

NOTE: Lawful Permanent Residents (LPRs) have been lawfully admitted to the United States and can generally only be charged as deportable under the grounds listed at INA § 237. However, LPRs can be charged as inadmissible under INA § 212 if they meet one of the exceptions under INA § 101(a)(13)(C), which requires the LPR to physically depart the United States and seek reentry. It is important to remember that, even if DHS charges the LPR with a ground of inadmissibility under INA § 212, it is the government's burden to prove to the immigration judge that the LPR meets the exception in INA § 101(a)(13)(C) and is also inadmissible. If not, the LPR should not be in removal proceedings and the advocate should move the immigration judge to terminate the removal proceedings.

In support of the charges of removability, DHS should also include on the NTA a list of factual allegations that establish the respondent's alienage (their country of birth or nationality) and other facts that support the charges of removal. DHS sometimes uses information provided by the respondent in prior applications filed for immigration benefits or statements made to CBP, ICE, or USCIS officers. However, it is not uncommon for the NTA to allege erroneous or incomplete facts in a respondent's case based on inaccurate or incomplete information provided by DHS databases or officers. For example, the NTA may allege an incorrect country of nationality for the respondent or allege an unknown date or place of entry. It is important for advocates to work with their clients to confirm the accuracy of the allegations on the NTA to determine what information needs to be corrected and what, if any, legal challenges can be made to the validity of the NTA and resultant removal proceedings.

Finally, the NTA also contains a number of warnings and advisals to the respondent about their rights and responsibilities while in removal proceedings, such as the right to obtain counsel, the responsibility to inform the government of any change of address, and the consequences of failing to provide a change of address or failing to appear for a scheduled hearing. It may inform the person of the date of the first removal hearing, i.e., the master calendar hearing, although the NTA often states that the initial hearing date and time is "to be determined", and the immigration court sends a notice of the first removal hearing on a later date. The NTA must be served at least ten days before the first hearing in immigration court.

IMPORTANT: For more than a decade, NTAs usually did not list the time or date of the client's hearing in immigration court. Many NTAs also failed to state the specific immigration court where the hearing was to take place. This lack of information carried important consequences after the U.S. Supreme Court issued its decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). In this case, the Court held that an NTA must have a date and time for a hearing in immigration court to comply with certain provisions in the Immigration and Nationality Act (INA), specifically the provision that stops the accrual of ten years of physical presence necessary for an applicant for non-LPR cancellation of removal.

IV. My client also has a hearing notice. What is this?

Typically, after DHS files the NTA with the immigration court, the immigration court will schedule the client's initial hearing with the immigration judge. The Court will then issue a "hearing notice," which states the date, time, address, and courtroom of the client's hearing at the immigration court. The hearing notice includes a certificate of service, which is important to check to ensure the client was properly served. The lack of evidence of proper service of the hearing notice may provide the respondent with a basis to ask for proceedings to be terminated.

There are two types of removal[7] hearings that can take place when someone is issued an NTA and hearing notice: Master Calendar and Individual (or Regular) Hearings. The hearing notice will indicate the type of hearing that will take place.

A. Master Calendar Hearings

Master calendar hearings are similar to arraignment hearings in criminal court, in that DHS acts as the "prosecutor" and must prove that the client can be deported as charged. For individuals who do not currently have lawful immigration status, DHS must only prove that the client was born in a country other than the United States, also referred to as establishing "alienage."[8] Though master hearings are normally short, preliminary hearings on the immigration matters at hand, the immigration judge may make serious substantive decisions at a master hearing. For example, an immigration judge may take away the client's previous immigration status (if they have one), such as nonimmigrant or LPR status.[9] Additionally, the client can decide to ask for a removal order or, even if the client wants to stay in the United States, they may be ordered removed if the immigration judge determines they are not eligible to file any applications for immigration relief.

B. Individual Hearings

At an individual hearing, also referred to as a "regular" or "merits" hearing, the client has an opportunity to apply for relief that would allow them to stay in the United States.[10] At this hearing, the client should present evidence that they are eligible for immigration relief, such as relief based on a family relationship, fear of persecution, or length of time in the United States.[11]

C. Immigration Court Mailing of Hearing Notices and Documents

If the client has no attorney of record for their case, the immigration court will send this hearing notice to the respondent's address that is listed on the Notice to Appear. However, after a legal representative submits a Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative before the immigration court, all documents issued by the immigration court will be mailed to the address for the legal representative. These

documents include subsequent hearing notices—if the client's hearing is rescheduled—and written decisions on motions or applications for relief. On occasion, the court will also send a copy of such documents to the client. It is important for the client and legal representative to update their addresses with the immigration court to ensure delivery of all-important documents.

