

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
ABILENE DIVISION

JUANA HIGAREDA-CANO,

PETITIONER,

v.

KRISTI NOEM, et al.,

RESPONDENTS.

Case No. 1:25-cv-225-H

**PETITIONER'S REPLY BRIEF IN SUPPORT OF HABEAS PETITION AND  
MOTION FOR A PRELIMINARY INJUNCTION**

RESPECTFULLY SUBMITTED,

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\_\_\_\_\_  
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## INTRODUCTION

The central issue presented by this habeas petition, like countless others nationwide, is straightforward: Are noncitizens like Petitioner, who are placed in removal proceedings after being encountered in the U.S. based on being present after entering without inspection (EWI), entitled to a bond hearing before a neutral adjudicator under 8 U.S.C. § 1226? Or, as the government now claims, are they subject to mandatory detention without any possibility of a bond hearing?

Petitioner's position affirms nearly three decades of settled agency practice and judicial interpretation.<sup>1</sup> The government's position, in stark contrast, asks this Court to adopt a radical reinterpretation of a thirty-year-old statutory scheme—a theory announced and taken by the agencies in the last couple months. This new theory would require the Court to believe that for thirty years, the agencies charged with administering these laws and the federal courts reviewing their actions have all profoundly misunderstood the statute's "plain language."

This Court need not indulge such a sweeping and unsupported revision of established law. Petitioner's interpretation is consistent with historical practice as well as the U.S. constitution. Moreover, Petitioner's positions are supported by reasoned, persuasive, and detailed analysis from Article III courts across the country who have

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<sup>1</sup> See e.g., *Pizarro Reyes v. Raycraft*, No. 25-CV-12546, 2025 WL 2609425, at \*6–7 (E.D. Mich. Sept. 9, 2025) ("The BIA's decision to pivot from three decades of consistent statutory interpretation and call for [Petitioner's] detention under § 1225(b)(2)(A) is at odds with every District Court that has been confronted with the same question of statutory interpretation.").

granted similar habeas petitions in recent weeks.<sup>2</sup> The government's new novel position, meanwhile, stands in direct opposition to this judicial consensus.

Critically, Petitioner's reading gives full effect to all the INA's provisions, including the statutory definitions given to the terms "admission," "admitted," and "application for admission" by Congress when IIRIRA was passed.<sup>3</sup> Meanwhile, the government asks the Court to ignore those definitions as well as circuit court precedent rejecting prior attempts by the government to ignore these definitions. Similarly, Petitioner's position harmonizes the statutes, regulations, decades of agency practice, and caselaw with the U.S. Constitution in a way that gives meaning to all the relevant provisions. Meanwhile, the government's

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<sup>2</sup> See e.g., *Lopez-Arevelo v. Ripa*, No. EP-25-CV-337-KC, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025); *Buenrostro-Mendez v. Bondi, et al.*, No. CV H-25-3726, 2025 WL 2886346, at \*3 (S.D. Tex. Oct. 7, 2025); *Kostak v. Trump*, No. CV 3:25-1093, 2025 WL 2472136 (W.D. La. Aug. 27, 2025); *Jose J.O.E. v. Bondi*, No. 25-CV-3051 (ECT/DJF), 2025 WL 2466670 (D. Minn. Aug. 27, 2025); *Carmona-Lorenzo v. Trump*, No. 4:25CV3172, 2025 WL 2531521 (D. Neb. Sept. 3, 2025); *Giron Reyes v. Lyons*, No. C25-4048-LTS-MAR, 2025 WL 2712427 (N.D. Iowa Sept. 23, 2025); *Sampiao v. Hyde*, No. 1:25-CV-11981-JEK, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Jimenez v. FCI Berlin*, No. 25-cv-326-LM-AJ (D.N.H. Sept. 8, 2025); *Choglio Chajla v. Scott*, 2025 WL 2688541 (D. Me. Sept. 21, 2025); *Samb v. Joyce*, No. 25 CIV. 6373 (DEH), 2025 WL 2398831 (S.D.N.Y. Aug. 19, 2025); *Leal-Hernandez v. Noem*, No. 1:25-CV-02428-JRR, 2025 WL 2430025 (D. Md. Aug. 24, 2025); *Hasan v. Crawford*, No. 1:25-CV-1408 (LMB/IDD), 2025 WL 2682255 (E.D. Va. Sept. 19, 2025); *Beltran Barrera v. Tindall*, 2025 WL 2690565 (W.D. Ky. Sept. 19, 2025); *Pizarro Reyes v. Raycraft*, No. 25-CV-12546, 2025 WL 2609425 (E.D. Mich. Sept. 9, 2025); *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239 (W.D. Wash. 2025); *Cuevas Guzman v. Andrews*, No. 1:25-CV-01015-KES-SKO (HC), 2025 WL 2617256 (E.D. Cal. Sept. 9, 2025); *Caicedo Hinestroza v. Kaiser*, No. 25-CV-07559-JD, 2025 WL 2606983 (N.D. Cal. Sept. 9, 2025); *Zaragoza Mosqueda v. Noem*, No. 5:25-CV-02304 CAS (BFM), 2025 WL 2591530 (C.D. Cal. Sept. 8, 2025); *Garcia v. Noem*, No. 25-CV-02180-DMS-MMP, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025); *Rosado v. Figueroa*, No. CV 25-02157 PHX DLR (CDB), 2025 WL 2337099 (D. Ariz. Aug. 11, 2025); *J.U. v. Maldonado*, 25-CV-04836, 2025 WL 2772765, at \*5 (E.D.N.Y. Sept. 29, 2025); *Lopez v. Hardin*, No. 25-cv-830, 2025 WL 2732717, at \*2 (M.D. Fla. Sept. 25, 2025) (agreeing on substantive claim but oddly not ordering any real relief in this decision); *Maldonado Vazquez v. Feeley*, 2:25-CV-01542-RFB-EJY, 2025 WL 2676082 (D. Nev. Sept. 17, 2025); *Rivera Zumba v. Bondi*, No. 25-cv-14626, 2025 WL 2753496, at \*7 (D.N.J. Sept. 26, 2025); *S.D.B.B. v. Johnson et. al.*, No. 1:25-CV-882, 2025 WL 2845170, at \*5 (M.D.N.C. Oct. 7, 2025); *Velasquez Salazar v. Dedos*, No. 25-cv-835, 2025 WL 2676729 (D.N.M. Sept. 17, 2025).

<sup>3</sup> 8 U.S.C. §§ 1101(a)(4) and (a)(13)(A).

interpretation renders that entire Laken Rile Act (LRA) superfluous, violates multiple constitutional provisions, decades of agency practice, and the most basic canons of statutory construction.

The government's continued detention of Petitioner without a bond hearing before an IJ is unlawful. This conclusion is difficult to doubt given decades of agency practice since the passage of IIRIRA in 1996. While the statutes at issue in this case have not changed in those decades, the agencies who administer them have. Drastically. In addition to the changes in the agencies administering the statutes, the decades since IIRIRA have seen countless provisions of the INA litigated ad nauseum and the entire first Trump presidency. Not once, however, did anyone ever suggest that all EWI aliens are subject to mandatory detention for the duration of removal proceedings.

For these reasons and those discussed below as well as in prior filings, Petitioner respectfully requests the Court grant his Motion for a Preliminary Injunction and Habeas Petition, and as a result, order the government to either promptly provide him with a bond hearing before a neutral IJ or release him.

**STATEMENT RELATED TO ONE OF THE MOST RELEVANT UNDISPUTED  
FACTS**

Ms. Higareda-Cano is the beneficiary of an approved I-130 that was filed by her U.S. citizen brother on April 30, 2001.<sup>4</sup> As discussed below, this visa category (U.S. citizen sibling) is subject to the visa cap, and therefore, she must either (1) wait for her priority

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<sup>4</sup> (ECF No. 1 at pp. 9-10; App. to Reply – Ex. 7.)

date for this approved petition to become current before she can adjust her status on it (i.e. within the U.S.) pursuant to § 1255(i); or (2) have an approved petition from a category with an immediately available visa available which would allow her to adjust on that petition in conjunction with the one filed by her brother which makes her § 1255(i) eligible.

The visa petition filed by her brother more than 24-years ago and approved more than 20 years ago still does not have a current visa available. Instead, there is only a visa available (according to both the November and December 2025 Visa Bulletins) falling into that category if their petitions filed on or before April 8, 2001. Accordingly, Ms. Higareda-Cano is likely a few months away from an available visa in this category.

In addition to the petition filed by her brother, Ms. Higareda-Cano also has a currently pending I-130 petition that was filed by her U.S. citizen daughter on September 15, 2025.<sup>5</sup> If that petition were approved, Ms. Higareda-Cano would have an immediately available visa through it and, as a result, be able to adjust her status to that of a LPR in conjunction with the petition filed by her brother making her eligible under § 1255(i).

She is also eligible for relief in the form of cancellation of removal under § 1229b(b) and a hearing on such an application has been set on the detained docket for January 27, 2026—more than 2-months away.<sup>6</sup> This is an admittedly more difficult form of relief to obtain due to the hardship that must be proved at the final hearing on the application for relief.

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<sup>5</sup> (*Id.*)

<sup>6</sup> (App. to Reply Ex. 8.)

In sum, there are several statutory forms of relief provided by statute which are available to Ms. Higareda-Cano and other EWI aliens. The process for getting to a point where one may obtain such relief, however, takes time. Whether it be the 24+ years it has already taken there to be an available visa for the approved petition filed by her brother, the months it has already taken and will continue to take for USCIS to adjudicate the petition filed by her daughter, or the 3-5 months it takes to get from the start of detained removal proceedings to the final hearing in such proceedings—it takes time.

