IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JOSE ANGEL AVILA MUNOZ, Petitioner,	)	
v.	)	CIV-25-1190-G
RUSSELL HOLT, et al., Respondents.	)	

RESPONDENTS' OBJECTION TO REPORT AND RECOMMENDATION

Respondents *respectfully* object to the Report and Recommendation (R&R) entered on November 10, 2025 (Doc. 10).

This objection expressly reasserts and does not waive the arguments set forth in the Response (Doc. 8), but focuses on two particular points: (1) the R&R misapplied the jurisdiction stripping provision of 8 U.S.C. § 1252(g); and (2) the R&R failed to properly apply the "deeming" provision of § 1225(a)(1) and the plain language of § 1225(b)(2)(A).

I. Section 1252(g) Applies to Count I

Section 1252(g) states that courts lack jurisdiction to consider "any cause or claim by or on behalf of any alien arising from the decision or action by [DHS] to *commence* proceedings, *adjudicate* cases, or *execute* removal orders against any alien under this chapter." (emphasis added). In the Tenth Circuit, the test is whether a challenged decision or action is one directly and immediately connected to one of the enumerated actions/decision. *See Tsering v. U.S. Immigr. & Customs Enf't*, 403 F. Appx 339, 343 (10th Cir. 2010) ("We agree with the Fifth Circuit that claims that clearly are included within the definition of arising from are those claims connected *directly and immediately* with a

decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." (cleaned up)) *Mochama v. Zwetow*, 14-cv-2121-KHV, 2017 WL 36363, at *8 (D. Kan. Jan. 3, 2017) ("The Tenth Circuit reviews whether claims are connected directly and immediately with a decision or action by the Attorney General to commence proceedings.").

Here, the immigration officer's examination of Petitioner and subsequent determination under § 1225(b)(2)(A) directly and immediately effected the *commencement* of the proceedings against Petitioner. If Petitioner contends that the immigration officer's examination and determination under § 1225 is not the basis of DHS's discretionary decision to commence removal proceedings, it is not stated in the Petition. Nor is it addressed or explained in the R&R. The application of § 1225(b)(2)(A) is an integral part of DHS's discretionary choice to commence proceedings and seek the deportation.

Petitioner's assertion that DHS should have used § 1226 instead of § 1225 underscores this point. Specifically, in § 1226(e), Congress made clear that the decision whether to use any of § 1226's provisions is itself an unreviewable discretionary act. *See* 8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review."). And critically, "§ 1252(g) was directed against … attempts to impose judicial constraints upon prosecutorial discretion." *Veloz-Luvevano v. Lynch*, 799 F.3d 1308, 1315 (10th Cir. 2015) (quoting *Reno v. Am.–Arab Anti–Discrimination Comm.* [hereinafter AADC], 525 U.S. 471, 485 n. 9 (1999)).

The R&R cites to *Jennings* for the proposition that the Court's *AADC* decision "did not interpret [§ 1252(g)] to sweep in any claim that can technically be said to 'arise from'

the three listed actions of the Attorney General." R&R at 7. However, that citation is to the three-judge plurality decision not adopted by other justices. *See Jennings v. Rodriguez*, 583 U.S. 281, 314 (2018) (concurrence by Thomas, J., joined by Gorsuch, J., contrasting the jurisdictional analysis of the plurality, concurrence, and dissent). Moreover, the assertion of § 1252(g) for the discretionary determinations of an immigration officer is not just "any claim." It is an act intimately tied to the commencement of proceedings. 8 U.S.C. § 1225(b)(2)(A) ("if the examining immigration officer determines … the alien shall be detained for a proceeding under section 1229a"); *AADC*, 525 U.S. 471, 483 (explaining that the enumerated actions/decisions "represent the initiation or prosecution of various stages in the deportation process.").

