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US IMMIGRATION & NATIONALITY LAW

BIA GRASPS FOR LOPER BRIGHT LIKE A DROWNING PERSON GRASPS FOR STRAWS

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On September 5, 2025, the BIA held in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), that a noncitizen respondent who entered the US without inspection and was placed in removal proceedings is not eligible for bond under INA 235(b)(2)(A) despite allowing bond since the passage of the Immigration Act of 1996. Mr. Yajure Hurtado entered the United States without inspection in November 2022. He was later granted Temporary Protected Status, but that designation expired on April 2, 2025, and he was thereafter apprehended and placed in removal proceedings. He requested bond, but the Immigration Judge indicated that he did not have the jurisdiction to set bond given the circumstances of Mr. Yajure Hurtado's case and, in the alternative, that bond would be denied because Mr. Yajure Hurtado posed a flight risk.

The BIA affirmed that an IJ does not have the jurisdiction to grant the bond request because any noncitizens present in the US without inspection are applicants for admission pursuant to INA 235(b)(2)(A) and subject to mandatory detention.

After almost three decades, the BIA finds now finds that the language in INA 235(b)(2)(A) is clear, but completely disregarded INA 236(a), which provides for the release on bond of a noncitizen who is not ineligible under the categories prescribed in INA 236(c), which do not make reference to respondents who have entered without inspection. The BIA addressed this discrepancy but stating that "nothing in the statutory text of section 236(c), including the text of the amendments made by the Laken Riley Act, purports to alter or undermine the provisions of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), requiring that aliens who fall within the definition of the statute 'shall be

detained for a proceeding under section 240"'.

This re-interpretation of the applicable statutory provisions by the BIA will result in the detention of respondents even if they have been in the United States for many years and have a meritorious application for relief. The BIA knows that a federal court will not give deference to its interpretation of the ambiguity posed by two competing statutory provisions, INA 235(b)(2)(A) and INA 236(c), and so preemptively invoked *Loper Bright v. Raimondo*, 603 US 369 (2024) to conclude that the language under INA 235(b)(1)(2) is clear and explicit without regard to the contradiction posed in neighboring INA 236(c). In *Loper Bright v. Raimondo*, which was discussed at length in a prior blog, the Supreme Court abolished the long-standing Chevron doctrine, under which, courts were required to defer to the government agency's interpretation of an ambiguous statute.

The BIA in *Yajure Hurtado* invoked *Loper Bright*, stating: "the statutory text of the INA is not 'doubtful and ambiguous' but is instead clear and explicit in requiring mandatory detention of all aliens who are applicants for admission, without regard to how many years the alien has been residing in the United States without lawful status. See INA § 235(b)(1), (2), 8 U.S.C. § 1225(b)(1), (2). The Supreme Court in *Loper Bright* did not hold that the long-standing practice of the government can somehow change, or even eviscerate, explicit statutory text that is contrary to that practice." But the maze of statutory provisions, which include INA 235(b)(1)(2)(A) and INA 236(c) and 30 plus years of allowing bond, do not clearly and explicitly authorize mandatory detention for noncitizens who entered without inspection.

AILA Executive Director Ben Johnson aptly remarked, "Stripping immigration judges of their authority to conduct bond hearings or redetermine custody for potentially millions is a disastrous plan. Without justification, individuals who have patiently awaited their fair day in court will now be indiscriminately detained. This effectively eradicates the possibility of bond for many, regardless of their long-standing residence, employment, or contributions to our society. Detaining vast numbers without judicial review, often in inhumane conditions, will inflict irreparable harm." This concern is further exacerbated by the recent Supreme Court decision in *Noem v. Perdomo*, which permits ICE to detain and remove individuals based on racial profiling. Those who entered without inspection face detention without bond until removal, even if their detention is

solely due to the color of their skin.

It is hoped that a federal court through a habeas corpus petition quickly reverses the BIA under *Loper Bright*, the very precedent that the BIA has clutched onto like a drowning person grasping for straws!

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