AMERICAN IMMIGRATION LAWYERS ASSOCIATION

# Policy Brief: Guiding Principles for an Electronic Service of the Notice to Appear

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Contact: Jennifer Ibañez Whitlock, Supervisory Policy and Practice Counsel at jwhitlock@aila.org, and Amy Grenier, Policy and Practice Counsel at agrenier@aila.org

## Introduction

The government issuing a Notice to Appear (NTA) and ensuring proper service and accessibility of the NTA to noncitizens are critical to ensuring the fairness and integrity of the immigration removal process. The Supreme Court has issued two decisions ruling in favor of noncitizens whose NTAs were incomplete and underscoring the importance of NTAs to due process.[1]

Recent developments in technology and increased migration encounters have generated interest in creating electronic systems for processing and serving NTAs. Depending on how such a system is implemented, it could bring significant benefits to the government and noncitizens: it has the potential to increase transparency, increase the efficiency of and coordination among immigration agencies, improve communication with noncitizens, and increase compliance by noncitizens with the process.[2] An electronic NTA system could also increase the accessibility of the NTA to noncitizens.

Nevertheless, allowing electronic service of the NTA could also erode the integrity of the system, weaken due process protections, and diminish the gravity that must be attributed to removal proceedings. If the government implements electronic service of the NTA (e-NTA), the process must ensure that noncitizen's legal and constitutional rights are protected. If issuing NTAs becomes too highly automated through an e-NTA system, the government would run the risk of issuing NTAs even in cases that do not warrant the prioritization of the government's finite prosecutorial resources.

AILA proposes the following principles for the development of and possible implementation of an e-NTA system.

[1] An NTA that does not include the time or place of the scheduled Immigration Court hearing does not trigger the "stop-time rule" for purposes of cancellation, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), AILA Doc. No. 18062132; To trigger the "stop-time rule," DHS must serve the noncitizen with a single-document NTA containing all the information about an individual's removal proceedings specified in INA § 239(a)(1), *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), AILA Doc. No. 21042931.

[2] Implementing an e-NTA system will require Congressional action, as INA §239 would need to be amended to allow for electronic service (e-service) since it currently requires personal service, or where personal service is not practicable, service by mail. Once amended, there are also likely to be regulatory or policy manual changes needed to implement this change.



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## Six Guiding Principles for Modernizing the Notice to Appear (NTA)

1. *Consent, knowingly obtained and properly documented, must be required for electronic service.*
2. *Delivery to a personal email address is insufficient for proper service.*
3. *Electronic service should be developed alongside the creation of a digitized "A-File."*
4. *Commitment to transparency and accessibility for noncitizens and attorneys is essential.*
5. *DHS must mitigate privacy risks and require archival capacity.*
6. *A filing deadline must be required for all NTAs.*

**Understanding the Impact of Service of an NTA**

Understanding the impact of service of the NTA is a crucial first step in developing the e-NTA. There are three acts associated with NTAs—charging, serving, and filing—all of which are distinct and critical to informing noncitizens about their rights and obligations. The process begins with the Department of Homeland Security (DHS) issuing a Form I-862, Notice to Appear. This fiscal year, DHS is on pace to issue nearly one million new NTAs, a record number.[3]

*Charging*

An NTA states the immigration charges alleged against a noncitizen, informs the charged individual of the time and place of their court hearing and their right to counsel, and explains the consequences of failing to appear at a hearing.[4] The law contains an additional list of information that must be included, such as the requirement that noncitizens notify the government of changes of address and the consequences of failing to do so.[5]

*Service*

Proper service communicates these critical pieces of information to the noncitizen. Given that there is no universal legal representation in immigration courts, not even for minors, ensuring due process is a significant consideration in the service of an NTA. There are special rules related to service on minors and noncitizens found to be mentally incompetent.[6]

Any changes to the procedures for service of the NTA must consider the legal consequences of service for the noncitizen. For example, the service of an NTA ends the "continuous presence" requirement for eligibility for cancellation of removal (also known as the "stop-time rule").[7] Service of the NTA cuts off the ability to secure relief for long-term residents of this country who may be close to establishing the requisite 10 years of continuous physical presence required

[3] TRAC Immigration, Immigration Court Case Closures Accelerate, Racing to Catch Up with Growing DHS Filings (2023), https://trac.syr.edu/reports/709/.
[4] INA §239(a)(1).
[5] *Id*.
[6] 8 CFR §103.8(c)(2).
[7] INA §240A(d)(1)(A).