And it bears repeating that Petitioner's assertion that § 1226 should have been used instead *is expressly protected by that very provision as discretionary*—which is what § 1252(g) is intended to protect. 8 U.S.C. § 1226(e); *AADC*, 525 U.S. at 487 (characterizing § 1252(g) as a "discretion-protecting provision"). And protected discretion is the discretion to be both more forgiving or more exacting. Here, DHS has made the determination to more fully utilize § 1225(b)(2)(A). That is a form of protected discretion under § 1252(g). *See Aguilar-Alvarez v. Holder*, 528 F. App'x 862, 870–71 (10th Cir. 2013) (applying § 1252(g) to the re-assertion of removal proceedings).

The R&R also attempts to recast Count I as merely challenging the legal basis of Petitioner's detention. R&R at 7. But that conflates Counts I (statutory challenge) and II (constitutional challenge). Petitioner's due process claim (Count II) challenges his detention as a due process violation. But the statutory argument of Count I is different. It

challenges the *means* DHS selected to commence proceedings against Petitioner. Specifically, Petitioner contends DHS should have used § 1226 instead of § 1225. But critically, there is no detention element to that debate. For example, detention plays no role in deciding whether Petitioner is an "applicant for admission" or "seeking admission" under § 1225. The availability of a bond determination for Petitioner is a *collateral* consequence of that debate. Thus, the crux of the challenge in Count I is *not* detention.

The R&R also cites to a recent district court opinion from another district. R&R at 7. That case asserts that § 1252(g) does not bar the review of purely legal determinations that require no factual development. *Id.* (citing *Gutierrez v. Baltasar,* No. 25-CV-2720-RMR, 2025 WL 2962908, at *3 (D. Colo. Oct. 17, 2025), which asserted that "[t]hese 'purely legal' questions fit the exception to § 1252(g)'s jurisdiction-stripping provision, as they can be decided in the abstract on an undisputed factual record"). But the Tenth Circuit has not adopted a "purely legal" or "abstract" non-factual exception to § 1252(g). And, as noted above, the application of § 1225 *does* involve factual issues regarding whether Petitioner is seeking admission—which the R&R relies upon. As such, *Gutierrez* uses the wrong standard and presumes "abstract" facts that are different than this case.

In summary, Petitioner asks the court to construe DHS to have exercised its discretion in a manner it did not. That is barred by § 1252(g). *See Alvarez v. U.S. Immigr. & Customs Enf't*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, [§ 1252(g)] bars [courts] from questioning ICE's discretionary decisions to commence removal—and thus necessarily prevents [courts] from considering whether the agency should have used a different statutory procedure to initiate the removal process."); *Acxel S.Q.D.C.*, 2025 WL

2617973, at *3 (D. Minn. Sept. 9, 2025) ("Petitioner precisely challenges Respondents' decision to detain him. Although he contends that § 1252(b)(9) does not bar his claims because he is challenging his ongoing detention, not the initial decision to detain him, this difference does not alter the Court's conclusion.").

II. Section 1225(b)(2)(A) Applies to Petitioner

At the outset, it is important to note the limited nature of the R&R's proposed holding. Unlike many of the opinions it (and Petitioner) cite, it does *not* contend that §§ 1225 and 1226 are mutually exclusive, such that § 1225 only applies to noncitizens at the border and that § 1226 only applies to noncitizens within the country. Rather, the R&R concedes that Petitioner is an "applicant for admission," but nonetheless contends that § 1225 does not apply in this instance because Petitioner is not actively seeking admission. It is, in effect, an as-applied challenge rather than a structural assertion that § 1225 can never be applied to noncitizens residing in the country.

That is significant because any reliance on the cited cases must account for the fact that those holdings were informed by a structural analysis that the R&R does *not* adopt or recommend.

A. The R&R Disregards Common Understandings of Language, the INA's Deeming Provision, and Petitioner's Actions When Confronted

Pursuant to § 1225(a)(1), any "alien present in the United States who has not been admitted" is **"deemed"** an "applicant for admission." 8 U.S.C. § 1225(a)(1) (emphasis added). That deeming provision eliminates issues of subjective intent or details of the application process; only the facts of *presence* and *lack of admission* are required. And

critically, Petitioner concedes that he was *present in the United States* and *has not been admitted*. In short, he is an "applicant for admission."

