UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

Gerardo VALENCIA MATEOS,

Petitioner,

v.

Christopher J. LAROSE, in his official capacity as Warden of Otay Mesa Detention Center; Gregory J. ARCHAMBEAULT, in his official capacity as San Diego Field Office Director, ICE Enforcement Removal Operations; Todd LYONS, in his official capacity as Acting Director of ICE; and Kristi NOEM, in her official capacity as Secretary of Homeland Security, Pamela BONDI, U.S. Attorney General; IMMIGRATION AND CUSTOMS ENFORCEMENT; DEPARTMENT OF HOMELAND SECURITY,

Respondents.

'25CV2653 BTM BJW

PETITION FOR WRIT OF HABEAS CORPUS
A# [redacted]

I. INTRODUCTION

1. Petitioner Gerardo Valencia Mateos ("Mr. Valencia") is a 41-year-old Mexican national who last entered the United States in 2008. He has resided in southern California for over 17 years. He has a long-time partner with whom he shares three U.S. children; G[redacted] (17 years-old), B[redacted] (15 years-old), and I[redacted] (8 years-old).

2. On August 25, 2025, an Immigration Judge ("IJ") ordered Mr. Valencia Mateos released on a $7,500 bond, finding he does not pose a danger to the community and the bond amount would offset any potential flight risk. (Exhibit C).

3. On August 26, 2025, Immigration and Customs Enforcement ("ICE") filed a

Notice of Intent to Appeal Custody Redetermination which automatically stayed the bond order under 8 C.F.R. § 1003.19(i)(2), preventing Mr. Valencia's release. Mr. Valenica remains confined at Otay Mesa Detention Center in San Diego, California.

4. The automatic-stay regulation exceeds any authority Congress conferred in the Immigration and Nationality Act ("INA") and violates the Fifth Amendment's Due Process Clause.

5. On September 10, 2025, ICE appealed the decision of the Immigration Judge, which remains pending with Board of Immigration Appeals ("BIA"). (Exhibit E).

6. Mr. Valencia therefore seeks a writ of habeas corpus directing his immediate release.

II. VENUE AND JURISDICTION

7. This Court has jurisdiction under 28 U.S.C. § 2241 (habeas corpus), 28 U.S.C. § 1331 (federal question), and Article I, § 9, cl. 2 of the Constitution (Suspension Clause), as Mr. Valencia is presently in custody under the authority of the United States and challenging his detention as in violation of the Constitution, laws, or treaties of the United States.

8. The federal district courts have jurisdiction under Section 2241 to hear habeas claims by individuals challenging the lawfulness of their detention by ICE. *See Jennings v. Rodriguez*, 583 U.S. 281, 290-92 (2018).

9. Venue is proper because Mr. Valencia is detained in the Otay Mesa Detention Center, within the San Diego Division, and Respondent LaRose is his immediate custodian. *See* 28 U.S.C. §§ 2241(d), 1391(e).

III. PARTIES

10. Petitioner Gerardo Valencia Mateos is a 41-year-old Mexican national who resides in Escondido, California. He is currently detained by Respondents at the Otay Mesa Detention Center in San Diego, California, pending removal proceedings.

11. Respondent Christopher J. LaRose is the Warden of Otay Mesa Detention Center. Respondent La Rose is responsible for the operation of the Detention Center where Mr. Valencia is detained. As such, Respondent LaRose has immediate physical custody of the Petitioner. He is being sued in his official capacity.

12. Respondent Gregory J. Archambeault is the San Diego Field Office Director ("FOD") for ICE Enforcement and Removal Operations. Respondent Archambeault is responsible for the oversight of ICE operations at the Otay Mesa Detention Center. Respondent Archambeault is being sued in his official capacity.

13. Respondent Todd Lyons is the Acting Director of ICE. Respondent Lyons is responsible for the administration of ICE and the implementation and enforcement of the immigration laws, including immigrant detention. As such, Respondent Lyons is a legal custodian of Mr. Valencia and is being sued in his official capacity.

14. Respondent Kristi Noem is the Secretary of the Department of Homeland Security ("DHS"). As Secretary of DHS, Secretary Noem is responsible for the general administration and enforcement of the immigration laws of the United States. Respondent Secretary Noem is being sued in her official capacity.

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IV. EXHAUSTION OF REMEDIES

15. No statutory exhaustion requirement applies. *See* 8 § U.S.C. 2241; *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004). Therefore, exhaustion is not jurisdictionally required.

16. Additionally, ICE's refusal to honor the IJ's bond order leaves no administrative avenue to secure release. Mr. Valencia has been detained since July 14, 2025, despite the IJ's order to release him on August 25, 2025.

17. Moreover, additional agency steps would be futile. Since the IJ's bond ordering Mr. Valencia's release on August 25, 2025, the BIA published *Matter of Yajure* Hurtado, 28 I&N Dec. 216 (BIA 2025). In its decision, the BIA adopted DHS' reading of 8 U.S.C. § 1225(b)(2), finding individuals similarly situated to Mr. Valencia ineligible for release on bond.