to apply. Service of the NTA also ends any grant of parole, typically a period in which a noncitizen is authorized to be in the United States.[8]

*Filing*

Notably, service of the NTA does not commence removal proceedings. Rather, it is the filing of the NTA with the immigration court that commences removal proceedings against an individual.[9] In other words, proper service *plus* filing commences removal proceedings.[10] As discussed further below, service and filing are not usually simultaneous due to factors both in and outside of the government's control. Proper filing also initiates the immigration court's jurisdiction over the case. The court's jurisdiction has become increasingly complicated given the use of remote adjudication centers where immigration judges are in physically different locations from noncitizens.[11]

**Guiding Principles for Electronic Service of the NTA**

The law permits DHS to serve noncitizens with NTAs by mail when in-person service is not practicable.[12] For example, if U.S. Citizenship and Immigration Services (USCIS) denies a noncitizen's application and decides to refer the case to immigration court, the noncitizen or their counsel of record will generally receive their NTA by regular mail. For noncitizens encountered at a port of entry or near our land borders, in-person service can be more practicable because they are typically in government custody. However, there is a significant danger to the safety of noncitizens in prolonged detention if DHS cannot release them without personally serving an NTA.[13]

In-person service has the benefit of ensuring noncitizens are in receipt of a critical document that will determine their ability to remain in the country. It also avoids future motions to reopen based on arguments that a noncitizen did not actually receive an NTA. With delivery by mail, a noncitizen could potentially not actually receive the NTA. An e-NTA could increase the likelihood of actual service when a mailing address is not available and decrease the likelihood of an *in absentia* removal order being issued due to an erroneous address hindering proper mail service. Additionally, an e-NTA could prove useful to quickly moving noncitizens out of custody if DHS adopts a policy of releasing them on an order of recognizance, bond, enrollment in some form of alternative to detention, or parole with the intent to then serve them with an e-NTA in an expeditious manner. If DHS were to introduce an e-NTA, it should only do so if the agency can guarantee due process for noncitizens as guided by the below principles:

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[8] 8 CFR §212.5I(2)(i).
[9] 8 CFR §§1003.14, 1239.1(a).
[10] At the beginning, we noted three steps associated with NTAs, but there is arguably a fourth. Immigration Court personnel must also physically accept or reject the government's filing of the NTA.
[11] The law of the federal circuit where venue in removal proceedings sits is controlling for the IJ and the Board of Immigration Appeals ("BIA"). *Matter of Garcia*, 28 I&N Dec. 693 (BIA 2023), AILA Doc. No. 23032704.
[12] INA § 239(a)(1) states "written notice (in this section referred to as a "notice to appear") shall be given in person to the alien."
[13] *See e.g.* DHS Office of Inspector General, "El Paso Sector Border Patrol Struggled with Prolonged Detention and Consistent Compliance with TEDS Standards," Aug. 9, 2022.

1. **Consent, knowingly obtained and properly documented, must be required for electronic service.**

If providing service electronically, the government should be required to obtain written consent to serve an e-NTA. This is especially important if the NTA will be delivered electronically after someone is released from custody. The purpose of consent is twofold. First, it puts the noncitizen on notice that they will need to access their future NTA electronically as opposed to expecting it in the mail or delivered in person. Second, it can prevent the use of a method of service that is not appropriate for certain noncitizens who may have vulnerabilities relating to literacy, language, and access to technology.

Additionally, requiring DHS to obtain consent for migrants to receive their NTA electronically aligns with Fair Information Practice Principles (FIPPS) that were developed by the DHS Privacy Office from the underlying concepts of the Privacy Act of 1974.[14] One of the principles is individual participation: "DHS should, to the extent practical, seek individual consent for the collection, use, dissemination, and maintenance of personally identifiable information" when assessing programs and new technology systems.[15] DHS officials could obtain consent using the same language interpretation services currently in place to process noncitizens. Using these services, officials would be required to explain to a migrant that they can choose to receive their NTA electronically and obtain their agreement to electronic service. The consent could then be documented by an attestation signed by the official on the NTA.

2. **Delivery of electronic service to a personal email address is insufficient for proper service.**

Once consent for electronic service has been obtained, proper service of the e-NTA should not hinge on delivery to a personal email address. Rather, DHS should affirmatively notify the noncitizen that they have uploaded the e-NTA to a website or government portal accessible to the noncitizen. After this affirmative notice, DHS should document that the NTA was accessed by the noncitizen using an electronic signature or acknowledgement system. The initial DHS notification could be via email, text message, or a voicemail message to a phone number provided by the noncitizen. DHS should be required to send the initial notification via at least two methods.

