**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

**PAULO CESAR MENDONCA,**

Plaintiff-Petitioner,

**v.**

**DONALD J. TRUMP,** in their official capacity as President of the United States; **KRISTI NOEM,** in their official capacity as Secretary of the United States Department of Homeland Security; **MARCO RUBIO,** in their official capacity as Secretary of State of the United States,
**PAMELA BONDI,** in their official capacity as Attorney General of the United States;
**TODD M. LYONS,** in their official capacity as Acting Director of the United States Immigration and Customs Enforcement;
**JOHN TSOUKARIS,** in their official capacity as Newark Field Office Director for Enforcement and Removal Operations, United States Immigration and Customs Enforcement;
**WARDEN, DELANEY HALL,** in their official capacity as Warden of Delaney Hall Detention Center

Defendant-Respondent

Case No. __ __ __ __

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; PETITION FOR HABEAS CORPUS**

## INTRODUCTION

1. This lawsuit seeks the immediate release of Plaintiff-Petitioner Paulo Cesar Mendonca ("Petitioner") from unlawful detention in violation of his constitutional and statutory rights.

2. Petitioner was detained on July 21, 2025, and remains in civil detention in the custody of the Department of Homeland Security ("DHS") Immigration and Customs Enforcement ("ICE") at Delaney Hall Detention Center in Newark, New Jersey.

3. Petitioner is a native and citizen of Brazil. Petitioner entered the U.S. on November 4, 2005, through the Texas–Mexico border without inspection and has remained here since then. Petitioner has a common-law partner with DACA status and two U.S.-born children aged 10 and 14. Petitioner is the sole breadwinner of the family. This detention is a substantial deprivation and burden that puts Petitioner and his family at risk of eviction from their residence without his financial and parental support.

4. Petitioner was arrested and charged with criminal mischief in New Jersey under N.J.S.A. 2C:17-3(a). The charge has been dismissed.

5. Petitioner was placed in removal proceedings on July 21, 2025, by DHS and was issued a Notice to Appear ("NTA") charging him as removable under INA § 212(a)(6)(A)(i) and for not being in possession of a valid entry document at the time of his application for admission under INA § 212(a)(7)(A)(i)(I).

6. On August 6, the Immigration Court conducted a bond hearing and granted Petitioner's

request for a change in custody status. The Immigration Judge found that since Petitioner was already in custody, he is detained under INA § 236 and assumed jurisdiction. The court found Petitioner met his burden of establishing he did not pose a danger to the community and was not a flight risk, setting bond at $3,500.

7. DHS filed an appeal arguing that Petitioner is detained under INA § 235(b)(2)(A), which deprives the Immigration Judge of jurisdiction to set bond. DHS also argued that Petitioner has not met the burden of proving that he is neither a danger to the community nor a flight risk.

8. DHS filed a Notice of ICE Intent to Appeal Custody Redetermination on August 7, 2025.

9. DHS also invoked the automatic stay of the Immigration Judge's decision.

10. Petitioner's detention became unlawful on August 6, 2025, when Petitioner was granted release on bond by an Immigration Judge (IJ), but was not released from custody. His continued detention is an unlawful violation of due process and is ultra vires.

11. Petitioner is represented in immigration proceedings by counsel and is statutorily eligible for relief from removal in the form of non-LPR cancellation of removal pursuant to 8 U.S.C. § 1229b(b)(1). He has been physically present in the United States for at least 10 years and has been a person of good moral character during that period. He has qualifying relatives in his U.S.-citizen children upon whom his removal would cause exceptional and extremely unusual hardship.

12. Petitioner respectfully requests this Court grant the instant petition for a writ of habeas corpus under 28 U.S.C. § 2241 and enjoin Respondents' continued detention of Petitioner

to ensure his due process rights. In the alternative, he respectfully requests the Court order Respondents to show cause why this Petition should not be granted within three days.

## JURISDICTION AND VENUE

13. Petitioner is detained in civil immigration custody at Delaney Hall Detention Center in Newark, New Jersey. He has been detained since on or about July 21, 2025.

14. This action arises under the Constitution of the United States and the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq.

15. This Court has subject-matter jurisdiction under 28 U.S.C. § 2241 (habeas corpus), 28 U.S.C. § 1331 (federal question), and, where applicable, Article I, § 9, cl. 2 of the United States Constitution (Suspension Clause). This Court may grant relief pursuant to 28 U.S.C. § 2241, the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and the All-Writs Act, 28 U.S.C. § 1651.

16. Venue is proper in the District of New Jersey under 28 U.S.C. § 1391 because at least one Defendant is in this District, Petitioner is detained in this District, and a substantial part of the events giving rise to the claims in this action took place in this District. Venue is also proper under 28 U.S.C. § 2243 because the immediate custodians of Petitioner reside in this District.

## REQUIREMENTS OF 28 U.S.C. § 2243

### Writ of Habeas Corpus: Issuance, Return, Hearing, and Decision

17. The Court must either grant the instant petition for writ of habeas corpus or issue an order to show cause to Respondents, unless Petitioner is not entitled to relief. If the Court issues

an order to show cause, Respondents must file a response "within three days" unless this Court permits additional time for good cause, which is not to exceed twenty days. 28 U.S.C. § 2243.

18. Habeas corpus is "perhaps the most important writ known to the constitutional law … affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement." Fay v. Noia, 372 U.S. 391, 400 (1963). "The writ of habeas corpus, challenging illegality of detention, is reduced to a sham if the trial courts do not act within a reasonable time." Jones v. Shell, 572 F.2d 1278, 1280 (8th Cir. 1978).

19. Due to the nature of this proceeding, Petitioner asks this Court to expedite proceedings in this case as necessary and practicable for justice.

**PARTIES**

20. Petitioner was born in Brazil and came to the United States in November 2005. Prior to his detention, he was living with and supporting his common-law partner and two U.S.-citizen children. Petitioner is the subject of a removal proceeding based upon the charges of being present in the U.S. in violation of INA § 212(a)(6)(A)(i) and INA § 212(a)(7)(A)(i)(I). He has been in civil immigration detention since July 21, 2025.

21. Respondent Donald J. Trump is named in his official capacity as President of the United States. In this capacity, he is responsible for the policies and actions of the executive branch, including the Department of State and the Department of Homeland Security.

22. Respondent Marco Rubio is named in his official capacity as the U.S. Secretary of State. In this capacity, among other things, he has the authority to determine, based on

"reasonable" grounds, that the "presence or activities" of a noncitizen "would have serious adverse foreign policy consequences for the United States."

23. Respondent Kristi Noem is named in her official capacity as the Secretary of the U.S. Department of Homeland Security ("DHS"). DHS is a department of the executive branch of the U.S. government tasked with, among other things, administering and enforcing the federal immigration laws. Secretary Noem is ultimately responsible for the actions of ICE; specifically, she is responsible for the administration of the immigration laws pursuant to INA § 103(a), 8 U.S.C. § 1103(a). Secretary Noem is legally responsible for any effort to detain and remove the Petitioner and as such is a legal custodian of Petitioner.

24. Respondent Todd M. Lyons is named in his official capacity as the Acting Director of U.S. Immigration and Customs Enforcement ("ICE"). ICE is the agency within DHS specifically responsible for managing all aspects of the immigration enforcement process, including immigration detention. ICE is responsible for apprehension, incarceration, and removal of noncitizens from the United States, and Acting Director Lyons is a legal custodian of Petitioner.

25. Respondent Pamela Bondi is named in her official capacity as the U.S. Attorney General. Attorney General Bondi is responsible for continuing a custody case against a noncitizen under 8 C.F.R. § 1003.6(d)

26. Respondent John Tsoukaris is named in his official capacity as the Field Office Director for the Newark office of ICE. Director Tsoukaris is responsible for the enforcement of the

immigration laws within this District, and for ensuring that ICE officials follow the agency's policies and procedures. Director Tsoukaris is a legal custodian of Petitioner.

27. Respondent Warden, Delaney Hall Detention Facility, is named in their official capacity as the Warden of Delaney Hall Detention Center. They have immediate physical custody of Petitioner pursuant to an agreement with ICE to detain noncitizens and is a legal custodian of Petitioner.

## FACTUAL ALLEGATIONS

28. Petitioner is a native and citizen of Brazil.

29. Petitioner entered the U.S. without inspection on November 4, 2005, through the Texas–Mexico border.

30. Petitioner has been living with his common-law partner, who is a Deferred Action for Childhood Arrivals ("DACA") recipient, and with his two U.S.-born children aged 10 and 14. [See Ex. A – Copies of documentation of Petitioner's partner's DACA status; birth certificates of Petitioner's children.]

31. Petitioner was arrested and charged with criminal mischief in New Jersey under N.J.S.A. 2C:17-3(a). The charge has been dismissed. [See Ex. B – Copy of disposition of Petitioner's charge.]

32. Petitioner was taken into custody by U.S. Immigration and Customs Enforcement ("ICE") on July 21, 2025.

33. Petitioner remains in ICE custody. [See Ex. C – Copy of Petitioner's information from ICE Detainee Locator website.]

34. On July 29, 2025, Immigration Counsel for Petitioner submitted a Motion for Bond Determination Hearing before the Immigration Judge and submitted information regarding his ties to the United States to demonstrate that he is not a flight risk or a danger and is statutorily eligible to be considered for relief, namely cancellation of removal. [See Ex. D – Motion for Bond Determination.]

35. A custody and bond determination hearing was held on August 6, 2025, and counsel for ICE argued that Petitioner was not entitled to bond due to ICE's assertion that he fell under 8 U.S.C. § 1225, rather than 8 U.S.C. § 1226. The IJ determined that Petitioner was eligible for bond under INA § 236 and ordered that Petitioner should be released upon posting bond in the amount of $3,500. [See Ex. E – Copy of Immigration Judge's Bond Order.]

36. ICE filed a Notice of ICE Intent to Appeal Custody Redetermination (EOIR-43) on August 7, 2025, which invoked the automatic stay provision of 8 C.F.R. § 1003.19(i)(2), reflecting its reversal of interpretation of bond eligibility. [See Ex. F – Notice of Intent to Appeal Custody Redetermination (EOIR-43).]

37. The Notice of Appeal from a Decision of an Immigration Judge (EOIR-26) filed by ICE confirms that their position at the custody hearing and the basis of their appeal is ICE's application of 8 U.S.C. § 1225 instead of 8 U.S.C. § 1226. [See Ex. G – Notice of Appeal (EOIR-26).]

38. On August 6, 2025, the IJ filed a written Bond Decision outlining ICE's argument that Petitioner is ineligible for bond. [See Ex. H – IJ Bond Memorandum.]

39. Petitioner is separated from his family and community. He is experiencing significant emotional and mental trauma from separation from all those he loves, including his U.S.-citizen children.

40. In addition, Petitioner is unable to support and provide for his family because he is detained. He is the primary breadwinner for his children. His daughter is only able to communicate with her father via phone calls.

41. Petitioner's continued detention separates him from his children, prohibits him from providing important support for his family, and inhibits his removal defense in many ways, including by making it difficult to communicate with witnesses, gather evidence, and afford a lawyer, among other related harms.

42. Despite having a reasoned IJ decision that he should be returned to his family and community upon posting bond, he remains detained and subjected to the aforementioned harms.

## LEGAL FRAMEWORK

**Due Process Clause**

43. "It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings." Demore v. Kim, 538 U.S. 510, 523 (2003) (quoting Reno v. Flores, 507 U.S. 292, 306 (1993)). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

44. Due process requires that there be "adequate procedural protections" to ensure that the government's asserted justification for a noncitizen's physical confinement outweighs the "individual's constitutionally protected interest in avoiding physical restraint." Id. at 690 (quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997)). In the immigration context, the Supreme Court recognizes only two purposes for civil detention: preventing flight and mitigating the risks of danger to the community. Zadvydas, 533 U.S. at 690; Demore, 538 U.S. at 528. A noncitizen may be detained based on these two justifications only if they are otherwise statutorily eligible for bond. Zadvydas, 533 U.S. at 690.

45. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). To determine what process Petitioner is due, this Court should consider (1) the private interest affected by the government action; (2) the risk that current procedures will cause an erroneous deprivation of that private interest, and the extent to which that risk could be reduced by additional safeguards; and (3) the government's interest in maintaining the current procedures, including the governmental function involved and the fiscal and administrative burdens that the substitute procedural requirement would entail. Id. at 335.

**Immigration and Nationality Act**

46. Title 8 of the United States Code, § 1221 et seq., of the Immigration and Nationality Act ("INA") controls the United States Government's authority to detain noncitizens during their removal proceedings.

47. The INA authorizes detention for noncitizens under four distinct provisions:

1. **Discretionary Detention. 8 U.S.C. § 1226(a)** generally allows for the detention of noncitizens who are in regular, non-expedited removal proceedings; however, it permits those noncitizens who are not subject to mandatory detention to be released on bond or on their own recognizance.

2. **Mandatory Detention of "Criminal" Noncitizens. 8 U.S.C. § 1226(c)** generally requires the mandatory detention of noncitizens who are removable because of certain criminal or terrorist-related activity after they have been released from criminal incarceration.

3. **Mandatory Detention of "Applicants for Admission." 8 U.S.C. § 1225(b)** generally requires detention for noncitizen applicants for admission, such as those arriving in the U.S. at a port of entry or other noncitizens who have not been admitted or paroled into the U.S. and appear subject to removal.