### **LEGAL FRAMEWORK**

“The complex provisions of the INA have provoked comparisons to a ‘morass,’<sup>7</sup> a “Gordian knot,”<sup>8</sup> and ‘King Minos's labyrinth in ancient Crete.’”<sup>9</sup> These comparisons are well-deserved. Without any background or experience with immigration law it is easy to get lost in the INA's labyrinth of statutes and terms. Worse, the INA has a unique way of making it difficult for non-practitioners to realize that an interpretation they are confident is right—is actually incorrect. To facilitate an understanding of the applicable statutory provisions, their meaning, and the way they work in practice, Ms. Higerada-Cano believes it would be helpful to provide an overview of the most relevant legal authorities to the issues presented here.

#### **I. Overview of Relevant Constitutional Principles.**

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<sup>7</sup> *Torres v. Barr*, 976 F.3d 918, 923 (9th Cir. 2020) (quoting *Lacsina Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (quoting *Agyeman v. I.N.S.*, 296 F.3d 871, 877 (9th Cir. 2002))

<sup>8</sup> *Id.* (quoting *Aguilar v. U.S. Immig. & Customs Enft.*, 510 F.3d 1, 6 (1st Cir. 2007)).

<sup>9</sup> *Id.* (quoting *Lok v. I.N.S.*, 548 F.2d 37, 38 (2d Cir. 1977)).

Congress may expand the protections granted by the Constitution through statute, but it cannot legislate away fundamental constitutional guarantees. The Fourth Amendment’s protection against unreasonable seizures applies to all persons within the territory of the United States, including noncitizens. Immigration officials may not detain individuals encountered in the interior indefinitely or without probable cause; the Fourth Amendment simply does not permit it.

“‘Longstanding precedent establishes that ‘[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.’”<sup>10</sup> The law in this area is not grey. Rather, for decades, it has been “‘clearly established . . . that immigration stops and arrests [are] subject to the same Fourth Amendment requirements that apply to other stops and arrests—reasonable suspicion for a brief stop, and probable cause for any further arrest and detention.’”<sup>11</sup> The clarity of the law in this area is bolstered by the statutes proscribing its arrest authority: 8 U.S.C. § 1226(a) and 8 U.S.C. § 1357. These statutes, “[c]ourts have consistently held,” “must be read in light of constitutional standards, so that ‘reason to believe’ must be considered the equivalent of probable cause.”<sup>12</sup> The “robust consensus of cases [and] persuasive

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<sup>10</sup> *Morales v. Chadbourne*, 793 F.3d 208, 215 (2015) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, (1975) (citing *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 16–19, (1968)); see also *Dunaway v. New York*, 442 U.S. 200, 216 (1979) (“[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.”).

<sup>11</sup> *Id.* at 215.

<sup>12</sup> *Id.* at 216–17 (citing *Au Yi Lau*, 445 F.2d at 222; see, e.g., *Tejeda-Mata v. Immigration & Naturalization Serv.*, 626 F.2d 721, 725 (9th Cir.1980) (“The phrase ‘has reason to believe’ [in § 1357] has been equated with the constitutional requirement of probable cause.”); *United States v. Cantu*, 519 F.2d 494, 496 (7th Cir.1975) (“The words [in § 1357] of the statute ‘reason to believe’ are properly taken to signify probable

authority” in this area makes it “beyond debate that an immigration officer . . . would need probable cause to arrest and detain individuals for the purpose of investigating their immigration status.”<sup>13</sup>

The Due Process Clause of the Fifth Amendment guarantees that no person in the United States shall be deprived of liberty without due process.<sup>14</sup> These substantive and procedural due process protections apply to all people, including noncitizens, regardless of their immigration status.<sup>15</sup> The Due Process Clause provides heightened protection against government interference with certain fundamental rights—and freedom from detention lies at the heart of the Due Process Clause’s protections. For persons in the United States (even unlawfully), courts have found that noncitizens who have established a life here—albeit without authorization—possess a strong liberty interest in their freedom from detention.

The Supreme Court has explained the critical distinction between those outside the U.S. and those within it when it comes to the due process required before they may be deprived of their liberty:

The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic

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cause.”); *see also United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir.2010) (“Because the Fourth Amendment applies to arrests of illegal aliens, the term ‘reason to believe’ in § 1357(a)(2) means constitutionally required probable cause.”).

<sup>13</sup> (*Id.*)

<sup>14</sup> U.S. Const. amend. V.

<sup>15</sup> *Trump v. J.G.G.*, 604 U. S. ---145 S. Ct. 1003, 1006 (2025) (*per curiam*) (“It is well established that the Fifth Amendment entitles aliens to due process of law’ in the context of removal proceedings.” (quoting *Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439 (1993))).

borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. Indeed, this Court has held that the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary depending upon status and circumstance.<sup>16</sup>

In *Zadvydas v. Davis*, the Supreme Court left no doubt that civil detention, including in the immigration context, requires a sufficient justification—namely preventing flight or danger to the community.<sup>17</sup> Where no such justification exists detention without due process is unconstitutional.<sup>18</sup>

At the nation’s borders, however, the constitution’s protections are lowered, even nonexistent for those who are not in the U.S. (including those who are at the border still under the legal fiction of parole). The history of the INA, the constitution’s protections as well as the lowered protections at or near the border, are reflected in the INA’s statutory scheme.

II. **Congress specifically defined the terms “Application for Admission,” “Admission,” and “Admitted,” to leave no doubt that that one who is “seeking admission” must be physically outside of the United States and asking to come in.”**

Under the post-IIRIRA INA, it is admission, not entry, that matters. The term “admission” and “admitted,” previously absent from the INA were added and defined at 8 U.S.C. § 1101(a)(13)(A), which provides:

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<sup>16</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001)

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

The terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien *into the United States* after inspection and authorization by an immigration officer.

Meanwhile, the related term “application for admission” (also added by IIRIRA) defined at 8 U.S.C. § 1101(a)(4), provides: “The term ‘application for admission’ has reference to the application for admission *into the United States* and not to the application for the issuance of an immigrant or nonimmigrant visa.”<sup>19</sup>

The terms “application for admission,” “admission,” and “admitted” all make Congress’ intent clear: Admission cannot happen anywhere other than when at the proverbial door asking to come in. Circuit courts interpreting INA provisions referencing the definition of “admission” at 8 U.S.C. § 1101(a)(13), have explained:

This definition “is limited and does not encompass a post-entry adjustment of status,” because it “refers expressly to *entry into* the United States, denoting by its plain terms passage into the country from abroad at a port of entry.”<sup>20</sup>

By explicitly defining these terms, the “work” of determining their meaning and the meaning of statutes using them has been done by Congress.<sup>21</sup> And in so doing, courts analyzing such provisions have rejected the government’s claims that an admission can

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<sup>19</sup> 8 U.S.C. § 1101(a)(4) (emphasis added).

<sup>20</sup> *Medina-Rosales v. Holder*, 778 F.3d 1140, 1145 (10th Cir. 2015) (quoting *Negrete-Ramirez*, 741 F.3d at 1051); *see also Papazoglou*, 725 F.3d at 793 (“That provision therefore encompasses the action of an entry into the United States, accompanied by an inspection or authorization.”); *Bracamontes*, 675 F.3d at 385 (“Clearly, neither term includes an adjustment of status; instead, both contemplate a physical crossing of the border following the sanction and approval of United States authorities.”); *Martinez*, 519 F.3d at 544 (recognizing that “ ‘admission’ is the lawful *entry* of an alien after inspection, something quite different ... from post-entry adjustment of status”).

<sup>21</sup> *Martinez v. Mukasey*, 519 F.3d 532, 543-44 (5th Cir. 2008).

happen from within the U.S.<sup>22</sup> This has been repeatedly affirmed by courts interpreting INA provisions containing these terms.<sup>23</sup>

A. Caselow interpreting eligibility for a waiver under 8 U.S.C. § 1182(h) affirms that the definition found at § 1101(a)(13) leaves no doubt an admission requires "passage into the country from abroad at a port of entry."

An illustration of the fact that by defining admission the way it did Congress unambiguously defined admission to "encompasses the action of an entry into the United States, accompanied by an inspection or authorization."<sup>24</sup> This is illustrated by the caselaw interpreting eligibility for a waiver under 8 U.S.C. § 1182(h). Specifically, courts tasked with determining whether an alien who had adjusted their status inside the United States, (rather than being admitted as a LPR at a POE), and subsequently was convicted of an aggravated felony, could apply for a waiver under § 1182(h).<sup>25</sup> The relevant portion of the statute in those cases provided:

No waiver shall be granted under this subsection *in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if ... since the date of such admission the alien has been convicted of an aggravated felony...*<sup>26</sup>

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<sup>22</sup> See e.g. *id.* (rejecting the government's argument that an alien's adjustment of status within the United States was the equivalent of "being admitted to the United States as an alien lawfully admitted for permanent residence" as that phrase is used in 8 U.S.C. § 1182(h)).

<sup>23</sup> See generally *Vartelas v. Holder*, 566 U.S. 257 (2012)(discussing IIRIRA's elimination of the entry doctrine through defining admission in 8 U.S.C. § 1101(a)(13) and the application of subparagraphs (C)(i)-(vi) to LPRs who, after a departure, are returning to the U.S. and seeking admission into it which it ultimately held violated the constitution's prohibition against retroactivity).

<sup>24</sup> *Papazoglou v. Holder*, 725 F.3d 790, 792-94 (7th Cir.2013).

<sup>25</sup> *Id.*

<sup>26</sup> 8 U.S.C. § 1182(h) (emphasis added).

