



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

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*86 Chambers Street  
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January 16, 2026

**By ECF**

Honorable Ronnie Abrams  
United States District Judge  
Southern District of New York  
40 Foley Square  
New York, New York 10007

Re: *Jinhong Xiao v. Almodovar, et al.*, No. 26 Civ. 239 (RA)

This Office represents the government in the above-referenced immigration habeas corpus action, in which petitioner Jinhong Xiao (“Petitioner”), an alien in removal proceedings, challenges his detention by U.S. Immigration and Customs Enforcement (“ICE”). The primary legal issue presented concerns the statutory authority for Petitioner’s detention—whether it is 8 U.S.C. § 1225(b)(2)(A), as the government maintains, or 8 U.S.C. § 1226(a)—and the attendant due process issues stemming from such authority. Petitioner principally seeks an order from this Court directing ICE to release him from detention.

While reserving all rights, including the right to appeal, the government submits this letter in lieu of a formal responsive memorandum of law to conserve judicial and party resources, and to expedite the Court’s consideration of this case in light of this Court’s decision in *Rivera Esperanza v. Francis, et al.*, No. 25 Civ. 8727 (RA), 2025 WL 3513983 (S.D.N.Y. Dec. 8, 2025), as discussed below.

**A. Relevant Underlying Facts**

On June 27, 2023, Petitioner, a native and citizen of the People’s Republic of China, unlawfully entered the United States without inspection. *See* Declaration of John Tucciarone (“Tucciarone Decl.”) ¶ 3 & Ex. A. Petitioner was encountered by U.S. Customs and Border Protection (“CBP”) in or near Otay Mesa, California on or about June 30, 2023, after which he was arrested and transported to the Chula Vista Border Patrol Station for further processing. *Id.* ¶ 4 & Exs. A, B. On the same day, due to lack of bed space, Petitioner was released from custody on an Order of Recognizance. *Id.* ¶ 5 & Ex. C. Petitioner was also served with a Form I-862 Notice to Appear, charging him as inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *Id.* ¶ 6 & Ex. D. The NTA directed Petitioner to appear before an immigration judge at 26 Federal Plaza, New York, New York, on December 8, 2023. *Id.* Petitioner was also served with a Form I-286 Notice of Custody Determination, which confirmed that he was being released on his own recognizance. *Id.* ¶ 7 & Ex. E.

On January 12, 2026, Petitioner appeared at ICE's New York Field Office at 26 Federal Plaza in New York, New York, for a scheduled check-in. *Id.* ¶ 8. That day, ICE cancelled the I-220A. *Id.* ¶ 9 & Ex. F. Petitioner was taken into custody and escorted to the ICE processing center area located in the building for further processing. *Id.* ¶ 10 & Exs. G & H. Petitioner is currently detained at the Delaney Hall Detention Facility in Newark, New Jersey pending removal proceedings, pursuant to 8 U.S.C. § 1225(b)(2)(A).

## **B. Habeas Petition**

Petitioner commenced this action on January 12, 2026, ECF No. 1, and filed an amended petition on January 13, 2026 (the "Amended Petition" or "Am. Pet."). ECF No. 5. Petitioner challenges his detention stemming from his arrest by ICE on January 12, 2026. He argues that the detention provision of 8 U.S.C. § 1225(b)(2)(A) does not apply to him because he previously entered and is residing in the United States. Am. Pet. ¶ 41. Instead, Petitioner contends that his detention is governed by 8 U.S.C. § 1226(a), which allows for release on conditional parole or bond. *Id.* ¶ 42.

In Counts One and Two, Petitioner asserts that application of § 1225(b)(2)(A) to him violates the INA and applicable bond regulations. *Id.* ¶¶ 58–60, 62–64. In Count Three, Petitioner asserts that ICE's detention of Petitioner without a bond redetermination hearing to determine whether he is a flight risk or a danger to others violates his Fifth Amendment due process rights. *Id.* ¶¶ 66–70. Finally, Petitioner argues that if this Court determines that he is detained pursuant to 8 U.S.C. § 1226(a), he should not be required to exhaust his administrative remedies through a bond hearing before obtaining relief in federal court. *Id.* ¶¶ 71–79.

## **C. *Rivera Esperanza v. Francis***

On November 12, 2025, this Court issued an order on the principal legal question presented in this action in a similar habeas case challenging an alien's re-detention after prior release on an order of recognizance at the border. There, the petitioner attempted to enter the country in 2023 and was encountered by CBP officers soon after crossing at the border. No. 25 Civ. 8728, ECF No. 11-1 (NTA). The petitioner was placed in removal proceedings and then released on his own recognizance. Following an appointment with ICE, on October 21, 2025, the petitioner was detained by ICE, and filed a habeas petition challenging the lawfulness of his detention.

