ACLU Northern California

AILA Northern California Chapter

JUSTICE & DIVERSITY CENTER OF THE BAR ASSOCIATION OF SAN FRANCISCO

NATIONAL LAWYERS GUILD · S.F. BAY AREA CHAPTER · NLG

11/2/2021

Assistant Chief Immigration Judge Elizabeth Young
Executive Office of Immigration Review
San Francisco Immigration Court
100 Montgomery Street, Suite 800
San Francisco, CA 94104

Re: Returned Notice Docket

Dear ACIJ Elizabeth Young,

We write regarding the San Francisco Immigration Court's recent creation of the "Returned Notice Docket" which poses a high risk of removal to hundreds of vulnerable individuals whose hearings have been rescheduled unexpectedly. The Returned Notice Docket was first brought to our attention when we learned of a respondent who had been ordered removed *in absentia* after she missed a hearing that had been advanced and rescheduled while she was recovering from side effects from the COVID-19 vaccine. After reaching out to Court personnel, we learned that the Court has created a new docket and is rescheduling hundreds of respondents for hearings when the Court receives returned mail from the respondent's address of record. It is our understanding that the Court then sends a new notice with an advanced hearing date, expecting the respondent to appear to correct their address and/or for the Court to confer with DHS about any alternative addresses in their A-file.

Our court observers have already witnessed and documented dozens of individuals ordered removed *in absentia* at these hearings when they fail to appear. This practice is resulting in the *in absentia* removal orders of asylees and other vulnerable immigrants who the Court knows are unlikely to receive actual notice of their hearing.

We have grave concerns about the sudden implementation of these special dockets, without stakeholder engagement beforehand and using the Court's already limited resources, that are resulting in an unprecedented wave of removal orders. We respectfully request that the practice be reconsidered immediately.

1. **This is not the time to create a special docket with high levels of *in absentia* removal orders in the midst of a pandemic when housing instability has been well documented and access to the court, ERO, and legal services has been limited.**

The COVID-19 pandemic led to local and statewide shutdowns in early 2020. As a result, our immigration system, along with the entire nation, has had to adjust and adapt to a new normal. During the last 18 months, the disproportionate impact of the pandemic on immigrant communities has been well documented. Not only have they seen higher rates of COVID-19 infections compared to the general population, they have also been more likely to work in service jobs where they are more likely to contract COVID-19 and live in multi-family housing situations where it is impossible to safely quarantine. Immigrants were more likely to lose their jobs during the pandemic and are more likely to have experienced housing insecurity as a result of the pandemic.

Compounding the issue is the fact that many legal service providers were forced to limit or decrease capacity to provide services to the immigrant community during the pandemic. Many regular legal clinics were cancelled and many organizations were closed for intake and consultation while organizations shifted to a remote work environment. Both the private bar and community-based organizations have had to adapt to ever changing restrictions on when and how they are able to meet with clients to provide services, which further limits their capacity to provide services. In addition, many respondents face technological barriers to access services that are no longer provided in person.

Making the situation even more dire, the government offices responsible for enforcing our immigration laws have been less accessible, with limited information provided directly to respondents about changes in their cases and where to obtain information. There has been a great deal of confusion to both respondents and their legal representatives regarding appointments and hearings that have been rescheduled multiple times, often with little or late notice.

It is therefore extremely problematic for the San Francisco Immigration Court to expend its limited resources to create a special docket that is highly likely to result in an *in absentia* order of removal during a time when respondents are more likely to experience housing instability, more likely to suffer from a deadly illness, less likely to have access to legal services, and less likely to be able to access the court or their ERO officer because of travel and other COVID related restrictions.

2. **The consideration given to each of the cases on the Returned Notice Docket is inconsistent.**

Since August 24, 2021, we have had volunteer advocates observe six of the Returned Notice Docket hearings in order to observe and better understand what, if any, safeguards

have been put in place to avoid *in absentia* removal orders being given *en masse*. We have seen huge differences among immigration judges in how they are proceeding during these dockets. While some judges take great care in requesting address information from OPLA attorneys or calling clients directly during the hearing, others proceed with an *in absentia* removal order as long as there is a Form I-213 on file.