4. **Detention Following Completion of Removal Proceedings. 8 U.S.C. § 1231(a)** generally requires detention for noncitizens who are subject to a final removal order during the 90-day period after completion of removal proceedings and permits the detention of certain noncitizens beyond that period. Id. § 1231(a)(2), (6).

48. The instant case concerns the detention provisions at §§ 1226(a) and 1225(b).

49. Both detention provisions, § 1226(a) and § 1225(b), were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. No. 104-208, div. C, §§ 302–03, 110 Stat. 3009-546, 3009-582 to 3009-583, 3009-585.

Section 1226(a) was most recently amended earlier this year by the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025).

50. Following enactment of IIRIRA, the Executive Office for Immigration Review ("EOIR") drafted new regulations explaining that, in general, people who entered the country without inspection were not considered detained under § 1225(b) and that they were instead detained under § 1226(a) after an arrest warrant was issued by the Attorney General. See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997).

51. For nearly thirty years, the practice of the government, specifically ICE and EOIR which operate under DHS, was that most individuals apprehended in the interior of the United States after they had been present in the U.S. for more than two years (as opposed to "arriving" at a port of entry, border crossing, or being apprehended near the border soon after entering without inspection) received a bond hearing. If determined to be neither a danger to the community nor a flight risk and, as a result, granted a change in custody status, the individuals were released from detention on their own recognizance or after paying the IJ-determined bond in full. 8 U.S.C. § 1226(a)(2)(A).

52. Recently, ICE has -without warning and without any publicly stated rationale- reversed course and adopted a policy of attempting to treat all individuals who were not previously admitted to the U.S. and who are contacted in the interior at any time after entry as "arriving," regardless of the particularities of their case. These particularities now being ignored- all of which have historically been highly relevant to DHS and Immigration

Courts- such as: when, why, or how they entered the U.S.; whether they have criminal convictions; whether they present a danger to the community or flight risk; whether they have serious medical conditions requiring ongoing care; whether U.S.-citizen family members depend upon them to provide necessary care; or whether detention is in the community's best interest. Though no public announcement of this sweeping new interpretation was ever announced, ICE now reasons, and argued in front of the IJ at Petitioner's bond redetermination hearing, that the mandatory detention provision of § 1225(b)(2)(A) applies to all people who enter without inspection who are alleged to be subject to grounds of inadmissibility at § 1182.

53. As a result of ICE's interpretation and practice change, individual noncitizens, including long-time U.S. community members—even those who have had their particular circumstances reviewed and were ordered to be released upon posting bond by an IJ, continue to be detained by ICE and subjected to automatic stay provisions. To be clear, Petitioner and other noncitizens are being held in continued ICE detention even when IJs do not agree with ICE's interpretation of the statutes and regulations at hand.

54. "The idea that a different detention scheme would apply to non-citizens 'already in the country,' as compared to those 'seeking admission into the country,' is consonant with the core logic of our immigration system." Martinez v. Hyde, CV 25-11613-BEM, 2025 WL 2084238 (D. Mass. July 24, 2025) (citing Jennings v. Rodriguez, 583 U.S. 281, 289 (2018).

55. The government's erroneous interpretation of the INA defies the plain text of 8 U.S.C. § 1226.

56. Section 1226(a) applies by default to all persons "pending a decision on whether the [noncitizen] is to be removed from the United States." Removal hearings for noncitizens under § 1226(a) are held under § 1229a, which "decid[e] the inadmissibility or deportability of a [noncitizen]."

57. By contrast, § 1225(b) applies to people arriving at U.S. ports of entry or who recently entered the United States.

58. Accordingly, the mandatory detention provision of § 1225(b)(2) does not apply to Petitioner.

**Staying Immigration Judge's Bond Order**

59. Bond decisions issued by an IJ can be appealed by DHS or the noncitizen to the Board of Immigration Appeals ("BIA") by filing a Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26) within 30 days.

60. DHS can file a motion with the BIA seeking a discretionary stay of the custody decision—whether to release the noncitizen on bond consistent with the IJ's order—at any time during the appeal period. 8 C.F.R. § 1003.19(i)(1) (hereinafter "discretionary stay").

61. In cases where the bond issued is greater than $10,000 or "DHS has determined" that the noncitizen should not be released, a stay of custody order is issued automatically upon filing a simple one-page form—the Notice of Service of Intent to Appeal Custody Redetermination (Form EOIR-43)—preventing the release of the noncitizen on bond. See 8 C.F.R. § 1003.19(i)(2) (hereinafter "automatic stay").

62. The discretionary stay requires an individualized analysis by the BIA of the noncitizen's

case to determine if staying the IJ's order is appropriate. This analysis considers the individual's criminal history, ties to the community, flight risk, dangerousness, and the likelihood of prevailing in removal proceedings. See, e.g., Gunaydin, 2025 WL 1459154 (D. Minn. May 21, 2025); Zavala v. Ridge, 310 F. Supp. 2d 1071 (N.D. Cal. 2004); Bezmen v. Ashcroft, 245 F. Supp. 2d 446 (D. Conn. 2003).

63. In contrast, the automatic stay is a unilateral decision by ICE through a boilerplate form (EOIR-43), which does not proffer any evidence or analysis of the noncitizen's status as either a flight risk or a danger to the community. This automatic stay results in ICE—the party that lost before the IJ—being able unilaterally, and without any grounds, to immediately prevent execution of the IJ's Order of Release, which is founded on a particularized determination that the noncitizen can safely be released from custody upon posting of bond.

64. The automatic stay is not subject to review by either the IJ or the BIA.

65. **"'In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.' ... Detention after a bail hearing rendered meaningless by an automatic stay likewise should not be the norm**." Ashley v. Ridge, 288 F. Supp. 2d 662, 675 (D.N.J. 2003) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).

66. Petitioner is detained today solely at the unilateral behest of ICE, pursuant to a regulation written by executive agencies, not Congress: 8 C.F.R. § 1003.19(i)(2). This regulation states, in whole:

Automatic stay in certain cases. In any case in which DHS has determined that an alien should not

be released or has set a bond of $10,000 or more, **any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination (Form EOIR-43)** with the immigration court within one business day of the order, and, except as otherwise provided in 8 C.F.R. § 1003.6(c), shall remain in abeyance pending decision of the appeal by the Board. The decision whether or not to file Form EOIR-43 is subject to the discretion of the Secretary.

§ 1003.19(i)(2) (emphasis added),

67. The regulations expand on the related procedures in 8 C.F.R. § 1003.6(c). "If the Board has not acted on the custody appeal, the automatic stay shall lapse 90 days after the filing of the notice of appeal." 8 C.F.R. § 1003.6(c)(4).

68. However, the regulations provide for DHS's continued power to keep a noncitizen detained even after the automatic stay lapses.

69. "DHS may seek a discretionary stay pursuant to 8 C.F.R. § 1003.19(i)(1) to stay the immigration judge's order in the event the Board does not issue a decision on the custody appeal within the period of the automatic stay." 8 C.F.R. § 1003.6(c)(5). All DHS must do is submit a motion and "may incorporate by reference the arguments presented in its brief in support of the need for continued detention of the alien during the pendency of the removal proceedings." Id.

70. If the BIA has not resolved the custody appeal within 90 days and "if the Board fails to adjudicate a previously filed stay motion by the end of the 90-day period, the stay will remain in effect (but not more than 30 days) during the time it takes for the Board to decide whether or not to grant a discretionary stay." 8 C.F.R. § 1003.6(c)(5).

71. If the BIA rules in a noncitizen's favor, authorizing release on bond or denying DHS's

motion for a discretionary stay, "the alien's release shall be automatically stayed for five business days." 8 C.F.R. § 1003.6(d).

72. This additional five-day automatic stay in the event of the BIA authorizing a noncitizen's release is to provide DHS with another opportunity to keep the person detained despite orders to the contrary.

73. "If, within that five-day [secondary automatic stay] period, the Secretary of Homeland Security or other designated official refers the custody case to the Attorney General pursuant to 8 C.F.R. § 1003.1(h)(1), the alien's release shall continue to be stayed pending the Attorney General's consideration of the case. The automatic stay will expire 15 business days after the case is referred to the Attorney General." 8 C.F.R. § 1003.6(d).

74. "DHS may submit a motion and proposed order for a discretionary stay in connection with referring the case to the Attorney General … The Attorney General may order a discretionary stay pending the disposition of any custody case by the Attorney General or by the Board." 8 C.F.R. § 1003.6(d).

75. Thus, even if the BIA upheld the IJ's order, granted the noncitizen's bond, and ordered release, the person would remain in detention for five more days while DHS is given the opportunity to refer the case to the Attorney General pursuant to 8 C.F.R. § 1003.1(h)(1). 8 C.F.R. § 1003.6(d). The same additional automatic five-day stay applies if the BIA denies DHS's motion for discretionary stay or fails to act on such a motion before the automatic stay period expires. Id. If the case is referred to the Attorney General, that second automatic stay expires 15 business days after referral. Id. DHS may thereafter file another motion for

discretionary stay. Id. Importantly, if a case is referred to the Attorney General, "[t]he Attorney General may order a discretionary stay pending the disposition of any custody case by the Attorney General or by the Board." Id. There is no time limit for this stay or these decisions.

76. The scheme, plainly designed by the executive branch to give DHS the power to circumvent both IJ and BIA orders, can be summarized as follows:

- Immigration Judge orders DHS to release noncitizen on bond.
  - DHS files Form EOIR-43 Notice of Intent to Appeal within one business day, invoking automatic stay. 8 C.F.R. § 1003.19(i)(2).
  - DHS files Form EOIR-26 Notice of Appeal within ten business days. 8 C.F.R. § 1003.6(c)(1).
  - Automatic stay lapses 90 days after DHS files EOIR-26 notice of appeal. 8 C.F.R. § 1003.6(c)(4).
  - DHS may seek discretionary stay before 90 days lapse. 8 C.F.R. §§ 1003.6(c)(5), 1003.19(i)(1).
- BIA orders release on bond or denies discretionary stay motion
  - Release is automatically stayed for an additional five business days. 8 C.F.R. § 1003.6(d).
  - Within that five-business-day automatic stay, DHS may refer the case to the Attorney General. 8 C.F.R. § 1003.6(d).
  - Automatic stay is extended for 15 business days after DHS refers the case to the Attorney General. 8 C.F.R. § 1003.6(d).
  - DHS may seek a discretionary stay with the Attorney General for the duration of the case. 8 C.F.R. § 1003.6(d).

77. The regulations are written such that it does not matter what either the IJ or BIA orders; if the government disagrees, the government can, through its own actions and regulations, keep the noncitizen detained, and that detention could be, in reality, indefinite

78. "Indefinite detention of a [noncitizen]" raises "a serious constitutional problem." Zadvydas, 533

U.S. at 690. The automatic stay provision detains individuals indefinitely, without a "discernible termination point" (Ashley, 288 F. Supp. 2d at 672), "definite termination point" (Zabadi v. Chertoff, No. C05-01796 WHA, 2005 WL 1514122, at *1 (N.D. Cal. 2005) (unpublished)), "finite time frame," "certain time parameters for final resolution" (Zavala, 310 F. Supp. 2d at 1075), or "ascertainable end point" (Bezmen, 245 F. Supp. 2d at 449–50).

79. Even more troubling, the automatic stay does not provide for review by the IJ or BIA—a clear due process violation. A noncitizen subject to DHS's arrest and continued detention in spite of an IJ ordering release has no method to challenge the automatic stay before the immigration court or BIA. See Ashley, 288 F. Supp. 2d at 675 ("continued detention of alien without judicial review of the automatic stay of bail determination violated alien's procedural and substantive due process rights").

80. Petitioner's continued detention under the automatic stay will never be reviewed. His only option is to wait for the BIA to take up the underlying matter.

**Board of Immigration Appeals**

81. However, the BIA's appellate process does not offer a meaningful or timely opportunity to correct Respondents' errors.

82. According to the agency's own data, during fiscal year 2024, the BIA's average processing time for a bond appeal was 204 days—approximately seven months. Meaning for an average case where bond was granted in July 2025, it would not be heard until February 2026. See Vazquez v. Bostock, No. 3:25-cv-05240-TMC (W.D. Wash. May 2, 2025).

83. The 204 days is only for the average case. Cases can take longer or shorter, meaning there is no

definite timeline for resolution and release.

84. The months a person waits for appellate review deprive them of time with their spouses, children, family and community members, and liberty. Their family and community—often U.S. citizens or lawful permanent residents—are similarly deprived of the love, care, financial support, and meaningful contributions the detained person provides.

85. Detained noncitizens are often incarcerated in jail, or jail-like, settings. They are forced to sleep in communal spaces, receive inadequate medical care, and are subjected to other degrading treatment.

86. While not all noncitizens succeed in their appeals, some do. The BIA's months-long appellate review means that for those individuals, they have spent months of unnecessary time in detention and suffered the harms outlined above.

87. Failing to provide timely appellate review of erroneous interpretations of the INA violates the Due Process Clause.

**The Automatic Stay Violates Due Process**

88. The automatic stay "operates by fiat and has the effect of prolonging detention even after a judicial officer has determined that release on bond is appropriate. That mechanism's operation here—in the absence of any individualized justification—renders the continued detention arbitrary as applied." Mohammed H. v. Trump, No. 25-1576 (JWB/DTS), 2025 WL 1334847, at *6 (D. Minn. May 5, 2025).

