NYLAG
New York Legal Assistance Group


# How Overenforcement Robs Asylum Seekers of Their Day in Court

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## Executive Summary

What happens when the government—notwithstanding an abject lack of capacity and viable humanitarian alternatives—insists on an enforcement-only approach to immigration? Thousands of asylum seekers are ordered removed and exposed to the horrors of detention and deportation, through no fault of their own.

In immigration court, an individual can be ordered removed (i.e. deported) for failing to appear at their hearing, even if their failure to appear is through no fault of their own.[1] That removal order is issued "*in absentia*" because it is issued in the individual's absence. A motion to reopen and rescind an *in absentia* order ("MTR") is the legal mechanism for asking the court to rescind the removal order and thereby "reopen" the case closed by the removal order.[2]

NYLAG, Make the Road New York ("MRNY"), and UnLocal together provide crucial legal services to individuals with final orders of removal through the Rapid Response Legal Collaborative ("RRLC"). As part of NYLAG and MRNY's work with the RRLC, between September 2022 and September 2023, NYLAG and MRNY prepared 57 motions to reopen and rescind *in absentia* removal orders on behalf of 64 clients. (RRLC organizations also provide numerous other forms of assistance, such as MTRs for removal orders that are not in absentia and assistance in fear proceedings.) These MTRs were filed just as approximately 100,000 asylum seekers[3] arrived in—and many were placed in removal proceedings in—New York City.[4]

[1] *See* INA § 240(b)(5)(A).
[2] *See* INA § 240(b)(5)(C).
[3] *See As Asylum Seekers in City's Care Tops 54,800, Mayor Adams Announces new Policy to Help Asylum Seekers Move From Shelter*, NYC (July 19, 2023), https://www.nyc.gov/office-of-the-mayor/news/519-23/as-asylum-seekers-city-s-care-tops-54-800-mayor-adams-new-policy-help-asylum#/0.
[4] These MTRs were also filed during a year when the total number of *in absentia* orders was approximately 116,000 nationwide, nearly double the year before as of only the third quarter. Executive Order for Immigration Review, Adjudication Statistics, https://www.justice.gov/eoir/page/file/1243496/download.

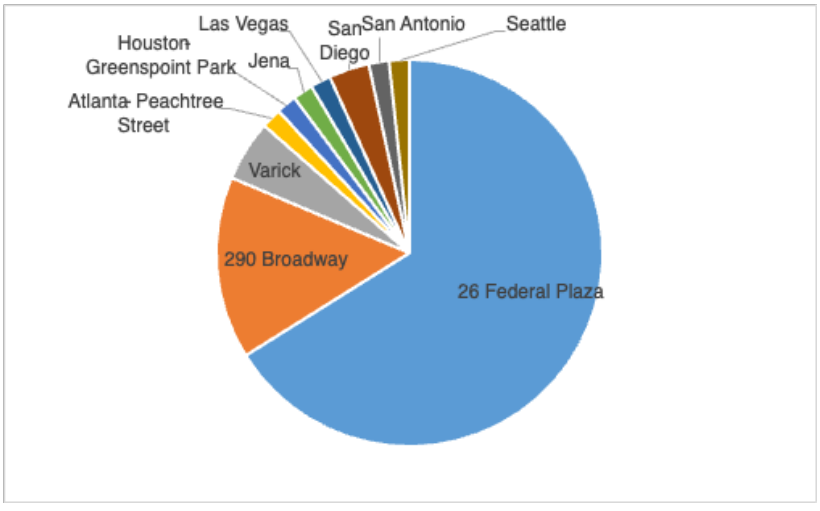
**We found that government errors from overenforcement caused asylum seekers to miss their hearings and receive *in absentia* orders.** Asylum seekers with every intention of attending their immigration court hearings were ordered removed because of avoidable government negligence and confusion. We noted the following trends:

- The Executive Office of Immigration Review (EOIR) ordered individuals removed *in absentia* despite individuals being denied entry to 26 Federal Plaza by government employees and contractors;
- EOIR and/or the Department of Homeland Security (DHS) issued flawed hearing notices or Notices to Appear (NTAs);
- Immigration and Customs Enforcement (ICE) officers provided incorrect and confusing information about hearing dates or failed to provide basic and crucial information about the lack of connection between ICE and the immigration court (despite their colocation in the same building in Manhattan);
- ICE officers noted the wrong address or venue;
- EOIR were unable to reschedule hearings in the event of illness; and
- EOIR lacked a mechanism for those intending but unable to appear at their hearings to notify the Court.