The Tenth Circuit, interpreting this provision, explained the consensus and clarity on this issue in *Medina Rosales v. Holder*, stating:

Eight circuits . . . have held that this language clearly and unambiguously precludes eligibility for a waiver after conviction of an aggravated felony only if the alien received LPR status at the time the alien lawfully entered the United States, but it does not apply to an alien who obtained LPR status after having been present in the United States before acquiring that status.<sup>27</sup>

This interpretation is consistent with the statutory definition given to the terms admission and admitted by Congress. That being said, it has (at first blush) an illogic to it: Aliens who entered EWI or overstayed their visa then adjusted their status to that of a LPR in the U.S. are eligible for the waiver; meanwhile, aliens who waited until they had legal status to enter the U.S. are ineligible for it.<sup>28</sup>

While some courts suggested possible reasons for the distinction,<sup>29</sup> most courts correctly pointed out that due to the unambiguous text of § 1101(a)(13) and § 1182(h) the reasons for the distinction were irrelevant to interpreting the statutes.<sup>30</sup> The *Medina-Rosales* court quoting from a Sixth Circuit decision explained:

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<sup>27</sup> *Medina-Rosales v. Holder*, 778 F.3d 1140, 1144 (10th Cir. 2015) (citing *Husic v. Holder*, 776 F.3d 59, 60–67 (2nd Cir.2015); *Stanovsek v. Holder*, 768 F.3d 515, 516, 517–19 (6th Cir.2014); *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1050–54 (9th Cir.2014); *Papazoglou v. Holder*, 725 F.3d 790, 792–94 (7th Cir.2013); *Leiba v. Holder*, 699 F.3d 346, 348–56 (4th Cir.2012); *Hanif v. Att’y Gen.*, 694 F.3d 479, 483–87 (3rd Cir.2012); *Bracamontes v. Holder*, 675 F.3d 380, 382, 384–89 (4th Cir.2012); *Lanier v. U.S. Att’y Gen.*, 631 F.3d 1363, 1365–67 (11th Cir.2011); *Martinez*, 519 F.3d at 541–46.).

<sup>28</sup> See *Medina-Rosales*, 778 F.3d at 1144-1146; see also *Martinez*, 519 F.3d at 544-546 (discussing the debatably absurd result of those who did everything legally by entering for the first time as a LPR and suggesting possible reasons for it, but ultimately pointing out that Congress' reasoning for the distinction is irrelevant where the text of § 1101(a)(13) and § 1182(h) are unambiguous).

<sup>29</sup> See e.g., *Martinez*, 519 F.3d at 544-546.

<sup>30</sup> See e.g., *Medina-Rosales*, 778 F.3d at 1146.

Why would Congress distinguish between those who obtained lawful permanent resident status at the time of lawful entry and those who adjusted status later, for purposes of barring permanent residents who have committed aggravated felonies from discretionary hardship relief? Our inability to answer such a question does not, however, warrant expanding the scope of a statutory provision beyond a meaning as plainly limited as the one in question here.<sup>31</sup>

B. Post-IIRIRA it is the action of an entry into the United States, accompanied by an inspection or authorization which matters—not one's legal status at the time of such admission.

Caselaw applying the definition to other provisions has left no doubt that the single most important requirement for an “admission” post-IIRIRA is being outside of the United States and passing through a POE after inspection by an immigration officer. This is true even when the alien does not have documents giving them lawful status. Subsequent to IIRIRA the BIA and every circuit court to address the issue has concluded that “the terms ‘admitted’ and ‘admission,’ as defined in [§ 1101(a)(13)(A) ], denote procedural regularity . . . rather than compliance with substantive legal requirements.”<sup>32</sup> This means that an alien who does not have documents allowing them to enter the U.S. who is nonetheless waived through a POE by an immigration officer has been admitted.<sup>33</sup> Significantly, an alien waived through the POE has been admitted, and as a result, is not an applicant for admission as defined by § 1225(a)(1).<sup>34</sup>

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<sup>31</sup> *Id.* at 1146.

<sup>32</sup> *Matter of Quilantan*, 25 I. & N. Dec. 285, 290 (BIA 2010); *see also Martinez v. Att’y Gen.*, 693 F.3d 408, 414 (3d Cir.2012); *Sum v. Holder*, 602 F.3d 1092, 1096 (9th Cir.2010); *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir.2008).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

The statutory definitions provided by Congress both by their use of the language “into the United States” and the case law applying those definitions throughout the INA where those terms appear, leave little room to dispute that the focus is on coming into the U.S. from outside at a designated POE.

**III. Aspects of § 1229a removal proceedings relevant to understanding the issues in this case.**

A. Removal proceedings under § 1229a are not commenced via 8 U.S.C. § 1225 or § 1226—rather, § 1229a proceedings are only commenced when DHS files a NTA, issued in accordance with § 1229, with EOIR.

First, it is important to point out that once referred to full § 1229a proceedings an alien is no longer being processed, detained, or in proceedings under § 1225.<sup>35</sup> Rather, at the point, the alien is in proceedings under § 1229a. Second, it is well-established that removal proceedings under § 1229a are *not* commenced via 8 U.S.C. § 1225 or § 1226. Formal § 1229a proceedings are only commenced when DHS files a Notice to Appear (NTA), issued in accordance with § 1229, with EOIR.<sup>36</sup>

B. U.S.C. §§ 1182 and 1227 provide the two mutually exclusive statutes for charging an alien as removable.

Aliens may only be placed in removal proceedings if they are “removable” under one of the statutory grounds established by Congress.<sup>37</sup> These grounds are set forth in two distinct and mutually exclusive statutory sections: 8 U.S.C. § 1182 which provides grounds

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<sup>35</sup> *Matter of X-K-*, 23 I&N Dec. 731, 734-36 (BIA 2005).

<sup>36</sup> See 8 U.S.C. §§ 1229 and 1229a (providing the procedures for initiating § 1229a proceedings through the issuance and filing of a NTA).

<sup>37</sup> § 1229a(a)(2).

of "inadmissibility" and 8 U.S.C. § 1227 which provides grounds of "deportability" or "removability."

Significantly, DHS does not get to choose which statute to use. Rather, the applicable section is dictated by the alien's circumstances, primarily focusing on their location (e.g., at a port of entry vs. inside the U.S.) and the "procedural regularity" of their last entry. Though there are only two statutes with potential charges of removal, in practice, IJs and immigration practitioners typically say there are three general categories of aliens in § 1229a proceedings. These categories are listed at the top of every NTA, including Petitioner's, as seen here:

- 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.

A more detailed description of each of these categories is as follows:

- a. **"Arriving Aliens" (Charged under § 1182):** These are noncitizens encountered at a port of entry (POE) who are seeking admission but are determined by an officer not to be "clearly and beyond doubt entitled to admission." If not required to wait outside the U.S., they may be "paroled" into the country for proceedings. This parole, however, does not constitute an admission; it maintains the legal fiction that the alien is still "at the door." Every single alien in this category is an "applicant for admission" under § 1225(a)(1).
- b. **"Entered Without Inspection" Aliens (Charged under § 1182):** This category includes any alien encountered *inside* the U.S. who last entered "without

inspection" (EWI), and therefore, are placed in removal proceedings under § 1182(a)(6)(A)(i). Every single alien in this category is an "applicant for admission" under § 1225(a)(1).

c. **"Admitted But Removable" Aliens (Charged under § 1227):** This group includes any alien who entered the U.S. through a POE after an inspection or authorization. This includes LPRs, those admitted on non-immigrant visas, "waive through" admissions, and even those admitted at a POE based on fraudulent documents. When these aliens are encountered in the U.S., they may *only* be placed in removal proceedings if a ground of removal under § 1227 applies to them.

These categories, specifically delineated at the top of every NTA, create a critical, absolute distinction: 100% of aliens in the first two categories (arriving aliens and EWI aliens) fall under the definition of "applicant for admission" and must be placed in removal proceedings under § 1182. Conversely, 100% of aliens in the last category are not "applicants for admission," and therefore, are placed in proceedings under § 1227. Simply put, an "applicant for admission" can only be charged under § 1182, and only an alien who is *not* an "applicant for admission" (i.e., one who was already lawfully admitted) can be charged under § 1227.

EWI aliens, (like visa overstays, student visa violators, and LPRs who commit offenses that make them removable), who are not "arriving aliens" may be encountered within the interior of the country and placed in removal proceedings in a variety of ways. Though mailing a "NTA" is one way to place them in proceedings, more often than not,

ICE will arrest the alien and process them for § 1229a removal proceedings. These arrests or *Terry* stops are subject to the Fourth Amendment (as discussed above and below).

To this end, 8 U.S.C. § 1226(a) applies to noncitizens already in the Country and authorizes the arrest and detention of noncitizens, pursuant to a warrant for the purpose of removal proceedings under 8 U.S.C. § 1229a.<sup>38</sup> In accordance with the Fourth Amendment and operational realities, 8 U.S.C. § 1357, provides certain officers with the authority to make an arrest under circumstances which parallel established exceptions to the Fourth Amendment's warrant requirement, but such arrests must be followed by the issuance of a warrant by an official who has been given such authority<sup>39</sup>

Before moving on to applying all the above to this case, it is important to point out that aliens are not and cannot simultaneously be in proceedings under § 1225(b) and § 1229a. In fact, when an alien who was initially processed for removal under § 1225(b)(1) is subsequently placed in § 1229a proceedings, the NTA will indicate it. Likewise, when

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<sup>38</sup> See *id.* at \*3; *Hasan v. Crawford*, No. 1:25-CV-1408 (LMB/IDD), 2025 WL 2682255, at \*8 (E.D. Va. Sept. 19, 2025) (“In *Jennings*, the Court explained that § 1225(b) governs ‘aliens seeking admission into the country’ whereas § 1226(a) governs ‘aliens already in the country’ who are subject to removal proceedings.”)(quoting *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018)).