18. Thus, reversal of the IJ's bond order by the BIA is inevitable, and any further pursuit of administrative remedies would be futile. Therefore, Mr. Valencia has exhausted his administrative remedies to the extent required by law, and his only remedy is by way of this judicial action.

V. STATEMENT OF FACTS

19. Mr. Valencia is a Mexican national born on [redacted] He first entered the United States in 2003, when he was approximately 19 years old. He returned briefly to Mexico in 2003 and 2008. Since his last entry into the United States in 2008, he has lived continuously in Southern California.

20. Mr. Valencia is employed full-time in landscaping and construction. He supports his partner, Anastacia De Ramon, and their three children; G[redacted]

B[redacted] and L[redacted] Anastacia is a stay-at-home mother and the primary caregiver to the couple's three children.

21. On or about, July 14, 2025, Mr. Valencia was apprehended by ICE agents at a 7-11 convenience store. (Exhibit A).

22. On the same day, DHS issued Form I-286, Notice of Custody Determination, indicating that Mr. Valencia was being detained "Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations...pending a final administrative determination in [his] case." (Exhibit B). Mr. Valencia has remained in Respondents' custody since that time.

23. On August 25, 2025, Mr. Valencia requested a custody redetermination hearing before the IJ. After showing significant ties to the community, prima facie eligibility for immigration relief, and a lack of danger to the community, Mr. Valencia was ordered released on bond under the amount of $7,500 and alternatives to detention at the discretion of DHS. (Exhibit C).

24. On August 26, 2025, DHS filed Form EOIR-43, Notice of ICE Intent to Appeal Custody Redetermination, preventing Mr. Valencia's release from detention for the next 10 business while DHS drafted its appeal. (Exhibit D).

25. On September 10, 2025, DHS filed its appeal of the IJ's bond order with the BIA. Mr. Valencia's detention continues. (Exhibit E).

26. Mr. Valencia is statutorily eligible for Cancellation of Removal and on October 24, 2025, filed Form EOIR-42B, Application for Cancellation of Removal of Certain Non-Permanent Residents.

27. Mr. Valencia's next master-calendar hearing is scheduled on October 8, 2025, at 1:00 p.m. before Immigration Judge Dixon at 7488 Calzada de la Fuente, San Diego, California. (Exhibit F).

28. Mr. Valencia remains detained solely because the automatic-stay regulation blocks execution of the IJ's bond order, even though bond can be posted and no stay has been granted by the BIA or any court. He now seeks habeas relief because continued detention under 8 C.F.R. § 1003.19(i)(2) exceeds statutory authority and violates the Fifth Amendment.

VI. LEGAL FRAMEWORK FOR RELIEF SOUGHT

29. Habeas corpus relief extends to a person "in custody under or by color of the authority of the United States" if the person can show he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241 (c)(1), (c)(3); see also *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1352 (11th Cir. 2008) (holding a petitioner's claims are proper under 28 U.S.C. section 2241 if they concern the continuation or execution of confinement).

30. "[H]abeas corpus is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), that "[t]he court shall ... dispose of [] as law and justice require," 28 U.S.C. § 2243. "[T]he court's role was most extensive in cases of pretrial and noncriminal detention." *Boumediene v. Bush*, 553 U.S. 723, 779–80 (2008). "[W]hen the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." *Id.* at 787.

VII. CAUSES OF ACTION

COUNT ONE
THE REGULATION IS *ULTRA VIRES*

31. Petitioner incorporates paragraphs 1 through 30 as if fully set out herein.

32. The Immigration and Nationality Act, 8 U.S.C. § 1226(a), authorizes discretionary detention subject to an Immigration Judge's bond decision; it does not authorize Immigration and Customs Enforcement to nullify that judicial decision by administrative fiat.

33. Regulation 8 C.F.R. § 1003.19(i)(2) purports to impose an automatic stay that takes effect the moment ICE files—or merely intends to file—a notice of appeal, without any neutral review or individualized findings.

34. By turning discretionary custody into de facto mandatory detention for detainees not subject to 8 U.S.C. § 1226(c), § 1003.19(i)(2) exceeds the statutory power Congress delegated.

35. Detention premised solely on this ultra vires regulation is "not in accordance with law," "in excess of statutory jurisdiction," and "arbitrary [and] capricious" under 5 U.S.C. § 706(2), entitling Petitioner to immediate release.

COUNT TWO
(PROCEDURAL DUE PROCESS)

36. Petitioner incorporates paragraphs 1 through 30 as if fully set out herein.

37. The Fifth Amendment forbids deprivation of liberty without notice and a meaningful opportunity to be heard before a neutral decision-maker. Due process protects "all 'persons' within the United States, including [non-citizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v.*

Davis, 533 U.S. 678, 698 (2001).

38. Subsection 1003.19(i)(2) strips Petitioner of that protection by allowing the prosecuting agency—after losing at the bond hearing—to veto the Immigration Judge's order with a one-page notice that requires no showing of danger, flight risk, or likelihood of success on appeal.

