

United States Senate
WASHINGTON, DC 20510

May 3, 2023

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
301 7th St, SW
Washington, DC 20528

Dear Secretary Mayorkas:

We write to you today to request that you take appropriate steps to expedite the issuance of Notices to Appear (NTA) to noncitizens who are in U.S. Customs and Border Protection (CBP) custody. Additionally, we request that you seriously consider exercising your authority under 8 C.F.R. § 2.1 to authorize Border Patrol Processing Coordinators (BPCC) and other appropriate law enforcement support staff to issue a NTA to individuals subject to removal pursuant to immigration laws. We believe permitting BPCC, after proper training and with supervisor approval, to issue NTAs while noncitizens are in the physical custody of CBP, would save resources for DHS and ultimately strengthen security on our borders as more Border Patrol Agents are able to swiftly return to the field.

While BPCC are not listed by regulation, the Secretary appears to have the authority to issue appropriate guidance and regulations to authorize BPCC to issue NTAs. For example, existing regulations provide the Secretary the authority to delegate “any such authority or function [of the Department of Homeland Security to administer and enforce immigration laws] to any official, officer, or employee” of the Department.¹ Furthermore, the Immigration and Nationality Act (INA) appears to be silent on which personnel are authorized to issue NTAs, leaving the administrative flexibility to promulgate regulations. Lastly, the implementing regulations allows for “Other duly authorized officers or employees of the DHS [...] who are delegated authority as provided by 8 C.F.R. § 2.1 to issue Notices to Appear [...].”²

Over the last year, a growing number of noncitizens have been released from U.S. Department of Homeland Security (DHS) custody without a properly issued NTA, creating costly and unnecessary backlogs for Immigration and Customs Enforcement (ICE) while also slowing down the noncitizen’s requirement to appear in immigration court. A recent GAO examination found that ICE has started scheduling appointments for migrants to complete processing following their release and that appointments were being scheduled at least two years into the future in certain cities and localities.³ Since the GAO examination published last October, we have seen reports that this backlog of pending cases has continued to grow. These reports state that there are

¹ 8 C.F.R. § 239.1; 8 C.F.R. § 2.1.

² 8 U.S.C. 1229(a); 8 C.F.R. § 239.1.

³ Govt. Accountability Office, “SOUTHWEST BORDER: Challenges and Efforts Implementing New Processes for Noncitizen Families,” GAO-22-105456, (Sept. 2022).

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roughly 600,000 cases where a noncitizen has been released from the border without full processing, meaning they have not received a properly issued NTA.⁴

The INA states that immigration court proceedings cannot be commenced until DHS issues a NTA to the noncitizen. This growing backlog is preventing a significant number of noncitizens from beginning their immigration court proceedings and will likely compound the already historically high backlog of cases pending before the immigration courts. Based on current trends, it is conceivable that some of the migrants released on Parole/ATD will wait at least a decade as their case moves through the NTA issuance backlog and then through the immigration court backlog.

In light of these concerns, we believe that the Department should prioritize the expeditious issuance of NTAs, particularly as it is preparing for the unwinding of the Title 42 order.

We understand there are challenges around allowing BPPC to issue NTA issuance, such as developing, funding, and conducting additional trainings and ensuring that other job functions performed by BPPC are not compromised. However, as the GAO has found that issuing an NTA can take 2-2.5 hours, we need to explore ways to streamline processing. Therefore, we encourage the Department to allow BPPC and any other personnel they deem appropriate to issue NTAs.

Thank you for your attention to this matter. We look forward to your response by not later than June 1st.

Sincerely,



JAMES LANKFORD
United States Senate



CHRISTOPHER S. MURPHY
United States Senate

⁴ Julia Ainsley, *Nearly 600,000 migrants who crossed the border since March 2021 were released in the U.S. with no immigration court date*, NBC News, (Feb. 3, 2023): <https://www.nbcnews.com/politics/immigration/nearly-600000-migrants-crossed-border-released-inside-us-rcna68687>.