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Legal Sidebar

Mandatory Detention During Removal Proceedings: Circuit Split

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The Department of Homeland Security (DHS) may arrest and detain aliens for immigration status violations that render them removable. While the agency generally has discretion to release aliens from custody during the pendency of their removal proceedings, some categories of aliens must be detained. Under 8 U.S.C. § 1225(b)(2)(A), if an immigration officer determines that an individual is an "applicant for admission" who is "seeking admission" into the United States and is "not clearly and beyond a doubt entitled to be admitted," the alien "shall be detained" during the removal proceedings. Federal statute expressly states that aliens who are either arriving in the United States or present in the country without lawful admission shall be treated as "applicants for admission," but federal law does not define "seeking admission."

In 2025, it was reported that the Trump Administration issued interim guidance determining that unlawfully present aliens found in the United States—including some who may have been present in the country for several years—are subject to mandatory detention under § 1225(b)(2)(A). This interpretation has resulted in numerous legal challenges by aliens present in the United States without having been admitted, who have been detained and, as a result of the interim guidance, are no longer eligible for a custody determination or release during their removal proceedings before an immigration judge. They argue that they are not subject to mandatory detention under § 1225(b)(2)(A) because they were not actively "seeking admission" into the United States. In the ensuing litigation, there has been a growing circuit split in the federal courts of appeals over whether § 1225(b)(2)(A) applies strictly to aliens actively seeking legal admission at the border or whether it also covers aliens present anywhere in the United States who have not been lawfully admitted.

Statutory Background

The current statutory framework governing the detention of aliens placed in removal proceedings was established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Generally, under 8 U.S.C. § 1226(a), DHS has the discretion to detain an alien pending the outcome of removal proceedings *or* it may release the alien on bond or the alien's own recognizance subject to specified conditions ("conditional parole"). In this circumstance, if the agency determines that the alien

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will remain detained, the alien may request review of the custody determination at a bond hearing before an immigration judge.

Some categories of aliens generally must be detained during their proceedings with no opportunity for a bond hearing. These include at least some "applicants for admission" whom the government seeks to remove. The phrase "applicants for admission" is defined at 8 U.S.C. § 1225(a)(1) to cover "[a]n alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters)." Under § 1225(b)(1)(B)(iii)(IV), an "applicant for admission" who is subject to an expedited removal process before an immigration officer generally must be detained pending a final determination of removability. A separate provision addresses detention of applicants for admission who are not placed in expedited removal. Under § 1225(b)(2)(A), if the examining immigration officer determines that "an alien *seeking admission* is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained*" (emphasis added) and placed in removal proceedings before an immigration judge under 8 U.S.C. § 1229a.

Although applicants for admission must be detained during the expedited removal process or during the duration of removal proceedings, § 1182(d)(5)(A) provides that, except in certain cases, the Secretary of DHS "may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit *any alien applying for admission to the United States*" (emphasis added). In *Jennings v. Rodriguez*, the Supreme Court construed §§ 1225(b)(1) and (b)(2)(A) as "mandat[ing] detention of applicants for admission until certain proceedings have concluded," and the Court explained that the "express exception" for parole "implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released."

DHS's Detention Policy and Administrative Guidance

DHS and its predecessor agency, the Immigration and Naturalization Service, historically took the position that "aliens *who are present* without having been admitted or paroled (formerly referred to as aliens who entered without inspection)" (emphasis added) were detained under the discretionary detention authority of § 1226(a) and were eligible for bond and bond redetermination during their detention. On the other hand, under the agencies' long-standing practice, "any arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings . . . shall be detained in accordance with [§ 1225(b)]" without bond hearings.