39. Applying the *Mathews v. Eldridge*, 424 U.S. 319 (1976), test, Petitioner's liberty interest is paramount; the risk of erroneous deprivation is extreme considering the Immigration Judge's determination that Petitioner is not subject to mandatory detention under 8 U.S.C. § 1226(c) and does not pose a danger to the community. Likewise, the risk of erroneous deprivation of liberty is great due to the lack of a non-independent adjudicator. *Marcello v. Bonds*, 39 U.S. 302, 305-306 (1955). In filing Form EOIR-43, ICE is acting as both the prosecutor as well as the adjudicator.

40. While the government has discretion to detain individuals under 8 U.S.C. § 1226(a) and to revoke custody decisions under 8 U.S.C. § 1226(b), this discretion is not "unlimited" and mist comport with constitutional due process. *See Zadvydas*, 533 U.S. at 698.

COUNT THREE
(SUBSTANTIVE DUE PROCESS)

41. Petitioner incorporates paragraphs 1 through 30 as if fully set out herein.

42. All persons residing in the United States are protected by the Due Process Clause of the Fifth Amendment.

43. The Due Process Clause of the Fifth Amendment provides that "[n]o person

shall be ... deprived of life, liberty, or property, without due process of law." U.S. CONT. amend. V. Freedom from bodily restraint is at the core of the liberty protected by the Due Process Clause. This vital liberty interest is at stake when an individual is subject to detention by the federal government.

44. Under the civil-detention framework set out in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and its progeny, the Government may deprive a non-citizen of physical liberty only when the confinement serves a legitimate purpose—such as ensuring appearance or protecting the community—and is reasonably related to, and not excessive in relation to, that purpose.

45. Once the Immigration Judge found Petitioner was not dangerous and set a bond that Mr. Valencia's family intended to post, the Government's lawful objectives were satisfied; continued confinement therefore bears no reasonable, non-punitive relationship to any legitimate aim and is unconstitutionally arbitrary.

46. The regulation is also excessive because an alternative provision enables ICE to seek an emergency stay of the immigration judge's release order on the merits. The "emergency stay" provision at 8 C.F.R. § 1003.19(i)(1) permits ICE to file an emergency request for a stay of release with the BIA, just as in any other proceeding in which the losing party seeks appellate review of an adverse decision and a stay pending appeal.

47. The continued detention of Petitioner pursuant to the "automatic stay" regulation violates his due process rights. *See Mohammed H. v. Trump*, No. 25-1576 (JWB/DTS), 2025 U.S. Dist. LEXIS 117197, at *15 (D. Minn. June 17, 2025); *Günaydin v. Trump*, No. 25-CV-01151 (JMB/DLM), 2025 U.S. Dist. LEXIS 99237 (D.

Minn. May 21, 2025). But for intervention by this Court, Petitioner has no means of release pending ICE's appeal.

48. In their appeal, Respondents contend that Mr. Valencia is detained pursuant to 8 U.S.C. § 1225(b)(2), which mandates the detention of an "applicant for admission" throughout the entirety of removal proceedings.

49. Respondents' newly formulated definition of "applicant for admission," which would include any noncitizen who has not been formally admitted regardless of years of residence in the United States, directly contradicts both the plain text of the statute and controlling Ninth Circuit precedent.

50. As the Ninth Circuit explained in interpreting the phrase "applicant for admission" under § 1225(b)(1), *"an immigrant submits an 'application for admission' at a distinct point in time,"* and stretching that phrase to apply *"potentially for years or decades ... would push the statutory text beyond its breaking point."* *United States v. Gambino-Ruiz*, 91 F.4th 981, 988–89 (9th Cir. 2024) (citing *Torres v. Barr*, 976 F.3d 918, 922–26 (9th Cir. 2020) (en banc)).

51. Because Mr. Valencia has resided continuously in the United States since 2008, his period as an "applicant for admission" has long since closed.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

1) Assume jurisdiction over this matter;

2) Grant Petitioner a writ of habeas corpus directing the Respondents to immediately release him from custody, under reasonable conditions of supervision;

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3) Order Respondents to refrain from transferring Petitioner out of the jurisdiction of this court during the pendency of these proceedings and while the Petitioner remains in Respondents' custody;

4) Order Respondents to file a response within 3 business days of the filing of this petition;

5) Award attorneys' fees to Petitioner; and

6) Grant any other and further relief which this Court deems just and proper.

I affirm, under penalty of perjury, that the foregoing is true and correct.

Respectfully submitted this 6th day of October, 2025.

/s/Julia V. Torres
Law Office of Andrew K. Nietor
750 B St., Ste. 2330
San Diego, CA 92101
CA Bar # 328301
Attorney for Petitioner

EXHIBIT A

DEPARTMENT OF HOMELAND SECURITY
NOTICE TO APPEAR

DOB: [redacted]

Event No: SND2507000483

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: [redacted] FINS: [redacted] File No: [redacted]

In the Matter of:

Respondent: GERARDO VALENCIA-MATEOS currently residing at:

[redacted]
(Number, street, city, state and ZIP code) (Area code and phone number)

☐ You are an arriving alien.

☒ You are an alien present in the United States who has not been admitted or paroled.