In this paper, we delve into the motions we prepared and each of the above-mentioned issues.

## Background Statistics

Between September 2022 and September 2023, NYLAG and MRNY prepared 57 motions to reopen and rescind *in absentia* removal orders, on behalf of 64 clients. These motions were primarily for cases before the three New York City immigration courts (39 at 26 Federal Plaza, 9 at 290 Broadway, and 3 at Varick), but we also filed one motion each for cases at the Atlanta (Peachtree Street), Houston (Greenspoint Park), Jena, Las Vegas, San Antonio, Seattle and San Diego immigration courts.



As of October 16, 2023, 50 of our motions were decided and 44 were granted, for an overall grant rate of 88%. The number of applicable MTRs and grant rates by issue area were:

| Issue | MTRs* | Grant Rate** |
|---|---|---|
| 26 Federal Plaza Guards | 6 | 100% |
| Faulty Notice/NTA | 11 | 73% |
| ICE/ERO Misinformation/Confusion | 11 | 100% |
| ICE/ERO Incorrect Address/Venue | 5 | 80% |
| Inability to Reschedule Due to Illness | 11 | 82% |
| Miscellaneous*** | 6 | 100% |

*number of MTRs containing the particular issue
**number of granted motions divided by number of decided motions
***included motions for older orders of removal, children whose parents failed to update notice and other varied grounds for reopening

## Motion to Reopen Trends for *In Absentia* Motions

### EOIR Ordered Individuals Removed *In Absentia* Despite Respondents Being Denied Entry to 26 Federal Plaza

About 11% of NYLAG and MRNY's filed MTRs were for asylum seekers who were ordered removed solely because the 26 Federal Plaza security guards refused to allow them to enter the building on the day of their hearing.

In New York City, the immigration court and ICE Enforcement and Removal Operations (ICE/ERO) office are both located at 26 Federal Plaza, on the twelfth and ninth floors, respectively. Because the vast majority of recently arrived immigrants have been subjected to enforcement, including check-ins with ICE/ERO, there have been long lines outside 26 Federal Plaza since last year, with many asylum seekers lining up starting the night before.[5] As a result, ICE/ERO instructed the 26 Federal Plaza security guards to allow the first several hundred individuals in line into the building, and turn away all those remaining outside when that number is reached.

However, not everyone in those lines is there to check in with ICE/ERO, which is merely one of several government agencies that share the building and its entrance. However, even when asylum seekers presented documentation of their mandatory court appearances to the 26 Federal Plaza security guards, some were barred entry from the building and reassured that they could reschedule. These people were subsequently ordered removed *in absentia*.

[5] *See Immigrants line up for hours outside 26 Federal Plaza*, TRIBECA CITIZEN (Apr. 11, 2023), https://tribecacitizen.com/2023/04/11/immigrants-line-up-for-hours-outside-26-federal-plaza/.

The clients for whom NYLAG filed these motions to reopen all had similar experiences. They all arrived at 26 Federal Plaza early in the morning in time for their hearings. The guards refused to let them enter and told them to come back the next day or send an email to reschedule (it turns out the email address was for rescheduling ICE/ERO check-ins). Clients tried to reason with the guards by showing their hearing notices or using Google translate to explain that they had a court hearing that day. The clients were ordered removed *in absentia* while they were just outside the building, pleading with the guards. Despite NYLAG's efforts to notify the immigration court of this issue, the problems with the guards have persisted since last summer and continue to occur. Horrifically, at least one asylum seeker also reported being sexually assaulted by a guard on federal property.[6]

In summary, many asylum seekers were likely ordered removed *in absentia* while they were standing right outside of the courthouse—all because DHS has a policy requiring in-person monitoring of asylum seekers that it does not have the capability to implement. Though all our motions for these clients were granted, there are likely many more asylum seekers who were not able to file these time-bound motions to reopen and have been deprived of their opportunity to present their claims for asylum.[7]

## EOIR or DHS Issued Flawed Notices

In about one-fifth of the motions to reopen we filed, asylum seekers did not receive notice of their hearing because EOIR and/or DHS issued flawed notices to appear.

