

Practice Summary: Updated EOIR Policy Memorandum, PM 24-01

Notices to Appear & DHS Failure to Prosecute

On August 22, 2024, the Executive Office for Immigration Review (EOIR) issued a new Policy Memorandum (PM 24-01), titled “Updated Guidance for Receipt of Notices to Appear Filed by the Department of Homeland Security.” PM 24-01 can be found via the following link: www.justice.gov/eoir/media/1364931/dl?inline.

Issue & Determination: If the Department of Homeland Security (DHS) serves a Notice to Appear (NTA) on an individual but does not file it with the Immigration Court (IC), Immigration Judges (IJs) have new guidance on time frames for when to consider Failure to Prosecute (FTP) and when they no longer have jurisdiction over the case. 8 C.F.R. § 1003.14(a). FTP can be found after a range of actions from DHS, but it essentially means DHS has not pursued its claim of removability against the individual (potential Respondent). There are protections for individuals when DHS fails to pursue its claim of removability against an individual by either failing to a) file the proper paperwork, b) proceed with the charges of removability, and in some cases, c) show up to hearings. In the interest of due process and fairness, courts can dismiss these proceedings when DHS fails to follow through with their allegations of removability.

Interrelated Note: Advocates should be aware that 16 days after issuance of PM 24-01, the Board of Immigration Appeals (BIA) published *Matter of R-T-P*- 28 I&N Dec. 828 (BIA 2024) further holding the requirements for a legally sufficient NTA and how to remedy it. The BIA held that written amendments by the Immigration Judge by motion of DHS can remedy a noncompliant NTA. PM 24-01 appears synchronous with *Matter of R-T-P*, confirming that IJs have discretion to amend the NTA, if not prejudicial. In the PM 24-01, EOIR indicates that if an NTA is facially noncompliant, the IC should reject it, but that DHS can refile a new NTA.

Issuance Date of PM 24-01: August 22, 2024

Effective Date of PM 24-01: September 20, 2024

Applies to all NTAs issued and scheduled 30 days after the issuance of PM 24-01 (effective September 20, 2024). Note that PM 24-01 footnote two indicates that for purposes of PM 24-01 the day a case was scheduled counts as “day 1.” Therefore, “day 1” begins on the date the PM-24-01 was signed, so that 30 days after and including August 22, 2024, is Friday, September 20, 2024. However, it is worth noting that the Immigration Court Practice Manual generally counts the original date as “day 0” though. See [ICPM 3.1\(c\)\(2\)\(D\)](#). Therefore, this is a slight departure from typical calculations because footnote two is not explicitly clear that the PM 24-01 issuance date should be counted as day one, there is room to argue that the 30-day calculation lands on September 21st, a Saturday, making the Effective Date actually September 23, 2024.

What Fact Patterns to Look For:

1. Scenarios where the NTA is legally deficient because it lacks the time or place of the hearing, or it has been scheduled on a holiday, a weekend, or otherwise when the court is closed.
2. A hearing date has been scheduled, but the NTA has not been filed with the court.

Important Takeaways:

- Once the hearing date and time are scheduled and DHS serves the NTA on the individual, DHS must file the NTA with the IC. Critically, the court does not have jurisdiction until the NTA is filed. 8 C.F.R. § 1003.14(a).
- If DHS fails to file the NTA by the time and date of the hearing listed on the NTA, the IC does not have jurisdiction over the case and the hearing cannot occur. 8 C.F.R. § 1003.14(a). In this scenario, EOIR is required to find that DHS has failed to prosecute the case.

Relevance to Individuals on the Non-Detained Dockets:

Generally, the IC can set a case to be heard based on the date provided in the NTA, thereby “scheduling the case.” For any non-detained case where DHS does not file the NTA with the IC within 120 calendar days after scheduling the case, EOIR will find that DHS has failed to prosecute the case. This should result in EOIR clearing the case placeholder from their docket, as they simply do not have jurisdiction to hear the case. The case will be noted within EOIR’s system as “FTP.”

There are specific time blocks outlined by EOIR that advocates must review to understand when an NTA might lead to FTP.

Specifically, NTAs that were issued prior to August 22, 2024, and have not yet been filed:

If the hearing is scheduled between September 20, 2024, and December 31, 2025, the NTA must be filed by close of business on March 31, 2025. If the hearing is scheduled on or after January 1, 2026, the NTA must be filed by June 30, 2025; otherwise, EOIR will find that DHS failed to prosecute the case. Acacia and AILA are still tracking how this will apply, such as if advocates and *pro se* respondents will see termination without prejudice or some other administrative change to the docket.

NTAs without a time or date:

EOIR will continue to reject any NTA in which the time or date of the scheduled hearing is facially incorrect (e.g., the hearing is scheduled on a holiday, a weekend, or otherwise when the court is closed).

A rejected NTA must be re-filed to initiate proceedings. If DHS reschedules the case, the 120-calendar-day period for FTP will begin to run on the day the case is rescheduled. Presumably, in the context of PM 24-01, yet not stated, “rescheduling pertains to a “new” hearing date correlated to that specific “new” (re-filed) NTA. Advocates should be considering the facts of an individual’s case beyond whether the IC has jurisdiction and therefore analyze stop-time rule considerations. Advocates must continually keep abreast of the rules regarding subsequent hearing notices, which are distinct from “new” hearing

notices. See *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), and its progeny. It is also worth noting that DHS cannot simply rectify the NTA on the form generally used for additional allegations, Form I-261. *Matter of Aguilar Hernandez*, 28 I&N Dec. 774 (BIA 2024). *R-T-P-*, 28 I&N Dec. at 836-38.