V. Could my client's hearing be rescheduled?

The immigration court often reschedules, or "resets," a hearing with an immigration judge. This may happen because a judge cannot hear the case due to illness, vacation, or a temporary or permanent reassignment to another immigration court. In this case, the immigration court must send a new hearing notice with the new date, time, and place of the hearing.

PRACTICE TIP: In recent years, advocates have reported that hearing dates listed on the NTA do not match the dates listed on the hearing notice issued by the immigration court. Because the immigration court has jurisdiction over adjudicating the case, advocates should follow information listed on the most recently issued hearing notice, which can be verified by telephone or online, as detailed below.

VI. How can I confirm if the hearing information is correct?

Advocates can obtain information on hearing dates and locations by calling EOIR's 1-800 automated telephone line or searching EOIR's online portal. Note that these systems are only updated after the hearing notice has been issued and lack of information in the electronic system can indicate that the NTA has not yet been filed with the Court, the hearing has not yet been scheduled, or that the system has not been updated. It is important to check the EOIR electronic system regularly when working with a client in removal proceedings.

If the client comes to you with an NTA that does not list a hearing date or does not have a hearing notice from the immigration court, you will have to confirm that the client is in fact in proceedings and has a court date. If the client has their Alien registration number, or "A-number," you can access the ***EOIR electronic system at 1-800-898-7180 or*** *https://portal.eoir.justice.gov/* for information about the case, including the next hearing date. If the NTA has not been filed with the immigration court, the electronic system will have no information. Please note that this manner of checking for the next hearing date will not be successful if the client provides an incorrect A-number. Using the A-number on the NTA is the best way to ensure that you are checking the right number. Sometimes clients have A-numbers from applications they filed in the past with USCIS or the former INS, which may or may not be the number associated with their current case in court. Whenever possible, the best practice is to personally review the client's NTA and use the A-number on the NTA when contacting EOIR.

NOTE: Due to the coronavirus pandemic, immigration courts around the country postponed non-detained hearings, and some closed completely. Advocates or respondents should check the EOIR website regularly for updates on re-openings and rescheduling of hearings. Advocates can visit https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic for updates.

VII. I called the EOIR hotline and my client is not in the system. What does that mean?

If the EOIR hotline does not have information on your client, it usually means that DHS has not filed the NTA with immigration court. As mentioned above, removal proceedings officially begin only after DHS both serves the respondent with the NTA **and** files the NTA with the immigration court. It is the filing of the NTA that vests jurisdiction with the Court.[12] Because of this, even if DHS has served the NTA with a time and date for the hearing to an individual, the case is not actually "scheduled" until DHS has filed the NTA with the immigration court, which vests the court's jurisdiction. If this step has not happened, there will be no record of proceedings in the system.

Individuals in this situation are encouraged to contact the EOIR hotline regularly to check for any changes in the court system. Sometimes it takes some time for the system to update. Additionally, even if the NTA has a date and time for the hearing, the immigration court may change it. EOIR will confirm the time and date of any hearing listed on the NTA.

VIII. What happens if DHS does not file my client's NTA?

If there is no hearing date on the NTA, and EOIR has not scheduled a hearing, there is no obligation for your client to go to immigration court. The client or advocate should regularly check for updates in the EOIR system to see if a hearing date has been scheduled. Also, it is important to update DHS of any changes of address. The client will ultimately be responsible for the consequences of failing to update their address with DHS or to comply with any other requests that DHS has. The consequences of not complying could include an *in absentia* removal order.[13]

If there is a hearing date on the NTA, but there is no record of it in the EOIR system and DHS fails to file the NTA with the immigration court before the time and date of the hearing, EOIR is supposed to classify the case as a "failure to prosecute" and reject the NTA if there is an attempt to file it after the time and date listed on the NTA.[14] Advocates can attend the hearing as scheduled and argue that the judge should terminate any such case for "failure to prosecute."

IX. What happens if my client did not receive the NTA or hearing notice?

In the case where you client did not receive the NTA or hearing notice, it is important to explore if service was proper. If you do not have a copy of the NTA, you can obtain a copy from the immigration court at the clerk window, with the DHS attorney at the Master Calendar Hearing, or by filing a Freedom of Information Act Request with DHS and/or EOIR.