In most of these cases, NYLAG and MRNY clients were never notified of any date and time for their hearing. The Notice to Appear ("NTA") is the document that DHS files with the immigration court to begin removal proceedings against an individual. In addition to listing the reasons that DHS believes the individual is removable, the NTA generally includes identifying information about the individual, the date and place of the proceedings, information about responsibilities and rights of the individual in removal, and a certificate of service.[8] However, because of the administrative burden created by the large number of individuals being placed into removal proceedings, historically few NTAs contain the date and time of individuals' first court hearings. Rather, NTAs often state that the hearing will take place at "a date to be set" and "a time to be set." More recently, NYLAG and MTRNY has seen NTAs with a "ghost" date and time that has not been entered in the immigration court database, meaning that when an immigrant appears on the stated date and time to the hearing, the immigrant it informed that in fact no such hearing will be held. In both cases, the immigrant should then subsequently receive another notice, informing them of when their hearing will occur.

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[6] *See*, *e.g.*, Maria Cramer, *Armed Guard Is Charged With Raping a Migrant at a Federal Building*, N.Y. TIMES (June 5, 2023), https://www.nytimes.com/2023/06/05/nyregion/migrant-rape-security-guard-charged-nyc.html.

[7] Motions to reopen and rescind *in absentia* orders based on "exceptional circumstances" must be filed within 180 days of the issuance of the removal order; motions based on no notice can be filed at any time. *See,* INA § 240(e)(1)(A), (B).

[8] *See* INA § 239; 8 CFR § § 1229, 1239.1.

However, in many of these cases, the immigration court failed to follow up with mailed hearing notices with the actual hearing date and time and sent to the correct address. In some instances, the United States Postal Service returned the mailed hearing notices to the court as undeliverable, yet the court ordered the respondent removed regardless. In other instances, the court's records indicated that the hearing notice was mailed, but the respondent did not receive anything in the mail. In other cases, clients were notified of the wrong date and time for their hearing. In one notable case, a fifteen-year-old child who entered the United States alone received two hearing notices with the wrong hearing date and time, both of which were after the actual hearing date.

In some cases, the use of an incorrect or outdated address is attributable to ICE, which failed to update the respondent's address before filing the NTA with the court.

Of those adjudicated, approximately 73% of motions raising notice errors were granted. In their denials, immigration judges (IJs) improperly blamed asylum seekers unable to successfully change their address or whose notices got lost in the mail. Indeed, individuals who cited not receiving notice in the mail required another strong countervailing circumstance to prevail in their motion. This is particularly concerning given that many asylum seekers are in transitional housing and subject to the recent change in New York City housing policy.[9]

## ICE Officers Providing Incorrect Information and Creating Confusion

In another 23% of the motions to reopen NYLAG and MTRNY filed, asylum seekers were ordered removed *in absentia* because of ICE/ERO misinformation.

Many recent arrivals are being asked to check in on a regular basis with ICE/ERO, while separately required to attend immigration court hearings. In many cases, ICE/ERO officers gave asylum seekers incorrect information about their hearings at their check-ins. For example, one client was told at an ICE/ERO check-in not to return to 26 Federal Plaza for a scheduled court hearing the next month because ICE/ERO was "flooded." It is clear that the ICE/ERO officers at her check-in mistook her court hearing for a subsequent ICE/ERO check-in and told her not to come. As a result, the client was ordered removed *in absentia* for failing to appear at her hearing. Another client was told at an ICE/ERO check-in that her immigration court hearing would take place in several weeks. When she went to court on the day they indicated, she learned that her hearing had already taken place several days prior, and that she had been ordered removed *in absentia*. ICE/ERO officers likely confuse ICE/ERO check-ins for immigration court hearing dates or provide asylum seekers the wrong hearing date due to overenforcement and incompetence. Moreover, check-ins—where ICE/ERO officers risk providing misleading information leading to an *in absentia*

[9] "What Ending 'Right to Shelter' Could Mean for New York City's Homeless," Bloomberg News, June 2, 2023, https://www.bloomberg.com/news/articles/2023-06-02/new-york-city-s-right-to-shelter-mandate-for-homelessness-faces-new-test.

order—could be avoided altogether if ICE/ERO would simply grant longer periods of parole rather than requiring check-ins.

In addition to providing incorrect information about removal proceedings, ICE/ERO officers also create confusion among asylum seekers. ICE/ERO officers (at worst) mislead asylum seekers about the distinct roles that ICE/ERO and EOIR play in removal proceedings, or (at best) fail to clarify the difference. Many asylum seekers believe, understandably, that ICE/ERO and the immigration courts are the same entity—a particular risk in New York City where the two are located in the same building. Moreover, due to the immigration court backlog, individuals now deal exclusively with ICE/ERO for longer periods of time, adding to the misunderstanding that ICE/ERO and the immigration court are the same entity.