☐ You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;

2. You are a native of MEXICO and a citizen of MEXICO;

3. You entered the United States at or near San Ysidro, CA, on or about March 1, 2008;

4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30 ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

7488 CALZADA DE LA FUENTE, SAN DIEGO, CALIFORNIA 92154. OTAY MESA DETENTION CENTER
(Complete Address of Immigration Court, including Room Number, if any)

on July 28, 2025 (Date) at 8:00 am (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

JAMES ORRELL - SDDO
(Signature and Title of Issuing Officer)

Date: July 14, 2025

San Diego, CA
(City and State)

EOIR - 1 of 3

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are in removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 1003.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents that you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing. At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear, including that you are inadmissible or removable. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge. You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of voluntary departure. You will be given a reasonable opportunity to make any such application to the immigration judge.

One-Year Asylum Application Deadline: If you believe you may be eligible for asylum, you must file a Form I-589, Application for Asylum and for Withholding of Removal. The Form I-589, Instructions, and information on where to file the Form can be found at www.uscis.gov/i-589. Failure to file the Form I-589 within one year of arrival may bar you from eligibility to apply for asylum pursuant to section 208(a)(2)(B) of the Immigration and Nationality Act.

Failure to appear: You are required to provide the Department of Homeland Security (DHS), in writing, with your full mailing address and telephone number. You must notify the Immigration Court and the DHS immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to your local DHS office, listed on the internet at http://www.ice.gov/contact/ero, as directed by the DHS and required by statute and regulation. Immigration regulations at 8 CFR 1241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after your departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Immigration and Nationality Act.

U.S. Citizenship Claims: If you believe you are a United States citizen, please advise the DHS by calling the ICE Law Enforcement Support Center toll free at (855) 448-6903.

Sensitive locations: To the extent that an enforcement action leading to a removal proceeding was taken against Respondent at a location described in 8 U.S.C. § 1229(e)(1), such action complied with 8 U.S.C. § 1367.

Request for Prompt Hearing

To expedite a determination in my case, I request this Notice to Appear be filed with the Executive Office for Immigration Review as soon as possible. I waive my right to a 10-day period prior to appearing before an immigration judge and request my hearing be scheduled.

Before:

(Signature of Respondent)

DO

(Signature and Title of Immigration Officer)

Date: 7/14/25

Certificate of Service

This Notice To Appear was served on the respondent by me on July 14, 2025, in the following manner and in compliance with section 239(a)(1) of the Act.

☒ in person ☐ by certified mail, returned receipt # _____ requested ☐ by regular mail

☐ Attached is a credible fear worksheet.

☒ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the SPANISH language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served)

G 3839 BAUTISTA - DO

(Signature and Title of officer)

EOIR – 2 of 3

Privacy Act Statement

Authority:
The Department of Homeland Security through U.S. Immigration and Customs Enforcement (ICE), U.S Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS) are authorized to collect the information requested on this form pursuant to Sections 103, 237, 239, 240, and 290 of the Immigration and Nationality Act (INA), as amended (8 U.S.C. 1103, 1229, 1229a, and 1360), and the regulations issued pursuant thereto.

Purpose:
You are being asked to sign and date this Notice to Appear (NTA) as an acknowledgement of personal receipt of this notice. This notice, when filed with the U.S. Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR), initiates removal proceedings. The NTA contains information regarding the nature of the proceedings against you, the legal authority under which proceedings are conducted, the acts or conduct alleged against you to be in violation of law, the charges against you, and the statutory provisions alleged to have been violated. The NTA also includes information about the conduct of the removal hearing, your right to representation at no expense to the government, the requirement to inform EOIR of any change in address, the consequences for failing to appear, and that generally, if you wish to apply for asylum, you must do so within one year of your arrival in the United States. If you choose to sign and date the NTA, that information will be used to confirm that you received it, and for recordkeeping.

Routine Uses:
For United States Citizens, Lawful Permanent Residents, or individuals whose records are covered by the Judicial Redress Act of 2015 (5 U.S.C. § 552a note), your information may be disclosed in accordance with the Privacy Act of 1974, 5 U.S.C. § 552a(b), including pursuant to the routine uses published in the following DHS systems of records notices (SORN): DHS/USCIS/ICE/CBP-001 Alien File, Index, and National File Tracking System of Records, DHS/USCIS-007 Benefit Information System, DHS/ICE-011 Criminal Arrest Records and Immigration Enforcement Records (CARIER), and DHS/ICE-003 General Counsel Electronic Management System (GEMS), and DHS/CBP-023 Border Patrol Enforcement Records (BPER). These SORNs can be viewed at https://www.dhs.gov/system-records-notices-sorns. When disclosed to the DOJ's EOIR for immigration proceedings, this information that is maintained and used by DOJ is covered by the following DOJ SORN: EOIR-001, Records and Management Information System, or any updated or successor SORN, which can be viewed at https://www.justice.gov/opcl/doj-systems-records. Further, your information may be disclosed pursuant to routine uses described in the abovementioned DHS SORNs or DOJ EOIR SORN to federal, state, local, tribal, territorial, and foreign law enforcement agencies for enforcement, investigatory, litigation, or other similar purposes.

For all others, as appropriate under United States law and DHS policy, the information you provide may be shared internally within DHS, as well as with federal, state, local, tribal, territorial, and foreign law enforcement; other government agencies; and other parties for enforcement, investigatory, litigation, or other similar purposes.

