

United States District Court  
Western District of Texas  
San Antonio Division

Keiber Mishel Yovera-Vivas,  
Petitioner,

v.

Todd M. Lyons, Acting Director of US ICE,  
et al.,  
Respondents.

Case No. 5:25-CV-01754-OLG

**Federal Respondents' Response to  
Petition for Writ of Habeas Corpus**

Federal<sup>1</sup> Respondents provide the following timely response to Petitioner's habeas petition and concurrently filed temporary restraining order ("TRO"). Any allegations that are not specifically admitted herein are denied. Petitioner is not entitled to the relief he seeks, including attorney's fees under the Equal Access to Justice Act ("EAJA")<sup>2</sup>, and this Court should deny this habeas petition without the need for an evidentiary hearing. Petitioner incorrectly alleges that the Board of Immigration Appeals (Board) opinion in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (2025), applies. ECF No. 1 at 3. This case is squarely covered by a different Board opinion, *Matter of M-S-*, 27 I&N Dec. 509 (2019), mandating Petitioner's detention.

**I. Relevant Facts and Procedural History**

Petitioner is a citizen of Venezuela who was apprehended upon his unlawful entry into the United States, served with a Notice to Appear (NTA) in immigration court, and released from custody by DHS. *See* ECF No. 1 at 1; ECF No. 1 ¶¶ 14, 16-17; *see also* Ex. A Petitioner's NTA.

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<sup>1</sup> The Department of Justice represents only federal employees in this action.

<sup>2</sup> *Barco v. Witte*, 65 F.4th 782 (5th Cir. 2023).

Petitioner unlawfully entered the United States in 2023, was placed in expedited removal and issued a Notice to Appear (NTA) after an asylum officer determined he demonstrated a credible fear of persecution or torture. *See* Ex. A Petitioner’s NTA; Ex. B Petitioner’s I-213.

## **II. Argument**

As a threshold issue, the only relief available to Petitioner through habeas is release from custody. 28 U.S.C. § 2241; *DHS v. Thuraissigiam*, 591 U.S. 103, 118–19 (2020). Petitioner, however, has no claim to any lawful status in the United States that would permit him to reside lawfully in the United States upon release. Even if this Court were to order him released from custody, he would be subject to re-arrest as an alien present within the United States without having been admitted. Ordering release in this circumstance produces no net gain to Petitioner, while mandating continued detention until at least the conclusion of removal proceedings furthers the government’s interests in enforcing the immigration laws. ICE will release Petitioner from custody, but only under a grant of relief from removal or an executed removal order.

### **A. Petitioner Is Detained under § 1225(b)(1), Not § 1225(b)(2).**

Petitioner’s 2023 NTA shows he was first placed in expedited removal, under INA § 235(b)(1), 8 U.S.C. § 1225, and then in “full” removal proceedings, under INA § 240, 8 U.S.C. § 1229. Ex. A. Petitioner’s NTA. As an application for admission, intercepted at or near the port of entry shortly after unlawfully entering, who indicates a fear of persecution, and whom an asylum officer determines has a credible fear of persecution or torture, “shall be detained for further consideration of the application for asylum,” properly described under § 1225(b)(1)(A)(ii), and not under the “catchall” provision. *Compare* 8 U.S.C. §§ 1225(b)(1)(A)(ii); 1225(b)(1)(B)(ii) *with* § 1225(b)(2)(A).

### **B. Start with the Statutory Text: § 1225(a) Unambiguously Defines an Applicant for Admission as an Alien Present in the United States Without Having Been Admitted.**

The statutory language is unambiguous: “An alien present in the United States who has not been admitted ... shall be deemed ... an applicant for admission.” 8 U.S.C. § 1225(a)(1); *Thuraissigiam*, 591 U.S. at 109; *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018); *Vargas v. Lopez*, No. 25-CV-526, 2025 WL 2780351 at \*4–9 (D. Neb. Sept. 30, 2025); *Chavez v. Noem*, No. 25-CV-23250CAB-SBC, 2025 WL 2730228 at \*4–5 (S.D. Cal. Sept. 24, 2025). Given the plain language of § 1225(a)(1), Petitioner cannot plausibly argue that he is not an applicant for admission, as when he unlawfully entered the United States, he was placed in expedited removal. ECF No. 1-2 at 1; 8 U.S.C. § 1225(b)(1). That he was subsequently released from custody, does not change the fact that he was an applicant for admission at the time he was initially apprehended. After Petitioner was released, the Attorney General issued his opinion in 2019, *Matter of M-S-*, applying prospectively, that aliens, like Petitioner, who established a credible fear, “**shall** be detained for further consideration of the application for asylum.” 27 I&N Dec. 509, 510 (2019) (emphasis added).