Secondly, ICE/ERO officers also misled asylum seekers about the extent to which ICE/ERO communicates with the immigration court about the asylum seeker's proceedings, sometimes inducing reliance and, in cases where no NTA was yet filed, failed to update the asylum seekers' information before filing the NTA. NYLAG's clients reported that in some cases ICE/ERO officers represented that they would relay change of address information to the immigration court or assist them with proceedings, but then did not. An MRNY client from Staten Island went to ICE to report that he had moved in April 2022, several months before his case was docketed with the immigration court. Yet ICE failed to provide his updated information to the court, instead using the now-outdated address he provided at the border. He did not receive notice of his court date and was ordered removed in absentia.

Finally and relatedly, ICE/ERO officers failed to properly explain the asylum seeker's distinct responsibilities in removal proceedings. For example, one NYLAG client went to an ICE/ERO check-in at 26 Federal Plaza shortly after arriving to New York City from a different state. He thought that he had notified the immigration court of his change in address and successfully changed venue by attending this check-in. This was understandable, since he provided his new address to ICE/ERO, and both ICE/ERO and the immigration court are located in 26 Federal Plaza. Another client was told by her ICE/ERO officer that he could help her with any issues regarding her immigration court hearing. When she contracted COVID several days before her hearing, the client thought that she could simply notify the ICE/ERO officer and get a new court date from him. She attempted to contact the ICE/ERO officer repeatedly to no avail and received an *in absentia* order of removal.

These are not isolated cases and indicate a pattern of asylum seekers being ordered removed *in absentia* because ICE/ERO officers provide misleading or plainly incorrect information about removal proceedings. This issue, again, stems from the government's insistence on placing recently-arrived asylum seekers in removal proceedings. All of NYLAG's motions relating to these errors were granted, which indicates that there are likely many more unrepresented individuals with removal orders that could be reopened with the right assistance.

## ICE/ERO Officers Noting the Wrong Address or Venue

In about 9% of motions filed, ICE/ERO officers made errors that led to *in absentia* orders.

There were several cases where asylum seekers were venued for proceedings far away from where they lived. For example, NYLAG filed an MTR on behalf of a family of asylum seekers whom the government mistakenly venued in Atlanta instead of New York City. Although the client explicitly stated that she and her family were on their way to New York City from the Texas border, the ICE/ERO officer thought that they were going to Alabama. Because of the misunderstanding, the ICE/ERO officer gave the client and her family a check-in date in Birmingham, Alabama, and the immigration court subsequently set their immigration court hearing in Atlanta, Georgia. And even though the client's immigration paperwork attested that she had been informed of all of this in her native language of Spanish, the client told NYLAG that no one had explained anything to her, and that no one she encountered actually spoke Spanish. This client tried to submit a *pro se* motion to change venue, but a shelter employee assisting her accidentally sent the motion to the wrong immigration court. Indeed, asylum seekers are (usually) told to update their addresses, but they are never told how to, or more importantly how to move to change venue. Another client tried for months to change venue from San Diego to New York by calling the San Diego Immigration Court, but no one answered the main court line. Yet another was baffled to learn that although ICE had told him to report in New York when releasing him, it had in fact docketed his proceedings in Texas.

In other instances, ICE/ERO officers made administrative errors that ultimately prevented asylum seekers from being able to attend their hearings. In one case, an ICE/ERO officer wrote down a client's address incorrectly when releasing him from Office of Refugee Resettlement (ORR) custody—writing "34th Street" rather than "54th Street." As a result, the client, an unaccompanied minor, never received notice of his hearing and was ordered removed *in absentia*.

In other cases, ICE/ERO officers deliberately recorded incorrect addresses for asylum seekers, listing addresses of organizations that had no affiliation with the individuals. For example, RRLC's peer organizations in New York City received hundreds of hearing notices for random individuals. Since many newly-arrived immigrants were bussed to cities all over the United States, and therefore had no addresses to report, ICE/ERO officers wrote down nonprofit organizations' addresses in lieu of actual addresses. MRNY assisted one individual (now residing in New York) who informed border officials he was going to Washington D.C., only to learn later they had recorded a shelter address there where he never stayed.