Disclosure:
Providing your signature and the date of your signature is voluntary. There are no effects on you for not providing your signature and date; however, removal proceedings may continue notwithstanding the failure or refusal to provide this information.

EOIR - 3 of 3

EXHIBIT B

DEPARTMENT OF HOMELAND SECURITY
NOTICE OF CUSTODY DETERMINATION

Alien's Name: VALENCIA-MATEOS, GERARDO A-File Number: [redacted]

Date: 07/14/2025

Event ID: [redacted] Subject ID: [redacted]

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that, pending a final administrative determination in your case, you will be:

☒ Detained by the Department of Homeland Security.

☐ Released (check all that apply):

☐ Under bond in the amount of $ _____

☐ On your own recognizance

[illegible] ill be provided.]

[redacted]
Name and Signature of Authorized Officer

07/14/2025 3:54 AM
Date and Time of Custody Determination

SDDO (b)(6) (b)(7)(C)
Title

ICE ENFORCEMENT AND REMOVAL OPERATIONS 880 FRONT STREET [redacted] SAN DIEGO, CA US 92101
Office Location/Address

(b)(6) (b)(7)(C)

You may request a review of this custody determination by an immigration judge.

☒ I acknowledge receipt of this notification, and

☐ I do request an immigration judge review of this custody determination.

☐ I do not request an immigration judge review of this custody determination.

_____
Signature of Alien

07/14/2025
Date

The contents of this notice were read to VALENCIA-MATEOS, GERARDO (Name of Alien) in the SPANISH (Name of Language) language.

[redacted]

_____
Name or Number of Interpreter (if applicable)

DO (b)(6) (b)(7)(C)
Title

EXHIBIT C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OTAY MESA IMMIGRATION COURT

Respondent Name:
VALENCIA-MATEOS, GERARDO

To:
Torres, Julia Veronica
750 B Street
Suite 2330
San Diego, CA 92101

A-Number:
[redacted]

Riders:
In Custody Redetermination Proceedings

Date:
08/25/2025

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 $ 7,500.00
- ☑ other:
  and ATD at the discretion of DHS.

☐ Other:

Immigration Judge: SAMEIT, MARK 08/25/2025

Appeal: Department of Homeland Security: ☐ waived ☑ reserved
Respondent: ☑ waived ☐ reserved
Appeal Due: 09/24/2025

Certificate of Service

This document was served:
Via: [M] Mail | [P] Personal Service | [E] Electronic Service | [U] Address Unavailable
To: [ ] Alien | [ ] Alien c/o custodial officer | [E] Alien atty/rep. | [E] DHS
Respondent Name : VALENCIA-MATEOS, GERARDO | A-Number : [redacted]
Riders:
Date: 08/25/2025 By: Rosa Rodriguez, Court Staff

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OTAY MESA IMMIGRATION COURT
7488 Calzada de la Fuente
San Diego, California 92154

File No.: A[redacted]	)	
	)	
In the Matter of	)	
	)	**IN BOND PROCEEDINGS**
Gerardo VALENCIA-MATEOS,	)	
	)	
Respondent.	)	

ON BEHALF OF RESPONDENT:	**ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:**
Julia Torres, Esquire	Assistant Chief Counsel
750 B Street, Suite 2330	P.O. Box 438150
San Diego, California 92101	San Diego, California 92143

BOND MEMORANDUM OF THE IMMIGRATION JUDGE

On August 19, 2025, the Respondent filed a bond redetermination request with this Court. On August 25, 2025, the Court conducted a custody redetermination hearing. After determining the Court had jurisdiction, it found that the Respondent had met their burden to show that they do not pose a danger to the community but found that Respondent did present a risk of flight which could be mitigated with bond and Alternatives to Detention. The Court granted Respondent's release with a $7,500 bond. *See* Order of the Immigration Judge, August 25, 2025. On August 26, 2025, the Department filed form EOIR-43, indicating its intent to appeal the Court's custody order. The Board of Immigration Appeals notified the Court of the Department's appeal on September 11, 2025. The Court provides this memorandum to facilitate review of the Department's appeal. *See* 8 C.F.R. § 1003.6(c)(2); EOIR Policy Man., Part II, Ch. 9.3(e)(7).

The Court found that it had jurisdiction to conduct a bond hearing, rejecting the Department's argument that the Respondent is an applicant for admission and detained under section 235 of the Immigration and Nationality Act ("INA"). *See, e.g., Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (rejecting the theory that any applicant for admission should be "treated as having made a continuing application for admission that does not terminate 'until it [is] considered by an immigration officer.'"); *see also United States v. Gambino-Ruiz*, 91 F.4th 981, 989 (9th Cir. 2024) (stating that "*Torres* merely rejected the view that an alien remains in a perpetual state of applying for admission."). The Court further found that Respondent did not pose a danger to the community because Respondent's only criminal history involved one conviction for DUI. Finally, the Court found that any risk of flight could be mitigated with a bond of $7,500 and alternatives to detention at the Department's discretion.