<sup>39</sup> The first two paragraphs of 8 U.S.C. §1357(a), titled “Powers without warrant” expressly provide:

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant— (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; (2) 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 made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, 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, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States

U.S.C. § 1357(a)(1)-(2)(emphasis added).

an alien is placed in § 1229a proceedings due to a positive credible fear finding which was made after an expedited removal order had actually been issued, DHS must indicate the regulation under which the order was vacated on the NTA. The way these things appear on the NTA can be seen below.

- 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)

C. In removal proceedings, the significance of being an "applicant for admission" has nothing to do with bond and everything to do with the allocation of the burden of proof.

The rights provided to aliens in removal proceedings and the conduct of those proceedings are set forth in § 1229a. Specifically, § 1229a(c)(3) allocates the burden on the government to prove removability in cases involving "deportable" aliens (i.e. aliens charges under § 1227); meanwhile, aliens in removal proceedings under § 1182, have the burden pursuant to § 1229a(c)(2), which states.

In the proceeding the alien has the burden of establishing—(A) if the alien is an *applicant for admission*, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.”<sup>40</sup>

It is helpful to consider (c)(2) part (A) versus (B) in context. Paragraph (A), by its very terms applies to an alien who is arriving and seeking to be admitted but is alleged to be inadmissible at the POE. Said differently, this option is plainly for those arriving aliens

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<sup>40</sup> 8 U.S.C. § 1229a(c)(emphasis added).

referred to as “other aliens” in § 1225(b)(2)(A) seeking admission who are referred for removal proceedings under § 1229a. Paragraph (B) on the other hand, by its terms contemplates the alien’s physical presence in the U.S., and therefore, does not ask that they demonstrate they should be admitted; instead, these aliens would only be successful in denying they are inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i) if they can demonstrate they were previously admitted. Admission, after all, cannot take place anywhere but from the outside coming in.

D. Removal Proceedings under 8 U.S.C. § 1229(a): Bifurcated Process and Statutory Relief from Removal.

Removal proceedings under 8 U.S.C. § 1229a are initiated when DHS files a Notice to Appear (NTA) with EOIR. These “quasi-judicial” proceedings are bifurcated, unfolding in two distinct stages: the first determines removability as charged on the NTA and if the removability is established and the alien will be seeking relief before the IJ then it proceeds to the relief stage.

*Stage 1: The Master Calendar Hearing—Determining Removability*

The primary purpose of the first stage is to determine whether the individual, referred to as the respondent, is removable as charged in the NTA. The charge may be based on grounds of inadmissibility under 8 U.S.C. § 1182 or deportability under 8 U.S.C. § 1227.

Master hearings are typically conducted on high-volume dockets. The timeline between the issuance of the NTA and the initial hearing varies significantly, with detained

cases being prioritized over non-detained cases, which can sometimes wait months or years for an initial appearance.

At the initial master hearing, an unrepresented respondent is formally advised of their rights—including the right to obtain counsel at their own expense and to examine the evidence presented by the government. The Immigration Judge (IJ) also ensures the respondent understands their responsibilities, such as reporting address changes and appearing at all future hearings. Respondents are typically granted a continuance if they wish to seek legal representation.

During a master hearing, the IJ will ask the respondent to plead to the factual allegations and the charge of removability listed in the NTA. In many cases, a respondent may admit to the allegations and concede the charge of removability. This concession is often a necessary procedural step to become eligible to apply for forms of relief from removal.

If the IJ determines that the charge of removability is not sustained, the proceedings are terminated. If the charge is sustained, either by the IJ's finding or the respondent's concession, the case progresses toward the second stage. The respondent must then identify any forms of relief from removal for which they intend to apply and demonstrate prima facie eligibility for such relief. Upon a showing of prima facie eligibility, the IJ will set deadlines for the submission of applications and evidence and schedule the case for an Individual Merits Hearing.

*Stage 2: The Individual Merits Hearing—Adjudicating Relief*

The second stage consists of an individual, or merits, hearing focused on the respondent's application for relief from removal. This is a formal evidentiary hearing where both the respondent and the government have the opportunity to present evidence, call and cross-examine witnesses, and make legal arguments regarding the respondent's eligibility for relief. Following the hearing, the Immigration Judge will issue a decision granting or denying the application and ordering removal or terminating proceedings.

Relief in removal proceedings that may be sought by those without status, (e.g. EWIs and overstays) include but are not limited to: Cancellation of removal for certain non-permanent residents under 8 U.S.C. § 1229b(b)(1);<sup>41</sup> Special rule cancellation of removal for certain non-permanent residents under 8 U.S.C. § 1229b(b)(2) for battered spouses and children;<sup>42</sup> and adjustment of status.

**IV. The default rule is that aliens encountered in the U.S. and placed in § 1229a removal proceedings are, at any point prior to the entry of a final order of removal, entitled to a bond hearing before an IJ unless one of the exceptions set forth in 8 C.F.R. § 1003.19(h)(2) applies.**

Pursuant to the INA, its implementing regulations, and decades of consistent agency practice, aliens placed into full § 1229a proceedings who are not described in 8 U.S.C. § 1226(c) or 8 C.F.R. § 1003.19(h)(2) are entitled to a bond hearing before an IJ. Indeed,

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<sup>41</sup> 8 U.S.C. § 1229b(b)(1)(proscribing the requirements for this relief to include 10-years continued presence in the U.S., no disqualifying offenses, proof of "exceptional and extremely unusual hardship" to a qualifying relative, and good moral character).

<sup>42</sup> 8 U.S.C. § 1229b(b)(2)(proscribing the requirements for relief to include 3-years continued presence in the U.S., no disqualifying offenses, they have been battered by a U.S. citizen or LPR spouse or parent, and good moral character

Section 1226(a) applies by default to all persons “pending a decision on whether the [noncitizen] is to be removed from the United States.”

When the provisions related to inspection, expedited removal, and removal proceedings before an IJ were amended by IIRIRA, Congress clarified “the amendment of § 1226(a) simply “restate[d]” the detention authority previously found at § 1252(a) “to arrest, detain, and release on bond an alien who is not lawfully in the United States.”<sup>43</sup> Meanwhile, the amendments did not disturb “the existing mandatory detention scheme for noncitizens arriving in the U.S. without a clear right to admission and expanded the scope of” expedited removal to “include certain recently arrived noncitizens.”<sup>44</sup> These amendments and the statutory scheme simply “reflected [Congress’] understanding of longstanding due process precedent that recognizes the more substantial due process rights of noncitizens already residing in the U.S. with those of noncitizens recently arriving.”<sup>45</sup>

Following the enactment of the IIRIRA, EOIR drafted new regulations explaining that, in general, EWI aliens, while applicants for admission, are detained for § 1229a proceedings under § 1226(a).<sup>46</sup> Thus, in the decades that followed, most people who

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<sup>43</sup> *Id.* (citing H.R. Rep. No. 104-469, pt. 1, at 229 (1996) and H.R. Rep. No. 104-828, at 210 (1996) (Conf. Rep.)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (citing H.R. Rep. No. 104-469, p. 1, at 163-66 (recognizing the “constitutional liberty interest[s]” of noncitizens present in the U.S., versus the assumed minimal due process rights of arriving noncitizens) (citing *Knauff v. Shaughnessy*, 338 U.S. 537 (1950))).

<sup>46</sup> *See id.* (“The EOIR’s regulations drafted following the enactment of the IIRIRA explained this distinction.”) (citing Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) (“Despite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection).

entered without inspection and were placed in standard removal proceedings received bond hearings, unless their criminal history rendered them ineligible.<sup>47</sup>

This, as every agency administering the INA and immigration attorney practicing when IIRIRA was passed knows, is nothing more than the obvious conclusion from the INA's statutory scheme (post-IIRIRA), the implementing regulations, and their actual application in millions of § 1229a proceedings for decades.

V. **IIRIRA's Twin Goals of Deterring Illegal Immigration and Fraud**

IIRIRA's primary goals were to disincentivize illegal entry and fraud in immigration. But the provisions enacted to achieve this goal are unrelated to detention during INA § 1229a proceedings. The "anomaly" IIRIRA aimed to fix had nothing to do with bond. Rather, it concerned the disparate *procedural* treatment (i.e. expedited removal) of aliens arriving at a Port of Entry (POE) versus those who entered without inspection (EWI).

Prior to IIRIRA, aliens arriving at a POE without proper documents were subject to expedited removal under INA § 1225(b)—a summary process culminating in immediate removal without a hearing before an Immigration Judge (IJ).<sup>48</sup> In stark contrast, an alien who entered without inspection, even if apprehended near the border moments after entry, was, prior to IIRIRA, statutorily entitled to full removal proceedings under § 1229a.

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<sup>47</sup> *Id.* (“[I]n the decades since IIRIRA was enacted, DHS and the EOIR have applied § 1226(a) to the detention of individuals apprehended within the continental U.S. who entered without inspection and provided them access to release on bond.”).

<sup>48</sup> *See generally* § 1225(b)(1).

IIRIRA corrected this procedural disparity by expanding the expedited removal provisions to EWI aliens who were encountered within two years of entry and within a geographic area defined by regulation and inadmissible under INA § 1182(a)(6)(C) or § 1182(a)(7) to expedite removal just as they would have been if at a POE.<sup>49</sup> This "anomaly" of giving aliens found a few miles from the border and hours after entering full § 1229a proceedings while those similarly situated at a POE were order removed without any hearing under the expedited removal statute was corrected by IIRIRA's expansion of expedited removal to such aliens.<sup>50</sup>

Both pre- and post- IIRIRA, aliens who are subjected to expedited removal that do not claim any fear of return are not supposed to be "detained" in custody—rather, the purpose and goal is immediate removal. Indeed, the very purpose of expedited removal is to effectuate an *immediate* removal, entirely bypassing the need for any detention or hearing. This goal of immediacy is codified in INA § 1231(c), which governs the "removal of aliens arriving at [a POE]" and mandates they "shall be removed immediately," unless impracticable. This focus on *immediacy*, not custodial detention, was the paradigm IIRIRA extended to recent EWI aliens.