89. In determining whether due process has been violated, the Court should weigh: (1) the private interest affected by the government action; (2) the risk that current procedures will cause an

erroneous deprivation of the private interest, and the extent to which that risk could be reduced by additional safeguards; and (3) the government's interest in maintaining the current procedures, including the governmental function involved and the fiscal and administrative burdens that the substitute procedural requirement would entail. Mathews, 424 U.S. at 335.

90. As to the first Mathews factor—the private interest affected by the government action—"Petitioner's liberty interest in remaining free from governmental restraint is of the highest constitutional import." Zavala, 310 F. Supp. 2d at 1076; see also Ashley, 288 F. Supp. 2d at 670–71 (same) (quoting St. John v. McElroy, 917 F. Supp. 243, 250 (S.D.N.Y. 1996)). Petitioner has been detained for over a month, preventing him from seeing his children, going to work, and participating in his community.

91. As to the second Mathews factor, the current procedures cause an erroneous deprivation of Petitioner's liberty interest in remaining free from detention. Unlike typical requests for a stay, which require a demonstration of the likelihood of success on the merits, the automatic stay provision demands no such showing; in fact, it was enacted precisely to avoid the need for such an individualized determination. An IJ has already determined that Petitioner is neither a flight risk nor a danger to the community.

92. But that individualized, reasoned decision by the IJ was effectively overruled by a unilateral determination by a DHS attorney, which "poses a serious risk of error." Zavala, 310 F. Supp. 2d at 1076. This allows the DHS attorney, "who has by definition failed to persuade a judge in an adversary hearing that detention is justified", to make the stay decision without oversight or review. Ashley, 288 F. Supp. 2d at 671. This conflates the role of prosecutor and adjudicator, which is impermissible due to the high potential for error. See Marcello v. Bonds, 349 U.S. 302,

305–06 (1955).

93. As to the third Mathews factor, the government's interest in maintaining the "current" procedure is minimal here. This "policy and procedure" was never officially published by DHS and was only discovered by the press observing an intra-office memo mere weeks ago on July 8, 2025. As explained above, the IJ has already made a determination that Petitioner is appropriate to be released on bond, having considered both dangerousness and flight risk. Further, DHS is still able to seek a discretionary stay before the BIA under 8 C.F.R. § 1003.19(i)(1), which would require some showing of likelihood of success on the merits. Ashley, 288 F. Supp. 2d at 670–71; Zavala, 310 F. Supp. 2d at 1079.

94. In order to prevail on a claim asserting the deprivation of due process, a petitioner must also show "actual prejudice." Puc-Ruiz v. Holder, 629 F.3d 771, 782 (8th Cir. 2010). Actual prejudice occurs if "an alternate result may well have resulted without the violation." Id. "To show prejudice, [a petitioner] must present plausible scenarios in which the outcome of the proceedings would have been different if a more elaborate process were provided." Tamayo-Tamayo v. Holder, 486 F.3d 484, 495 (9th Cir. 2007).

95. Certainly, if DHS could not invoke the automatic stay, Petitioner would have been released on bond and would be home with his children and able to support his household. This would occur pursuant to the IJ's order that he may be released upon posting of a $3,500 bond—which was and is ready to be paid on Petitioner's behalf. His continued detention through the automatic stay despite that order is actual prejudice.

96. Furthermore, it is entirely plausible that the more elaborate process of the discretionary stay (8

C.F.R. § 1003.19(i)(1)) would have resulted in the BIA not granting a stay of the bond order. This is because DHS is unable to show a likelihood of success on the merits, and Petitioner would be permitted to reply in opposition to the stay, arguing the same grounds as the IJ's reasoning for granting release upon bond.

## CLAIMS FOR RELIEF

### FIRST CAUSE OF ACTION
**Violation of the Due Process Clause of the Fifth Amendment to the United States Constitution**

97. Petitioner repeats and incorporates by reference all allegations above as though set forth fully herein.

98. The Due Process Clause asks whether the government's deprivation of a person's life, liberty, or property is justified by a sufficient purpose. Here, there is no question that the government has deprived Petitioner of his liberty.

99. The government's detention of Petitioner is unjustified. Respondents have not demonstrated that Petitioner needs to be detained. See Zadvydas, 533 U.S. at 690 (finding immigration detention must further the twin goals of (1) ensuring the noncitizen's appearance during removal proceedings and (2) preventing danger to the community). There is no credible argument that Petitioner cannot be safely released back to his community.

100. The automatic stay provision keeping Petitioner detained today is unconstitutional as applied to him and in violation of his due process rights. An IJ ordered ICE to release Petitioner on a reasonable bond of $3,500, and because ICE disagrees with that order, it invoked an automatic stay of the order, leaving Petitioner stuck in detention.

101. The automatic stay regulation rendered Petitioner's bond hearing a charade, because the

outcome of the hearing or the validity of the IJ's reasoning did not matter. ICE wants Petitioner detained, and through the automatic stay, it can effectively ignore the IJ's order to the contrary. There is no due process when the government, having lost the argument in court, gets to do what it wants anyway.

102. For these reasons, Petitioner's detention violates the Due Process Clause of the Fifth Amendment. See Jacinto v. Trump, No. 4:25-cv-3161, 2025 WL 326606 (D. Neb. Aug. 6, 2025).

**SECOND CAUSE OF ACTION**
**U*ltra Vires* Regulation**

103. Petitioner repeats and incorporates by reference all allegations in paragraphs 1–96 as though set forth fully herein.

104. The automatic stay regulation exceeds the authority given to the Attorney General by Congress and unlawfully eliminates IJs' discretionary authority to make custody determinations.

105. Congress gave the Attorney General discretion to decide whether to release detained noncitizens pending removal proceedings if they have not been convicted of certain criminal offenses and are not linked to terrorist activities. See 8 U.S.C. § 1226(a), (c). The Attorney General has delegated this authority to IJs, who have discretion to determine whether to release these noncitizens on bond. 8 C.F.R. §§ 1003.19, 1236.1; see also 28 U.S.C. § 510 (permitting the Attorney General to delegate her functions to officers or employees within the Department of Justice).

106. Congress has not delegated this authority to DHS. There is no statutory authority for DHS to unilaterally stay an IJ's bond determination. DHS's use of the automatic stay is an unlawful use of the discretionary power granted to the Attorney General and "has the effect of mandatory

detention of a new class of aliens, although Congress has specified that such individuals are not subject to mandatory detention." Zavala, 310 F. Supp. 2d at 1079; see also Ashley, 288 F. Supp. 2d at 673 ("As Congress exempted aliens like Petitioner from the mandatory detention of § 1226(c), it is unlikely that it would have condoned this back-end approach to detaining aliens like Petitioner through the combined use of § 1226(a) and § 1003.19(i)(2).").

107. Here, the IJ determined that upon posting of set bond Petitioner is not a danger to the community or a sufficient flight risk and ordered DHS to release him on bond.

108. The automatic stay regulation, 8 C.F.R. § 1003.19(i)(2), purports to give DHS the authority to unilaterally override the IJ's decision. It is unlawful and ultra vires.

## PRAYER FOR RELIEF

Wherefore, Petitioner respectfully requests that this Court grant the following relief:

1) Assume jurisdiction over this matter;

2) Order the immediate release of Petitioner pending these proceedings;

3) Order Respondents not to transfer Petitioner out of the District of New Jersey during the pendency of these proceedings to preserve jurisdiction and access to counsel;

4) Declare that Respondents' actions to detain Petitioner violate the Due Process Clause of the Fifth Amendment and are ultra vires;

5) Issue a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and order Respondents to immediately release Petitioner from custody in accordance with the IJ's bond order, or, in the alternative, order Respondents to show cause why this Petition should not be granted

within three days;

6) Award reasonable attorneys' fees and costs for this action; and

7) Grant such further relief as the Court deems just and proper.

Dated: October 3, 2025
Respectfully submitted,

Paulo Cesar Mendona,
Petitioner.

By: _____

Darilyn Octave, Esq.
*Attorney for Petitioner*

John Nicelli & Associates LTD
225 Broadway, Suite 1040
New York, NY 10007
Tel: (212) 227-8020
Fax: (212 227-8175

Visuvanathan Rudrakumaran
*Pro-Hac-Vice Counsel*

Law Office of Visuvanathan Rudrakumaran
875 Ave of the Americas, Ste. 2309
New York, NY 10001
Tel: (212) 290-2925
Fax: (212) 290-2303

# APPENDIX OF DOCUMENTS

| | |
|---|---|
| **Exhibit A (pg. 28)** | Copies of documentation of Petitioner's partner's DACA status **(pg. 29-30)**; and Birth certificates of Petitioner's two US-born children **(pg. 31-32)**; |
| **Exhibit B (pg. 33)** | Copy of Disposition of Petitioner's charge **(pg. 34)** |
| **Exhibit C (pg. 35)** | Copy of Petitioner's information from ICE Detainee Locator website **(pg. 36-37)** |
| **Exhibit D (pg. 38)** | Motion for Bond Determination **(pg. 39-42)** |
| **Exhibit E (pg. 43)** | Copy of the Immigration Judge's Bond Order **(pg. 44-45)** |
| **Exhibit F (pg. 46)** | Notice of Intent to Appeal Custody Redetermination (EOIR-43) **(pg. 47)** |
| **Exhibit G (pg. 48)** | Notice of Appeal (EOIR-26) **(pg. 49-77)** |
| **Exhibit H (pg. 78)** | Copy of Immigration Judge's Bond Memorandum **(pg. 79-82)** |

# EXHIBIT C

# Search Results: 1

**PAULO CESAR MENDONCA**

**Country of Birth :** Brazil

[redacted]

**Status :** In ICE Custody

**State:** NJ

**Current Detention Facility**: DELANEY HALL DETENTION FACILITY

** Click on the Detention Facility name to obtain facility contact information*

BACK TO SEARCH >

< BACK TO RESULTS

# Facility Page

Detention Information For:

**PAULO CESAR MENDONCA**
**Country of Birth:** Brazil
[redacted]

Current Detention Facility:

DELANEY HALL DETENTION FACILITY

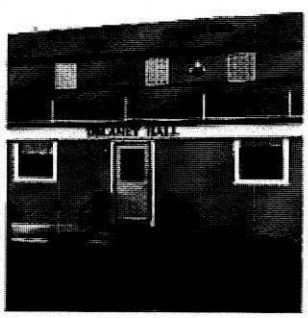
451 DOREMUS AVENUE

NA

NEWARK, NJ 07105

**Visitor Information:** (973) 474-2200

MORE INFORMATION >



## ERO Office Information

Family members and legal representatives may be able to obtain additional information about this individual's case by contacting this ERO office:

NEWARK, NJ, DOCKET CONTROL OFFICE,

Phone Number: (862) 445-9200

# EXHIBIT D

**DETAINED**

John A. Nicelli, Esq.
C/O Law Office of John A. Nicelli
225 Broadway, Suite 1040,
New York, NY 10007

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**ELIZABETH, NEW JERSEY**

| | |
|---|---|
| In the Matter of: | |
| **MENDONCA,** [redacted] | **File No.:** [redacted] |
| In Removal Proceedings | |

Respondent, through undersigned counsel, respectfully moves this Court for a redetermination of the conditions of his detention and release pending his removal proceedings, pursuant to 8 C.F.R. § 1003.19 and 8 C.F.R. § 1236.1(d). Respondent is statutorily eligible for a bond because he is not subject to mandatory detention under INA § 235(b) (expedited removal) and does not fall under the mandatory detention provisions for criminal offenses under INA § 236(c)(1).

In Support of this Motion, the Respondent submits the following:

1. Respondent [redacted] Mendonca is a native and citizen of Brazil. He entered the United States without inspection on November 04, 2005 through the Texas-Mexico border and has remained in the United States continuously since.
2. Respondent resides at 1380 Garfield Place, Elizabeth, NJ along with his girlfriend, Quezia Chaves who holds DACA status, and his two U.S. Citizenship children [redacted] and [redacted], ages 10 and 14.

3. Respondent is the sole economic provider for his family. He holds steady employment as a supervisor at a truck repair company.

**ARGUMENT**

**A. RESPONDENT is statutorily eligible for bond because he is not subject to mandatory detention under INA § 235(b) or INA § 236(c)(1).**

First, respondent is not subject to INA § 235(b). The Board of Immigration Appeals has held that individuals placed in expedited removal proceedings, including those later placed in INA § 240 proceedings after a positive credible fear determination, are ineligible for bond. *Matter M-S-*, 27 I&N Dec. 509, 518 (A.G. 2019). Consequently, immigration judges lack jurisdiction to redetermine bond for individuals initially processed through expedited removal.

However, the respondent in this case was never subjected to expedited removal. Instead, the Department, exercising its discretion, placed Mr. Mendonca directly in full removal proceedings under INA § 240. *See Matter of Cabrera-Fernandez*, 28 I&N Dec. 747, 748 (BIA 2023) (citing *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 523 (BIA 2011)) (reaffirming that DHS has the authority to elect whether to initiate expedited removal proceedings under INA § 235(b) or full removal proceedings under INA § 240). Therefore, this Court has jurisdiction under INA § 236(a) to grant bond in the minimum amount of $1,500 or grant conditional parole.

While Mr. Mendonca has been charged in New Jersey under 2C:17-3A (1), this criminal charge alone does not trigger mandatory detention under INA § 236(c)(1). That provision applies to specific categories of offenses, including particularly serious crimes, but its application depends on whether the detainee has been convicted of such an offense and whether the offense falls within the enumerated categories.