Subsequent to the Court's decision, the Board of Immigration Appeals issued *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), which held that the plain language of INA 235(b)(2)(A) divests jurisdiction from Immigration Judges to hear bond requests or to grant bond to aliens who are present in the United States without admission. Here, the record does not contain evidence that Respondent was admitted to the United States. Therefore, under intervening Board precedent. the Court lacks jurisdiction to redetermine Respondent's custody.

Dated: 9/11/25

Mark Sameit
Immigration Judge

ECIR - 2 of 2

EXHIBIT D

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

Notice of ICE Intent to Appeal Custody Redetermination

Date: August 26, 2025

Alien Number: A [redacted]

Alien Name: VALENCIA-MATEOS, Gerardo

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 _____ (Date)

   ☐ a. Authorized the respondent's release.

   ☑ b. Redetermined the ICE bond to $ 7,500 .

3. Filing this form on August 26, 2025 (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).

Michael P. McQuinn
ICE Counsel

I, Michael P. McQuinn (Name), served the Notice of ICE Intent to Appeal Custody Redetermination on Julian Torres, Esq., via ECAS (Respondent or Respondent's Representative), on August 26, 2025 (Date).

_____
Signature

EOIR – 1 of 1

Form EOIR-43
Rev. Oct. 2006

EXHIBIT E

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):
VALENCIA-MATEOS, GERARDO [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 Otay Mesa Immigration Court, San Diego, California *(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 August 25, 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 36

Form EOIR-26
Rev. Nov. 2022
Exp. Jan. 2026

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.**

See addendum.

In addition to the reasons stated in the addendum, the Board should also vacate the bond order consistent with its precedential decision in Matter of Yajure Hurtado, 29 I&N Dec. 216 (BIA Sept. 5, 2025). Because there is no evidence that the respondent is present in the United States following a lawful admission, he is subject to mandatory detention pursuant to INA 235(b)(2) as an applicant for admission. Accordingly, the Immigration Judge did not have authority to redetermine his custody.

(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 P. McQuinn, Assistant Chief Counsel

11. **Sign Here:** X _____ August 26, 2025

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

EOIR – 2 of 36

Form EOIR-26
Rev. Nov. 2022
Exp. Jan. 2026

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

VALENCIA-MATEOS, GERARDO
(Name)

Otay Mesa Detention Center
(Street Address)

7488 Calzada de la Fuente
(Apartment or Room Number)

San Diego, CA 92154
(City, State, Zip Code)

(Telephone Number)

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

Julia Torres
(Name)

750 B Street
(Street Address)

Suite 2330
(Suite or Room Number)

San Diego, CA 92101
(City, State, Zip Code)

(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 _____ 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.

VALENCIA-MATEOS, GERARDO
221-421-576

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). Accordingly, DHS respectfully requests that the Board of Immigration Appeals (Board) reverse the decision of the Immigration Judge and vacate the bond order.

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, a convicted drunk driver whose sentence was enhanced for causing great bodily injury or death to a child, met his burden to establish that he does not present a danger to persons or property.

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 this 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[1] 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

[1] 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. 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.

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 Mexico with a history of multiple illegal entries and voluntary returns to Mexico. Bond ROP Exhibit 3, p. 21. As an alien who has not established that he is present in the United States following a lawful admission, he is deemed to be an applicant for admission pursuant to INA § 235(a). On July 11, 2025, the respondent was apprehended by Immigration Officers and taken into custody pending removal proceedings. Bond ROP Exhibit 3, pp. 22-23. On August 21, 2025, he requested that an Immigration Judge redetermine his custody pursuant to INA § 236(a). DHS opposed custody redetermination on the basis that the Immigration Judge does not have authority to redetermine the custody of an alien who, like the respondent, is detained pursuant to INA § 235(b). On August 25, 2025, the Immigration Judge granted the respondent a bond in the amount of $7,500.00. In so doing, the Immigration Judge necessarily (but erroneously) found that the respondent is detained pursuant to INA § 236(a) and that he had established that he is not a danger to United States persons or property. Because the respondent is detained pursuant to INA § 235(b)(2), the Immigration Judge did not have authority to redetermine his custody. However, even assuming, *arguendo*, that the Immigration Judge did have authority to redetermine the respondent's custody, it

was improper to do so on this record. Accordingly, DHS respectfully requests that the Board reverse the Immigration Judge and vacate the bond order.

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 has not established that he is present in the United States pursuant to a lawful admission. As an alien, he is presumed by law to have illegally entered the United States between POEs and without having been admitted or paroled after inspection by an immigration officer. *Veneracion v. I.N.S.*, 791 F.2d 778, 780 (9th Cir. 1986) (an alien is presumed to have illegally entered the United States and to be present in violation of law unless he establishes the time, place, and manner of a lawful entry). The respondent has not rebutted that presumption. He 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)[2] or removal proceedings before an Immigration Judge under INA § 240. INA

[2] 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); *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]").

§§ 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 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),[3] 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.

[3] 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))).

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 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").[4] *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.

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

[4] 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.*

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").[5]

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.