The vast majority of NYLAG and MRNY's MTRs in this posture were granted (80%). Though most judges were sympathetic to victims of government oversight, some still blamed asylum seekers for not knowing how to change venue and assumed they could easily reach and receive assistance from court personnel. Again, this does not account for the many

more asylum seekers that were likely ordered removed in this posture and were unable to obtain assistance reopening their cases in a timely manner.

### Inability to Reschedule Hearings in the Event of Illness

Approximately 25% of motions we filed involved clients who were seriously ill on the day of their hearing. The majority of them sought to notify the court of their absence via the main phone line or the SmartLink application but were unsuccessful and subsequently received an *in absentia* order. NYLAG and MRNY clients dealt with pregnancy, complications from birth control devices, HIV, COVID-19, other flu-like illnesses (high fever, body pain, sore throat, vomiting, nausea, diarrhea), tonsilitis, gastritis, other gastrointestinal illnesses, foreign substances in their eyes from a work accident, mental illness, and their child's or parent's serious illness.

We noticed two trends with motions involving serious illness. First, notwithstanding the fact that both "serious illness of the [noncitizen]" and "serious illness . . . of the spouse, child, or parent of the [noncitizen]" are exceptional circumstances expressly contemplated by the statute,[10] IJs were more likely to grant motions citing illness of the respondent (86%) than illness of the respondent's immediate family member (40%). Second, IJs only granted motions citing trauma as an exceptional circumstance where the respondent received a psychological diagnosis and provided documentation of that diagnosis. This is particularly concerning as many asylum seekers do not have health insurance and are unable to access treatment and evaluation for serious medical issues.

Though 82% of these MTRs were successful, some were not. The fact that IJs failed to recognize trauma and its debilitating symptoms as grounds for reopening (short of a formal diagnosis) was troubling, considering many asylum seekers are managing trauma and mental health issues with little to no treatment.

## Conclusion

NYLAG and MTRNY's post-order practice this past year exposed the impact that overenforcement has had on the basic due process rights of asylum seekers. Whether it be because of the 26 Federal Plaza security guards, problems with notice, or issues with ICE/ERO, countless asylum seekers were ordered removed without their day in court. Because of the government's insistence on enforcement, they now face detention and deportation back to countries where they face life-threatening persecution.

[10] *See* INA 240(e)(1).

Recommendations:

- The practice of indiscriminately placing asylum seekers in proceedings must end.
- ICE/ERO and EOIR should train its personnel—officers, IJs, and court administrators—to minimize administrative errors.
- Both ICE/ERO and EOIR need to provide better and clearer information to individuals appearing at New York-area courthouses, and do so in all available languages.
- ICE/ERO and EOIR need to make the motion-to-change venue process much more accessible—for instance, by treating a change of address form from a pro se individual as a de facto motion—and to disseminate information in multiple languages to all individuals reporting or seeking information at New York-area courts on how to file such a motion.
- EOIR should develop an accessible mechanism for asylum-seekers to notify the court of their inability to appear, whether because they are denied entry to the building or because they are ill, and share information conveyed via that mechanism to the Immigration Judge deciding whether to order them removed *in absentia*.
- EOIR should train IJs to conduct *in absentia* hearings differently. IJs should take judicial notice of relevant issues that contribute to the respondent's absence, carefully review the record and question DHS counsel as to ICE's latest available information to confirm notice was properly sent, request information from DHS counsel on whether the individual is reporting and if he or she is in compliance and reporting take that into account in considering whether to continue the case, and save *in absentia* proceedings for the end of the day when it is more likely that a person who has been delayed entry to the Court could appear.
- EOIR should offer internet-based hearings to *pro se* respondents as well as represented respondents.
- Dedicated, sustained funding for legal representation for individuals with final orders of removal is critical, particularly given the ongoing and systemic deprivation of due process for asylum seekers. NYLAG and MTRNY's high rate of success – nearly 90% grant rate -- in these cases is due to long-term investment in the legal expertise necessary to respond quickly and effectively.

The U.S. government has an obligation to provide due process to asylum seekers and justice mandates that our Courts give everyone an opportunity to present their claim and be heard. The current reality deprives many migrants of these rights and results in dangerous deportation orders based on administrative failures of our institutions. With the sheer number of asylum seekers in proceedings, it is now more important than ever that the government reconsider its policies on enforcement for asylum-seekers and rectify the egregious due process failures.