In the hearings we have observed, we have seen as many as 70% of respondents scheduled for the docket ordered removed *in absentia.* On average, we have observed fewer than three respondents appear in person at these dockets, where more than twenty individuals are scheduled to appear. In most cases, the only evidence the government is able to provide is a Form I-213 which solely contains uncorroborated allegations made by the government. We have observed several instances where the Notice to Appear that was filed with the court had a hearing date that was incorrect. We have also observed *in absentia* orders entered against individuals who were represented and had their cases terminated in 2018 and did not receive notice when the case was remanded to the immigration court. During one hearing, the Judge stated that she did not believe the Department of Homeland Security had met its burden regarding removability, and then proceeded with ordering the respondent removed *in absentia.* Another case involved a 19 year old who had entered the United States as a minor and it was clear that the guardian had not been served with the NTA. That case was continued to give the Department an opportunity to serve the respondent's aunt, however there was no discussion of the requirements of the Department to serve the Form I-770 or other protections specific to unaccompanied children. In many cases, these *in absentia* orders are entered against entire families, including against children who are completely reliant on their parents in notifying the court of address changes.

We acknowledge that during regular Master Calendar hearings, there may be one or two individuals that fail to appear and that the IJ may be justified in ordering removal if the government has met their burden of proof. In these cases, we often see that the respondents had received adequate notice in court and were aware of their future hearing date. Also, when only one or two individuals fail to appear, the IJ has adequate time to review each file individually and take into account any circumstances that may have prevented the respondent's appearance. We do not believe the same can be said for the Returned Notice Docket. In these hearings, every IJ is reviewing 15-25 cases at a time and some are ordering individuals removed in groups with little attention paid to each individual case besides a cursory review of the form I-213.

3. The Returned Notice Dockets violate a respondent's Fifth Amendment right to due process.

The practice of sending a notice to reschedule an existing hearing date, to an address known to be invalid, with the logically anticipated outcome of ordering a large number of individuals removed *in absentia* is fundamentally unfair and denies respondents the

opportunity to reasonably present their case. This process clearly results in prejudice to the respondent who is unaware of the change in his hearing date and therefore is ordered removed by default. Furthermore, in the majority of these cases on the Returned Notice Docket, the respondent is *pro se*. "Because aliens appearing *pro se* often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ's scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts."

The creation of the Returned Notice Docket during an unprecedented public health crisis is likely to impede the Court's ability to meet its obligations to *pro se* respondents. Rescheduling hearings using an unworkable address where respondents are unlikely to receive notice not only denies the respondent of their right to have their cases heard, but it also denies the individual IJ's the opportunity to "scrupulously and conscientiously" explore the reasons that a respondent failed to appear. The IJ must rely entirely on evidence provided by the government in order to move forward, and because it is likely that the respondent has no knowledge that the hearing is taking place, there is nobody in these proceedings to speak on their behalf or protect their rights.

As attorneys, we understand that the respondent has the responsibility of informing the Court of an address change within five days of moving. However, the consequences to those who fail to meet this requirement in a timely manner is severe, and there are myriad reasons why this responsibility has become more difficult during the COVID-19 pandemic. Many respondents do not fully understand when and how to inform the court of an address change, the process is often confusing to those who are unfamiliar with our legal system, and those who are illiterate and have limited education and do not understand service requirements. It is especially difficult for many because the change of address form is only provided in English and not everyone has access to translation services. Access to free or low cost legal services where *pro se* respondents would often receive this information and advice has also been more limited during the pandemic.

Additionally, we often meet with individuals who have informed ERO of their new address and mistakenly believe that this information will be submitted to the Court. Many of these respondents are under the impression that they have complied with the Court's address requirements. There is no publicly-available information about what ERO officers do with these updated addresses, and whether this information is timely shared with OPLA attorneys, let alone the Court. While we often see OPLA attorneys in Court with updated contact information, we have also seen multiple instances where an individual with regular ERO check-ins has to repeatedly inform their deportation officer of their new address. Since the COVID-19 pandemic began, hundreds of community members have had difficulty contacting ERO and have reported to our organizations that they would often call or send emails and not receive any response. Their regular check-ins were cancelled with no information on how or when they could check in or update their address. In one instance, the Justice and Diversity Center helped a *pro se* community member update their address with ERO, in writing, via email. The respondent was later reprimanded by her deportation officer when she was eventually able to check