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[5] Within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, in which this case arises, not every "applicant for admission" is necessarily requesting permission to enter. *See United States v. Gambino-Ruiz*, 91 F.4th 981, 989 (9th Cir. 2024) (citing, *inter alia*, *Torres v. Barr*, 976 F.3d 918, 924-26 (9th Cir. 2020) (en banc)). In particular, *Gambino-Ruiz* explained that the court in *Torres* held that certain aliens with the Commonwealth of the Northern Mariana Islands (CNMI) never made an actual application for admission "because they lawfully entered CNMI" and thereafter "the border crossed them" once the INA began to apply in CNMI. *Id.* By contrast the respondent is presumed by law to have illegally crossed into the United States between POEs without entry documents, and in so doing was, like the defendant in *Gambino-Ruiz*, making an application 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

[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

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).

> 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

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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)).

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 Sept. 5, 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*, 146 F.4th 128, 134 (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*, 146 F.4th 743, 746 (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"

[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).

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 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

[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.

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

In order to secure release on bond, an alien bears the burden to establish that he is not a danger to persons or property, is not a threat to national security, and does not pose a risk of flight. *Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006), citing *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999). Whether an alien poses a danger to persons or property upon release is a question of judgment that is reviewed by the Board of Immigration Appeals *de novo*. *Matter of Beltrand-Rodriguez*, 29 I&N Dec. 76, 77 (BIA 2025), citing 8 C.F.R. § 1003.1(d)(3)(ii) (questions of judgment are reviewed *de novo*). In examining whether an alien is a danger to the community, the Immigration Judge should consider the nature and circumstances of an alien's criminal activity, *including* her history of arrests. *Matter of Siniauskas*, 27 I&N Dec. 207, 208-09 (BIA 2018) ("In 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. It is also proper to consider *both* arrests and convictions.") (internal citations omitted) (emphasis added), citing *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006) ("In the context of custody redeterminations, Immigration Judges are not limited to considering *only* criminal convictions in

assessing whether an alien is a danger to the community."). Where, as here, an alien has not rebutted the presumption that he is a danger, he is properly detained without a bond. *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009), citing 8 C.F.R. § 1236.1(c)(8). That is because dangerous aliens do not have a constitutional right to be at liberty in the United States pending completion of proceedings to remove them from this country. *Id.*, citing *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952).

Here, the record establishes that the respondent has been convicted of driving with a BAC in excess of the legal limit of .08%. His sentence for this offense was enhanced by a true finding that the underlying criminal conduct resulted in great bodily injury to, or the death of, a child. Bond ROP at Exhibit 3, p. 16. Even if the Immigration Judge did have authority to grant the respondent a bond, this record does not support the court's conclusion, implicit in the granting of a bond, that the respondent had met his burden to demonstrate that he is not a danger to United States persons or property.

That the respondent is a DUI offender is extremely troubling. That someone who does not even belong in the United States committed a DUI that likely resulted in great bodily injury or death of a child is outrageous. These circumstances clearly warrant the denial of bond. In analyzing custody cases, the Board has repeatedly emphasized the "grave danger to the community" posed by driving under the influence. *Matter of Choc-Tut*, 29 I&N Dec. 48 (BIA 2025), citing *Matter of Siniauskas*, 27 I&N Dec. 207, 209 (BIA 2018) ("Driving under the influence is a significant adverse consideration in bond proceedings."). This offense is an "'extremely dangerous crime'

which creates a serious potential risk of physical injury to others". *Id.*, quoting *Begay v. United States*, 553 U.S. 137, 141-42 (2008), abrogated on other grounds by *Johnson v. United States*, 576 U.S. 591 (2015). A DUI offender demonstrates an "indifference to the welfare of other drivers and pedestrians and defiance of known legal obligations." *Id.*, at 50, quoting *Portillo-Rendon v. Holder*, 662 F.3d 815, 816 (7th Cir. 2011). The Attorney General has likewise recognized the serious harms associated with drunken driving in the removal context. DUI offenders, he explained, put "the lives of innocents on the road in *grave danger*." *Matter of Castillo Perez*, 27 I&N Dec. 664, 673 (A.G. 2019) (emphasis added). Drunk drivers, he observed, engage in "unacceptable conduct that imposes intolerable harms on society[.]" *Id.*, citing *Birchfield v. North Dakota*, 579 U.S. 438, 443-44 ("Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year."). In this case, the respondent's conduct did not impose a theoretical harm on others. It actually resulted in real, tangible harm to a child.

Given the inherently serious nature of even one drunk driving *arrest* and the respondent's status as a convicted DUI offender whose criminal conduct resulted in either great bodily injury, or death, to a child, the Immigration Judge's conclusion that the respondent had met his burden to establish that he is not a danger to U.S. persons or property lacks a "reasonable foundation" on this record. *Id.*, at pp. 50-51 (IJ's decision to grant bond to a DUI offender lacked a "reasonable foundation" and therefore required reversal), citing *Matter of Guerra*, 24 I&N Dec. 37, 39-40 (BIA

2006) (custody redetermination that has a reasonable foundation will not be disturbed on appeal). This is particularly so because there is a complete absence of *any* evidence relating to the factual basis of the respondent's conviction (which might show, *e.g.*, his blood alcohol level, the extent of injuries to the victim or victims, and any statements that he made to police about the circumstances that led to his decision to drive while intoxicated) let alone any evidence that he has been rehabilitated of the criminal behavior that resulted in those convictions. *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009) (the alien bears the burden of proving that his release on bond would not pose a danger to persons or property). *Matter of Siniauskas*, 27 I&N Dec. at 209, citing *Matter of Roberts*, 20 I&N Dec. 294, 303 (BIA 1991) (an alien's "assurances" alone are not sufficient to "show genuine rehabilitation"). Accordingly, even if the Board finds that the Immigration Judge had authority to redetermine the respondent's custody, it should nevertheless vacate the bond order because the record does not support finding that the respondent has met his burden to establish that he is not a danger to U.S. persons or property.