These two steps are important to protect due process. It is insufficient to upload the e-NTA to any future system for the purpose of service and not proactively notify the noncitizen that the e-NTA has been uploaded and how to access it. Simply emailing an NTA to a personal email address creates the potential for noncitizens to fail to receive a critical document because it was sent to a spam folder or because they are locked out of a personal email account.

3. **Electronic service should be developed alongside the creation of a digitized "A-File."**

[14] Memorandum of Hugo Teufel III, DHS Chief Privacy Officer, *Privacy Policy Guidance Memorandum 2008-01* (De. 29, 2008), AILA Doc. No. 08123162, https://www.aila.org/infonet/dhse-framework-for-privacy-policy.
[15] *Id.*

AILA supports the development of a digitized "A-file" system so long as it is done in a manner that protects the privacy and due process rights of the noncitizen. The e-NTA should be developed in conjunction with ongoing efforts by DHS to create a fully digitized "A-file" (an electronic version of all documents related to the noncitizen's immigration history) and online change of address systems.[16] Developing a digitized "A-file" while also developing the e-NTA will ensure the e-NTA is fully incorporated. By integrating these systems from the beginning, the federal government will avoid creating separate systems that will not work together effectively.

This electronic "A-file" and e-NTA system should be accessible throughout the removal process, which requires all immigration agencies to coordinate their development, including consultation with the Executive Office for Immigration Review (EOIR). We recognize that EOIR maintains a record of proceedings that is distinct from a digitized "A-file" that might be developed. Nevertheless, it should be a consultative partner in this process given the role the immigration courts play in adjudicating the charges contained within the NTA. Congress should instruct all immigration agencies to coordinate the development of both technologies.

4. **Commitment to transparency and accessibility for noncitizens and attorneys is essential.**

Accessibility and equity need to be at the core of any modernization of the e-NTA and the creation of a digitized "A-file." This includes language and disability access, attorney access, and a fundamental understanding of the audience using this service. For example, based on AILA members' experiences working with noncitizens, those who could benefit most from a more accessible NTA process often do not use email or even have a reliable email account. As a result, requiring an email address for notice and account creation will not provide the benefits of accessibility to those who need it the most.

The development of the e-NTA and the electronic "A-file" is an excellent opportunity to expand language access in line with related efforts in the immigration courts.[17] Automatic translating services that allow for audibly reading text must be incorporated into the development of this program. This would allow for non-English speakers and individuals who are illiterate to understand the information in their e-NTA, even if the English-language version remains the legal version that controls. At a minimum, DHS should be required to provide a written or oral translation of the NTA, so noncitizens understand the consequences of failing to appear and understand the charges against them. Ultimately, increasing the accessibility of the NTA process will greatly advance the government's interest in informing noncitizens about their legal responsibilities and thereby increase compliance with court appearances, the primary goal of service.

[16] ICE Press Release: ICE Announces Online Tool for Noncitizens to Provide Change of Address (Apr. 6, 2023). https://www.ice.gov/news/releases/ice-announces-online-tool-noncitizens-provide-change-address.
[17] Memorandum of David L. Neal, Director of EOIR, *Language Access in Immigration Court* (June 6, 2023), AILA Doc. No. 23061301, https://www.aila.org/infonet/eoir-issues-memo-on-language-access.

Attorneys with a G-28 on file should also be able to access the e-NTA in full. Any future systems must have a mechanism for notifying when an attorney has withdrawn from representation and allow for the introduction of new counsel with ease and speed.

5. **DHS must mitigate privacy risks and require archival capacity.**

DHS must conduct a privacy impact assessment *prior* to implementing an e-NTA program. Generally, DHS conducts a privacy impact assessment (PIA) when it creates a new program or method to collect information that may have privacy implications.[18] Operating a new program collecting the personal information of thousands of noncitizens before a PIA is performed is unacceptable because of the sensitive nature of immigration cases. For example, an inadvertent disclosure of information of a noncitizen who is seeking asylum could jeopardize the asylum seeker's safety and that of loved ones in their home country. The government also bears a responsibility of safeguarding personal information, regardless of U.S. citizenship status, from the threat of financial exploitation and other global cyber threats. DHS operated the Intensive Supervision Appearance Program (ISAP), collecting the personal information of thousands of noncitizens for almost 20 years before a PIA was issued on March 17, 2023.[19] This should not be permitted to happen again.

