BIA Decision Strips Immigration Judges of Bond Authority, All but Guaranteeing Mandatory Detention for Undocumented Immigrants

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On September 5, the Trump administration took yet another step to punish undocumented people in the United States.

In *Matter of Yajure Hurtado*, the Board of Immigration Appeals proclaimed that any person who crossed the border unlawfully and is later taken into

immigration detention is no longer eligible for release on bond. This decision reverses longstanding precedent and will needlessly separate families and harm communities while lining the pockets of private prison companies.

Before *Yajure Hurtado*: Eligibility for release on bond for most undocumented immigrants

Entry without inspection is by far the most common charge in ongoing immigration court cases. In fiscal year 2024 alone, it was used in over a million of the 1.76 million immigration court cases initiated that year. This trend has so far continued into 2025, with an entry without inspection charge in 62% of new cases.

Before September 5, the official BIA position was that in the run-of-the-mill case of a person who entered without inspection, the immigration judge had power to grant release on bond under INA § 236(a) if the person did not have a disqualifying criminal record and the judge was satisfied, after a hearing, that the person was not a danger to the community or a flight risk. The BIA reiterated this position in a precedential decision less than three months ago.

Immigration court bond hearings are far from perfect. But they provide at least some minimal process to show that immigration detention, which is supposed to be civil and not punitive in nature, is not arbitrary and instead serves a legally legitimate purpose. The odds are already against the noncitizen seeking release: in most immigration courts, the burden of proof lies with the person seeking release on bond, and not the government. This means the noncitizen has to prove that they do not pose a flight risk or a danger to the community. Even with stacks of evidence, freedom is far from assured. In July, for example, immigration judges ordered release on bond in less than half of bond hearings nationally. Those who win bond must come up with the cash (the average

bond was $8,176 in August 2025). After that, their immigration court process continues, but between hearings they may live their lives in their communities.

Bond authority has long excluded some people seeking to come in at the border or a port of entry, under INA § 235(b)(1) and (2). People detained under INA § 235(b) may instead seek release on parole, granted only at the discretion of the Department of Homeland Security. But these days parole is all but a dead letter, with ICE data showing the average monthly parole releases for the last six months dropping by 98.5% compared to the last three months of 2024.

After *Yajure Hurtado*: Mandatory detention for all who entered without inspection

Yajure Hurtado involved a citizen of Venezuela who crossed the border without inspection in November 2022 and later obtained Temporary Protected Status. When his TPS purportedly expired (likely as a result of DHS' premature cancelation of the 2023 TPS Venezuela designation, which a judge recently held was unlawful), DHS detained him and placed him in removal proceedings based solely on a charge that he entered without inspection under INA § 212(a)(6)(A)(i).

Mr. Yajure Hurtado argued, given his residence in the United States for three years, that he was not "seeking admission" as required by INA § 235(b)(2)(A), and therefore § 236(a) was the relevant detention statute and he was entitled to a bond hearing.

The BIA rejected this argument, announcing that people who entered the United States without being "admitted" by an immigration officer are "applicants for admission," and therefore the border detention statute, INA § 235(b)(2), applies when they are in removal proceedings.

> **The decision creates a sweeping new rule that strips most**

> **noncitizens who entered without inspection of the right to seek bond from an immigration judge, regardless of how long they have been residing in the country or where they were arrested.**

The BIA is the appellate body that reviews immigration judge decisions, and when it designates a decision as precedential, like *Yajure Hurtado*, its reasoning is binding on all immigration judges unless a federal court says otherwise. This means that in immigration courts across the country, thousands of detained immigrants who were eligible for a bond hearing last week now have no recourse to be released during their immigration court proceedings unless they file—and win—a federal lawsuit.

From a legal perspective, the BIA's decision is deeply flawed. It departs from the only interpretation of the detention statutes formally on the books since the laws were enacted in 1996, instead adopting a new argument DHS started making in immigration courts nationally for the first time in July of this year.

Before *Yajure Hurtado*'s issuance, dozens of federal district courts had already considered the issue and resoundingly rejected the Trump administration's re-interpretation of the law. This includes a court in the same federal district where Mr. Yajure Hurtado's immigration proceedings are taking place. Multiple federal courts have already picked apart the poor reasoning in *Yajure Hurtado*, reiterating established law: § 235(b)(2) applies to people coming in at U.S. borders and ports of entry, while § 236(a) applies to people already in the country. A case challenging the BIA's and DHS' new legal position and seeking declaratory relief on behalf of a nationwide class, *Maldonado Bautista v. Noem*, is currently pending in the Central District of California.

What effect will *Yajure Hurtado* have?

To call *Yajure Hurtado* a mere break from past practice fails to capture the

magnitude of the injustice it will cause.

The grandmother down the street who crossed the border 30 years ago? Her detention is now, for the first time, "mandatory." The asylum seeker who, desperate for safety, braved the desert, and later sent his information to the government in an asylum application? Mandatory detention. The countless undocumented mothers and fathers who work tirelessly to care for their children? Them too.

The new rule is particularly bad in combination with the Supreme Court's recent decision to allow racial profiling in immigration arrests. Most undocumented people caught up in ICE's brutal dragnet now face extraordinary new hurdles to release. If they decide to fight their case in immigration court, they may very well remain detained for months or years. This is so even for people who present no risk of flight or danger, whose detention serves no purpose yet costs taxpayers an estimated $236.52 per person per day.

Many of those plucked out of our communities and denied access to bond, however, will decide they can't bear the inhumane costs of immigration jail—separation from their loved ones, medical neglect, lack of food and water, isolation, and physical violence and sexual abuse. They will even abandon cases that are easily winnable under our laws and leave the United States rather than face these deplorable conditions.

Detention as an instrument of suffering—to coerce immigrants to abandon the legal process—is both the foreseeable result and the unstated goal undergirding *Yajure Hurtado*.

The decision comes from an agency that is housed within the Department of Justice and controlled by political appointees. DOJ has fired all of the Biden appointees on the BIA and over 100 immigration judges for ideological reasons since Trump took office—a palpable threat that judges must toe the line when deciding cases or risk losing their livelihoods. All

41 precedential decisions issued by the BIA since inauguration have been decided in the administration's favor, save one where the government won only in large part. *Yajure Hurtado* is yet another marker of the political weaponization of the legal system.

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