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). However, even if the Immigration Judge had authority to redetermine the respondent's custody, the Immigration Judge also erred in concluding that, despite his criminal history, the respondent had met his burden of proof to establish that he is not a danger to the community. For these reasons, DHS

requests that the Board reverse the Immigration Judge's decision and vacate the order releasing the respondent from DHS custody.

[redacted]

A[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.

9/10/2025
Date

JASON B AGUILAR
Digitally signed by JASON B AGUILAR
Date: 2025.09.10 14:52:18 -07'00'
Jason B. Aguilar
Chief Counsel
U.S. Immigration and Customs Enforcement

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OTAY MESA IMMIGRATION COURT

Respondent Name:
VALENCIA-MATEOS, GERARDO

To:
Torres, Julia Veronica
750 B Street
Suite 2330
San Diego, CA 92101

A-Number:
[redacted]

Riders:
In Custody Redetermination Proceedings

Date:
08/25/2025

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 $ 7,500.00
- ☑ other:
  and ATD at the discretion of DHS.

☐ Other:

Immigration Judge: SAMEIT, MARK 08/25/2025

Appeal: Department of Homeland Security: ☐ waived ☑ reserved
Respondent: ☑ waived ☐ reserved
Appeal Due: 09/24/2025

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Respondent Name : VALENCIA-MATEOS, GERARDO | A-Number : [redacted]
Riders:
Date: 08/25/2025 By: Rosa Rodriguez, Court Staff

EXHIBIT F

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OTAY MESA IMMIGRATION COURT

LEAD FILE: [redacted]
IN REMOVAL PROCEEDINGS
DATE: Sep 17, 2025

TO: Law Office of Andrew Nietor
Torres, Julia Veronica
750 B Street
Suite 2330
San Diego, CA 92101

RE: [redacted] VALENCIA-MATEOS, GERARDO

Notice of In-Person Hearing

Your case has been scheduled for a MASTER hearing before the immigration court on:

Date: Oct 8, 2025
Time: 1:00 P.M. PT
Court Address: 7488 CALZADA DE LA FUENTE, SAN DIEGO, CA 92154

Representation: You may be represented in these proceedings, at no expense to the Government, by an attorney or other representative of your choice who is authorized and qualified to represent persons before an immigration court. If you are represented, your attorney or representative must also appear at your hearing and be ready to proceed with your case. Enclosed and online at https://www.justice.gov/eoir/list-pro-bono-legal-service-providers is a list of free legal service providers who may be able to assist you.

Failure to Appear: If you fail to appear at your hearing and the Department of Homeland Security establishes by clear, unequivocal, and convincing evidence that written notice of your hearing was provided and that you are removable, you will be ordered removed from the United States. Exceptions to these rules are only for exceptional circumstances.

Change of Address: The court will send all correspondence, including hearing notices, to you based on the most recent contact information you have provided, and your immigration proceedings can go forward in your absence if you do not appear before the court. If your contact information is missing or is incorrect on the Notice to Appear, you must provide the immigration court with your updated contact information within five days of receipt of that notice so you do not miss important information. Each time your address, telephone number, or email address changes, you must inform the immigration court within five days. To update your contact information with the immigration court, you must complete a Form EOIR-33 either online at https://respondentaccess.eoir.justice.gov/en/ or by completing the enclosed paper form and mailing it to the immigration court listed above.

Internet-Based Hearings: If you are scheduled to have an internet-based hearing, you will appear by video or telephone. If you prefer to appear in person at the immigration court named above, you must file a motion for an in-person hearing with the immigration court at least fifteen days before the hearing date provided above. Additional information about internet-based hearings for each immigration court is available on EOIR's website at https://www.justice.gov/eoir/eoir-immigration-court-listing.

In-Person Hearings: If you are scheduled to have an in-person hearing, you will appear in person at the immigration court named above. If you prefer to appear remotely, you must file a motion for an internet-based hearing with the immigration court at least fifteen days before the hearing date provided above.

For information about your case, please call **1-800-898-7180** (toll-free) or **304-625-2050.**

The Certificate of Service on this document allows the immigration court to record delivery of this notice to you and to the Department of Homeland Security.

CERTIFICATE OF SERVICE

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DATE: *09-17-2025* BY: COURT STAFF *VA*
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सूचना अनलाइनमा पढ्न यस पृष्ठमा कोड स्क्यान गर्न स्मार्टफोनको क्यामेरा प्रयोग गर्नुहोस्।

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