IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 26-cv-01099-SKC

JIORDAN HECTOR LOPEZ RICARDO,

Petitioner,

v.

JUAN BALTAZAR, Warden of the Denver Contract Detention Facility;
GEORGE VALDEZ,[1] Field Office Director, Denver Field Office, U.S. Immigration and Customs Enforcement;
TODD M. LYONS, Acting Director, U.S. Immigration and Customs Enforcement;
MARKWAYNE MULLIN, Secretary, U.S. Department of Homeland Security; and
TODD BLANCHE,[2] Acting United States Attorney General,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF (ECF No. 9)

Pursuant to this Court's Order (ECF No. 9), Respondents submit this supplemental brief addressing the three issues raised by the Court: (1) "[w]hether, notwithstanding the immigration judge's grant of Petitioner's Application for Adjustment of Status that is currently on appeal, Petitioner may be detained under 8 U.S.C. § 1226;" (2) "[w]hat effect the grant of Petitioner's Application for Adjustment of Status has on Petitioner's due process claims;" and (3) "[w]hether the appeal has any effect on the due process considerations." ECF No. 9. As

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[1] George Valdez, the Acting Field Office Director for ICE's Denver Field Office, is substituted for Robert G. Hagan pursuant to Fed. R. Civ. P. 25(d).
[2] Todd Blanche, Acting United States Attorney General, is automatically substituted for Pam Bondi pursuant to Fed. R. Civ. P. 25(d).

explained below, the Immigration Judge's ("IJ") order granting Petitioner adjustment of status under the Cuban Adjustment Act is not final and currently does not have any legal effect because it is on appeal to the Board of Immigration Appeals ("BIA"). Therefore, in response to the Court's Order: (1) because Petitioner's removal proceedings are ongoing, he could be lawfully detained pursuant to Section 1226(a), (2) the IJ's order granting adjustment of status is not final and currently has no legal effect, so it does not impact Petitioner's due process claims, and (3) the appeal to the BIA also does not impact Petitioner's due process claims because he is receiving the process he is due under the relevant statute.

BACKGROUND

On March 18, 2026, Petitioner filed his habeas petition challenging his detention by Immigration and Customs Enforcement ("ICE"). ECF No. 1. As relevant here, Petitioner alleges that on February 6, 2026, an IJ granted Petitioner's I-485, Application for Adjustment of Status under the Cuban Adjustment Act. *Id.* ¶ 2. The Department of Homeland Security ("DHS") timely appealed the IJ's ruling to the BIA. *Id.* at 42 (Notice of Appeal). Petitioner alleges that his continued detention during the pendency of the appeal to the BIA is a violation of the Immigration and Nationality Act, 8 U.S.C. § 1226(a), and his substantive and procedural due process rights. *Id.* ¶¶ 39-71. As relief, Petitioner seeks "immediate[] release" from ICE custody and an order requiring "Respondents to implement and give effect to the Immigration Judge's grant" of Petitioner's

adjustment of status including, among other things, issuing "documentary proof of lawful permanent resident status." *Id.* at 14-15.

Respondents responded to the Petition and the Court's Order to Show Cause. ECF No. 8. Respondents explained that their position is that Petitioner is subject to mandatory detention under § 1225(b). *Id.* at 4-6. In addition, as relevant here, Respondents argued that Petitioner's removal proceedings have not been finally terminated because the IJ's order granting him adjustment of status is on appeal, and, as such, he is still subject to detention pursuant to § 1225(b)(2). *Id.* at 7-8.

On April 3, 2026, the Court ordered "additional briefing on" three issues: (1) "[w]hether, notwithstanding the immigration judge's grant of Petitioner's Application for Adjustment of Status that is currently on appeal, Petitioner may be detained under 8 U.S.C. § 1226;" (2) "[w]hat effect the grant of Petitioner's Application for Adjustment of Status has on Petitioner's due process claims;" and (3) "[w]hether the appeal has any effect on the due process considerations." ECF No. 9.

ARGUMENT

I. Petitioner is detained pursuant to § 1225(b)(2), but he could be detained pursuant to § 1226(a) because his removal proceedings are not final.

As Respondents explained, it is Respondents' position that Petitioner is subject to detention pursuant to 8 U.S.C. § 1225(b)(2). ECF No. 8 at 4. But, notwithstanding the IJ's grant of adjustment of status, Petitioner could be detained

pursuant to 8 U.S.C. § 1226(a) if the Court determines that is the proper basis for detention because his removal proceedings are not yet final.

In general, Department of Justice regulations (which govern IJs and the BIA) provide that a ruling of an IJ does not become final if an appeal is taken, or before the expiration of the time to take an appeal. Rather, "the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first." 8 C.F.R. § 1003.39 (in 8 C.F.R. Part 1003, Subpart C (Immigration Court—Rules of Procedure)); *see also* 8 U.S.C. § 1003.6(a) ("the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not . . . be executed while an appeal is pending").

Indeed, Congress has expressly authorized federal agencies to specify, by rule, that an interim ruling is inoperative until an internal agency appeal is completed. In the Administrative Procedure Act, Congress specified that an agency decision would become final "unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704. As the Supreme Court has explained, this provision permits an agency to provide for an initial decision to be "inoperative" during any intra-agency appeal:

> In its report on the APA, the Senate Judiciary Committee explained that [this provision means that] . . . an initial decision made by a hearing officer becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by

> rule. . . . [A]n agency may permit an examiner to make the initial decision in a case, which becomes the agency's decision in the absence of an appeal to or review by the agency. If there is such review or appeal, the examiner's initial decision becomes inoperative until the agency determines the matter. . . . .
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> The purpose of [§ 704] was to permit agencies to require an appeal to 'superior agency authority' before an examiner's initial decision became final. . . . Agencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be 'inoperative' pending appeal.