in and accused of not informing the office of her address change. We are also concerned that this information may not make it to OPLA's files in a timely manner, or at all, especially when these hearings are re-scheduled to be heard in the next 1-2 months. Additionally, those that do not have a secure address often rely on the EOIR Automated Case Information system to obtain information about their hearing date and are not expecting a hearing they believe to be scheduled in 2022 or 2023 to suddenly advance to within a few weeks.

It would be a mistake to assume that all respondents who fail to appear at their hearings are deliberately evading our laws. Indeed, studies have shown that those respondents who receive notice of their hearings attend them at exceptionally high rates. For example, data released by the Department of Justice on this topic suggests that asylum applicants attend their hearings at very high rates. By advancing their hearing dates and sending notices to addresses that the Court knows have already failed to reach the respondent, the Court is creating additional barriers that make it difficult for immigrants to access the judicial system and have their cases heard. While they legally have the option to file a motion to reopen after the hearing, there are strict time and numerical limitations on these motions that are difficult to overcome without the assistance of an attorney. Even if the time limitations are tolled for lack of notice, it creates yet another logistical and financial barrier for *pro se* respondents to find an attorney to help them with such a motion. In these cases, it is doubtful that a *pro se* respondent would be able to prepare and file a timely motion to reopen when they have already struggled with preparing and filing a Form EOIR-33. Again, we believe the vast majority of these respondents are eager to have their cases heard and proceed with their hearings. Instead they are being set up for failure, by having their hearings advanced unexpectedly.

4. The Returned Notice Docket is a misuse of the Court's limited resources.

Again, we are greatly concerned about the timing of the Returned Notice Dockets: they were created during a public health crisis when the Court has very limited capacity to hear cases and many respondents who are seeking a decision on the merits of their case are having their hearings postponed to 2024 and 2025. Immigration Judge, legal assistant, and OPLA attorney time is being used to schedule and attend these hearings, when such time could go to countless other cases that are being cancelled and reset far into the future. In many of the cases on the Returned Notice Docket, the issue related to the returned notice could be easily resolved by a phone call from a clerk to the respondent, without setting the stage for what is inevitably the failure to appear by many of the respondents. We are now seeing judges spend their time at hearings making phone calls or reviewing documents in the A-file to try to find a correct address and order multiple notices sent out, when their time would be better spent adjudicating cases that are ready to move forward. We are also seeing these hearings continued where there are issues related to service and notice. If there is any question regarding adequate notice, this should be resolved by terminating the case completely, instead of keeping it on the docket indefinitely and scheduling multiple hearings where the respondent is unlikely to appear.

As representatives of the non-profit legal community, there are several avenues for collaboration that would allow us to use our resources to help individuals with returned notices to update their addresses. The Justice & Diversity Center's volunteer-driven Attorney of the Day Program is able to assist by reaching out to individuals on the court's behalf and assist them with filing a Form EOIR-33. Additionally, a local non-profit is currently building an EOIR-funded program, the Immigration Court Help Desk, to provide orientations and clinics that would help respondents better understand the Court's address requirements and assist them in properly filing a change of address form.

In conclusion, we would like to offer the following recommendations to the Court:

1. Pause or discontinue the use of the Returned Notice Docket all together, or

2. If the docket continues, solicit further feedback from local stakeholders and consider greater collaboration with the local bar to prevent negative consequences arising out of the docket.

In either scenario, we hope the Court will collaborate with the local bar and non-profit community to ensure that *pro se* respondents are fully advised of their legal obligations and are getting adequate notice of their hearings before the Court. You may contact Milli Atkinson via phone or email at matkinson@sfbar.org, (415) 782-8926, if you wish to discuss this letter further.

We appreciate your time and consideration in addressing these concerns.

Sincerely,

ACLU of Northern California
AILA NorCal Advocacy Liaisons
Justice and Diversity Center of the Bar Association of San Francisco
National Lawyers Guild – San Francisco Bay Area Chapter