Moreover, as the criminal proceeding is still pending, and there is no conviction at this stage, the detention statute does not mandate detention solely based on the pending criminal charge. Additionally, the nature of the charge does not qualify it as a "particularly serious crime" under the

statute.

In conclusion, Pending the outcome of the criminal case, and given that no conviction has yet been entered, Mr. Mendonca cannot be categorically detained under INA § 236(c)(1). Therefore, his eligibility for bond remains intact.

**RESPONDENT merits release from custody.**

In *Matter of Guerra*, 25 I&N Dec. 37, 40 (BIA 2006), the Court set forth a series of factors that Immigration Judges could look to when considering whether to release a noncitizen from custody including:

> (1) whether the [noncitizen] has a fixed address in the United States; (2) the [noncitizen's] length of residence in the United States; (3) the [noncitizen's] family ties in the United States, and whether they may entitle the [noncitizen] to reside permanently in the United States in the future; (4) the [noncitizen's] employment history; (5) the [noncitizen's] record of appearance in court; (6) the [noncitizen's] criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the [noncitizen's] history of immigration violations; (8) any attempts by the [noncitizen] to flee prosecution or otherwise escape from the authorities; and (9) the [noncitizen's] manner of entry to the United States.

**1. RESPONDENT is not a flight risk.**

Respondent has a permanent address where he will stay if released. The respondent owns his home located at 1380 Garfield Place, Elizabeth, New Jersey where he resides along with his two U.S. Citizen children and his common-law partner.

Further, respondent is prima facie eligible for Cancellation of Removal and has a right to seek this relief before the Immigration Court, which is an incentive for him to attend future immigration court hearings

As stated above, respondent has no serious criminal history and is not subject to any bars to Cancellation of Removal. Therefore, he would merit a discretionary grant if he meets

his burden of establishing the elements of Cancellation of Removal.

**CONCLUSION**

Mr. Mendonca warrants release on conditional parole or bond. He is statutorily eligible for a bond, and is neither a danger to the community or a flight risk. We respectfully request that this Court release the respondent so that he can pursue his claim for relief from removal.

Respectfully submitted by,

John A. Nicelli

Date: 7/29/25

# EXHIBIT E

Filed at BIA on: 08/20/2025 at 10:19:15 AM (Eastern Daylight Time)

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**ELIZABETH IMMIGRATION COURT**

Respondent Name:
MENDONCA, PAULO CESAR

To:
Nicelli, John Anthony
225 Broadway, Suite 1040
New York, NY 10007

A-Number:
[redacted]

Riders:
In Custody Redetermination Proceedings

Date:
08/06/2025

## ORDER OF THE IMMIGRATION JUDGE

The respondent requested a custody redetermination pursuant to 8 C.F.R. § 1236. After full consideration of the evidence presented, the respondent's request for a change in custody status is hereby ordered:

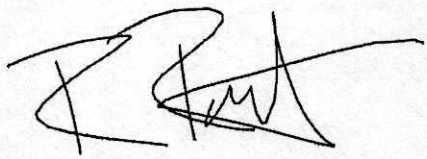
☐ Denied, because

☑ Granted. It is ordered that Respondent be:
- ☐ released from custody on his own recognizance.
- ☑ released from custody under bond of $ 3,500.00
- ☐ other:

☐ Other:

EOIR – 30 of 31

Filed at BIA on: 08/20/2025 at 10:19:15 AM (Eastern Daylight Time)



Immigration Judge: Rastegar, Ramin 08/06/2025

Appeal: Department of Homeland Security: ☐ waived ☑ reserved
Respondent: ☑ waived ☐ reserved

Appeal Due: 09/05/2025

**Certificate of Service**

This document was served:
Via: [ M ] Mail | [ P ] Personal Service | [ E ] Electronic Service | [ U ] Address Unavailable
To: [ ] Noncitizen | [ ] Noncitizen c/o custodial officer | [ E ] Noncitizen's atty/rep. | [ E ] DHS
Respondent Name : MENDONCA, PAULO CESAR | A-Number : [redacted]
Riders:
Date: 08/06/2025 By: DUARTE, ORDALINA, Court Staff

# EXHIBIT F

**U.S. Department of Justice**
Executive Office for Immigration Review

# Notice of ICE Intent to Appeal Custody Redetermination

Date: 8/7/2025

Alien Number: [redacted]

Alien Name: MENDONCA, Paulo Cesar

1. Immigration and Customs Enforcement (ICE) has:

   ☒ a. Held the respondent without bond.

   ☐ b. Set the respondent's bond at $ _____.

2. The Immigration Judge on 8/6/2025 (Date)

   ☐ a. Authorized the respondent's release.

   ☒ b. Redetermined the ICE bond to $ 3,500.

3. Filing this form on 8/7/25 (Date) automatically stays the Immigration Judge's custody redetermination decision. See 8 C.F.R. §1003.19(i)(2).

4. The stay shall lapse if ICE does not file a notice of appeal along with appropriate certification within ten business days of the issuance of the order of the Immigration Judge, or upon ICE's withdrawal of this notice, or as set forth in 8 C.F.R. §1003.6(c)(4) and (5).
   See 8 C.F.R. §1003.6(c)(1).

ICE Counsel

I, Michael Campise (Name), served the Notice of ICE Intent to Appeal Custody Redetermination on John Anthony Nicelli via ECAS (Respondent or Respondent's Representative), on 8/7/25 (Date).

Signature

EOIR – 1 of 1

Form EOIR-43
Rev. Oct. 2006

# EXHIBIT G

Filed at BIA on: 08/20/2025 at 10:19:15 AM (Eastern Daylight Time)

**U.S. Department of Justice**
Executive Office for Immigration Review
*Board of Immigration Appeals*

OMB# 1125-0002

# Notice of Appeal from a Decision of an Immigration Judge

Staple Check or Money Order Here. Include Name(s) and "A" Number(s) on the face of the check or money order.

**1.** List Name(s) and "A" Number(s) of all Respondent(s)/Applicant(s):
MENDONCA, Paulo Cesar [redacted]

**For Official Use Only**

**WARNING:** Names and "A" Numbers of everyone appealing the Immigration Judge's decision must be written in item #1. The names and "A" numbers listed will be the only ones considered to be the subjects of the appeal.

**2.** I am ☐ the Respondent/Applicant ☑ DHS-ICE *(Mark only one box.)*

**3.** I am ☑ DETAINED ☐ NOT DETAINED *(Mark only one box.)*

**4.** My last hearing was at 625 Evans Street, Elizabeth, NJ 07201 *(Location, City, State)*

**5. What decision are you appealing?**

*Mark only one box below. If you want to appeal more than one decision, you must use more than one Notice of Appeal (Form EOIR-26).*

☐ I am filing an appeal from the Immigration Judge's decision *in **merits** proceedings* (example: removal, deportation, exclusion, asylum, etc.) dated _____.

☑ I am filing an appeal from the Immigration Judge's decision *in **bond** proceedings* dated 08/06/2025. (For DHS use only: Did DHS invoke the automatic stay provision before the Immigration Court? ☑ Yes. ☐ No.)

☐ I am filing an appeal from the Immigration Judge's decision ***denying a motion to reopen or a motion to reconsider*** dated _____.

*(Please attach a copy of the Immigration Judge's decision that you are appealing.)*

EOIR – 1 of 31

6. **State in detail the reason(s) for this appeal. Please refer to the General Instructions at item F for further guidance. You are not limited to the space provided below; use more sheets of paper if necessary. Write your name(s) and "A" number(s) on every sheet.**

Please see attached.

*(Attach additional sheets if necessary)*

**WARNING:** You must clearly explain the specific facts and law on which you base your appeal of the Immigration Judge's decision. The Board may summarily dismiss your appeal if it cannot tell from this Notice of Appeal, or any statements attached to this Notice of Appeal, why you are appealing.

7. Do you desire oral argument before the Board of Immigration Appeals? ☐ Yes ☑ No

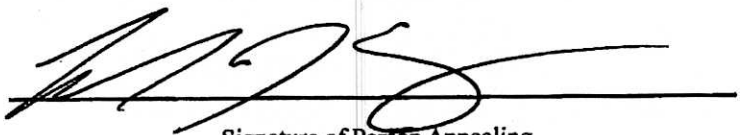
8. Do you intend to file a separate written brief or statement after filing this Notice of Appeal? ☐ Yes ☑ No

9. If you are unrepresented, do you give consent to the BIA Pro Bono Project to have your case screened by the Project for potential placement with a free attorney or accredited representative, which may include sharing a summary of your case with potential attorneys and accredited representatives? *(There is no guarantee that your case will be accepted for placement or that an attorney or accredited representative will accept your case for representation)* ☐ Yes ☐ No

**WARNING:** If you mark "Yes" in item #7, you should also include in your statement above why you believe your case warrants review by a three-member panel. The Board ordinarily will not grant a request for oral argument unless you also file a brief.

If you mark "Yes" in item #8, you will be expected to file a written brief or statement after you receive a briefing schedule from the Board. The Board may summarily dismiss your appeal if you do not file a brief or statement within the time set in the briefing schedule.

10. **Print Name:** Michael Campise

11. **Sign Here:** X  8/20/25

Signature of Person Appealing *(or attorney or representative)*

Date

EOIR – 2 of 31

Filed at BIA on: 08/20/2025 at 10:19:15 AM (Eastern Daylight Time)

**12.** **Mailing Address of Respondent(s)/Applicant(s)**

MENDONCA, Paulo Cesar
(Name)

[redacted]
(Street Address)

(Suite or Room Number)

(City, State, Zip Code)

(Telephone Number)

**11.** **Mailing Address of Attorney or Representative for the Respondent(s)/Applicant(s)**

JOHN NICELLI
(Name)

225 BROADWAY
(Street Address)

1040
(Suite or Room Number)

NEW YORK, NY 10007
(City, State, Zip Code)

212-227-8020
(Telephone Number)

**NOTE:** You must notify the Board within five (5) working days if you move to a new address or change your telephone number. You must use the Change of Address Form/Board of Immigration Appeals (Form EOIR-33/BIA).

**NOTE:** If an attorney or representative signs this appeal for you, he or she must file *with this appeal*, a Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27).

**13.** **PROOF OF SERVICE (You Must Complete This)**

I Michel Campise mailed or delivered a copy of this Notice of Appeal
(Name)

on _____ to _____
(Date) (Opposing Party)

at _____
(Number and Street, City, State, Zip Code)

☑ No service needed. I electronically filed this document, and the opposing party is participating in ECAS.

**SIGN HERE** → X _____
Signature

**NOTE:** If you are the Respondent or Applicant, the "Opposing Party" is the Assistant Chief Counsel of DHS - ICE.

**WARNING:** If you do not complete this section properly, your appeal will be rejected or dismissed.

**WARNING:** If you do not attach the fee payment receipt, fee, or a completed Fee Waiver Request (Form EOIR-26A) to this appeal, your appeal may be rejected or dismissed.

**HAVE YOU?**

- ☐ Read all of the General Instructions.
- ☐ Provided all of the requested information.
- ☐ Completed this form in English.
- ☐ Provided a certified English translation for all non-English attachments.
- ☐ Signed the form.
- ☐ Served a copy of this form and all attachments on the opposing party, if applicable.
- ☐ Completed and signed the Proof of Service
- ☐ Attached the required fee payment receipt, fee, or Fee Waiver Request.
- ☐ If represented by attorney or representative, attach a completed and signed EOIR-27 for each respondent or applicant.

EOIR – 3 of 31



Form EOIR-26
Rev. Nov. 2022

Filed at BIA on: 08/20/2025 at 10:19:15 AM (Eastern Daylight Time)

MENDONCA, Paulo Cesar
[redacted]

**ATTACHMENT TO FORM EOIR-26 AND MEMORANDUM OF LAW**

The Immigration Judge erred in ordering the respondent released from the custody of the Department of Homeland Security (DHS) pursuant to section 236(a) of the Immigration and Nationality Act (INA). Section 235 of the INA is the applicable immigration detention authority for all applicants for admission. Section 236 of the INA is the applicable detention authority for aliens who are already present in the United States after an admission and are deportable. *Id.* §§ 236, 237(a). The respondent, who is present in the United States without admission or parole (PWAP), is an applicant for admission in INA § 240 removal proceedings and is therefore detained pursuant to INA § 235(b)(2)(A). DHS requests that the Board of Immigration Appeals (Board) reverse the decision of the Immigration Judge in a precedent decision, as this case presents an issue that "arise[s] frequently in immigration cases," and given the "need to achieve, maintain, or restore national uniformity of interpretation of issues under the immigration laws or regulations." 8 C.F.R. § 1003.1(g)(3)(ii), (v)..[1]

[1] This case presents substantive issues that would benefit from clarification from the Board in a precedential decision. Notably, the Executive Office for Immigration Review (EOIR) recently issued a policy memorandum acknowledging that "when conflicting Board precedents exist, Immigration Judges are uncertain as to which line of precedent they are obligated to follow." EOIR PM 25-34, *Conflicting Precedents of the Board of Immigration Appeals* § I, at 2 (July 3, 2025). That EOIR recognizes there are situations in which multiple lines of precedent may be in tension or conflict with one another underscores the need for Board precedent on this issue.

## ISSUES PRESENTED

1. The Immigration Judge erred in ordering the respondent released from DHS custody pursuant to INA § 236(a), where the respondent is an applicant for admission and is thus subject to detention pursuant to INA § 235(b)(2)(A) and ineligible for release but for a release on parole by DHS pursuant to INA § 212(d)(5).