Darby v. Cisneros, 509 U.S. 137, 147-152 (1993) (internal citations and quotation marks omitted).

Section 1003.39 is just such a rule. In accordance with the APA, it ensures that the IJ's decision is not operative where the decision has been timely appealed to the BIA. This process accords with "the general rule that an agency action is not final until the agency has completed its decision-making process." *Farrell-Cooper Mining Co. v. U.S. Dep't of Interior*, 864 F.3d 1105, 1114 (10th Cir. 2017); *see also Kewayfati v. Bondi*, ___ F.4th ___, 2026 WL 100809, at *5 (5th Cir. Jan. 14, 2026) (explaining, in the context of asylum applications, that an IJ "renders a decision subject to review by the BIA, which affords a greater chance to discover and correct . . . errors before any judicial intervention," which is part of an "integrated administrative process that culminates with a BIA decision that speaks with final authority for the executive branch. . . . Until that point, the executive branch has not completed its decisionmaking"(internal quotation marks omitted)).

8 U.S.C. § 1226(a) provides that a noncitizen "may be" "detained pending a decision on whether the [noncitizen] is to be removed from the United States." As

the Supreme Court explained in *Jennings*, "U.S. immigration law . . . authorizes the Government to detain certain aliens . . . pending the outcome of removal proceedings under §§ 1226(a) and (c)." *Jennings v. Rodriguez*, 583 U.S. 281, 289, (2018); *see also de Jesus de Jesus v. Wolf*, No. 1:20-cv-03637-RBJ, 2021 WL 603056, at *2 (D. Colo. Feb. 16, 2021) (rejecting petitioner's argument that "that 'a decision' was made by the immigration judge, and therefore, ICE's authority to detain him [under Section 1226(a)] expired" because "[a]n immigration judge's order is not final until either the parties have waived an appeal or the time to appeal has expired.").

Here, Petitioner's removal proceedings are ongoing. The IJ's order granting Petitioner adjustment of status is not yet final because it is on appeal to the BIA. Because his removal proceedings are still pending, Petitioner could be subject to detention pursuant to Section 1226(a).

II. The IJ's order granting Petitioner adjustment of status is not final and, as such, does not impact Petitioner's due process claims.

Because the IJ's order is not final and currently has no legal impact, the grant of Petitioner's Application for Adjustment of Status does not impact his due process claims.

In support of his due process claim, Petitioner alleges that because he was granted adjustment of status by the IJ, "Respondents have no . . . authority to detain him." ECF No. 1 ¶ 50. But, as explained above, the IJ's order is not final and cannot take effect during the pendency of the appeal to the BIA. Indeed, the regulations provide that the IJ's decision "shall not" "be executed while an appeal is

pending." 8 U.S.C. § 1003.6(a). In other words, Petitioner is not yet a lawful permanent resident and is still in removal proceedings. *See* ECF No. 1 ¶ 52 (alleging Petitioner "is a lawful permanent resident who is not removable from the United States"). And because he is still in removal proceedings his continued detention is justified under 8 U.S.C. § 1225(b)(2). Therefore, the IJ's grant of Petitioner's Application for Adjustment of Status does not impact his due process claims because the IJ's order is not final or operative while the BIA appeal is pending.

III. The appeal to the BIA does not impact Petitioner's due process claims.

DHS's appeal of the IJ's decision to the BIA does not impact Petitioner's due process claims. Regarding substantive due process, Petitioner does not show a violation, as his removal proceedings will have a definite end point once the BIA rules on the appeal, and the Supreme Court has approved mandatory detention during such proceedings. Regarding procedural due process, Petitioner fails to show a violation because he is subject to detention under § 1225(b)(2)(A), and he has received the due process that is set forth by statute.

First, Petitioner has not shown that his detention violates substantive due process. The Supreme Court "has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003). The Supreme Court acknowledged the "longstanding view that the Government may constitutionally detain deportable

aliens during the limited period necessary for their removal proceedings . . . ." *Id.* at 526. Later, in *Jennings*, the Court observed that in *Demore,* the Court, in rejecting the due process challenge, had relied on the principle that the detention during removal proceedings "has a definite termination point: the conclusion of removal proceedings." 583 U.S. at 304 (internal quotation marks omitted). Here, under *Demore*, Petitioner has not shown that his detention is unconstitutional. He is detained during his removal proceedings, which have a definite end point—when the BIA rules on the pending appeal.

Second, to show that he has been denied procedural due process, Petitioner would need to show that he has been deprived of a statutory right. The Supreme Court has "often reiterated" the "important rule" that for "foreigners who have never been . . . admitted into the country pursuant to law," "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020). In *Thuraissigiam*, the Court explained that an alien who was an "applicant for admission" had "only those rights regarding admission that Congress has provided by statute," and "the Due Process Clause provides nothing more." *Id.* at 140. As explained in the Respondents' Response (ECF No. 8), it is Respondents' position that Petitioner has not been deprived of any statutory right as he is properly detained under § 1225(b)(2)(A).

In sum, Petitioner's removal proceedings are ongoing and, as such, his detention under Section 1225(b)(2) is permitted and he has received the due process set forth by statute.

Dated: April 10, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2026, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

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