Notably, the scope of expedited removal (its temporal and geographic limits) is explicitly subject to expansion by the Secretary through, of course, the proper notice and

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<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

comment rule making process.<sup>51</sup> And shortly after the current administration took office it began the required process for making such a change by posting the required notice of expanding the "Designation of Aliens for Expedited Removal."<sup>52</sup> In stark contrast, no analogous provision exists in 8 U.S.C. § 1226 that would permit anyone—much less the Acting ICE Director or three panel members of the BIA—to unilaterally alter which categories of aliens are entitled to a bond hearing before an IJ. If it were that simple, the BIA's decision in *Hurtado* would have been a single paragraph that said DHS decided to exercise the full extent of its "mandatory detention" powers and now EWI aliens cannot get bond. That would have been much simpler than trying to explain the multitude of INA provisions rendered superfluous by the new policy or its oversight on this issue for so many years.

Significantly, the Government's new position is further undermined by IIRIRA's parallel goal of eradicating immigration fraud. IIRIRA enacted severe penalties for fraud, such as the permanent, non-waivable bar for falsely claiming U.S. citizenship under INA § 1182(a)(6)(C)(ii). Yet, under the Government's strained interpretation of the detention statutes, those aliens who *would* remain eligible for a bond hearing under § 1226(a) after being placed in § 1229a proceedings for *committing* fraud—such as successfully

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<sup>51</sup> 8 U.S.C. § 1225(b)(1)(A)(iii)(providing the Attorney General, now Secretary of DHS, with the authority to apply expedited removal to any alien encountered up no more than two years after the entering without inspection).

<sup>52</sup> The first posted notice of this can be found at <https://www.federalregister.gov/documents/2025/01/24/2025-01720/designating-aliens-for-expedited-removal>

committing fraud at a POE, engaging in marriage fraud, or violating the terms of their nonimmigrant visas. It defies logic and congressional intent to suggest IIRIRA created a scheme where those who commit affirmative fraud are entitled to a bond hearing, while aliens whose sole charge is entry without inspection are subject to mandatory detention.

**VI. The real deterrent to entering the country EWI established by IIRIRA were the 3-year and 10-year bars for unlawful presence.**

A. IIRIRA put provisions in place to deter illegally entering as well as extended stays of unlawful presence in the U.S. by penalizing such actions through bars to becoming a LPR

Beyond expanding expedited removal, IIRIRA employed other significant statutory tools to deter illegal entry. Chief among these was the creation of the 3- and 10-year unlawful presence (ULP) bars found at INA § 1182(a)(9)(B). Because EWI aliens are generally ineligible to adjust status within the United States under § 1255(a), they must depart and seek admission via consular processing.<sup>53</sup> IIRIRA's new bars ensured that such a departure, after accruing sufficient unlawful presence, would trigger a multi-year, or even decade-long, bar to their lawful return.<sup>54</sup> IIRIRA did provide a waiver for these bars in the case of aliens who have either a spouse or parent that is a U.S. citizen or LPR who will suffer hardship if the alien's application for admission as a LPR is denied.<sup>55</sup> This, not mandatory detention, was yet another deterrent aimed at the EWI population.

B. Adjustment of status for EWI aliens under § 1255(i) provides a reprieve from the departure requirement, and therefore, ULP bars for

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<sup>53</sup> 8 U.S.C. § 1255(a) (proscribing the classes of aliens who are eligible to adjust their status to LPRs in the United States and exempting those present in the U.S. after entering without inspection).

<sup>54</sup> § 1182(a)(9)(B)(i)(I)-(I).

<sup>55</sup> § 1182(a)(9)(B)(v).

those whom a petition was filed before April 30, 2000—a date extended twice after the passage of IIRIRA.

The usual rule that an EWI alien cannot adjust their status in the United States is not applicable if such alien is eligible for adjustment of status under § 1255(i).<sup>56</sup> This provision provides a critical reprieve to the normal requirement that such aliens must depart the U.S. and then return by seeking admission through consular processing. First passed in 1994, it was amended twice after IIRIRA to extend the deadlines by which a petition must have been filed for the alien beneficiary to be eligible for adjustment under, provided their adjustment application was submitted along with a \$1,000 penalty fee."<sup>57</sup>

After being amended by Legal Immigration Family Equity (LIFE) Act of 2000, § 1255(i) provides that an EWI alien "who is the beneficiary . . . of—(i) a petition for classification under § 1154 of this title that was filed with the Attorney General on or before April 30, 2001" may apply for adjustment of status.<sup>58</sup> This extension further provided, however, that when such EWI aliens who are the "beneficiary of a petition" "filed after January 14, 1998" the alien must also be "physically present in the United States on December 21, 2000."<sup>59</sup> To be clear, this last amendment literally meant EWI aliens were required to be unlawfully present in the U.S. on December 21, 2000 to receive the benefit of § 1255(i).

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<sup>56</sup> This is referred to in the immigration world as being "245(i) eligible."

<sup>57</sup> § 1255(i).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

It is logically irreconcilable to argue that Congress intended to subject every EWI alien to the harsh loss of liberty that is mandatory detention, while simultaneously passing legislation *twice* to expand a benefit that not only requires their continued presence but, in its final form, legislatively conditioned that benefit on their physical (and unlawful) presence in the country *after* IIRIRA's passage.

Significantly, an alien who has an approved petition may not file an application for adjustment of status unless and until their "priority date" becomes current. Whether a visa is available for an alien's category and priority date is determined by looking at the Visa Bulletin. This November 2025 Visa Bulletin for family based petition categories subject to the cap can be seen below:<sup>60</sup>

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<sup>60</sup> <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2026/visa-bulletin-for-november-2025.html>

FAMILY-SPONSORED PREFERENCES

First: (F1) Unmarried Sons and Daughters of U.S. Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any unused first preference numbers:

A. (F2A) Spouses and Children of Permanent Residents: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. (F2B) Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents: 23% of the overall second preference limitation.

Third: (F3) Married Sons and Daughters of U.S. Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: (F4) Brothers and Sisters of Adult U.S. Citizens: 65,000, plus any numbers not required by first three preferences.

A. FINAL ACTION DATES FOR FAMILY-SPONSORED PREFERENCE CASES

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are authorized for issuance to all qualified applicants; and "U" means unauthorized, i.e., numbers are not authorized for issuance. (NOTE: Numbers are authorized for issuance only for applicants whose priority date is earlier than the final action date listed below.)

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	08NOV16	08NOV16	08NOV16	22NOV05	22JAN13
F2A	01FEB24	01FEB24	01FEB24	01FEB23	01FEB24
F2B	01DEC16	01DEC16	01DEC16	15DEC07	01OCT12
F3	08SEP11	08SEP11	08SEP11	01MAY01	22SEP04
F4	08JAN08	08JAN08	01NOV06	08APR01	22MAR06

The added highlight to the screenshot above shows that beneficiaries of petitions filed by their U.S. citizen sibling still do not have a currently available visa. Said differently, there are EWI aliens who will be able to adjust their status under § 1255(i) once their priority date is current who have been waiting more than 24-years now for an available visa.

As stated previously, Ms. Higareda-Cano is one such alien as her U.S. citizen brother filed a petition for her on April 30, 2001. This means she will be eligible to adjust status under § 1255(i) as amended by Congress post-IIRIRA—when her priority date becomes current sometime at the beginning of next year (hopefully).

Hardly consistent with a harsh rule subjecting every EWI alien to mandatory detention for the duration of § 1229a proceedings, Congress passed legislation to alleviate the potential impacts of the ULP bars twice after the passage of IIRIRA. Indeed, the fact that Congress extended the date for petitions to be filed by for an alien to be § 1255(i) eligible, the government's repeated banging of the "IIRIRA meant to punish EWI aliens" drum rings hollow."

**VII. There is no question that *Jennings* reached the conclusion it did with the understanding that § 1225(b) applies at or near the border and § 1226(a) to those encountered in the interior and not subject to expedited removal—these are key distinctions that would have otherwise changed the analysis.**

While 8 U.S.C. § 1225 does not explicitly state that its application is limited to ports of entry (POEs) or their immediate vicinity, this was without question the Supreme Court's understanding in *Jennings*. The Court's conclusions regarding the statute's interpretation and constitutionality relied heavily on the historically limited rights afforded to aliens at the country's borders. This was not an incidental assumption; the Supreme Court is fully cognizant of the limited constitutional rights at the border, and the government itself argued this precise distinction in support of its interpretation of § 1225 and § 1226.

This understanding was evident during the *Jennings* oral argument. Justice Breyer, for instance, pointed out the difficult task aliens faced regarding § 1225 due to it being applied at the border.<sup>61</sup> Furthermore, there is no question the Supreme Court understood §

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<sup>61</sup> (App. - Ex. 1 – Transcript of Oral Arguments in *Jennings v. Rodriguez*.)

1226(a)—not § 1225(b)—to apply to aliens who entered without inspection (EWI) and were encountered *within* the United States (and not subject to expedited removal).