The Court granted the petition and ordered the petitioner's immediate release, ruling that the petitioner's detention was governed by Section 1226, not Section 1225. *Rivera Esperanza*, 2025 WL 35139833 at \*9. In reaching that conclusion, the Court was "persuaded by the reasoning in the large majority of cases 'reject[ing] the notion that § 1225(b) applies to all ... individuals,' never lawfully admitted but present in the United States." *Id.* at \*6 (citing *Lopez Benitez v. Francis*, No. 25 Civ. 5937 (DEH), 2025 WL 2371588, at \*3 (S.D.N.Y. Aug. 13, 2025)). The Court further held that due to the lack of a basis for petitioner's arrest, either in the record or in the brief, "this Court, like so many before it, finds that Mr. Rivera Esperanza's detention violated the Due Process Clause of the Fifth Amendment." *Id.* at \*8.

## D. Discussion

With respect to Counts I and II, while the government respectfully disagrees with the Court's decision in *Rivera Esperanza*, the government acknowledges that the decision would control the result in this case if the Court adheres to that decision, as the facts of this case are materially indistinguishable from those of *Rivera Esperanza*—in that Petitioner was charged with inadmissibility under 8 U.S.C. § 1182(a)(6)(A)(i) as an alien present in the United States without being admitted or paroled and then subsequently detained pursuant to § 1225(b)(2)(A). Thus, to conserve judicial resources and to expedite the Court's consideration of this case, the government hereby relies upon, and incorporates by reference, the legal arguments it presented in *Rivera Esperanza*,<sup>1</sup> and the Court can decide this matter without further briefing. However, should the Court prefer to receive a formal opposition brief in this matter, we will file such a brief upon the Court's request.<sup>2</sup>

Further, notwithstanding its submission of this letter in lieu of a formal brief, the government reserves all rights, including the right to appeal. Accordingly, for the reasons set forth in the government's brief in *Rivera Esperanza v. Francis*, respondents respectfully request that the Court deny this habeas petition.

Lastly, it is premature for this Court to prejudge or make any finding with respect to any potential fee application under the Equal Access to Justice Act ("EAJA"), as the Court lacks jurisdiction to address such a fee application until after a final judgment has been entered. Under EAJA, a party seeking a fee award must submit its application "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). A "final judgment" is "a judgment that is final and not appealable." *Id.* § 2412(d)(2)(G). That provision has been interpreted to mean that the "EAJA clock begins to run after the time to appeal that 'final judgment' has expired." *Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991) (finding an EAJA application was premature when it was filed prior to entry of a "final judgment"); *see also, e.g., United States v. 27.09 Acres of Land*, 1 F.3d 107, 111 (2d Cir. 1993) ("The record on this appeal reflects neither entry of a final judgment, nor

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<sup>1</sup> Specifically, the government incorporates by reference all arguments raised in its Memorandum of Law in Opposition to the Petition, ECF No. 12, which is annexed to this letter brief as Exhibit A. Since the time of this Court's decision, other judges in this District have issued decisions reaching the same result (by far, the majority view), but two have reached the opposite result. *See Yinxiao Chen v. Almodovar*, No. 25 Civ. 9670 (JPC), 2026 WL 100761 (S.D.N.Y. Jan. 14, 2026); *Liang v. Almodovar*, 25 Civ. 9322 (MKV), 2025 WL 3641512 (S.D.N.Y. Dec. 15, 2025); *Xiaoquan Chen v. Almodovar*, No. 25 Civ. 8350 (MKV), 2025 WL 3484855 (S.D.N.Y. Dec. 4, 2025). Further, the government notes for the Court's awareness that there are several appeals that have been filed and are pending at the Second Circuit on this issue. *See, e.g., Barbosa Da Cunha v. Freden*, No. 25-CV-6532-MAV, 2025 WL 3280575 (W.D.N.Y. Nov. 25, 2025), *appeal filed*, *Barbosa Da Cunha v. Moniz*, No. 25-3141 (2d Cir.).

<sup>2</sup> Given the above, it is unnecessary for the Court to reach Count III or Petitioner's exhaustion argument. If the Court wishes to address those claims, the government respectfully requests an opportunity to provide a response to those claims.