2. The Immigration Judge erred in finding that the respondent met his burden to establish he does not present a danger to persons or property because the record showed that the incident that led to his arrest involved domestic violence.

## STANDARD OF REVIEW

The Board reviews questions of fact for clear error, 8 C.F.R. § 1003.1(d)(3)(i), and "questions of law, discretion, and judgment and all other issues in appeals from decisions of [I]mmigration [J]udges de novo," *id.* § 1003.1(d)(3)(ii). The statutory authority governing an alien PWAP's detention and whether such an alien is eligible for a custody redetermination hearing before an Immigration Judge is a question of law reviewed *de novo*. *See id.* Whether the respondent is a danger to the community is a question of judgment that is reviewed *de novo*; however, the factual findings underlying that determination is reviewed for clear error. *Matter of Beltrand-Rodriguez*, 29 I&N Dec. 76, 77 (BIA 2025).

## SUMMARY OF THE ARGUMENT

Section 235 of the INA is the applicable detention authority for all applicants for admission; specifically, INA § 235(b)(2)(A) provides the detention authority for aliens PWAP.[2]

[2] The respondent in this case has not been granted parole. Nonetheless, it bears emphasis that as explained in Argument I.C. below, an alien granted parole remains an applicant for admission and therefore subject to detention under INA § 235. INA § 212(d)(5)(A) (permitting parole only for aliens "applying for admission" and requiring that the alien "continue to be dealt with in the same manner as that of any other applicant for admission to the United States" following parole); *see* 8 C.F.R. §§ 1.2 (providing that "[a]n arriving alien remains an arriving alien even if paroled pursuant to [INA §] 212(d)(5)"), 1001.1(q) (same). The Supreme Court and the Board have long recognized that aliens paroled into the United States are legally in the position of aliens standing at the border, regardless of the duration of their parole. *See Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958); *Matter of Abebe*, 16 I&N Dec. 171, 173 (BIA 1976) (citing, *inter alia*, *Leng May Ma*, 357 U.S. at 185; *Kaplan v. Tod*, 267 U.S. 228 (1925)); *Matter of L-Y-Y-*, 9 I&N Dec. 70 (BIA; A.G. 1960); *see also, e.g.*, *Duarte v. Mayorkas*, 27 F.4th 1044, 1059-60 (5th Cir.

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placed in INA § 240 removal proceedings given such aliens are both applicants for admission under INA § 235(a)(1) and aliens seeking admission under INA § 235(b)(2)(A). Section 236 of the INA is the applicable detention authority for those aliens who have been admitted and are deportable. The respondent, who is an alien PWAP, is properly detained pursuant to INA § 235(b)(2)(A) such that the Immigration Judge lacked authority to redetermine the respondent's custody; however, assuming, arguendo, that the Immigration Judge had authority to redetermine the respondent's custody, the Immigration Judge improperly concluded that the respondent is not a danger to the community.

**STATEMENT OF THE CASE**

The respondent is a native and citizen of Brazil who entered the United States without inspection on an unknown date. On July 21, 2025, DHS placed the respondent in removal proceedings by filing a Notice to Appear (NTA) with the Elizabeth immigration court, charging him as inadmissible pursuant to INA § 212(a)(6)(A)(i) because he entered the country without inspection, and pursuant to INA § 212(a)(7)(A)(i)(I) because he is not in possession of a valid document as required by the Attorney General under section 211(a) of the Act.

The respondent has a criminal history here in the United States. The respondent was arrested on September 22, 2024, and charged with criminal mischief in violation of N.J.S.A. 2C:17-3A(1). On July 30, 2025, after being detained by Immigration and Customs Enforcement (ICE), the respondent submitted an Application for Cancellation of Removal (Form 42-B).

On August 6, 2025, the Immigration Judge conducted a hearing on the respondent's request for bond redetermination. The respondent argued, through counsel, that because his sole

2022); *Ibragimov v. Gonzales*, 476 F.3d 125, 134 (2d Cir. 2007). Accordingly, although this brief refers as shorthand to aliens PWAP, aliens who are present without admission but have been paroled likewise remain applicants for admission subject to detention under INA § 235.

criminal charge was downgraded and his significant equities in the United States, he is not a danger to the community nor a flight risk. The DHS argued that the respondent is an applicant for an admission subject to detention under INA § 235 and is ineligible for release by an Immigration Judge. DHS additionally argued that the respondent failed to meet his burden of demonstrating that he is not a danger to persons or property. At the hearing, DHS characterized this matter as a crime of domestic violence. The Immigration Judge noted that the State of New Jersey had not charged Respondent with "domestic violence." However, the police report shows that the checkmark next to "Domestic Violence – Confidential) was checked. *See* Respondent's Evidence at 12 (Aug. 5, 2025). The charge has since been downgraded, but has yet to be dismissed.

On August 6, 2025, the Immigration Judge determined that the respondent was not subject to mandatory detention under INA § 235(b), and was instead detained under INA § 236(a). Further, the Immigration Judge found that the respondent is not a danger to the community, nor does he post a flight risk. The Immigration Judge set bond at $3,500 and DHS reserved appeal. The respondent remains in ICE custody following a timely filing of Form EOIR-43, Notice of ICE Intent to Appeal Custody Redetermination, on August 7, 2025, within 24 hours of the Immigration Judge's order. *See* Other Form (Aug. 7, 2025).

**ARGUMENT**

I. APPLICANTS FOR ADMISSION ARE SUBJECT TO DETENTION UNDER INA § 235 AND ARE INELIGIBLE FOR RELEASE BY AN IMMIGRATION JUDGE

The Immigration Judge erred in ordering the respondent released pursuant to INA § 236(a), where the respondent is an applicant for admission in INA § 240 removal proceedings and is thus subject to detention under INA § 235(b)(2)(A). Section 235 of the INA is the applicable detention authority for all applicants for admission—both arriving aliens and PWAPs

alike—regardless of whether the alien was initially processed for expedited removal proceedings under INA § 235 or placed directly into removal proceedings under INA § 240.

"As with any question of statutory interpretation, [the] analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)). Section 235 of the INA defines an "applicant for admission" as an "alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . .) . . . ." INA § 235(a)(1); *see Matter of Velasquez-Cruz*, 26 I&N Dec. 458, 463 n.5 (BIA 2014) ("[R]egardless of whether an alien who illegally enters the United States is caught at the border or inside the country, he or she will still be required to prove eligibility for admission."). Accordingly, by its very definition, the term "applicant for admission" includes two categories of aliens: (1) arriving aliens and (2) aliens PWAP. *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140 (2020) (explaining that "an alien who tries to enter the country illegally is treated as an 'applicant for admission'" (citing INA § 235(a)(1)); *Matter of Lemus*, 25 I&N Dec. 734, 743 (BIA 2012) ("Congress has defined the concept of an 'applicant for admission' in an unconventional sense, to include not just those who are expressly seeking permission to enter, but also those who are present in this country without having formally requested or received such permission . . . ."); *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 523 (BIA 2011) (stating that "the broad category of applicants for admission . . . includes, *inter alia*, any alien present in the United States who has not been admitted" (citing INA § 235(a)(1))). An arriving alien is defined, in pertinent part, as "an applicant for admission coming or attempting to come into the United States at a [POE] . . . ." 8 C.F.R. §§ 1.2, 1001.1(q). Section 212(a) of the INA describes certain classes of aliens who are

inadmissible, including aliens "present in the United States without being admitted or paroled[.]" INA § 212(a)(6)(A)(i).

All aliens who are applicants for admission "shall be inspected by immigration officers." *Id.* § 235(a)(3); *see also* 8 C.F.R. § 235.1(a) ("Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. [POE] when the port is open for inspection . . . ."). An applicant for admission seeking admission at a United States POE "must present whatever documents are required and must establish to the satisfaction of the inspecting officer that the alien is not subject to removal . . . and is entitled, under all of the applicable provisions of the immigration laws . . . to enter the United States." 8 C.F.R. § 235.1(f)(1); *see* INA § 240(c)(2)(A) (describing the related burden of an applicant for admission in removal proceedings). "An alien present in the United States who has not been admitted or paroled or an alien who seeks entry at other than an open, designated [POE] . . . is subject to the provisions of [INA § 212(a)] and to removal under [INA §] 235(b) or [INA §] 240." 8 C.F.R. § 235.1(f)(2).

Here, the respondent did not present himself at a POE but instead entered the United States at an unknown time and between POEs and without having been admitted or paroled after inspection by an immigration officer. The respondent is therefore an alien PWAP and, consequently, an applicant for admission.

Both arriving aliens and aliens PWAP, as applicants for admission, may be removed from the United States by, *inter alia*, expedited removal under INA § 235(b)(1).[3] or removal

[3] Section 235(b)(1) of the INA authorizes immigration officers to order certain inadmissible aliens "removed from the United States without further hearing or review" if the immigration officer finds that the alien, "who is arriving in the United States or is described in [INA § 235(b)(1)(A)(iii)] is inadmissible under section 212(a)(6)(C) or 212(a)(7)." INA § 235(b)(1)(A)(i); *see* 8 C.F.R. § 235.3(b)(2)(i). If DHS wishes to pursue inadmissibility charges other than INA § 212(a)(6)(C) or (a)(7), DHS must place the alien in removal proceedings under INA § 240. 8 C.F.R. § 235.3(b)(3). Additionally, an alien PWAP "who establishes that he or she has been continuously physically present in the United States for the 2–year period immediately prior to the date of determination of inadmissibility shall be detained in accordance with [INA § 235(b)(2)] for a proceeding under [INA § 240]." *Id.* § 235.3(b)(1)(ii);

proceedings before an Immigration Judge under INA § 240. INA §§ 235(b)(1), (b)(2)(A), 240; *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018) (describing how "applicants for admission fall into one of two categories, those covered by [INA § 235(b)(1)] and those covered by [INA § 235(b)(2)]"). Immigration officers have discretion to apply expedited removal under INA § 235 or to initiate removal proceedings before an Immigration Judge under INA § 240. *E-R-M- & L-R-M-*, 25 I&N Dec. at 524; *see also Matter of Q. Li*, 29 I&N Dec. 66, 68 (BIA 2025) ("DHS may place aliens arriving in the United States in either expedited removal proceedings under section 235(b)(1) of the INA, or full removal proceedings under section 240 of the INA" (citations omitted))

**A. Immigration Judges Do Not Have Authority to Redetermine the Custody Status of Applicants for Admission in Expedited Removal Proceedings Given They Are Detained Pursuant to INA § 235(b)(1).**

Applicants for admission whom DHS places into expedited removal under INA § 235 are subject to detention under INA § 235(b)(1); such aliens (including those referred for INA § 240 removal proceedings after establishing a credible fear of persecution or torture) are ineligible for a bond hearing before an Immigration Judge. INA § 235(b)(1/)(B)(ii) (providing for detention of any alien who is found to have established a credible fear of persecution in expedited removal proceedings for further consideration of their asylum application), (iii)(IV) ("Any alien subject to the procedures under [INA § 235(b)(1)(B)] shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); *see also* 8 C.F.R. § 235.3(b)(2)(iii) ("An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending

*id.* § 1235.6(a)(1)(i) (providing that an immigration officer will issue and serve an NTA to an alien "[i]f, in accordance with the provisions of [INA § 235(b)(2)(A)], the examining immigration officer detains an alien for a proceeding before an immigration judge under [INA § 240]").

determination and removal."), (b)(4)(ii) ("Pending the credible fear determination by an asylum officer and any review of that determination by an [I]mmigration [J]udge, the alien shall be detained."); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) (holding that aliens PWAP placed in expedited removal and later transferred to INA § 240 removal proceedings after establishing a credible fear of persecution or torture are subject to detention under INA § 235(b)(1) and are ineligible for release under INA § 236).

The respondent, an applicant for admission, has never been subject to expedited removal proceedings and is therefore not subject to detention under INA § 235(b)(1). However, the respondent is an alien PWAP in INA § 240 removal proceedings and is therefore subject to detention under INA § 235(b)(2)(A).

**B. Immigration Judges Do Not Have Authority to Redetermine the Custody Status of Applicants for Admission in INA § 240 Removal Proceedings Given They Are Detained Pursuant to INA § 235(b)(2)(A).**

Applicants for admission whom DHS places in removal proceedings before an Immigration Judge under INA § 240 are similarly subject to detention and ineligible for a custody redetermination hearing before an Immigration Judge. Specifically, aliens PWAP placed in INA § 240 removal proceedings are both applicants for admission as defined in INA § 235(a)(1) *and* aliens "seeking admission," as contemplated in INA § 235(b)(2)(A). Such aliens are subject to detention under INA § 235(b)(2)(A) and thus ineligible for a bond redetermination hearing before the Immigration Judge.

i. Aliens PWAP whom DHS places in INA § 240 removal proceedings are subject to detention under INA § 235(b)(2)(A) and ineligible for a bond hearing before an Immigration Judge.