**C. Congress Intended to Mandate Detention of Applicants for Admission who were Placed in Full Removal Proceedings after Receiving a Positive Credible Fear Determination.**

Section 235 expressly provides for the detention of aliens originally placed in expedited removal. *See M-S-*, 27 I&N Dec. at 3. Such aliens “shall be detained pending a final determination of credible fear.” *Id.*; INA § 235(b)(1)(B)(iii)(IV). The Text of the Act mandates Petitioner’s detention. Section 235(b)(1)(B)(ii) provides that, “if an alien in expedited proceedings establishes a credible fear, he “shall be detained for further consideration of the application for asylum.” *Id.* “The word ‘shall’ generally imposes a nondiscretionary duty.” *Id.*; *see also SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018). The Statute’s plain language requires detention and the petition should be denied.

**D. Petitioner Does Not Overcome Jurisdictional Hurdles.**

Where an alien, like this Petitioner, challenges the decision to detain him in the first place or to seek a removal order against him, or if an alien challenges any part of the process by which his removability will be determined, the court lacks jurisdiction to review that challenge. 8 U.S.C. § 1252(g); *see also Jennings*, 583 U.S. at 294–95. In *Jennings*, the Court did not find that the claims were barred, because unlike Petitioner here, the aliens in that case were challenging their continued and allegedly prolonged detention during removal proceedings. *Id.* Here, Petitioner is challenging the decision to detain him in the first place, which arises directly from the decision to commence and/or adjudicate removal proceedings against him after encountering him upon unlawful entry at the border. *See id.*

Even if the alien claims he is not appropriately categorized as an applicant for admission subject to § 1225(b), such a challenge must be raised before an immigration judge in removal proceedings. 8 U.S.C. § 1225(b)(4). In other words, if an alien contests that he is an applicant for admission subject to removal under § 1225(b), any claim challenging his continued detention under § 1225(b) is inextricably intertwined with the removal proceedings themselves, meaning that judicial review is available only through the court of appeals following a final administrative order of removal. *See* 8 U.S.C. § 1225(b)(4).<sup>3</sup> This is consistent with the channeling provision at 8 U.S.C. § 1252(b)(9), which mandates that judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action or proceeding brought to remove an alien from the United States must be reviewed by the

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<sup>3</sup> While bond proceedings under § 1226(a) are separate and apart from removal proceedings under § 1229a, challenges to decisions under § 1225(b), including the mandatory detention provision found within that statute, are to be raised in the same § 1229a proceedings. *See* 8 U.S.C. § 1225(b)(4).

court of appeals upon review of a final order of removal. *See SQDC v. Bondi*, No. 25–3348 (PAM/DLM), 2025 WL2617973 (D. Minn. Sept. 9, 2025).

**E. On Its Face, and As Applied to Petitioner, § 1225(b) Comports with Due Process.**

Section 1225 does not provide for a bond hearing, regardless of whether the applicant for admission is placed into full removal proceedings. The Supreme Court upheld the facial constitutionality of § 1225(b) in *Thuraissigiam*, 591 U.S. at 140 (finding that applicants for admission are entitled only to the protections set forth by statute and that “the Due Process Clause provides nothing more”). An “expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause.” *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12 (1983). That the alien in *Thuraissigiam* failed to request his own release in his prayer for relief does not make the holding any less binding here. *But see Lopez-Arevelo v. Ripa*, No. 25–CV–337–KC, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025). The alien in *Thuraissigiam* undisputedly brought his claim in habeas, and the Court noted that even if he had requested release, his claim would have failed. *Thuraissigiam*, 591 U.S. at 118–19. In any event, Petitioner is not entitled to more process than what Congress provided him by statute, regardless of the applicable statute. *Id.*; *see also Jennings*, 583 U.S. at 297–303.

