UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSE ALTAGRACIA FRANCO DE LA CRUZ,

Petitioner,

v. 25-CV-06699-MAV

JOSEPH FREDEN, in his official capacity as Deputy Field Office Director, Buffalo Field Office, U.S. Immigration & Customs Enforcement, et al.,

Respondents.

RESPONDENTS' MEMORANDUM OF LAW IN REPLY TO PETITIONER'S OPPOSITION AND IN FURTHER SUPPORT OF THE MOTION TO DISMISS

Petitioner De La Cruz's arguments regarding seeking admission and applicant for admission fail because this case is *not* one based on the Board of Immigration Appeals' ("BIA") analysis in *Hurtado.* Instead, De La Cruz is an arriving alien who was paroled into the United States in 2017. ECF No. 8 at pg. 8. Regardless of his prior entries into the United States or his prior status, once he arrived on parole in 2017 his status was that of an arriving alien. In *Abitih v. Wilkinson*, Chief Judge Wolford decided a case in which an alien spent over six years in the United States after overstaying his visa, then left and returned to the United States on parole for an additional year before that parole expired. No. 6:20-CV-06403 EAW, 2021 WL 733806, at *1 (W.D.N.Y. Feb. 25, 2021). Despite having spent seven years in the country, Chief Judge Wolford held that Abitih was an arriving alien, and that such aliens "are not protected by the procedural protections of constitutional due process and are thus entitled only to the process authorized by Congress." *Id.* at *2. Accordingly, Abitih was not entitled to any bond hearing justifying his detention. *Id.*

In that same vein, although not arising out of the expiration of parole but instead the

withdrawal/termination of parole, the Tenth Circuit has addressed the issue at the heart of this Court's inquiry: whether an alien who was never lawfully admitted is entitled to additional due process protections due to their presence in the country for a long period of time (in this instance, twenty years). The Tenth Circuit said such aliens are not entitled to additional due process merely due to their presence in the country:

> Although he has been physically present in the United States for more than twenty years, Sierra is "legally considered to be detained at the border and hence as never having effected entry into this country." *Gisbert v. U.S. Attorney Gen.*, 988 F.2d 1437, 1440 (5th Cir.), amended by 997 F.2d 1122 (5th Cir.1993). The Due Process Clause does not provide him a liberty interest in being released on parole. *See Ho*, 204 F.3d at 1060. Ordinarily, then, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544, 70 S.Ct. 309, 94 L.Ed. 317 (1950).

Sierra Immigr. & Naturalization Serv., 258 F.3d 1213, 1218 (10th Cir. 2001).

Because De La Cruz was paroled into the country and that parole has now ended, his immigration status reverts back to what it was *at the time of his parole.* 8 U.S.C. § 11182(d)(5)(A) (". . . the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."). Thus, De La Cruz is unequivocally and without a doubt treated as an alien stopped at the border who is both an applicant for admission and seeking admission into the United States. The *Campbell* court erred by ignoring this important distinction between a paroled alien (who is treated as if stopped at the border) and an alien who surreptitiously enters the United States but is being treated as if at the border under the new *Hurtado* framework. This case falls within the confines of the former description, which is unchanged by any recent decisions by the BIA. Thus, the *Campbell* court ignored the limited role parole plays and looked at Campbell as of

2025 while he was within the United States, albeit not lawfully admitted. De La Cruz, instead, is only allowed to enter the United States for the limited purpose of parole, and, for legal purposes, is deemed to remain at the border. Thus, even under the definition of "seeking admission" proposed by Petitioner, he is seeking lawful admission as opposed to his unlawful present status.

De La Cruz' s arguments regarding due process are likewise unavailing. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Supreme Court essentially held that even spending 25 years in the United States does not entitle an arriving alien any more due process than an alien arriving at the United States border in the first instance. *Id.* at 213 ("Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding."); *see Leng May Ma v. Barber,* 357 U.S. 185, 190 (1958) ("The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally 'within the United States' is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court."). And *Thuraissigiam* made clear that an alien in De La Cruz's position "has no entitlement to procedural rights other than those afforded by statute." *Department of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 107 (2020). And although *Thuraissigiam* was decided with regards to a challenge to immigration admission procedures, the Supreme Court made clear "the continuing vitality of *Mezei*, which addressed the issue of detention. *See Thuraissigiam*, 140 S.Ct. at 1982. Moreover, nothing in *Thuraissigiam* suggests that its discussion of whether an alien who is apprehended shortly after unlawfully entering the country has effected an

entry is limited to the admission context." *Gonzales Garcia v. Rosen*, 513 F. Supp. 3d 329, 334 (W.D.N.Y. 2021). Thus, De La Cruz is not entitled to a bond hearing as an arriving alien with extremely limited due process rights.

Accordingly, the Petition should be dismissed in its entirety.

Respectfully submitted,

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