Section 235(b)(2)(A) of the INA "serves as a catchall provision that applies to all applicants for admission not covered by [INA § 235(b)(1)]." *Jennings*, 583 U.S. at 287; *see* INA § 235(b)(2)(A), (B). Under INA § 235(b)(2)(A), "an alien who is an applicant for admission"





"*shall be detained* for a proceeding under [INA §] 240" "if the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted." INA § 235(b)(2)(A) (emphasis added); 8 C.F.R. § 235.3(b)(3) (providing that an alien placed into INA § 240 removal proceedings in lieu of expedited removal proceedings under INA § 235 "shall be detained" pursuant to INA § 235(b)(2)); 8 C.F.R. § 235.3(c) (providing that "any arriving alien . . . placed in removal proceedings pursuant to section 240 of the [INA] shall be detained in accordance with section 235(b) of the [INA]" unless paroled pursuant to INA § 212(d)(5)).

Thus, according to the plain language of INA § 235(b)(2)(A), applicants for admission in INA § 240 removal proceedings "*shall* be detained." INA § 235(b)(2)(A) (emphasis added). "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' . . . ." *Ardestani v. INS*, 502 U.S. 129, 135–36 (1991) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see Lamie*, 540 U.S. at 534 ("It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (quotation marks omitted)). As the Supreme Court observed in *Jennings*, nothing in INA § 235(b)(2)(A) "says anything whatsoever about bond hearings." 583 U.S. at 297. Further, there is no textual basis for arguing that INA § 235(b)(2)(A) applies only to arriving aliens. The distinction the Attorney General drew in the 1997 Interim Rule (addressed in detail below) between "arriving aliens," *see* 8 C.F.R. §§ 1.2, 1001.1(q), and "aliens who are present without being admitted or paroled," Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62





Fed. Reg. 10,312, 10,323 (Mar. 6, 1997),[4] finds no purchase in the statutory text. No provision within INA § 235(b)(2) refers to "arriving aliens," or limits that paragraph to arriving aliens, as Congress intended for it to apply generally "in the case of an alien who is an applicant for admission." INA § 235(b)(2)(A). Where Congress means for a rule to apply only to "arriving aliens," it uses that specific term of art or similar phrasing. *See, e.g.*, *id.* §§ 212(a)(9)(A)(i), 235(c)(1).

Until recently, DHS and the Department of Justice (DOJ) interpreted INA § 236(a) to be an available detention authority for aliens PWAP placed directly in INA § 240 removal proceedings. *See, e.g.*, *Matter of Cabrera-Fernandez*, 28 I&N Dec. 747, 747 (BIA 2023); *Matter of R-A-V-P-*, 27 I&N Dec. 803, 803 (BIA 2020); *Matter of Garcia-Garcia*, 25 I&N Dec. 93, 94 (BIA 2009); *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003). However, legal developments have made clear that INA § 235 is the sole applicable immigration detention authority for *all* applicants for admission. In *Jennings*, the Supreme Court explained that INA § 235(b) applies to all applicants for admission, noting that the language of INA § 235(b)(2) is "quite clear" and "unequivocally mandate[s]" detention. 583 U.S. at 300, 303 (explaining that "the word 'shall' usually connotes a requirement" (quoting *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 171 (2016))). Similarly, the Attorney General, in *Matter of M-S-*, unequivocally recognized that INA § 235 and INA § 236(a) do not overlap but describe "different classes of aliens." 27 I&N Dec. at 516. The Attorney General also held—in an analogous context—that

[4] As discussed more below, the preamble language of the 1997 Interim Rule states that "[d]espite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination." 62 Fed. Reg. at 10,323. However, preambular language is not binding and "should not be considered unless the regulation itself is ambiguous." *El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008); *see also Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9th Cir.2002) ("[T]he plain meaning of a regulation governs and deference to an agency's interpretation of its regulation is warranted only when the regulation's language is ambiguous." (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000))).





aliens PWAP placed into expedited removal proceedings are detained under INA § 235 even if later placed in INA § 240 removal proceedings. 27 I&N Dec. at 518-19. In *Matter of Q. Li*, the Board held that an alien who illegally crossed into the United States between POEs and was apprehended without a warrant while arriving is detained under INA § 235(b). 29 I&N Dec. at 71. This ongoing evolution of the law makes clear that all applicants for admission are subject to detention under INA § 235(b). *Cf. Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021) (providing that "no amount of policy-talk can overcome a plain statutory command"); *see generally Florida v. United States*, 660 F. Supp. 3d 1239, 1275 (N.D. Fla. 2023) (explaining that "the 1996 expansion of [INA § 235(b)] to include illegal border crossers would make little sense if DHS retained discretion to apply [INA § 236(a)] and release illegal border crossers whenever the agency saw fit").[5] *Florida's* conclusion "that [INA § 235(b)]'s 'shall be detained' means what it says and . . . is a mandatory requirement . . . flows directly from *Jennings*." *Florida*, 660 F. Supp. 3d at 1273.

Given INA § 235 is the applicable detention authority for all applicants for admission—both arriving aliens and aliens PWAP alike, regardless of whether the alien was initially processed for expedited removal proceedings under INA § 235 or placed directly into removal proceedings under INA § 240—and "[b]oth [INA § 235(b)(1) and (b)(2)] mandate detention" "throughout the completion of applicable proceedings," *Jennings*, 583 U.S. at 301–03, Immigration Judges do not have authority to redetermine the custody status of an alien PWAP.

[5] Though not binding on the Board, *see Matter of Duarte-Gonzalez*, 28 I&N Dec. 688, 690 n.2 (BIA 2023); *Matter of K-S-*, 20 I&N Dec. 715, 718-19 (BIA 1993), the U.S. District Court for the Northern District of Florida's decision is instructive here. *Florida* held that INA § 235(b) mandates detention of applicants for admission throughout removal proceedings, rejecting the assertion that DHS has discretion to choose to detain an applicant for admission under either INA §§ 235(b) or 236(a). 660 F. Supp. 3d at 1275. The court held that such discretion "would render mandatory detention under [INA § 235(b)] meaningless." *Id.*

Here, the respondent is an applicant for admission (specifically, an alien PWAP), placed directly into removal proceedings under INA § 240. He is therefore subject to detention pursuant to INA § 235(b)(2)(A) and ineligible for a custody redetermination hearing before an Immigration Judge. "It is well established . . . that the Immigration Judges only have the authority to consider matters that are delegated to them by the Attorney General and the [INA]." *Matter of A-W-*, 25 I&N Dec. 45, 46 (BIA 2009). "In the context of custody proceedings, an Immigration Judge's authority to redetermine conditions of custody is set forth in 8 C.F.R. § 1236.1(d) . . . ." *Id.* at 46. The regulation clearly states that "the [I]mmigration [J]udge is authorized to exercise the authority in section 236 of the [INA]." 8 C.F.R. § 1236.1(d); *see id.* § 1003.19(a) (authorizing Immigration Judges to review "[c]ustody and bond determinations made by [DHS] pursuant to 8 C.F.R. part 1236"); *see id.* § 1003.19(h)(2)(i)(B) ("[A]n [I]mmigration [J]udge may not redetermine conditions of custody imposed by [DHS] with respect to . . . [a]rriving aliens in removal proceedings, including aliens paroled after arrival pursuant to [INA §] 212(d)(5)[.]"). "An Immigration Judge is without authority to disregard the regulations, which have the force and effect of law." *Matter of L-M-P-*, 27 I&N Dec. 265, 267 (BIA 2018). Thus, the Immigration Judge erred in ordering the respondent released from custody pursuant to INA § 236(a) given he is an applicant for admission and is therefore subject to detention under INA § 235(b)(2)(A).

ii. Aliens PWAP in INA § 240 removal proceedings are both applicants for admission under INA § 235(a)(1) and aliens seeking admission under INA § 235(b)(2)(A).

As discussed above, aliens PWAP placed in removal proceedings under INA § 240 are applicants for admission as defined in INA § 235(a)(1), subject to detention under INA § 235(b)(2)(A), and thus ineligible for a bond redetermination hearing before the Immigration Judge. Such aliens are also considered "seeking admission," as contemplated in INA





§ 235(b)(2)(A). To be sure, "many people who are not *actually* requesting permission to enter the United States in the ordinary sense are nevertheless deemed to be 'seeking admission' under the immigration laws." *Lemus*, 25 I&N Dec. at 743; *see Q. Li*, 29 I&N Dec. at 68 n.3; *see also Matter of Valenzuela-Felix*, 26 I&N Dec. 53, 56 (BIA 2012) (explaining that "an application for admission [i]s a continuing one").

In analyzing INA § 235(b)(2)(A), the Supreme Court in *Jennings* equated "applicants for admission" with aliens "seeking admission." *See Jennings*, 583 U.S. at 289. As noted above, the Supreme Court stated that INA § 235(b)(2) "serves as a catchall provision that applies to all applicants for admission not covered by [INA § 235(b)(1)]." *Id.* at 287. In doing so, it specifically cited INA § 235(b)(2)(A)—and thus did not appear to consider aliens "seeking admission" to be a subcategory of applicants for admission. *Id.* The Supreme Court also stated that "[a]liens who are instead covered by [INA § 235(b)(2)] are detained pursuant to a different process . . . [and] 'shall be detained for a [removal] proceeding' . . . ." *Id.* at 288 (quoting INA § 235(b)(2)(A)). The Supreme Court considered all aliens covered by INA § 235(b)(2) to be subject to detention under subparagraph (A)—not just a subset of such aliens. Moreover, *Jennings* found that INA § 235(b) "applies primarily to aliens *seeking entry* into the United States (*'applicants for admission' in the language of the statute*)." *Id.* at 297 (emphases added). The Court therefore considered aliens seeking admission/entry and applicants for admission to be virtually indistinguishable; it did not consider them to be merely a subcategory of applicants for admission.

Indeed, the Supreme Court explicitly stated that aliens seeking admission are subject to INA § 235(b) detention: "In sum, U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under [INA §§ 235(b)(1) and (b)(2)]." *Id.* at

289. This was recently reiterated by the Board in *Matter of Q. Li*, which held that for aliens "seeking admission into the United States who are placed directly in full removal proceedings, [INA §] 235(b)(2)(A) . . . mandates detention 'until removal proceedings have concluded.'" 29 I&N Dec. at 68 (quoting *Jennings*, 583 U.S. at 299.

The structure of the statutory scheme prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) bolsters the understanding that under the current statutory scheme, all applicants for admission are subject to detention under INA § 235(b). The broad definition of applicants for admission was added to the INA in 1996. Before 1996, the INA only contemplated inspection of aliens arriving at POEs. *See* INA § 235(a) (1995) (discussing "aliens arriving at ports of the United States"); *id.* § 235(b) (1995) (discussing "the examining immigration officer at the port of arrival"). Relatedly, any alien who was "in the United States" and within certain listed classes of deportable aliens was deportable. *Id.* § 241(a) (1995). One such class of deportable aliens included those "who entered the United States without inspection or at any time or place other than as designated by the Attorney General." *Id.* § 241(a)(1)(B) (1995) (former deportation ground relating to entry without inspection). Aliens were excludable if they were "seeking admission" at a POE or had been paroled into the United States. *See id.* §§ 212(a), 235(a) (1995). Deportation proceedings (conducted pursuant to former INA § 242(b) (1995)) and exclusion proceedings (conducted pursuant to former INA § 236(a) (1995)) differed and began with different charging documents. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993) (explaining the "important distinction" between deportation and exclusion); *Matter of Casillas*, 22 I&N Dec. 154, 156 n.2 (BIA 1998) (noting the various forms commencing deportation, exclusion, or removal proceedings). The placement of an alien in exclusion or deportation





proceedings depended on whether the alien had made an "entry" within the meaning of the INA. *See* INA § 101(a)(13) (1995) (defining "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession"); *see also Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963) (concluding that whether a lawful permanent resident has made an "entry" into the United States depends on whether, pursuant to the statutory definition, he or she has intended to make a "meaningfully interruptive" departure).

Former INA § 235 provided that aliens "seeking admission" at a POE who could not demonstrate entitlement to be admitted ("excludable" aliens) were subject to mandatory detention, with potential release solely by means of parole under INA § 212(d)(5) (1995). INA § 235(a)-(b) (1995). "Seeking admission" in former INA § 235 appears to have been understood to refer to aliens arriving at a POE..[6] *See id.* The INS regulations implementing former INA § 235(b) provided that such arriving aliens had to be detained without parole if they had "no documentation or false documentation," 8 C.F.R. § 235.3(b) (1995), but could be paroled if they had valid documentation but were otherwise excludable, *id.* § 235.3(c) (1995). With regard to aliens who entered without inspection and were deportable under former INA § 241, such aliens were taken into custody under the authority of an arrest warrant, and like other deportable aliens, could request bond. *See* INA §§ 241(a)(1)(B), 242(a)(1) (1995); 8 C.F.R. § 242.2(c)(1) (1995).

[6] Given Congress's overhaul of the INA, including wholesale revision of the definition of which aliens are considered applying for or seeking admission, Congress clearly did not intend for the former understanding of "seeking admission" to be retained in the new removal scheme. Generally, "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates . . . the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). However, the prior construction canon of statutory interpretation "is of little assistance here because, . . . this is not a case in which 'Congress re-enact[ed] a statute without change.'" *Public Citizen Inc. v. U.S. Dep't of Health and Human Servs.*, 332 F.3d 654, 668 (D.C. Cir. 2003) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982)). Rather, the presumption "of congressional ratification" of a prior statutory interpretation "applies only when Congress reenacts a statute without relevant change." *Holder v. Martinez Gutierrez*, 566 U.S. 583, 593 (2012) (citing *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 349 (2005)).