Mandatory detention of an applicant for admission during “full” removal proceedings does not violate due process, because the constitutional protections are built into those proceedings, regardless of whether the alien is detained. 8 U.S.C. § 1229a. The alien is served with a charging document (NTA) outlining the factual allegations and the charge(s) of removability against her. *Id.* § 1229a(a)(2). He has an opportunity to be heard by an immigration judge and represented by counsel of his choosing at no expense to the government. *Id.* § 1229a(b)(1), (b)(4)(A). He can seek reasonable continuances to prepare any applications for relief from

removal, or he can waive that right and seek immediate removal or voluntary departure. *Id.* § 1229a(b)(4)(B), (c)(4). Should he receive any adverse decision, he has the right to seek judicial review of the complete record and that decision not only administratively, but also in the circuit court of appeals. *Id.* § 1229a(b)(4)(C), (c)(5). Moreover, relief applications are heard more expeditiously on the detained docket than the non-detained docket. *See* Section 9.1(e), Executive Office for Immigration Review | 9.1 - Detention | United States Department of Justice (last accessed Oct. 18, 2025).

While an as-applied constitutional challenge, such as a prolonged detention claim, may be brought before the district court in certain circumstances, Petitioner cannot raise such a claim where he has been detained for only a brief period pending his removal proceedings. For aliens, like Petitioner, who are detained during removal proceedings as applicants for admission, what Congress provided to them by statute satisfies due process. *Thuraissigiam*, 591 U.S. at 140. As applied here to Petitioner, § 1225(b)(1)(A)(iii)(II) does not violate due process. *See Thuraissigiam*, 591 U.S. at 140.

### **III. Response to the Court's Order of December 19, 2025**

In the Court's Order of December 19, 2025, Respondents were asked to consider the attached orders and identify any material differences that exist between the facts in this case and those presented in those cases. ECF No. 3 at 2.

Petitioner's case does have material differences from *Rahimi v. Thompson*, Order, No. SA-25-CV-1338-OLG (W.D. Tex. Dec. 4, 2025) and *Perez-Puerta v. Johnson*, Order, No. SA-25-CV-01476-OLG (W.D. Tex. Dec. 15, 2025). In *Rahimi v. Thompson*, the petitioner was detained pursuant to the "catchall" provision under 8 U.S.C. § 1225(b)(2). *See Rahimi v. Thompson*, Order, No. SA-25-CV-1338-OLG ECF No. 13. Additionally, the *Rahimi v. Thompson*

case is different as that case dealt with post-order not pre-order detention. *Id.* Here, Petitioner was placed into expedited removal proceedings when initially encountered, received a positive credible fear determination, and then placed into “full removal” proceedings. *See* Ex. A Petitioner’s NTA. Petitioner therefore falls squarely under 8 U.S.C. § 1225(b)(1)(B)(ii) and not the catchall provision of 8 U.S.C. § 1225(b)(2).

The *Perez-Puerta v. Johnson* case is also distinct from Petitioner’s case. In *Perez-Puerta*, petitioner was placed into full removal proceedings rather than going through the Expedited Removal process so the court found that 8 U.S.C. § 1225(b)(1) did not apply. *See Perez-Puerta v. Johnson*, Order, No. SA-25-CV-01476-OLG at 1-2, 4-5. Here, Petitioners NTA and I-213 clearly show that Petitioner was initially placed into Expedited Removal proceedings and was only issued an NTA after a positive credible fear determination was made. Ex. A; Ex. B. Once a positive credible fear determination has been made, 8 U.S.C. § 1225(b)(1)(B)(ii) mandates detention for further consideration of an application for asylum.

#### **IV. Conclusion**

Petitioner is not left without a remedy. Though sparsely granted in only the most extenuating circumstances, Petitioner nonetheless may seek a humanitarian parole, which is granted in the exercise of DHS’s discretion. 8 U.S.C. § 1182(d)(5). Petitioner is already in “full” removal proceedings before an immigration judge, which includes the right to counsel at no expense to the government and the right to seek judicial review administratively and through the circuit court. 8 U.S.C. § 1229a. Finally, detention is not indefinite, because removal proceedings will end, either with a grant of relief or with an order of removal. The Court should deny the Petition.

Respectfully submitted,

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