

Migrant Arrivals at the Southwest Border: Challenges for Immigration Courts

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The United States has recently experienced [record high levels of migration](#) at the Southwest border, with border enforcement encounters [exceeding 2.3 million in FY2022](#). In addition to the processing strain for Department of Homeland Security (DHS) components, this volume of migration has implications for [immigration courts in the Department of Justice’s Executive Office for Immigration Review \(EOIR\)](#).

Migrant Processing and Removal Proceedings

DHS’s Customs and Border Protection (CBP) facilitates lawful travel and trade and enforces immigration law at the U.S.-Mexico border; performed by the Office of Field Operations (OFO) at ports of entry (POEs) and the U.S. Border Patrol (USBP) between POEs. This includes processing migrants who arrive at POEs with no lawful basis to enter the country or who cross into the United States illegally between POEs. In some cases, CBP may expel migrants to Mexico or their country of origin without a hearing or the option to apply for [asylum](#) under Title 42, a public health authority temporarily in place in response to the COVID-19 pandemic. Otherwise, migrants are placed in Title 8 proceedings (certain migrants are exempt from Title 42 because they are unaccompanied children, from certain countries of origin, or meet other case-by-case exceptions). Under Title 8, DHS has discretion to place migrants in [expedited removal](#) or [formal removal proceedings](#). In FY2022, CBP processed approximately 1.3 million migrants at the Southwest border under Title 8, nearly double the number in FY2021, with most (89%) processed by USBP for entering between POEs. This Insight focuses only on USBP processing under Title 8 and its intersection with immigration courts.

Under expedited removal, DHS may remove migrants “without further hearing or review” unless they express a fear of persecution or an intent to apply for asylum. In those cases, DHS’s U.S. Citizenship and Immigration Services asylum officers determine whether the migrant has established [credible fear](#) and, if so, places them in formal removal proceedings where they may pursue an application for relief before an immigration judge (IJ). (*A DHS interim final rule allows asylum officers to adjudicate defensive asylum applications rather than placing the migrant in formal removal proceedings. DHS is implementing this process in a phased manner; it is not yet widespread.*)

During formal removal proceedings, an IJ determines whether a migrant (*respondent* in immigration court) charged with an immigration violation is removable, and, if so, adjudicates defensive applications

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for relief from removal (e.g., asylum). To initiate formal removal proceedings, DHS must issue the respondent a [Notice to Appear \(NTA\)](#) and file it with an immigration court. The NTA includes, among other information, charges against the respondent; the respondent's rights in proceedings; and the time, date, and location for the first hearing. In some cases, USBP agents issue the NTA after processing migrants, at which point they may be either [detained by DHS's Immigration and Customs Enforcement \(ICE\)](#) or released from custody. However, due to holding capacity and processing limitations, under certain conditions, USBP agents have discretion to release migrants without an NTA. Currently, USBP agents may, on a case-by-case basis, release migrants on [immigration parole](#) under [alternatives to detention](#) supervision by ICE and instruct them to report to an ICE field office upon reaching their destination, at which time ICE issues the NTA.

Backlogs in Immigration Courts

Immigration courts hear removal cases for noncitizens charged with grounds of [deportability](#) or [inadmissibility](#), including those already residing in the United States. The number of pending cases in immigration courts has grown substantially in recent years. At the end of FY2022, immigration courts had [1.8 million pending cases](#).

As a result, [EOIR's IJs](#) must contend with large caseloads, and some respondents must wait years to have their cases adjudicated. Although the [factors underlying the backlog](#) are multifaceted, migrant flows and growing numbers of arriving asylum seekers have direct implications for the number of cases added to court dockets. In FY2022, [immigration courts received an average 58,654 cases per month](#).

NTA Issuances: Nonspecific Addresses

In certain cases, [detention](#) is mandatory while respondents await removal proceedings (e.g., for those convicted of specified criminal offenses); in other cases, detention is discretionary and DHS may choose to release migrants. After screening, USBP frequently releases migrants awaiting removal proceedings and issues them NTAs. NTAs must specify migrants' intended addresses after release. The respondent may also be served a separate hearing notice with their hearing time and location.

However, amid the increase in enforcement encounters, USBP agents have sometimes collected [incomplete and or invalid addresses](#). [Reports suggest](#) that certain recent migrant arrivals have no U.S. contacts and may be unable to provide an intended destination. In some cases, DHS has mailed NTAs and hearing notices to nonresidential addresses, including [nonprofit organizations](#) with no connection to respondents. In addition, some states and cities have [transported released migrants to certain U.S. destinations](#), which may be different from migrants' originally intended destinations and the ones specified on their NTAs. Migrants may also elect to go to locations different from their initially intended destinations.

Respondents who fail to appear for their hearings [may be ordered removed in absentia](#) and deported. Advocates have argued that misdirected NTAs [create due process concerns](#) for migrants. They also generate concerns regarding wasted time and resources for immigration courts.

Unfiled NTAs and Case Dismissals

DHS officers have access to EOIR systems that allow them to electronically file NTAs and schedule initial [master calendar](#) hearings for nondetained respondents. Under [federal regulation](#), IJs obtain jurisdiction when DHS files the NTA with an immigration court. If DHS does not file the NTA with the court before the first hearing, there is a ["failure to prosecute,"](#) and the case may be dismissed until DHS files an NTA. Analyses by the Transactional Records Access Clearinghouse at Syracuse University have found that CBP officials [have increasingly failed to file NTAs](#) with immigration courts, leading to

63,586 case dismissals in FY2022. Failures to prosecute have raised concerns regarding wasted court time and resources and questions surrounding issues such as [implications for respondents' ability to seek asylum and to apply for work authorization](#).

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