> As a result, "[aliens] who had entered without inspection could take advantage of the greater procedural and substantive rights afforded in deportation proceedings," while [aliens] who actually presented themselves to authorities for inspection were restrained by "more summary exclusion proceedings." To remedy this unintended and undesirable consequence, the IIRIRA substituted "admission" for "entry," and replaced deportation and exclusion proceedings with the more general "removal" proceeding.

*Martinez v. Att'y Gen.*, 693 F.3d 408, 413 n.5 (3d Cir. 2012) (citation omitted) (quoting *Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010)). Consistent with this dichotomy, the INA, as amended by IIRIRA, defines *all* those who have not been admitted to the United States as "applicants for admission." IIRIRA § 302.

Moreover, Congress's use of the present participle—seeking—in INA § 235(b)(2)(A) should not be ignored. *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). By using the present participle "seeking," INA § 235(b)(2)(A) "signal[s] present and continuing action." *Westchester Gen. Hosp., Inc. v. Evanston Ins. Co.*, 48 F.4th 1298, 1307 (11th Cir. 2022). The phrase "seeking admission" "does not include something in the past that has ended or something yet to come." *Shell v. Burlington N. Santa Fe Ry. Co.*, 941 F.3d 331, 336 (7th Cir. 2019) (concluding that "having" is a present participle, which is "used to form a progressive tense" that "means presently and continuously" (citing Bryan A. Garner, *Garner's Modern American Usage* 1020 (4th ed. 2016))). The present participle "expresses present action in relation to the time expressed by the finite verb in its clause," *Present Participle*, Merriam-Webster, http://www.merriam-webster.com/dictionary/present%20participle (last visited Aug. 4, 2025), with the finite verb in the same clause of INA § 235(b)(2)(A) being "determines." Thus, when pursuant to INA § 235(b)(2)(A) an "examining immigration officer determines" that an alien "is not clearly and beyond a doubt entitled to be admitted" the officer does so contemporaneously with the alien's present and ongoing action of



seeking admission. Interpreting the present participle "seeking" as denoting an ongoing process is consistent with its ordinary usage. *See, e.g.*, *Samayoa v. Bondi*, No. 24-1432, 2025 WL 2104102, at *2 (1st Cir. July 28, 2025) (alien inadmissible under INA § 212(a)(6)(A)(i) but "seeking to remain in the country lawfully" applied for relief in removal proceedings); *Garcia v. USCIS*, No. 23-35267, 2025 WL 2046176, at *2 (9th Cir. July 22, 2025) ("USCIS requires all U visa holders seeking permanent resident status under [INA § 245(m)] to undergo a medical examination . . ."). Accordingly, just as the respondent in *Samayoa* is not only an alien PWAP but also seeking to remain in the United States, the respondent in this case is not only an alien PWAP, and therefore an applicant for admission as defined in INA § 235(a)(1), *but also* an alien seeking admission under INA § 235(b)(2)(A).

Lastly, Congress's significant amendments to the immigration laws in IIRIRA supports DHS's position that such aliens are properly detained pursuant to INA § 235(b)—specifically, INA § 235(b)(2)(A). Congress, for example, eliminated certain anomalous provisions that favored aliens who illegally entered without inspection over aliens arriving at POEs. A rule that treated an alien who enters the country illegally, such as the respondent, more favorably than an alien detained after arriving at a POE would "create a perverse incentive to enter at an unlawful rather than a lawful location." *Gambino-Ruiz*, 91 F.4th at 990 (quoting *Thuraissigiam*, 591 U.S. at 140) (rejecting such a rule as propounded by the defendant). Such a rule reflects "the precise situation that Congress intended to do away with by enacting" IIRIRA. *Id.* "Congress intended to eliminate the anomaly 'under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a [POE]'" by enacting IIRIRA. *Ortega-Lopez v. Barr*,





978 F.3d 680, 682 (9th Cir. 2020) (quoting *Torres*, 976 F.3d at 928); *see also* H.R. Rep. No. 104-469, pt. 1, at 225–29 (1996).

During IIRIRA's legislative drafting process, Congress asserted the importance of controlling illegal immigration and securing the land borders of the United States. *See* H.R. Rep. 104-469, pt. 1, at 107 (noting a "crisis at the land border" allowing aliens to illegally enter the United States). As alluded to above, one goal of IIRIRA was to "reform the legal immigration system and facilitate legal entries into the United States . . . ." H.R. Rep. No. 104-828, at 1 (1996). Nevertheless, after the enactment of IIRIRA, the DOJ took the position—consistent with pre-IIRIRA law—that "despite being applicants for admission, aliens who are present without being admitted or paroled . . . will be eligible for bond and bond redetermination." 62 Fed. Reg. at 10,323. Affording aliens PWAP, who have evaded immigration authorities and illegally entered the United States bond hearings before an Immigration Judge, but not affording such hearings to arriving aliens, who are attempting to comply with U.S. immigration law, is anomalous with and runs counter to that goal. *Cf.* H.R. Rep. No. 104-469, pt. 1, at 225 (noting that IIRIRA replaced the concept of "entry" with "admission," as aliens who illegally enter the United States "gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a [POE]").

Accordingly, for the reasons discussed above, the respondent, as an alien PWAP in INA § 240 removal proceedings, is an applicant for admission and an alien seeking admission and is therefore subject to detention under INA § 235(b)(2)(A) and ineligible for a bond redetermination hearing before an Immigration Judge.

### C. Applicants for Admission May Only Be Released from Detention On an INA § 212(d)(5) Parole.

Importantly, applicants for admission may only be released from detention if DHS invokes its discretionary parole authority under INA § 212(d)(5). DHS has the exclusive authority to temporarily release on parole "any alien applying for admission to the United States" on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." INA § 212(d)(5); *see* 8 C.F.R. § 212.5(b). In *Jennings*, the Supreme Court placed significance on the fact that INA § 212(d)(5) is the specific provision that authorizes release from detention under INA § 235(b), at DHS's discretion. *Jennings*, 583 U.S. at 300. Specifically, the Supreme Court emphasized that "[r]egardless of which of those two sections authorizes . . . detention, [INA § 235(b)(1) or INA § 235(b)(2)(A)], applicants for admission may be temporarily released on parole . . . ." *Id.* at 288.

Parole, like an admission, is a factual occurrence. *See Hing Sum*, 602 F.3d at 1098; *Matter of Roque-Izada*, 29 I&N Dec. 106 (BIA 2025) (treating whether an alien was paroled as a question of fact). The parole authority under INA § 212(d)(5) is "delegated solely to the Secretary of Homeland Security." *Matter of Castillo-Padilla*, 25 I&N Dec. 257, 261 (BIA 2010); *see* 8 C.F.R. § 212.5(a). Thus, neither the Board nor Immigration Judges have authority to parole an alien into the United States under INA § 212(d)(5). *Castillo-Padilla*, 25 I&N Dec. at 261; *see also Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771, 777 n.5 (BIA 2002) (indicating that "parole authority [under INA § 212(d)(5)] is now exercised exclusively by the DHS" and "reference to the Attorney General in [INA § 212(d)(5)(A)] is thus deemed to refer to the Secretary of Homeland Security"); *Matter of Singh*, 21 I&N Dec. 427, 434 (BIA 1996) (providing that "neither the Immigration Judge nor th[e] Board has jurisdiction to exercise parole power"). Further, because DHS has exclusive jurisdiction to parole an alien into the United

States, the manner in which DHS exercises its parole authority may not be reviewed by an Immigration Judge or the Board. *Castillo-Padilla*, 25 I&N Dec. at 261; *see Matter of Castellon*, 17 I&N Dec. 616, 620 (BIA 1981) (noting that the Board does not have authority to review the way DHS exercises its parole authority).

Importantly, parole does not constitute a lawful admission or a determination of admissibility, INA §§ 101(a)(13)(B), 212(d)(5)(A), and an alien granted parole remains an applicant for admission, *id.* § 212(d)(5)(A); *see* 8 C.F.R. §§ 1.2 (providing that "[a]n arriving alien remains an arriving alien even if paroled pursuant to [INA § 212(d)(5)], and even after any such parole is terminated or revoked"), 1001.1(q) (same). Parole does not place the alien "within the United States." *Leng May Ma*, 357 U.S. at 190. An alien who has been paroled into the United States under INA § 212(d)(5) "is not . . . 'in' this country for purposes of immigration law . . . ." *Abebe*, 16 I&N Dec. at 173 (citing, *inter alia*, *Leng May Ma*, 357 U.S. at 185; *Kaplan*, 267 U.S. at 228). Following parole, the alien "shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States," INA § 212(d)(5)(A), including that they remain subject to detention pursuant to INA § 235(b)(2).

**D. Section 236 of the INA Does Not Impact the Detention Authority for Applicants for Admission.**

Section 236(a) of the INA is the applicable detention authority for aliens who have been admitted and are deportable who are subject to removal proceedings under INA § 240, INA §§ 236, 237(a), 240, and does not impact the directive in INA § 235(b)(2)(A) that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceedings under [INA





§ 240]," *id.* § 235(b)(2)(A)..[7] As the Supreme Court explained, INA § 236(a) "applies to aliens already present in the United States" and "creates a default rule for those aliens by permitting—but not requiring—the Attorney General to issue warrants for their arrest and detention pending removal proceedings." *Jennings*, 583 U.S. at 289, 303; *Q. Li*, 29 I&N Dec. at 70; *see also M-S-*, 27 I&N Dec. at 516 (describing INA § 236(a) as a "permissive" detention authority separate from the "mandatory" detention authority under INA § 235)..[8]

Generally, such aliens may be released on bond or their own recognizance, also known as "conditional parole." INA § 236(a); *Jennings*, 583 U.S. at 303, 306. Section 236(a) of the INA does not, however, confer the *right* to release on bond; rather, both DHS and Immigration Judges have broad discretion in determining whether to release an alien on bond as long as the alien establishes that he or she is not a flight risk or a danger to the community. *See* 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *Matter of Guerra*, 24 I&N Dec. 37, 39 (BIA 2006); *Matter of*

[7] The specific mandatory language of INA § 235(b)(2)(A) governs over the general permissive language of INA § 236(a). "[I]t is a commonplace of statutory construction that the specific governs the general . . . ." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *see RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (explaining that the general/specific canon is "most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission" and in order to "eliminate the contradiction, the specific provision is construed as an exception to the general one"); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016) (discussing, in the context of asylum eligibility for aliens subject to reinstated removal orders, this canon and explaining that "[w]hen two statutes come into conflict, courts assume Congress intended specific provisions to prevail over more general ones"). Here, INA § 235(b)(2)(A) "does not negate [INA § 236(a)] entirely," which still applies to admitted aliens who are deportable, "but only in its application to the situation that [INA § 235(b)(2)(A)] covers." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 185 (2012).

[8] Importantly, a warrant of arrest is not required in all cases. INA § 287(a). For example, an immigration officer has the authority "to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation" or "to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . . ." *Id.* § 287(a)(2); 8 C.F.R. § 287.3(a), (b) (recognizing the availability of warrantless arrests); *see Q. Li*, 29 I&N Dec. at 70 n.5. Moreover, DHS may issue a warrant of arrest within 48 hours (or an "additional reasonable period of time" given any emergency or other extraordinary circumstances), 8 C.F.R. § 287.3(d); doing so does not constitute "post-hoc issuance of a warrant," *Q. Li*, 29 I&N Dec. at 69 n.4. While the presence of an arrest warrant is a threshold consideration in determining whether an alien is subject to INA § 236(a) detention authority under a plain reading of INA § 236(a), there is nothing in *Jennings* that stands for the assertion that aliens processed for arrest under INA § 235 cannot have been arrested pursuant to a warrant. *See Jennings*, 583 U.S. at 302.





*Adeniji*, 22 I&N Dec. 1102 (BIA 1999). Further, ICE must detain certain aliens due to their criminal history or national security concerns under INA § 236(c). *See* INA § 236(c)(1), (c)(2); 8 C.F.R. §§ 236.1(c)(1)(i), 1236.1(c)(1)(i); *see also id.* § 1003.19(h)(2)(i)(D). Release of such aliens is permitted only in very specific circumstances. *See* INA § 236(c)(2).

Notably, INA § 236(c) references certain grounds of inadmissibility, INA § 236(c)(1)(A), (D)-(E), and the Supreme Court in *Barton v. Barr*—after issuing its decision in *Jennings*—recognized the possibility that aliens charged with certain grounds of inadmissibility could be detained pursuant to INA § 236. 590 U.S. 222, 235 (2020); *see also Nielsen v. Preap*, 586 U.S. 392, 416-19 (2019) (recognizing that aliens who are inadmissible for engaging in terrorist activity are subject to INA § 236(c)). However, in interpreting provisions of the INA, the Board does not view the language of statutory provisions in isolation but instead "interpret[s] the statute as a symmetrical and coherent regulatory scheme and fit[s], if possible, all parts into an harmonious whole." *Matter of C-T-L-*, 25 I&N Dec. 341, 345 (BIA 2010) (internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). As the Supreme Court in *Barton* also noted, "redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication." *Barton*, 590 U.S. at 239. "Redundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text . . . ." *Id.* The statutory language of INA § 236(c)—including the most recent amendment pursuant to the Laken Riley Act, *see* INA § 236(c)(1)(E), merely reflects a "congressional effort to be doubly sure" that certain aliens are detained, *Barton*, 590 U.S. at 239.