Reportedly, on July 8, 2025, DHS's Immigration and Customs Enforcement (ICE) issued interim guidance interpreting § 1225(b)(2)(A) to cover arriving aliens and aliens present in the United States without having been admitted. The ICE interim guidance has been described as explaining that, because both categories of aliens are considered to be "applicants for admission" under § 1225(a)(1), both categories are subject to mandatory detention under § 1225(b) "and may not be released from ICE custody except [under 8 U.S.C. § 1182(d)(5)] parole." The guidance specifies that "[f]or custody purposes, these aliens [i.e., aliens present in the United States who have not been admitted] are now treated in the same manner that 'arriving aliens' have historically been treated." Under the guidance, only aliens who are considered to have been *admitted* into the United States and who are then charged with being deportable under 8 U.S.C. § 1227 and placed in removal proceedings are eligible for bond hearings under § 1226(a). The guidance is reportedly applicable unless the described alien is subject to mandatory detention under § 1226(c), a separate provision that requires the detention during removal proceedings of aliens who commit certain crimes or terrorist offenses. (Although the ICE interim guidance does not appear as of the date of this Sidebar to have been made publicly available on the agency's website, DHS's

Customs and Border Protection issued similar guidance on July 10, 2025, and July 15, 2025, interpreting § 1225(b)(2)(A) to cover arriving aliens and aliens present without admission.)

On September 5, 2025, the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting federal immigration laws, issued a precedential decision in *Matter of Yajure Hurtado*. In that case, a Venezuelan national who unlawfully entered the United States without inspection in November 2022 (and whose temporary protected status expired on April 2, 2025) was apprehended by immigration officials on April 8, 2025, and detained. He requested a bond hearing before an immigration judge, and the judge determined that he lacked authority under the statute to conduct a bond hearing. The alien challenged the immigration judge's determination, and the BIA ruled that the immigration judge lacked jurisdiction because aliens present in the United States without having been admitted or inspected and who have been residing in the United States are considered "applicants for admission" subject to mandatory detention under § 1225(b)(2)(A). The alien conceded that he was an "applicant for admission" for purposes of federal statute, but claimed that, because he had been residing in the United States for nearly three years, he could not be considered as "seeking admission" as the phrase is used in § 1225(b)(2)(A). The BIA rejected the alien's contention that he could not be considered to be "seeking admission," determining that this argument was "not supported by the plain language" of the statute. The BIA also determined that Congress, in enacting IIRIRA, had intended that aliens who entered without inspection would be treated in a similar manner as aliens initially arriving at U.S. ports of entry and that both classes of aliens would be ineligible for bond hearings. In short, the BIA held, the statutory text is "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."

Federal Court Litigation and Circuit Split

DHS's interpretation of § 1225(b)(2)(A) as covering aliens present in the United States without admission, and the BIA's decision upholding that interpretation, has resulted in numerous legal challenges by detained aliens who were denied bond hearings during their removal proceedings before an immigration judge, including some who were in the United States for many years. During the litigation, the government has argued, among other things, that aliens present without admission are covered by § 1225(b)(2)(A) because, based on the ordinary meaning of that provision, every "applicant for admission" is necessarily "seeking admission," and that Congress, in enacting IIRIRA, had sought to prevent unlawful entrants from obtaining benefits, including bond determinations, that were unavailable to arriving aliens.

Federal courts have split on this issue, with the majority rejecting the government's interpretation of § 1225(b)(2)(A) and holding that its detention mandate applies only to aliens seeking lawful admission into the United States. In particular, the Second, Sixth, and Eleventh Circuits have held that the provision applies only to aliens who are seeking to enter the United States. On the other hand, the Fifth and Eighth Circuits have sided with the government and interpreted the statute more broadly to also cover those who are present without admission. The Seventh Circuit, in litigation over a consent decree concerning the release of hundreds of persons in immigration detention, fractured on the permissibility of the government's interpretation.

The Second Circuit reasoned that the plain text of § 1225(b)(2)(A) applies to a person who is both an "applicant for admission" *and* "seeking admission." The court interpreted the phrase "seeking admission" to mean that a person is "presently pursuing lawful entry into the United States." According to the court, the statute's reach is thus limited to those who arrive at ports of entry or are encountered at the border shortly after entry. The court also concluded that, based on the statutory context, structure, and history, Congress intended § 1225(b)(2)(A) to apply only to aliens seeking lawful entry. Further, the court remarked that, even if this provision was ambiguous, "the fact that the Executive Branch has for nearly

three decades acted inconsistently with the newfound interpretation strongly counsels against adopting it." Alternatively, the court held that rejecting the government's broad interpretation of the statute was warranted to avoid "the grave constitutional concerns" it raised by subjecting aliens present in the United States to "categorical detention without bond" in violation of their right to due process.

