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November 5, 2021

**Re: DHS's Stated Intention to Mail Notices to Appear to Individuals Released at the Border.**

Dear Acting Director Johnson and Principal Legal Advisor Doyle,

Since the beginning of the year, Customs and Border Protection (CBP) officials have reportedly released nearly 130,000 people at the border with a "Notice to Report" (NTR) at the person's nearest Immigration and Customs Enforcement (ICE) local field office within 60 days to be processed for a "Notice to Appear" (NTA) in immigration court. According to DHS officials, the majority of individuals issued NTRs have successfully reported within the 60-day period.

At a stakeholder engagement yesterday, DHS announced "Operation Horizon," through which it intends to mail NTAs to individuals who were initially issued a NTR but have not yet been able to check in with ICE. We write to express concern about the execution of this plan, which has the potential to lead to a significant number of individuals wrongfully being ordered removed "in absentia" if they do not receive the NTA and subsequently miss a hearing before an immigration judge.

Studies have consistently shown that one of the primary reasons that individuals receive orders of removal in absentia is due to bureaucratic issues related to lack of notice.<sup>1</sup> Some immigration courts even hold "returned notice" hearings at which immigration judges order respondents removed *en masse* following hearing notices being returned as undeliverable, raising serious concerns about due process.<sup>2</sup> As a result, when respondents have access to counsel who can help them navigate the complex process of immigration court, they overwhelmingly appear in court.<sup>3</sup>

Individuals issued NTAs under this new initiative are likely to encounter bureaucratic and other serious obstacles preventing them from appearing in court. Unlike in a typical case where an NTA

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<sup>1</sup> Urban Justice Center and CLINIC, "Denied a Day in Court: The Government's Use of *In Absentia* Removal Orders Against Families Seeking Asylum," 2018, <https://asylumadvocacy.org/wp-content/uploads/2018/04/Denied-a-Day-in-Court.pdf>.

<sup>2</sup> Tal Kopan & Deepa Fernandes, "S.F. Immigration Court fast-tracking cases in what critics call a deportation conveyor belt," *San Francisco Chronicle*, Oct. 31, 2021, <https://www.sfchronicle.com/sf/article/San-Francisco-Immigration-Court-fast-tracks-16576102.php>.

<sup>3</sup> American Immigration Council, "Measuring *In Absentia* Removal in Immigration Court," January 28, 2021, <https://www.americanimmigrationcouncil.org/research/measuring-absentia-removal-immigration-court>.

is issued contemporaneously with processing – and served in-person – weeks and even months have passed since individuals issued NTRs last provided an anticipated address to DHS. And critically, unlike an NTA, NTRs do not inform respondents of their obligation to update the immigration court with any change of address.<sup>4</sup> Therefore, it is highly likely that many individuals issued an NTR at the border no longer reside at the address they provided DHS months earlier. Moreover, “Operation Horizon” is presently slated to roll out at a time when substantial numbers of those who received NTRs will not have legal representation.

While we appreciate ICE’s stated intention to address the risk of notice failures and *in absentia* removal orders, we are concerned that insufficient safeguards are in place. Given the possibility that the issuance of these NTAs will lead to a significant number of individuals being ordered removed *in absentia* without notice, we urge the agency to reconsider its current path and explore alternative means for contacting individuals issued NTRs, such as calling any phone number provided by the individual first, sending a new NTR prior to the issuance of an NTA, or working with local community stakeholders on outreach to individuals issued NTRs.

However, should ICE choose to go forward with this plan, we believe the agency should take the following measures:

- Direct the Office of Principal Legal Advisor (OPLA) to issue guidance clarifying that service of an NTA by mail to an individual issued a NTR is not sufficient to satisfy the notice requirements in INA § 239(c) and 240(b)(5)(A) relating to service of NTAs by mail.<sup>5</sup> We request that any such guidance be made publicly available, and also that such guidance indicate that the unique circumstances created by the NTR process counsels against the filing of an NTA with the Executive Office for Immigration Review (EOIR) if an individual does not subsequently check in with ICE pursuant to the process set out in the informational packet being sent to each individual.
- Further direct that such OPLA guidance should reinforce that respondents may not be ordered removed *in absentia* absent proof by “clear, unequivocal, and convincing evidence” that the respondent received notice, and providing that Trial Attorneys should generally not seek or consent to the issuance of an order of removal *in absentia* for individuals originally issued NTRs and subsequently mailed an NTA months later.
- Maintain a centralized list of Operation Horizon cases and ensure that any postal service delivery failure is noted in both the centralized list and in each individual’s A-File, and

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<sup>4</sup> INA § 240(a)(1)(F). We recognize that some individuals received a notice on “Reporting to ICE” which mentioned address changes, but the notice did not provide any instructions on doing so.

<sup>5</sup> *Cf. Matter of G-Y-R-*, 23 I&N Dec. 181, 189 (BIA 2001) (“In short, the notice requirement leading to an *in absentia* order cannot be satisfied by mailing the Notice to Appear to the last known address of the [respondent] when the [respondent] does not receive the mailing”).

provide this list to EOIR with an explanation of the unique circumstances under which these NTAs were generated. In addition, provide the OPLA guidance discussed above expressing the position that such individuals should not be ordered removed *in absentia* absent further evidence that the individual received notice of the hearing.

- Further inform EOIR of the dates and times provided for each individual sent an NTA through Operation Horizon. We recognize that ICE may not file NTAs with the court unless the individual appears in person at an ICE office for further processing. This creates the possibility that individuals who receive such NTAs may appear at the immigration court on that date and time even if they have not checked in with ICE for further processing, only to discover that no hearing exists because ICE did not file the NTA with the court. ICE should work with EOIR to establish a system to ensure that individuals in this circumstance are given information on how to proceed with their cases. ICE should also work with and update stakeholders as it develops a process to remedy any confusion that may result from individuals prematurely arriving to immigration court based on dates included on their NTA before ICE has served the NTA with the court.
- In coordination with U.S. Citizenship & Immigration Services' Refugee, Asylum, and International Operations Directorate, exempt individuals from Operation Horizon who have already filed Form I-589 Application for Asylum and for Withholding of Removal. These individuals have already provided their current address to DHS and initiated proceedings to determine eligibility for relief. Attempting to put these individuals in removal proceedings will create confusion, lead to potential delays in the ability to access employment authorization, and add to the immigration court backlog.

We look forward to engaging with your offices further on this matter.

Sincerely,

American Immigration Council

American Immigration Lawyers Association

Asylum Seeker Advocacy Project (ASAP)

National Immigrant Justice Center

National Immigration Law Center

National Immigration Project of the National Lawyers Guild (NIPNLG)

Cc: Ken Padilla, Deputy Principal Legal Advisor for Field Legal Operations

David Neal, Director of the Executive Office for Immigration Review