To reiterate, to interpret INA § 235(b)(2)(A) as not applying to all applicants for admission would render it meaningless. As explained above, Congress expanded INA § 235(b) in 1996 to apply to a broader category of aliens, including those aliens who crossed the border illegally. IIRIRA § 302. There would have been no need for Congress to make such a change if INA § 236 was meant to apply to aliens PWAP. Thus, INA § 236 does not have any controlling impact on the directive in INA § 235(b)(2)(A) that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under [INA § 240]." INA § 235(b)(2)(A).

## II. ASSUMING, ARGUENDO, THAT THE IMMIGRATION JUDGE HAD AUTHORITY TO REDETERMINE THE RESPONDENT'S CUSTODY, THE RESPONDENT FAILED TO MEET HIS BURDEN TO SHOW THAT HE DOES NOT PRESENT A DANGER TO PERSONS OR PROPERTY

The respondent has no constitutional right to release on bond and bears the burden to establish eligibility for bond. 8 C.F.R. § 1236.1(c)(8); *Matter of D-J-*, 23 I&N Dec. 572, 575 (AG 2003); *Matter of Guerra*, 24 I&N Dec. 37, 39 (BIA 2006). Decisions on bond "may be based upon any information that is available to the [I]mmigration [J]udge or that is presented to him or her by the alien or [DHS]." 8 C.F.R. § 1003.19(d); *Matter of Chirinos*, 16 I&N Dec. 276, 277 (BIA 1977) (explaining that the Immigration Judge has a responsibility to develop and consider the full factual record). The Immigration Judge may consider any direct or circumstantial evidence, including evidence of crimes for which the respondent was not convicted. 8 C.F.R. § 1003.19(d); *Matter of Fatahi*, 26 I&N Dec. 791 (BIA 2016); *Matter of Guerra*, 24 I&N at 37.

"In general, an Immigration Judge must consider whether an alien who seeks a change in custody status is a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk." *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006)

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(citing *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976)). "Dangerous aliens are properly detained without bond." *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009); *Guerra*, 24 I&N Dec. at 38 (citing *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994)). In assessing whether the respondent poses a danger to the community, the Immigration Judge should consider the respondent's "criminal record, including the extensiveness of the criminal activity, the recency of such activity, and the seriousness of the offenses" committed. *Guerra*, 24 I&N Dec. at 40. Where criminal offenses are concerned, the Immigration Judge should consider both arrests and convictions in assessing "not only the nature of a criminal offense but also the specific circumstances surrounding the alien's conduct." *Matter of Siniauskas,* 27 I&N Dec. 207, 208 (BIA 2018) (citing *Guerra*, 24 I&N Dec. at 40). Further, the Immigration Judge should consider national security concerns, even without a criminal charge or conviction. *See Matter of Fatahi*, 26 I&N Dec. 791, 795 (BIA 2016).

The Immigration Judge erred when he found the respondent met his burden to show he is not a danger to the community. The respondent was arrested because of a domestic incident. As per the police complaint submitted by the respondent, which specifically did not include the affidavit of probable cause, the respondent was accused of grabbing a watch from the wrist of the mother of his children and destroying that watch. Respondent's Evidence at 12 (July 30, 2025). As per the N.J. Domestic Violence Civil Complaint and Temporary Restraining Order, the victim states that he also placed the same watch on the floor and stomped on it. *Id.* at 15. At the hearing, DHS argued that the respondent is a danger to the community because he was involved in an unresolved domestic incident. The alleged victim of the crime, the mother of his children, wrote a letter in which she explained the situation and noted that she was not injured. However, at the hearing, the Immigration Judge stated that the charge against the respondent did not fall within





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the scope of a crime of domestic violence because the State of New Jersey had not charged him with "domestic violence." However, under NJ Rev Stat § 2C:25-19 (2024), domestic violence is defined as "the occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor…(10) Criminal mischief N.J.S.2C:17-3."

Here, the respondent was charged with a crime that involved domestic violence, and that charge is still pending. The Immigration Judge errored by not factoring the domestic violence component into his decision.

**CONCLUSION**

In sum, the respondent is subject to detention under INA § 235(b)(2)(A), and the Immigration Judge erred in ordering the respondent released from DHS custody pursuant to INA § 236(a). In addition, the respondent failed to meet his burden of proof that he does not present a danger to persons and property. DHS requests that the Board reverse the Immigration Judge's decision and vacate the order releasing the respondent from DHS custody.

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[redacted]

EOIR-43 Senior Legal Official Certification

I certify that I have approved the filing of the notice of appeal in this case according to review procedures established by U.S. Immigration and Customs Enforcement, Department of Homeland Security.

I further certify that I am satisfied that the evidentiary record supports the contentions justifying the continued detention of the alien and the legal arguments are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing precedent or the establishment of new precedent.

8/13/2025
Date

Jane H. Minichiello
Chief Counsel
U.S. Immigration and Customs Enforcement

# EXHIBIT H

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**IMMIGRATION COURT**
**ELIZABETH, NEW JERSEY**

| | |
|---|---|
| **File No.:** [redacted] | **In Removal Proceedings** |
| **In the Matter of** | |
| **MENDONCA, Paulo Cesar,** | **BOND APPEAL** |
| **Respondent.** | |

| **ON BEHALF OF RESPONDENT** | **ON BEHALF OF ICE/DHS** |
|---|---|
| John A. Nicelli, Esq.<br>Law Office of John A. Nicelli<br>225 Broadway, Suite 1040<br>New York, NY 10007 | Assistant Chief Counsel<br>Office of Chief Counsel<br>970 Broad Street, 13th Fl<br>Newark, NJ 07102 |

**BOND MEMORANDUM**

Paulo Cesar Mendonca ("Respondent") is a native and citizen of Brazil. On July 21, 2025, the Department of Homeland Security ("DHS") issued Respondent a Notice to Appear ("NTA") charging him as removable for being present in the United States without admission or parole, under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA"), and for not being in possession of a valid entry document at the time of his application for admission, under INA § 212(a)(7)(A)(i)(I). *See* NTA. On August 6, 2025, the Court conducted a bond hearing and granted Respondent's request for a change in custody status. *See* Order of the Immigration Judge (Aug. 6, 2025). The Court found Respondent met his burden of establishing he did not pose a danger to the community and was not a flight risk, setting bond in the amount of $3,500. *Id.* The DHS subsequently filed an appeal before the Board of Immigration Appeals ("BIA").

The DHS maintains the Court lacks jurisdiction to redetermine Respondent's custody status because he is subject to mandatory detention as an applicant for admission, as defined in INA § 235(a)(1). Under INA § 235(a)(1), "[a]n alien present in the United States who has not been admitted . . . shall be deemed for purposes of this Act an applicant for admission." The Supreme Court has held that INA §§ 235(b)(1) and (b)(2) "mandate detention of applicants for admission until certain proceedings have concluded." *See Jennings v. Rodriguez*, 583 U.S. 281, 297 (2018). In *Jennings*, however, the Supreme Court also clarified how INA § 235 relates to those individuals

"*seeking to enter* the country," whereas INA § 236 authorizes the DHS to "detain certain aliens *already in* the country." *Id.* at 289 (emphasis added).

Contrary to DHS's position that Respondent is detained under section 235(b)(2)(A), the Court finds that Respondent is currently detained under section 236(a) of the INA, 8 U.S.C. 1226(a). The BIA recently held that "[a]n applicant for admission who is arrested and detained without a warrant *while arriving in the United States*, whether or not at a port of entry, and subsequently placed in removal proceedings, is detained under section 235(b) of the INA . . . and is ineligible for any subsequent release on bond under section 236(a) of the INA. . . ." *See Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025) (emphasis added). By contrast, "Section 236(a) applies to aliens already present in the United States and authorizes detention *only* on a warrant issued by the Attorney General leading to the alien's arrest." *Id.* at 70. (emphasis in original).

As clearly set forth in the Form I-213 submitted by DHS, Respondent's first encounter with immigration officials was on July 21, 2025, the day of his most recent arrest. *See* DHS Evidence, p. 4. Unlike the Respondent in *Matter of Q. Li*, who was initially encountered and arrested by DHS without a warrant pursuant to section 287(a)(2) of the INA as she tried to illegally enter the United States through the southern border, this Respondent was encountered and arrested for the *first* time by DHS on July 21, 2025, pursuant to a warrant. *Id.* As such, the Respondent was clearly arrested by DHS under section 236(a) of the INA.

The Court also notes that DHS has failed in this case to inform Respondent of the specific detention authority used to detain him and the type of custody redetermination hearing to which he is entitled. *See Gayle v Johnson*, 81 F. Supp. 3d 371, 386 (D.N.J. 2015)[1] Regardless of DHS's position that Respondent is being detained under Section 235(b)(2), it is still obligated to inform the Respondent in writing of such detention authority in the State of New Jersey pursuant to the District Court's order, a determination whose validity must then be established by DHS by a preponderance of the evidence before this Court.

An alien who has been detained by DHS under the provisions set forth in 8 C.F.R. § 1236 has the right to seek a redetermination of the initial custody decision before an Immigration Judge. *See* 8 C.F.R. §§ 1236.1(d)(1); 1003.19(a). An Immigration Judge should only set a bond if an alien demonstrates to the satisfaction of the Court that his or her release would not pose a danger to property or persons. *See Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009); *Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006); *Matter of Adeniji*, 22 I&N Dec. 1102, 1113 (BIA 1999). Immigration judges have "broad discretion" in deciding which factors to consider in custody redeterminations and how much weight to assign those factors, so long as the decision is

[1] Although this decision was remanded by the Third Circuit, the portion of the holding regarding the communication of the specific detention authority used by DHS to detain Respondent and his or her right to a custody redetermination before the Court remain in effect.

reasonable. *Guerra*, 24 I&N Dec. at 40. Custody and bond determinations are "[b]ased upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service." 8 C.F.R. § 1003.19(d).

In determining whether an alien presents a danger to the community, immigration judges are not restricted to considering criminal convictions and may consider any "probative and specific" evidence in the record. *Guerra*, 24 I&N Dec. at 40-41. As "[t]he question whether an alien poses a danger to the community is broader than determining if the record contains proof of specific acts of past violence or direct evidence of an inclination toward violence," an Immigration Judge may rely on circumstantial evidence and a respondent's misrepresentations to determine whether he poses a danger to the community. *Matter of Fatahi*, 26 I&N Dec. 791, 794 (BIA 2016). Moreover, "[i]n bond proceedings, it is proper for the Immigration Judge to consider not only the nature of a criminal offense but also the specific circumstances surrounding the alien's conduct;" "family and community ties generally do not mitigate an alien's dangerousness." *Matter of Siniauskas*, 27 I&N Dec. 207, 208-10 (BIA 2018).

In determining the risk of flight, immigration judges should assess the alien's criminal record, ties to the community, length of residence in the community, immigration history, employment history, and his or her ability to pay the bond. *Matter of Andrade*, 19 I&N Dec. 488, 489 (BIA 1987). Immigration judges should also consider any factor which tends to indicate a respectful attitude toward our laws and court procedures, stability and reliability in complying with schedules and deadlines, and the respondent's motivation to attend any further court proceedings related to this case. An alien will be considered a flight risk, even if he or she has a pending application for relief, if he or she has no family in the United States, no employment history, few community ties, and no probable path to obtain lawful status. *Matter of R-A-V-P-*, 27 I&N Dec. 803 (BIA 2020); *see also Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979); *Matter of Spiliopoulos*, 16 I&N Dec. 561 (BIA 1978); *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976); *Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974).

The Court finds Respondent has met his burden of demonstrating that he does not pose a danger to the community. *See Urena*, 25 I&N Dec. at 141. On September 22, 2024, Respondent was charged with the offense of criminal mischief – damage to property between $500 and $2,000, under N.J. STAT. ANN. § 2C:17-3(a)(1). *See* Resp't Mot. for Bond, Tab B, p. 12. Specifically, he is alleged to have recklessly or negligently damaged a watch belonging to his partner by grabbing the watch off of her wrist and damaging it. *Id.* While the Court recognizes the charge remains pending, the Court notes the prosecutors have reduced the charge to criminal mischief – damage to property $500 or less, under N.J. STAT. ANN. § 2C:17-3(a)(1), a disorderly persons offense. *See* Resp't Evidence, Tab A.1 (Aug. 5, 2025). Respondent has no other criminal history and the Court is persuaded by his partner's letter of support. *See* Resp't Mot. for Bond, Tab C; *see also Guerra*, 24 I&N Dec. 40-41.

Moreover, the Court also finds Respondent has met his burden of demonstrating that he does not pose a significant flight risk. *See Urena*, 25 I&N Dec. at 141; *see Andrade*, 19 I&N Dec. at 489. Respondent has resided in the United States for nearly twenty years, has two United States citizen children, and maintains a fixed address and steady employment. *See* Resp't Mot. for Bond, Tabs D-H. Moreover, Respondent submitted his filed income tax returns for the past ten years and provided evidence of extensive ties to the community. *Id.* at Tabs I-J. Furthermore, Respondent has a viable pending application for cancellation of removal. *Id.* at 4.

Based on the totality of the circumstances, the Court will grant Respondent's request for a change in custody status and will set bond in the amount of $3,500 to further ensure he will present himself for all future hearings. *See Urena*, 25 I&N Dec. at 141. Accordingly, Respondent's request for a change in custody status is granted and the Court hereby orders that Respondent be released from custody under bond of $3,500.

RAMIN RASTEGAR Digitally signed by RAMIN RASTEGAR Date: 2025.08.29 10:26:13 -04'00'

Date

Ramin Rastegar
Immigration Judge