The R&R seems to accept that Petitioner is "technically" an applicant for admission, but contends that § 1225(b)(2)(A) does not apply because Petitioner is nonetheless not "seeking" admission. R&R at 11. That conclusion contravenes ordinary language, the deeming provision of the INA, and Petitioner's efforts to obtain legal status.

As an initial matter, crafting a distinction between an "applicant" and one who is "seeking" defies common understandings of language. It is akin to saying an "applicant for college admission" is not "seeking admission to college"; or that an "applicant for a job" is not "seeking the job." In each instance, the individuals are "seeking" by virtue of being an applicant. If it were otherwise, they would not be an "applicant" in the first instance.

Resort to the same dictionary relied upon by the R&R underscores this point. R&R at 13 (citing dictionary for "seeking"). Specifically, Merriam-Webster defines "applicant" as "one who applies." Applicant, Merriam-Webster, https://www.merriam-webster.com/dictionary/applicant (last visited November 14, 2025). Thus, an "applicant for admission" is one who *applies* for admission. Again, that accords with common understandings of plain language. The college applicant and the job applicant are seeking admission to college and a job, respectively.

The R&R resists this straight-forward application by suggesting that this *particular* petitioner is somehow not "seeking admission" despite being an applicant for admission. But the INA's deeming provision conclusively resolves that question. Section 1225(a)(1) provides that noncitizens residing in the country are "deemed" an applicant for admission;

meaning there is no need to inquire as to subjective intent or whether a noncitizens actions are sufficient to suggest an intent to apply. To the contrary, Congress included the deeming provision to obviate any such inquiry. As a matter of law, by being "present in the country" without being "admitted," Petitioner *is* deemed an "applicant for admission." *Olalde v. Noem*, 1:25-CV-00168-JMD, 2025 WL 3131942, at *3 (E.D. Mo. Nov. 10, 2025) ("[T]he statute *defines* [petitioner] as seeking admission ... Because [petitioner] is an alien, present in the United States, who has not been admitted, the law defines him to be an applicant for admission. He is thus seeking admission."); *Sandoval v. Acuna*, 2025 WL 3048926, at *5 n.5 (W.D. La. Oct. 31, 2025) ("The fact that Petitioner may have lacked the subjective intent to ever apply for admission does not prevent her from being categorized as an "applicant for admission" under § 1225. For this Court to hold otherwise would clearly contravene the plain statutory language and Congress's intent."); *Oliveira v. Patterson*, 2025 WL 3095972, at *5 n.4 (W.D. La. Nov. 4, 2025) (same); *Vargas Lopez v. Trump*, No. 8:25CV526, 2025 WL 2780351, at *9 (D. Neb. Sept. 30, 2025) ("just because [petitioner] illegally remained in this country for years does not mean that he is suddenly not an 'applicant for admission' under § 1225(b)(2)"). The Court need not—and should not—look further.[1]

[1] The R&R also points to the broad scope of inspection authority in § 1225(a)(3) to suggest "seeking" must mean something more. R&R at 12. But that observation fundamentally misreads the section. By its plain terms, § 1225(a)(3) expansively applies to "all aliens" seeking admission, not just applicants for admission. *See* § 1225(a)(3) ("All aliens ... who are applicants for admission *or otherwise seeking admission* ... shall be inspected." (emphasis added)). Thus, the section actually underscores that applicants for admission (a subset of aliens) are definitionally "seeking admission"—and thus the catchall "or

But if the Court does look further, the immigration officer's determination that, when confronted, Petitioner was seeking admission is confirmed by Petitioner's own application for cancellation of deportation. *See* 8 U.S.C. § 1225(b)(2)(A) ("if the examining immigration officer determines …"); *Rojas v. Olson*, 2025 WL 3033967, at *8 (E.D. Wis. Oct. 30, 2025) ("Indeed, one suspects that upon apprehension most unadmitted aliens promptly seek admission and permission to stay; their alternative is to elect to remove themselves voluntarily."). As noted in the Response, Petitioner filed a 42B Application for cancellation of removal. If successful, Petitioner's status would be legal permanent resident and he would be lawfully admitted. *See* Doc. 8-2 (first page of motion); Doc. 11 at 7 (Petitioner's Reply, admitting he filed for "Cancellation of Removal"); 8 U.S.C. § 1229b(b) ("The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien …"); *Djong v. Mayorkas*, No. 24-CV-00475-CNS, 2024 WL 5089985, at *4 n.5 (D. Colo. Dec. 12, 2024) ("The INA allows immigration judges to adjust the status of certain noncitizens to lawful permanent resident during a removal proceeding to avoid removal."). Thus, to the extent there is any question as to whether Petitioner is *seeking* admission, it is resolved by Petitioner's application.[2]