The Eleventh Circuit, in a divided decision, also addressed the meaning of § 1225(b)(2)(A). The court explained that, although an alien present without admission is an "applicant for admission" under § 1225(a)(1), the alien's detention is justified under § 1225(b)(2)(A) only if the alien is also "seeking admission." The court defined "seeking admission" as "the pursuit of lawful entry . . . after inspection and authorization by an immigration officer." The court determined that its interpretation of § 1225(b)(2)(A) was reinforced by "the broader statutory scheme," the provision's legislative history, and "nearly thirty years of unbroken executive practice" that allowed aliens present without admission to seek bond.

Examining the statutory text of § 1225(b)(2)(A) and other provisions, a divided Sixth Circuit panel likewise construed the "seeking admission" phrase to mean that the alien "must actively be in search of lawful entry into the United States via inspection and authorization by an immigration officer." The court also determined that the government's "previously unbroken 29-year streak" of applying the discretionary detention provisions of § 1226(a) to aliens present without admission informed the court's conclusion that § 1225(b)(2)(A) applied strictly to aliens seeking entry. Additionally, the Sixth Circuit upheld lower courts' rulings that mandating detention without bond hearings of this category of aliens who are already residing in the United States violates their constitutional right to due process.

In contrast, the Fifth Circuit, in a split decision, held that § 1225(b)(2)(A) mandates the detention of aliens present without admission. The court rejected the claim that the phrase "seeking admission" refers only to those pursuing lawful entry. The court explained that there is no distinction between "applying for" and "seeking" something, reasoning that "[j]ust as an applicant to a college seeks admission, an applicant for admission to the United States is 'seeking admission' to the same, regardless whether the person actively engages in further affirmative acts to gain admission." The court observed that other § 1225 provisions use the phrases "applicant for admission" and "seeking admission" synonymously. As for the government's past detention policy, the court stated that "[y]ears of consistent practice cannot vindicate an interpretation that is inconsistent with a statute's plain text." The court also determined that the government's newer interpretation of § 1225(b)(2)(A) is consistent with Congress's intent to "put aliens seeking admission lawfully on equal footing with those who entered without inspection."

The Eighth Circuit, in a split decision, similarly rejected the claim that "seeking admission" under § 1225(b)(2)(A) requires an "affirmative action" to obtain admission. The court agreed with the Fifth Circuit "that the ordinary meanings of the phrases 'applicant for admission' and 'seeking admission' are the same" and that there is no indication in § 1225(b)(2)(A) or other provisions that "seeking admission" has a separate meaning. In the court's view, interpreting § 1225(b)(2)(A) to cover unadmitted aliens in the United States is compatible with Congress's goal of placing all unadmitted aliens on an "equal footing" during removal proceedings. Like the Fifth Circuit, the court determined that the government's previous interpretation of the statute did not require construing it in a manner that contradicts its plain meaning.

Lastly, in another case, the Seventh Circuit considered, among other things, a district court's order requiring the release of certain unlawfully present aliens who were found to have been arrested in violation of a consent decree. In a fractured 2-1 decision, two judges rejected the government's claim that a federal statute limiting courts' authority to restrain the government's ability to engage in certain immigration enforcement actions barred the lower court from issuing the release order because it restrained the government's ability to detain aliens under § 1225(b)(2)(A). One judge determined that the government had waived this argument at the time it entered the consent decree. In the alternative, the judge rejected the government's argument that aliens present without admission are subject to mandatory detention under § 1225(b)(2)(A), interpreting that provision as covering only those "who are seeking lawful entry at the border or ports of entry." The other judge, in a concurring opinion, expressly declined

to consider the interpretation of § 1225(b)(2)(A), reasoning that the government had "intentionally relinquished" this argument by agreeing to the consent decree.

