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ALTHOUGH THE FIFTH CIRCUIT HAS JUSTIFIED DETENTION WITHOUT BOND FOR NONCITIZENS WHO ENTERED WITHOUT INSPECTION, COURTS OUTSIDE THE FIFTH CIRCUIT ARE NOT BOUND AND CAN USE INDEPENDENT JUDGMENT UNDER LOPER BRIGHT

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In its June 28, 2024 decision in *Loper Bright Enterprises v. Raimondo*, the Supreme Court abolished the long-standing Chevron doctrine. Under this doctrine, courts were required to defer to the government agency's interpretation of an ambiguous statute. Chief Justice John Roberts, writing for the majority, stated that "Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires", but made clear that prior cases decided under the Chevron framework are not automatically overruled. We have discussed Loper Bright at length in prior blogs (here, here, here and here).

Thus far, Loper Bright's influence on federal courts' handling of immigration cases has been relatively subtle under the Immigration and Nationality Act (INA) but it has proved a powerful tool for challenging the Board of Immigration Appeal (BIA)'s reinterpretation of INA 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A), and INA 236(a), 8 U.S.C. 1226(a) to hold that noncitizens who entered without inspection (EWI) are not eligible for bond. 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). This BIA decision

was a marked reversal of policy, as bond had been permitted for noncitizens who entered without inspection for three decades, since the passage of the Immigration Act of 1996. The decision also 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 notably excludes respondents who have entered without inspection. Addressing this discrepancy, the BIA stated 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'".

Aware that a federal court would not give deference to its interpretation of the ambiguity posed by two competing statutory provisions, INA 235(b)(2)(A) and INA 236(c), the BIA invoked *Loper Bright* to conclude that the language under INA 235(b)(2)(A) is clear and explicit without regard to the contradiction posed in neighboring INA 236(c), 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)."

However, a string of recent district court rulings have relied on *Loper Bright* to reject the theory that noncitizens who entered without inspection are ineligible for bond as set out in *Matter of Yajure Hurtado*. These decisions invoke *Loper Bright* to emphasize that judges must independently interpret INA §§ 235 and 236, rather than automatically deferring to the BIA's interpretation, and arguing that EWIs are eligible for § 236(a) detention and, thus, bond hearings. The courts reasoned that DHS's new policy departs from three decades of consistent practice and lacks clear statutory grounding, thereby maintaining bond eligibility for these individuals. *See*, for example, *Barco Mercado v. Francis*, *Guerreno Orellana v. Moniz*, and *Pizarro Reys v. ICE*.

In *Buenrostro-Mendez v. Bondi* (5th Cir. 2026) the Fifth Circuit agreed with *Yajure Hurtado*, holding that noncitizens who entered without inspection are ineligible for bond. The court addressed the statutory discrepancy by stating that "Section 1226(a) undeniably does work independent from § 1225(b)(2)(A) because only § 1226(a) applies to admitted aliens who overstay their visas, become deportable on many different grounds, or were admitted erroneously

due to fraud or some other error… Not only does § 1226(c) sweep in deportable aliens in addition to the inadmissible aliens covered by § 1225(b)(2)(A)…it also eliminates the option of parole for those to whom it applies." In a dissenting opinion, Justice Douglas found that "Combining the ordinary meaning of 'seeking' with the statutory definition of 'admission,' there is no need to resort to strained analogies with the college admissions process to determine the meaning of key statutory terms governing detention."

Nonetheless, most district courts outside the Fifth Circuit have not been persuaded and continue to rule in favor of releasing the citizen using their own independent interpretation of the INA under *Loper Bright*. District court cases that have cited *Buenrostro* to date have primarily done so to point out that the Fifth Circuit's holding is an outlier and nonbinding. *See*, for example, *Aroca v. Mason*, *Pascual Jose-de-Jose v. Noem*, *Carlos Roldan Chang v. Noem*. In a New Jersey district court case, Judge Padin wrote in her opinion that the court was "unpersuaded" by the Fifth Circuit's decision in Buenrostro, reasoning that "the majority's interpretation risks rendering substantial portions of the statutory scheme superfluous and internally inconsistent". The Seventh Circuit preliminarily concluded that the U.S. Department of Homeland Security was not likely to prevail on its argument that "§ 1225(b)(2)(A) covers any noncitizen who is unlawfully already in the United States as well as those who present themselves at its borders," *Castanon-Nava v. U.S. Dep't of Homeland Sec*., 161 F.4th 1048, 1062 (7th Cir. 2025). Only a handful of district courts have adopted the reasoning laid out by the Fifth Circuit in *Buenrostro*. *See e.g.* *D.M.R.D. v. Andrews* and *Zhuang v. Bondi*. Even the Fifth Circuit's decision in *Buenrostro-Mendez* also does not preclude release based on constitutional grounds. In *Buenrostro-Mendez*, the Fifth Circuit did not consider whether a noncitizen detained under 8 U.S.C. § 1225 may be constitutionally entitled to a bond hearing at the outset of proceedings, or even to release on constitutional grounds. It also leaves intact habeas corpus as a key mechanism for challenging unlawful prolonged detention.

The BIA in *Yajure Hurtado* invoked *Loper Bright* to conclude that the language under INA 235(b)(2)(A) is clear and explicit to justify the detention of a noncitizen who entered without inspection without bond. Paradoxically, the majority of courts who have also invoked *Loper Bright* have done so to justify that they need not pay deference to the BIA's interpretation of INA 235(b)(2)(A) in *Yajure Hurtado*. An administrative agency like the BIA cannot use *Loper Bright*

to insulate itself from a court's independent review of the statute. Only a federal court can invoke *Loper Bright* to justify why it is not deferring to the agency's erroneous interpretation of a statute. To date, there have been hundreds of federal court decisions that have not paid deference to *Yajure Hurtado* and are also not deferring to the Fifth Circuit decision in *Buenrostro-Mendez v. Bondi*.

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