Once you have a copy of the NTA, you can check the certificate of service to see whether it contains the client's signature, if it was served in person, or to see if it was served by mail. If the NTA was mailed, then you can check whether it was sent to the correct address. This is critical because the BIA has held that termination may be proper when DHS mails the NTA to the last address on file and the record reflects that the noncitizen did not "receive the mailing."[15] This would mean that the noncitizen was never notified of the proceedings or informed of the obligation *pursuant to the NTA* to provide an updated address.

X. What should I review with my client before our first hearing?

It is important to thoroughly review the NTA with your client before you go to court. You should discuss the factual allegations presented in the NTA so that you do not concede a fact or a point of law that might be incorrect. There are times when the government may allege facts that are not accurate or include charges that cannot be substantiated, so you want to double check everything with the client.

Things that you should double check with you client are:

- ***Check if your client might be a US Citizen***. Remember that a person who is born abroad might acquire or derive U.S. citizenship and be unaware.[16] Remember that in removal proceedings, the government has the burden to prove "alienage" by "clear, convincing, and unequivocal evidence of foreign birth."[17] "Evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the alleged citizen to prove citizenship. Upon his production of substantial credible evidence in support of his citizenship claim, the presumption of alienage is rebutted."[18]
- ***Check if there are sufficient facts to establish removability.*** If the NTA does not have sufficient facts to establish removability, the proceedings should be terminated. Remember that the allegations on the NTA are not facts unless they are conceded or proven by clear and convincing evidence.
- ***Check the charges***. It is important to check if your client is properly charged under the listed removability grounds. Remember that removability or deportability applies to people who have already been admitted – they should be charged under INA § 237. Whereas inadmissibility applies to those who have never been admitted – they should be charged under INA § 212. The distinction is important because someone who is seeking admission will bear the burden to prove that they are admissible, whereas in the case of someone facing deportability, the government bears the burden of proof to show that the noncitizen is deportable. Also, it is important to check whether DHS marked the correct box near the top of the first page of the NTA, because it can limit the individual's access to rights and relief.

End Notes

[1] Though the NTA is supposed to state the time and place for proceedings, this is often missing, and advocates should call the 1800 EOIR number for updated information on the case. More information on this automated system can be found on page 4 on this advisory.
[2] 8 C.F.R. § 1003.14
[3] Please note recent case law on the requirements for a Notice to Appear. In June 2018, Supreme Court clarified the required content of a valid NTA when filed with an immigration court. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The Board of Immigration Appeals issued a decision limiting the applicability of *Pereira* in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018).
[4] DHS typically includes the respondent's name, address, DHS alien registration number or "A-Number," and, often, date of birth,
[5] INA § 239; 8 C.F.R. § 1229.
[6] Pursuant to INA § 101(a)(13)(A), "[t]he terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."
[7] In addition, in the case of respondents detained in DHS custody, the immigration court may schedule bond (or "custody redetermination") hearings, which are technically separate from the removal case.
[8] 8 C.F.R. § 1240.8(c).
[9] Note that only a final order of removal can terminate a person's lawful permanent resident status. *Matter of Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981).
[10] While individual hearings often involve decisions on applications for relief from removal, the immigration judge may also hold an individual hearing to decide evidentiary issues related to removability, such as whether the person's arrest by ICE was lawful or whether a marriage was bona fide.
[11] For summaries of options for relief from removal, see ILRC, *Immigration Relief Toolkit For Criminal Defenders: How to Quickly Spot Possible Immigration Relief For Noncitizen Defendants* (January 2016), https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf.
[12] 8 CFR 1003.14(a).
[13] The INA permits an immigration judge to order a person removed *in absentia* if the government can show by clear, unequivocal, and convincing evidence that proper written notice was provided, and that the person is removable. INA §240(b)(5).
[14] EOIR, *Policy Memorandum: Acceptance of Notice to Appear and Use the Interactive Scheduling System*, (Dec. 21, 2018), https://www.justice.gov/eoir/file/1122771/download
[15] *Matter of G-Y-R,* 23 I&N Dec. 181, 192 (BIA 2001)
[16] INA §§ 301, 309, 320; *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2007); ILRC, *Acquisition & Derivation Quick Reference Charts* (Feb. 26, 2020), https://www.ilrc.org/acquisition-derivation-quick-reference-charts.
[17] *Woodby v INS,* 385 US 276, 277 (1966)
[18] *Ayala-Villanueva v. Holder*, 572 F.3d 736, 738 (9th Cir. 2009).

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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.