It is unclear from PM-24-01 if DHS could refile indefinitely to rectify their own persistent errors. This would seem inconsistent with the fair administration of justice. Advocates should look closely at the hearing notice to determine if it is a subsequent notice or “new” notice and consider stop-time calculations for Cancellation of Removal. See INA § 240A(d)(1), 8 U.S.C. § 1229b(a)(1).

How will an individual know their case status or if their case was deemed “FTP” after a time lapse?

An individual will know this by calling the 800-898-7180 number, likely a few times, or checking the Respondent Access Portal, if they have an account. A response potentially indicating FTP would be “No case found for this A-Number.” There will be no ability to file an E-28 if FTP in the EOIR eCas System. The case cannot be opened within EOIR’s system unless DHS files a new, compliant NTA again.

Timeframes to Consider Failure to Prosecute (We Recommend Advocates Calendar these Dates)

For New NTAs Issued and Scheduled by DHS After the Effective Date of PM 24-01 (September 20, 2024):

Scenario	Timeframe to mark on your calendar	Result
For non-detained cases where the NTA was issued and scheduled by DHS after September 20, 2024:	If 120 calendar days pass after scheduling the case, then	EOIR will find that DHS failed to prosecute the case. Scheduling date + 120 calendar days = FTP For calculations: the day the case was scheduled shall count as “day 1.”

For NTAs Issued Prior to Date of PM 24-01 (August 22, 2024) and have not yet been filed:

Scenario	Timeframe to mark on your calendar	Result
For cases where the hearing is scheduled between September 20, 2024, and December 31, 2025:	NTA must be filed by close of business on March 31, 2025; otherwise,	EOIR will find that DHS failed to prosecute the case.
For cases where the hearing is scheduled on or after January 1, 2026:	NTA must be filed by June 30, 2025; otherwise,	EOIR will find that DHS failed to prosecute the case.

And in any scenario where the time or date on the NTA of a scheduled hearing is facially incorrect:

If	Then
The time or date on the NTA is facially incorrect (e.g., the hearing is scheduled on a holiday, a weekend, or otherwise when the court is closed)).	EOIR will reject the NTA.
DHS reschedules the case	The 120-calendar-day clock will begin again, starting on the day the case was rescheduled. The date the case was scheduled counts as “day 1.”

What Risks Should Orientation Providers Consider?

- The NTA can be challenged as deficient or as a failure to prosecute, but DHS can refile.
- An individual might want to move forward with their proceedings because certain forms of relief are only available in removal proceedings and therefore may not want to challenge a deficient NTA.

Potential Predictions for the Future: It appears that EOIR’s issuance of PM 24-01 is an indication of their attempts to clear their dockets of unfiled cases. Keeping these time frames in mind may help practitioners and providers manage their caseloads with the understanding that a case may never be docketed if EOIR finds that DHS failed to prosecute the case. Pay close attention to the NTA, such as when it was issued, whether it is compliant, and the time and date of the listed hearing. Compare this to the dates in the chart above.

Additionally, PM 24-01 could impact the cases of respondents who are not subject to PM 24-01 because a shift on one docket could change the scheduling of other dockets. Pay close attention to respondents' hearing dates in the eCas portal, as those could shift around the timeframes outlined in the chart above.

General Cautionary Note: Inquiring as to whether DHS has filed the NTA can prompt DHS to realize their mistake and take corrective action. Here are suggestions for obtaining this information:

- Advocates, individuals, and Respondents can always contact the EOIR hotline if more information is needed on upcoming hearing dates. Check the automated case information system, <https://acis.eoir.justice.gov/>, or call the automated case information hotline at 800-898-7180 to see if the NTA has been filed with the Court. If the case results indicate that “No case found for this A-Number,” then the NTA has likely not been filed.
- Ask local practitioners in your jurisdiction for the best way to inquire without prompting DHS to realize their mistake and then correct the error, *unless* this is what the client or respondent actually desires.
- Providers could ask the court clerk if the “130” has been filed (this is distinct from the I-130 in the USCIS system). However, this could inadvertently prompt the clerk to reach out to DHS to initiate the filing of the NTA. Generally, clerks have high caseloads and might not have time to affirmatively reach out to DHS.
- Practitioners can also determine if the NTA has been filed by obtaining a copy of the Record of Proceedings (ROP). Generally, providers obtain a copy of the ROP by submitting an E-28, entry of appearance of legal representative. Time frames vary by jurisdiction from instantaneous if available in the eCas portal to weeks if on paper. If an NTA has not been filed, and thus the case is not pending, the system will not permit the practitioner to enter their appearance and will indicate through a message that the case is not pending with EOIR.
- Respondents can access their own ROP via the Respondent Access Portal if they are not detained, however there are verification procedures to initiate respondents’ own access to this portal. The Respondent Access Portal is linked below:
<https://respondentaccess.eoir.justice.gov/en/>
- Another option is to submit a FOIA for the EOIR file. However, advocates should determine whether obtaining the ROP directly from the court, seeking out local court knowledge, or talking to a court clerk might be a more effective strategy.
- Make it a regular practice to check all NTAs for legal deficiencies as well in compliance with this guidance.

If you are a provider with Acacia, please share trends advocates and *pro se* individuals are observing. Acacia has a representative on the national EOIR Committee with AILA, and they are also tracking general NTA issues here: [EOIR Liaison Committee, https://www.aila.org/committees-groups/aila-national-committees/eoir-liaison-committee](https://www.aila.org/committees-groups/aila-national-committees/eoir-liaison-committee), Report a Trend.

Special thanks to Lilah Thompson at Nationality Services Center for her feedback.

Note: This document has formatting techniques following 508 compliance guidelines, which might appear unusual for visual readers, but this ensures all have access, regardless of visual range.