Indeed, the Court presented the precise question this Court is being asked to answer now to the Solicitor General more than once. For example, Justice Sotomayor asked,

Clarifying question. For an alien who is found in the United States illegally, has not been admitted, are they held under 1225(b) or are they held under 1226(a)?<sup>62</sup>

The Solicitor General responded,

So they are held under – if they are not – if they are not detained within 100 miles of the border or within 14 days... then they are under 1226(a) and not (c).<sup>63</sup>

Seeking further clarity, Justice Sotomayor posed a hypothetical of an EWI alien stating,

I'm talking about an alien who has come into the United States illegally without being admitted who takes up residence 50 miles from the border.<sup>64</sup>

Without hesitation, the Solicitor General confirmed:

The answer is they are held under 1226(a) and that they get a bond hearing under it - - and this is at page 156a of the appendix.<sup>65</sup>

As discussed below, the simple reality is that the Supreme Court and all the litigants in *Jennings* recognized that § 1225 is a statute applicable at or near the border, and

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<sup>62</sup> (*Id.* at p. 7.)

<sup>63</sup> (*Id.* at pp. 7-8.)

<sup>64</sup> (*Id.* at p. 8.)

<sup>65</sup> (*Id.* at p. 8-9.)

therefore, the warrant requirement of the Fourth Amendment and the due process clause of the Fifth Amendment have little or no application.

Those advocating for the government's new position have often asserted that nothing in § 1225 says it applies only at POEs and near the border so it must apply everywhere and anywhere. But this ignores context and the assumption that Congress seeks to legislate constitutionally. Moreover, just as the § 1225 does not explicitly state its application is at or near the border, § 1226 does not say its application is in the interior of the United States. The absence of such language does not change the fact that its application is in the interior of the United States. This distinction between the geographical location of their application was explicitly acknowledged in *Jennings*.

The application of § 1225 at POEs and near the border is obvious, unless one's entire test for interpretation is whether the statute explicitly states: "this statute applies only at X." The placement of § 1225 strongly supports its border-centric application. It is preceded by statutes plainly applying at POEs: § 1221 (arrival/departure manifests), § 1222 (detention and health examinations of arriving aliens), § 1223 (contracts with transportation companies regarding arriving aliens), and § 1224 (designation of POEs for aircraft). It is immediately followed by § 1225A, governing pre-inspection at airports. Simply put, § 1225 is surrounded by statutes that obviously apply at the borders and POEs.

Furthermore, the statute's implementing regulations affirm this understanding. The very first section, 8 C.F.R. § 235.1(a), states: "Generally, Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section." The

subsequent regulatory sections under 8 C.F.R. § 235 *et. seq.* consistently address procedures at the point of entry. Furthermore, most the implementing regulations have to do with airports, vessels, and other things that are clearly taking place at the border.

**LEGAL FRAMEWORK APPLIED TO MS. HIGAREDA-CANO &  
GOVERNMENT'S RESPONSE**

At the outset, it is important to point out that districts court decisions on the issues presented here have been all over the map on their reasoning related to the substantive issues of statutory analysis and constitutional grounds related to detention, but have been, to the best of undersigned's knowledge, unanimous in finding that exhaustion is not required. Likewise, all such district courts have found none of the INA's jurisdiction stripping provisions apply to the issues presented by these habeas petitions. Given that there seems to be complete unanimity on exhaustion and jurisdiction, Ms. Higareda-Cano does not believe the point needs belabored here. Accordingly, this reply will proceed to address the other arguments raised by the government's response.

I. **Ms. Higareda-Cano is an "applicant for admission" but she is NOT "seeking admission" which is an absolute predicate for § 1225(b)(2)(A).**

At the outset, it is important to point out that the government's response places a great deal of focus on the fact that § 1225(b)(2)(A) does not include reference to "arriving aliens" while simultaneously asking that no significance be given to the qualifier of its application to those "seeking admission." If it applied to all "applicants for admission" without regard for where and when they were encountered, the provision would have no need for the phrase "seeking admission" and would read:

[I]n the case of an alien who is an applicant for admission, 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 section 1229a of this title.<sup>66</sup>

But Congress did include the phrase "seeking admission" and, as a result, it has always been understood to have its application at or near POEs and the border.

This statute, as countless courts have repeatedly found, does not apply to every "applicant for admission" encountered anywhere and at any time. To be subject to mandatory detention under § 1225(b)(2)(A), the plain text requires an individual to be 1) an "applicant for admission"; 2) "seeking admission"; and 3) determined by an examining immigration officer to be "not clearly and beyond a doubt entitled to be admitted."<sup>67</sup>

As discussed below, the government's new interpretation conveniently ignores the emphasis Congress placed on an admission being an act that requires one to be at the door asking to come in at a POE and the second, critical element: that the person must be actively "seeking admission." Worse still, the government's response appears to claim that applying for relief from removal in § 1229a proceedings is "seeking admission." This is not simply false but wholly ignores Congress definitions and the terms of art associated with relief inside the U.S. versus seeking it at a POE.

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<sup>66</sup> § 1225(b)(2)(A) (alteration added).

<sup>67</sup> 8 U.S.C. § 1225(b)(2)(A); *see also* *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at \*2 (D. Mass. July 24, 2025) (affirming these "several conditions must be met" for a noncitizen to be subject to mandatory detention under § 1225(b)(2)(A)).

- A. The government's new interpretation conveniently ignores the emphasis Congress placed on an admission being an act that requires one to be at the door asking to come in at a POE.

The government's response and its position on this issue seem to attribute its own beliefs about the "plain meaning" of terms "admission," "admitted," and "application for admission." This is problematic because, as discussed above, Congress defined these terms, and those definitions have been applied in the many different provisions that include them throughout the INA. Significantly, the government's position and arguments on this issue are remarkably similar to those it made with respect to "admission" and "admitted" during prior litigation on eligibility for a waiver under § 1182(h).

Here, the government asks the Court to find an EWI alien who is present in the interior of the U.S. as somehow "seeking admission" from within it, and in so doing, ignores the definitions found at §§ 1101(a)(4) and (a)(13). Meanwhile, in *Medina-Rosales*, the government argued that an alien's adjustment of status to that of a LPR inside the U.S. should be interpreted to constitute being "admitted to the United States as an alien lawfully admitted for permanent residence."<sup>68</sup> The Fifth Circuit, like numerous others addressing the issue, rejected the government's attempts to effectively nullify the unambiguous definition of admission proscribed by Congress.<sup>69</sup>

Similar to ignoring the "admitted to the United States" phrase when litigating the § 1182(h) issue, the government in its litigation of this issue ignores the "seeking admission"

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<sup>68</sup> *Medina-Rosales*, 778 F.3d at 1446.

<sup>69</sup> *Martinez v. Mukasey*, 519 F.3d 532, 543-44 (5th Cir. 2008)

phrase Congress specifically included in § 1225(b)(2)(A). Simply put, the case law in every circuit, including the Fifth, makes clear that an "admission" "contemplate[s] a physical crossing of the border following the sanction and approval of United States authorities."<sup>70</sup> The government's response does not even acknowledge the expansive body of case law interpreting provisions of the INA where terms related to "admission" appear.

Meanwhile, For example, both courts reach their decision by changing the word "applicant" to "applying." There is no basis in any caselaw or the INA for saying that the word "applicant" and "applying" are synonymous when used in the INA. The mental gymnastics and word play that was required to reach that conclusion involved changing several words tense and meaning to first equate being an "applicant for admission" to "applying for admission" to "seeking admission." This does not only ignore the caselaw discussed above, it fails entirely to account for the definition of "application for admission." in to account.

As stated above, § 1101(a)(4) explicitly states an "'application for admission' has reference to the application for admission into the United States. . . ." To summarize, Congress made clear that an "application for admission" is one "for admission into the United States" and that an admission requires one to be coming from the outside into the United States" through a POE. And yet, the government and cases it cites to claim that despite all these clear statements about where an application for admission and admission takes place are wholly irrelevant to whether all EWI aliens already present in the U.S. are—

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<sup>70</sup> *Bracamontes v. Holder*, 675 F.3d 380, 382, 384–89 (4th Cir.2012).

without regard to when they entered or where they are encountered—somehow engaged in "seeking admission."<sup>71</sup> This simply cannot be the case. Moreover, it ignores the Supreme Court's understanding that § 1225(b) applied at the border and the importance of that understanding.<sup>72</sup>

B. Ms. Higareda-Cano may seek to "adjust her status" or ask the IJ to "cancel her removal," but she is not "seeking admission" as that is, according to the Fifth Circuit, something that happens from the outside asking to come in.

In its response, the government claims that Petitioner is "still seeking admission" under § 1225(b)(2) because she has not agreed to leave.<sup>73</sup> This conclusion is reached based on a number of cascading errors undoubtedly the result of Congress using the "language of specialists" throughout the INA which are easily misunderstood when using the language of ordinary people. This was pointed out by the Third Circuit, which explained:

Adjustment of status" and "cancellation of removal" are not the sort of phrases you often hear at the corner coffee shop. Polling a group of ordinary and competent English speakers on what these six words mean is likely to produce equal parts blank stares and reasonable guesses. But that does not give courts license to invent a meaning to our liking. Instead, when interpreting technical and specialized legal language, we look not for the public meaning (as none is likely to exist), but what we might call the legal meaning.

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<sup>71</sup> In its response, the government appears to claim a LPR could be present in the U.S. and seeking admission based on the response brief's interpretation of § 1101(a)(13)(C). (ECF No. 9 p. 20 n. 6.) This is simply incorrect. The fact that § 1101(a)(13)(C) only applies to LPRs who are at the door knocking to come in after a return from travel and who are described in one of its subparagraphs abroad and are seeking admission is just that—an indisputable fact. Indeed, the Supreme Court's decision in *Vartelas v. Holder* was entirely about the "new disability" § 1101(a)(13)(C) placed on LPR ability to travel outside the country due to the potential consequences on their return. Simply put, far from providing any support for the government's position, § 1101(a)(13)(C) and its limited application at the border is just another of many provisions in the INA that support Petitioner's position.