DHS should also maintain a log of individuals and associated agencies or law firms that viewed or edited the e-NTA, including the time and date of the action. The noncitizen and their attorney should be able to view this log on the e-NTA. Even with these provisions, requirements under the law to issue a new NTA or the proper form for additional or substitute charges must be obeyed.

A log with notifications for any edits is an important due process safeguard. Without a log available to the noncitizen and their attorney, substantive changes could be made after service without notice. Without a log of edits, it would be impossible to know whether the NTA is compliant in order to timely raise objections to this violation.[20]

6. **A filing deadline must be required for all NTAs.**

If changes are anticipated in how NTAs are served, we recommend requiring a deadline by which DHS must file an NTA. The e-NTA should also clearly state the status of filing the NTA with the immigration court. If it has been filed with the court, the e-NTA should note the date and time, the name of the officer that filed it with the immigration court, and with which immigration court it was filed. Currently, cases that are not filed remain in jurisdictional limbo. Being able to see where the NTA is in the process will facilitate and reinforce communication between agencies, the noncitizen, and attorneys.

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[18] DHS Privacy Impact Assessments, https://www.dhs.gov/privacy-impact-assessments.

[19] ICE Press Release, *ICE announces first-ever Alternatives to Detention Privacy Impact Assessment* (Mar. 30, 2023), https://www.ice.gov/news/releases/ice-announces-first-ever-alternatives-detention-privacy-impact-assessment.

[20] With respect to the time and place of a future hearing, the BIA has held that because these are required under INA §239(a)(1)(G), a noncompliant NTA violates a mandatory claim-processing rule. There is no requirement that a noncitizen demonstrate prejudice arising from the violation, but they are required to timely raise objections. *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022), AILA Doc. No. 22080803.

As noted above, service only gets you half-way to commencing proceedings. There is nothing in the current statute or regulation containing a timeframe for filing the NTA with the immigration court or serving the NTA on an individual.[21] As a result, AILA has tracked multiple instances in which the government fails to file an NTA until the day of the scheduled hearing, which causes a number of issues for the noncitizen as their hearing will not show up in the EOIR system until it is filed.

Per an EOIR Director Memo, if DHS fails to file an NTA at the time of the scheduled hearing, immigration judges should classify this as a "failure to prosecute" and the NTA is supposed to be rejected if filed after the date and time of the hearing listed on the NTA.[22] However, that does not always occur and AILA members report NTAs being filed within mere hours of a hearing and immigration judges moving forward with in absentia orders of removal if the noncitizen is not present or giving DHS additional time to file NTAs.

The filing deadline could be tied to the stated hearing date on the NTA or a set time period like six months. The consequence for failing to timely file an NTA does not have to change, but a deadline puts DHS on notice that it must file the NTA by a certain time period. As is the case now, nothing would bar DHS from issuing a new NTA or exercising prosecutorial discretion to not seek removal proceedings.

If Congress enacts a filing deadline for NTAs, it should also require a 10-day advance filing period before the initial hearing.[23] For example, if DHS files the NTA less than 10 days before the hearing date, that should trigger a new hearing date. This is necessary to give sufficient time for the hearing information to appear on the EOIR hotline or webpage that noncitizens use to confirm their current hearing information, retain counsel, and make any necessary travel, work, or childcare plans.

**Conclusion**

Changes to how removal proceedings commence are enormously consequential and carry significant ramifications for the rights of the noncitizen as well as the overall integrity, credibility, and fairness of the immigration system. Removal orders, especially those issued in absentia, have powerful, lifelong consequences for individual noncitizens, their families, and their communities. Adults with significant ties to this country learn years later that they were ordered removed in absentia as children. If electronic service of the NTA is to be introduced, these recommendations are guiding principles for an efficient and fair system.

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[21] In contrast, there is a time frame for making charging and custody determinations and deciding whether to issue an NTA, "except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time." 8 CFR §287.3(d

[22] Memorandum of James R. McHenry, III, Director of EOIR, Acceptance of Notices to Appear and Use of the Interactive Scheduling System (Dec. 21, 2018), AILA Doc. No. 18122405, https://www.aila.org/infonet/eoir-memo-notices-interactive-scheduling-system.

[23] Currently, INA §239(b) require respondents to be granted at least 10 days after service of NTA before the hearing can commence to provide an opportunity to secure counsel.