---

otherwise seeking admission" is intended to sweep *even further* than "applicants for admission."

[2] The R&R cites *Lomeu v. Soto*, 2025 WL 2981296, at *8 (D.N.J. Oct. 23, 2025), for the proposition that seeking to "remain in" the United States is different than "seeking admission." R&R at 14. Putting aside that that the assertion confuses location with legal status, *Lomeu* notably lacks any analysis, citation, or explanation. Seeking legal status before an IJ *is* seeking legal admission by submitting to "inspection and authorization by an immigration officer." 8 U.S.C.A. § 1101(13)(A) ("The terms 'admission' and 'admitted'

In summary, by any measure, Petitioner is an applicant for admission seeking admission, and therefore subject to § 1225.

B. The R&R's Heightened "Seeking" Standard Contravenes Congressional Intent Evidenced by the Deeming Provision

Aside from the fact that the R&R's heightened reading of "seeking" effectively undoes the deeming provision, it also contravenes congressional intent. Specifically, as noted in the Response, prior to the passage of IIRIRA in 1996, an "anomaly" existed "whereby immigrants who were attempting to lawfully enter the United States were in a worse position than persons who had crossed the border unlawfully." *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020). The addition of § 1225(a)(1) "ensure[d] that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are placed on equal footing in removal proceedings under the INA—in the position of an 'applicant for admission.'" *Id.*; *see also* H.R. Rep. No. 104-469, pt. 1, at 225 (1996) ("This subsection is intended to replace certain aspects of the current 'entry doctrine,' 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 port of entry.").

The R&R's reading of "seeking" would undo that fix and incentivize noncompliance with immigration laws by providing more protection to those that bypass border inspections and evade detection to reside within the United States but are not

---

mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.").

"seeking" admission—a result at odds with the intent of Congress when amending § 1225 of the INA. *See Chavez v. Noem*, Case No. 3:25-cv-02325-CAB, 2025 WL 2730228, at *4 (S.D. Cal. Sept. 24, 2025) (rejecting Petitioner's reading because it would repeal the IIRIRA statutory fix); *Sandoval*, 2025 WL 3048926, at *6 n.7 ("For this Court to conclude that an alien who has unlawfully entered the United States and managed to remain in the country for a sufficient period of time is entitled to a bond hearing, while those who seek lawful entry and submit themselves for inspection are not, not only conflicts with the unambiguous language of the governing statutes, but would also seemingly undermine the intent of Congress in enacting the IIRIRA."); *Oliveira*, 2025 WL 3095972, at *6 (holding that application of § 1225(b)(2)(A) to those residing in the country comports with the legislative history of IIRIRA").

Additionally, the R&R's construction results in immigration officers not being able to immediately detain a noncitizen residing in the United States without first determining if they were somehow *actively* seeking admission (a standard not identified or defined in the INA or implementing regulations). Instead, the proper standard for the immigration officer is that which is plainly stated in the INA; namely, whether the noncitizen is "entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A).

CONCLUSION

The Respondents respectfully request that the Court overrule the Report and Recommendation, deny the Petition, and dismiss the case.

Dated: November 17, 2025

Respectfully submitted,
ROBERT J. TROESTER
United States Attorney

/s/ Scott Maule

Scott Maule (OBA 31760)
Assistant U.S. Attorney
United States Attorney's Office
Western District of Oklahoma
210 Park Avenue, Suite 400
Oklahoma City, OK 73102
(405) 553-8832/8700
scott.maule@usdoj.gov