<sup>72</sup> See Sec. IX, *supra*.

<sup>73</sup> (ECF No. 9 p. 21.)

Often, legal meaning and ordinary public meaning travel together because interpretation using ordinary public meaning ensures that the people have received appropriate notice of the government's legitimate purpose. And notice is necessary for posited law to serve one of its central purposes, "coordinating society's members toward the common good." So when this coordinating purpose predominates, so too should the public meaning, even if a law incorporates technical terms. That is because statutes "are written to guide the actions of men.... If a statute is written for ordinary folk, it would be arbitrary not to ... read [it] with the minds of ordinary men." But "[i]f they are addressed to specialists, they must be read by judges with the minds of specialists." Here, Congress used the language of the specialist versed in the execution of the immigration laws.<sup>74</sup>

Foremost among them, it automatically assumes she is or even could be seeking admission from the interior of the United States. But as the Fifth Circuit has plainly and repeatedly pointed out, "an admission" is the lawful *entry* of an alien after inspection, something quite different ... from post-entry adjustment of status."<sup>75</sup>

In the same section, it appears the government argues that voluntary departure under 8 U.S.C. § 1229c(a)(1) and stipulated removal under 8 U.S.C. § 1229a(d) serve to transform an applicant for admission from being one "seeking admission" to one who is no longer "seeking admission."<sup>76</sup> It is unclear where this conclusion comes from, but it is not in the cited statutes or regulations. Nor is undersigned aware of any authority that has ever suggested this to be the case. More to the point, these statements are simply incorrect.

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<sup>74</sup> *Lopez v. Att'y Gen.*, 49 F.4th 231, 234 (3d Cir. 2022) (emphasis added)(citations omitted and cleaned up extensively).

<sup>75</sup> *Martinez v. Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008), *as amended* (June 5, 2008) (recognizing that " 'admission' is the lawful *entry* of an alien after inspection, something quite different ... from post-entry adjustment of status"); *Marques v. Lynch*, 834 F.3d 549, 558-560 (5th Cir. 2016)(discussing all the reasons an alien already in the country is not applying for admission but for an adjustment of status and pointing out the similarity to arguments the government had made during the litigation on § 1182(h)).

<sup>76</sup> (ECF No. 9 p. 21.)

Before moving on it is important to point out the implication of the government's suggestion that Ms. Higareda-Cano could solve her current detention based solely on being an "applicant for admission" through taking voluntary departure or a stipulated removal order. Both of these options are ones taken by aliens in removal proceedings who do not wish to pursue any of the statutory forms of relief from removal Congress explicitly provided for aliens who meet prima facie eligibility requirements for such relief. The implication is simple: Ms. Higareda-Cano—a mother of U.S. citizen children who has no criminal history and is the beneficiary of an I-130 petition filed on April 30, 2001 and approved in 2004—can be let out of ICE detention if she will just agree not to pursue the forms of relief Congress explicitly provided by statute.

If Congress had not provided multiple avenues by which EWI aliens could not simply obtain relief from removal in § 1229a proceedings (relief that will make them a LPR no less), one could understand the government's position that Ms. Higareda-Cano should agree to leave or removal. But that's not the statutory scheme Congress created through IIRIRA and amending § 1255(i) twice after it passed IIRIRA to give reprieve from the harsh impact of the ULP bar.

Does anyone really believe that Congress simultaneously provided EWI aliens like Ms. Higareda-Cano—a mother and human being—with ways to become a LPR after being illegally present in the U.S. for more than 10-years, but only if they are willing to go through months of being locked up and deprived of her liberty?.

**II. Prior to IIRIRA, § 1226 proscribed the process for "exclusion proceedings" and was completely replaced with current § 1226 at the same time and in conjunction with the amendments to the relevant portions of § 1225.**

At the outset, it is critical to point out that the government's arguments in response to the fact that that multiple provisions of § 1226(c) are rendered meaningless by its claim that every applicant for admission is subject to mandatory under § 1225(b)(2)(A), fail to account for the fact that § 1226 did not exist in its current form prior to IIRIRA. The version of it immediately prior to IIRIRA is attached at Ex. 2 of the Reply Appendix. This is significant as it illustrates that most of its provisions were passed as part of IIRIRA. When one considers the fact that they were passed as part of the same overhaul of the statutory scheme as the provisions of § 1225 at issue here, it makes blowing off the multitude of provisions rendered meaningless by the government's new position as "redundancies" or things that happen when legislating, hard to swallow.

**A. 50% of § 1226(c)(1)'s subparagraphs are rendered completely meaningless by the government's new claims that § 1225(b)(2)(A) subjects all applicants for admission to mandatory detention for the duration of § 1229a proceedings.**

It is important to recall that 100% of aliens in removal proceedings who are charged on the NTA under a ground of inadmissibility listed in § 1182 are applicants for admission; and 100% of the aliens in removal proceedings who are charged on the NTA under a ground of removability in § 1227 are NOT applicants for admission. Among other reasons, this is important because Congress made the relevant amendments to § 1225 at the same time it amended § 1226 entirely to govern bond for aliens in § 1229a proceedings. In so doing, it provided for mandatory detention of aliens who were convicted of certain crimes,

depending on whether the alien was an applicant for admission charged under § 1182 or an alien who was not applicant for admission charged under § 1227. Then, In January 2025, Congress passed the Laken Riley Act in which it added a new subparagraph to the mandatory detention provisions of § 1226(c).

This statute, as amended by the LRA to add subparagraph (E) (in its entirety), can be seen below. The version below has been altered to highlight and underline those provisions which are only applicable to aliens who are applicants for admission, with the LRA's amendments highlighted, underlined, and italicized.

**(c) Detention of criminal aliens (1) Custody** The Attorney General shall take into custody any alien who-- (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title, (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence<sup>1</sup> to a term of imprisonment of at least 1 year, (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, or *(E)(i) is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 1182(a) of this title; and (ii) is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person.*<sup>77</sup>

As illustrated above, subparagraph (c)(1)(A), the first clause of subparagraph (c)(1)(D), and subparagraph (c)(1)(E), do not apply to anyone who is removable under 8 U.S.C. § 1227 (i.e. those who entered the United States legally after inspection by an immigration officer). Rather, those provisions only apply to aliens who are charged under § 1182—

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<sup>77</sup> 8 U.S.C. § 1226(c)(emphasis added).

100% of which are applicants for admission. Put another way, of § 1226(c)'s five subparagraphs two and a half of them are only applicable to aliens falling within 1225(a)(1)'s definition of "applicant for admission."<sup>78</sup>

The above also illustrates that, while the response's statement that "§ 1226 can clearly apply to another category of aliens that are not covered under § 1225—those who are *not* applicants for admission" is technically true, it is not true of the highlighted paragraphs above. For example, the alien from *Jennings* referenced by the government's response, was in proceedings under § 1227 and subject to mandatory detention under § 1226(c)(1)(B)—which is not one of the highlighted provisions above. Conversely, an LPR encountered in the country could not and would not be subject to mandatory detention under subparagraph (E) added by the LRA.

The amendments made by the LRA were specific to proscribe mandatory detention of noncitizens who meet both the status requirement of subclause (i) (inadmissibility for EWI, fraud, or lack of documents; aka "applicants for admission") *and* the conduct requirement of subclause (ii) (a criminal charge, arrest, or conviction for a specified

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<sup>78</sup> Id.

offense).<sup>79</sup> After signing the LRA into law, the president touted its importance, stating: "It's a landmark law that we are doing today, it will save countless innocent American lives."<sup>80</sup>

Claims about § 1226 simply having some redundancies, therefore, do not paint the real picture. The reality is that one must believe Congress on multiple occasions has amended § 1226(c) to include provisions that have no meaning or application whatsoever.

B. Congress did not give anyone the authority to change who is entitled to bond hearings under § 1226, BUT if it had, the retroactive application of such a change would violate the due process and the ex post facto clause.

The government cites an order from this Court in a different case (not involving petitioner or undersigned), which explicitly acknowledged it was being issued at an early stage and without the benefit of full consideration. That order appeared to express a belief that EWI aliens may have only been getting bond hearings because "the government declined to exercise the full extent of its authority under the INA."<sup>81</sup> Under this theory, the July 2025 internal memorandum from the acting ICE director acted as notice that DHS would subject all aliens to the detention under § 1225 rather than § 1226 going forward.<sup>82</sup>

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<sup>79</sup> *Id.*; see also *Vazquez v. Feeley*, No. 2:25-CV-01542-RFB-EJY, 2025 WL 2676082, at \*5 ("1226(c)(1)(E) (enacted by the Laken Riley Act) requires mandatory detention for people who were charged as being (1) inadmissible under § 1182(a)(6)(A)(i) (the inadmissibility ground for entry without inspection) or (a)(7) (the inadmissibility ground for lacking valid documentation to enter the U.S.) and who (2) have been arrested, charged with, or convicted of certain crimes not relevant here.").

<sup>80</sup> After signing the LRA into law, the president touted its importance, stating: "It's a landmark law that we are doing today, it will save countless innocent American lives." <https://www.npr.org/2025/01/29/g-s-l-45275/trump-laken-riley-act>.

<sup>81</sup> *Garibay-Robledo v. Noem, et. al.*, 1:25-cv-0177-H, ECF No. 9, \*5-6 (NDTX Oct. 24, 2025).