Considerations for Congress

The extent to which aliens present in the United States without having been admitted are subject to mandatory detention and not entitled to a bond hearing during their removal proceedings under § 1225(b)(2)(A) continues to be litigated in the federal courts. The circuit split over the scope of the statute's detention mandate has led some to speculate that the Supreme Court may eventually decide this question. In *Jennings v. Rodriguez*, the Supreme Court in 2018 held that detention under § 1225(b)(2)(A) is mandatory "until certain proceedings have concluded," and that covered aliens may be released only under DHS's parole authority. The Court did not decide whether § 1225(b)(2)(A) applies strictly to aliens seeking entry into the United States or whether it also covers those who are present without admission, which was a separate issue that was not before the Court.

The *Jennings* Court started its analysis by stating that the process the federal government utilizes to determine who may enter the country and who may stay "generally begins at the Nation's borders and ports of entry, where the Government must determine whether an alien seeking to enter the country is admissible." The Court stated that under § 1225, "an alien who 'arrives in the United States,' or 'is present' in this country but 'has not been admitted,' is treated as 'an applicant for admission.'" The Court determined that § 1225(b)(2) "serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1)." The Court continued examining the statute and explained that individuals detained under § 1225(b)(2) must be detained for removal proceedings "if an immigration officer 'determines that [they are] not clearly and beyond a doubt entitled to be admitted' into the country." The Court further explained that § 1226(a) governs the detention of "certain aliens already in the country."

In the recent litigation, the Second and Eleventh Circuits interpreted the Supreme Court's statements as one reason, among others, to conclude that § 1225(b)(2)(A) applies only to those who are seeking entry. Conversely, the Fifth and Eighth Circuits have viewed these statements as merely a general explanation of the statutory framework that did not address the difference between §§ 1225(b)(2)(A) and 1226(a), or preclude the possibility that § 1225(b)(2)(A) could still apply to aliens who are in the United States.

In the ongoing litigation, courts have also looked to recent legislation for guidance. In 2025, Congress passed the Laken Riley Act (LRA), which amended § 1226(c) to require the detention during removal proceedings of aliens who entered unlawfully if they have committed certain crimes. In considering the statutory context, the Second and Eleventh Circuits decided, among other things, that interpreting § 1225(b)(2)(A) to cover aliens present in the United States without admission would make § 1226(c), as amended by the LRA, superfluous because aliens who unlawfully enter would already be subject to mandatory detention under § 1225(b)(2)(A). According to the Fifth and Eighth Circuits, the government's interpretation of § 1225(b)(2)(A) does not result in any redundancy despite the overlap in covered populations because § 1226(c) covers certain aliens who were previously admitted in addition to certain aliens who were not admitted; it makes detained aliens ineligible for parole, which they could otherwise potentially receive under § 1225(b)(2)(A) detention; and the LRA was enacted at a time when DHS was still detaining most aliens present without admission under § 1226(a) instead.

Given the uncertainty about which categories of aliens are covered by § 1225(b)(2)(A), Congress may seek to clarify the scope and meaning of that statute. For example, Congress could specify whether the statute's detention requirement applies only to aliens seeking to lawfully enter the United States or whether it also applies to unadmitted aliens apprehended anywhere in the United States. In the alternative, Congress could consider whether or under what circumstances aliens in removal proceedings may be detained without bond hearings generally. For example, in the 119th Congress, the Dignity for Detained Immigrants Act (H.R. 6397, S. 3702) would, among other things, amend § 1225(b)(2)(A) by striking the

language mandating the detention of applicants for admission during their removal proceedings, and, more generally, it would require prompt custody determinations and bond hearings for any alien detained by DHS. Another introduced bill (H.R. 7190) would remove DHS's detention authority entirely, including under § 1225(b)(2)(A). In contrast, the Detention Authority Clarification Act (S. 4593) would clarify that aliens present in the United States without admission are subject to mandatory detention.

Author Information

Hillel R. Smith
Legislative Attorney

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