<sup>82</sup> *Id.*

Such a reading or conclusion is one of many examples of the "labyrinth" that may cause one to get lost among both its provisions as well as the many agencies involved in the administration of it. For example, the implementing regulations for bond hearings before an IJ under § 1226 are found at § 1003.19—which is in Chapter V – Executive Office for Immigration Review, Department of Justice. In other words, the relevant regulation is one which applies only to EOIR which is part of DOJ. Acting ICE Directory Lyons on the other hand, is part of ICE which is part of DHS. Even if regulations could be undone through the issuance of an internal memorandum, (which they cannot), an internal memorandum issued by a DHS agency cannot act to undo the implementing regulations for a DOJ agency.

Perhaps most telling, however, is that if the issue of whether EWI aliens were subject to mandatory detention under § 1225(b)(2)(A) was as simple as this, the BIA would have said it in *Hurtado* and this issue would have come to a close long ago. But a change like subjecting every EWI alien to mandatory detention for the duration of § 1229a cannot be made without significantly more. Petitioner maintains that is an Act of Congress. But, even if there were an argument to be made that it could be done through changing the implementing regulations at § 1003.19, such changes would be subject to the proper rule making procedures.

Equally, if not more, important, were it true that such a significant change could be made without an act of Congress or new regulations, a change of suddenly subjecting all EWI aliens to mandatory detention for the duration of removal proceedings (a new disability) based on nothing more than the past act of being EWI, would violate the

principles of retroactivity repeatedly applied to changes in the implementation of the INA as set forth on pages 26 – 28 of the habeas petition filed in this case.

In sum, neither the internal memorandum nor the BIA's decision constituted a valid change or notice that DHS was now applying the full extent of its authority to detain EWI aliens for the duration of § 1229a proceedings. But were it possible, the application of such a significant change retroactively is unconstitutional.

### **III. Reliance on *Jennings* is Misplaced at Best and Misleading at Worst.**

In *Matter of Hurtado*, the BIA claims that the Supreme Court's decision in *Jennings v. Rodriguez*, 583 U.S. 281 (2018) dictates this result. This claim, as one court put it, however, "is, to say the least, not without some doubt."<sup>83</sup> Contrary to the BIA's claims about *Jennings*, Article III courts have seemingly uniformly pointed out that *Jennings* actually said: "'U.S. immigration law authorizes the Government to detain certain aliens *seeking admission into the country* under §§ 1225(b)(1) and (b)(2) ... [and] to detain certain aliens *already in the country* pending the outcome of removal proceedings under §§ 1226(a) and (c)."<sup>84</sup>

Furthermore, as discussed above and illustrated by the oral argument transcript provided in the Appendix, the *Jennings* court was operating under the belief that the application of § 1225 was at or near the border. A change in this fact completely changes the constitutional analysis. This is particularly true given the fact that when the Solicitor

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<sup>83</sup> *Arce v. Trump*, No. 8:25CV520, 2025 WL 2675934, at \*4–6 (D. Neb. Sept. 18, 2025).

<sup>84</sup> *Jennings*, 583 U.S. at 289 (emphasis added).

General was directly asked—more than once and in more than one way—what statute an alien who entered illegally who was not subject to expedited removal was detained under, he unequivocally responded § 1226(a) every time.

**IV. Ms. Higareda-Cano has demonstrated that her current detention violates the due process clause of the Fifth Amendment, and as a result, she is entitled to the relief sought by his Petition.**

The purpose of § 2241 is to enjoin the government from continuing to unlawfully detain a person. Meanwhile, the purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm until the court makes a final decision on the relief sought.<sup>85</sup> To obtain an injunction, an applicant must establish four elements: (1) substantial likelihood of success on the merits; (2) substantial threat of irreparable harm; (3) the threatened injury outweighs any harm the order might cause the defendant; and (4) the injunction will not disserve the public interest.<sup>86</sup>

**A. Ms. Higareda-Cano's civil detention is unconstitutional.**

Ms. Higareda-Cano's current detention by ICE violates the due process clause of the Fifth Amendment.<sup>87</sup> This is demonstrated by looking to the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Pursuant to *Mathews*, courts weight the following factors:

- (1) the private interest that will be affected by the official action;

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<sup>85</sup> *Granny Goose Foods, Inc. v. Bhd. Of Teamsters & Auto Truck Drivers Loc. No. 70 of Alameda Cnty.*, 415 U.S. 423, 439 (1974).

<sup>86</sup> *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); see *Enrique Bernat F., S.A. v. Guadalajara, Inc.*, 210 F.3d 439, 442 (5th Cir. 2000).

<sup>87</sup> *Demore v. Kim*, 538 U.S. 510, 523 (2003).

- (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
- (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>88</sup>

Under these factors, as set forth in her initial filings, Ms. Higareda-Cano's civil detention is unconstitutional as applied to her. First, Ms. Higareda-Cano has a significant private interest in being free from detention. "The interest in being free from physical detention" is "the most elemental of liberty interests."<sup>89</sup> Moreover, when assessing the private interest, courts consider the detainee's conditions of confinement, specifically, "whether a detainee is held in conditions indistinguishable from criminal incarceration."<sup>90</sup>

*Private interest.* Ms. Higareda-Cano is a mother and human being with no criminal history who is on the cusp of finally being able to adjust her status to that of a LPR under § 1255(i) which required her presumably unlawful presence here in the United States in December 2000. Nonetheless, she has been locked up in overcrowded ICE detention without a bond hearing or the possibility of obtaining one for weeks. As in *Günaydin*, "[s]he is experiencing all the deprivations of incarceration, including loss of contact with friends and family, loss of income earning, . . . lack of privacy, and, most fundamentally, the lack

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<sup>88</sup> *Matthews*, 424 U.S. at 335.

<sup>89</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

<sup>90</sup> *Günaydin v. Trump*, No. 25-cv-01151 (JMB/DLM), 2025 WL 1459154, at \*7 (D. Minn. May 21, 2025) (citing *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27 (1st Cir. 2021); *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020)).

of freedom of movement.”<sup>91</sup> The first *Matthews* factor supports Ms. Higareda-Cano’s claim of a Fifth Amendment violation.

*Risk of erroneous deprivation.* Under this factor, courts must “assess whether the challenged procedure creates a risk of erroneous deprivation of individuals’ private rights and the degree to which alternative procedures could ameliorate these risks.”<sup>92</sup> Surely, all of the above, including Ms. Higareda-Cano’s 1255(i) eligibility, her cancellation of removal eligibility (only given to those who don’t have status and have been continuously present in the U.S. for at least 10-years), nearly three full decades of agency practice, and all of the other things discussed above and in prior filings—at a minimum—makes the risk of an erroneous deprivation of her liberty far more likely than not.

*Respondents’ competing interests.* Under this factor, the court weighs the private interests at stake and the risk of erroneous deprivation of those interests against Respondents’ interests.<sup>93</sup> Petitioner does not dispute that the government and the public have a strong interest in the enforcement of the immigration laws. But providing Ms. Higareda-Cano with a bond hearing does not have any impact on this interest. To the contrary, providing her—who is not a criminal and is plainly eligible now or will be soon for multiple avenues of obtaining LPR status—with a bond hearing is simply consistent with the repeated importance this country used to place on “life, liberty, and happiness” for

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at \*8.

<sup>93</sup> *Matthews*, 424 U.S. at 335.

all within it. Moreover, if the government actually does believe her release would cut against its interest in enforcing immigration laws somehow, it could express such concerns the way it did for decades: during a bond hearing before an IJ. Accordingly, the government's interest in upholding the Constitution and immigration laws is fulfilled through the relief sought by Ms. Higareda-Cano's habeas petition.

Because all three *Matthews* factors favor Ms. Higareda-Cano's position, this Court should determine that Ms. Higareda-Cano is likely to succeed in demonstrating that her detention without a bond hearing based on nothing more than being EWI contravenes her due process rights under the Fifth Amendment.<sup>94</sup>

B. Without an Injunction Ms. Higareda-Cano faces immediate irreparable harm, with an injunction no one—not the government and not the people it represents—will be harmed.

As a result of this unlawful detention and without this Court's intervention, Ms. Higareda-Cano faces immediate and irreparable harm. This conclusion is supported by Supreme Court precedent which has affirmed that “[f]reedom from imprisonment . . . lies at the heart of the liberty” protected by the Due Process Clause.<sup>95</sup> Accordingly, each day Ms. Higareda-Cano remains in custody, she is irreparably harmed by the loss of her fundamental liberty

In addition to the irreparable harm of the loss of liberty, Ms. Higareda-Cano potentially faces the harm of not being able to obtain LPR status through adjustment under

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<sup>94</sup> See *Martinez v. Secretary of Noem*, No. 5:25-cv-01007-JKP, 2025 WL 2598379, at \*1 (W.D. Tex. Sept. 8, 2025).

<sup>95</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

§ 1255(i) as a result of her § 1229a proceedings moving at a far faster pace than they would on the non-detained docket. Absent her more than 24 year old priority date becoming current or USCIS adjudicating the I-130 petition filed by her daughter before the individual hearing on January 27, 2025, she will be limited to seeking relief in the form of cancellation of removal (a more difficult relief to obtain).

Finally, the balancing of the equities weighs strongly in Ms. Higareda-Cano's favor. The injury to Ms. Higareda-Cano is undeniable: unlawful detention and forcing her to remain locked in a cage if she wants to pursue one of the statutory forms of relief Congress provided. Conversely, the harm to Respondents is nonexistent. The public interest is served by preserving "life, liberty, and happiness" and by preventing the waste of taxpayer resources on unlawful and unnecessary detention.

### **CONCLUSION**

For the above stated reasons, Ms. Higareda-Cano respectfully requests the Court find Respondent's detention of him without a bond hearing is contrary to the both the statutory scheme and the U.S. Constitution for the reasons set forth in her petition and above, and as a result order ICE to immediately release her.

RESPECTFULLY SUBMITTED,

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