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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of: Amicus Invitation No. 20-24-02	)	Amicus Invitation No. 20-24-02

REQUEST TO APPEAR AS AMICUS CURIAE
AND BRIEF FOR AMICUS CURIAE
IMMIGRATION REFORM LAW INSTITUTE

REQUEST TO APPEAR AS AMICUS CURIAE

The Immigration Reform Law Institute respectfully requests leave to file this *amicus curiae* brief at the invitation of the Board of Immigration Appeals. *See* Amicus Invitation No. 20-24-02.

INTEREST OF AMICUS CURIAE

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including: *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec*., No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

INTRODUCTION

The Immigration and Nationality Act ("INA") requires the U.S. Department of Homeland Security ("DHS") to provide an alien with written notice when initiating removal proceedings. Written notice is often provided through a standardized form, Form I-862.

Three check boxes are included on Form I-862. The first box reads, "1. You are an arriving alien." The second box reads, "2. You are an alien present in the United States, who has not been admitted or paroled." The third box reads, "3. You have been admitted to the United States, but are removable for the reasons stated below." Form I-862 also includes a space for DHS to state

reasons for an alien's removal. Executive Office for Immigration Review, *Notice To Appear Form I-862*, U.S. Department of Justice (Jan. 13, 2015), https://www.justice.gov/eoir/dhs-notice-appear-form-i-862.

The three questions presented in Amicus Invitation No. 20-24-02 each relate to the legal consequences—if any—of an immigration official's choice of which box to check on Form I-862. As explained below, such box-checking is inconsequential to the outcome of removal proceedings. It does not diminish the effectiveness of Form I-862 with respect to the initiation, conduct, or resolution of removal proceedings.

QUESTIONS PRESENTED

The questions presented in this Amicus Invitation are:

1. Is a Notice to Appear (Form I-862) sufficient notice of the type of proceedings being initiated, when it does not indicate whether a respondent in removal proceedings is alleged to be an (1) an arriving alien, (2) an alien present in the United States who has not been admitted or paroled, or (3) an alien who has been admitted to the United States, but is removable for reasons stated elsewhere on the NTA ("Notice to Appear")?

2. Is a Notice to Appear (Form I-862) sufficient for purpose of establishing removability, when it does not indicate whether a respondent in removal proceedings is alleged to be an (1) an arriving alien, (2) an alien present in the United States who has not been admitted or paroled, or (3) an alien who has been admitted to the United States, but is removable for reasons stated elsewhere on the NTA?

3. With respect to an alien who is not alleged to be an arriving alien in a Notice to Appear (Form I-862) and who entered the United States, and who is not alleged to have entered the United States via a port of entry or by interdiction, may the Department of Homeland Security, under the provisions of section 235(b)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(C), apprehend and return him or her to a contiguous territory pending removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a?

ARGUMENT

I. Form I-862 is sufficient to initiate removal proceedings when it lacks information about the circumstances of an alien's arrival, because the INA does not require information about the circumstances of an alien's arrival to be included in written notice to appear.

The INA requires that written notice shall be given to an alien in removal proceedings. But the INA does not require this notice to appear on the Form I-862. The INA does not even require such notice to include all reasons for removability, let alone details such as whether the alien is arriving, paroled, or admitted.

The INA specifies which information is required as written notice to an alien in removal proceedings. 8 U.S.C. § 1229(a)(1). That information includes: (A) the nature of the proceedings against the alien; (B) the legal authority under which the proceedings are conducted; (C) the acts alleged to be illegal; (D) the charges and statutory provisions alleged to have been violated; (E) a statement of the alien's access to counsel; (F) the alien's first and continuing obligation to provide his address and telephone number and the consequences of failing to provide such contact information; and (G) the time and place of removal proceedings and the consequences of a failure to appear. *Id.* No other information is required in order to provide complete "notice to appear" under the INA. *In re Castro-Tum*, 27 I. & N. Dec. 271, 289 n.12, (B.I.A. 2018) ("DHS adequately alleged that it provided sufficient notice because the Notice to Appear informed the respondent of all statutorily required information about the proceedings, and the subsequent Notice of Hearing included the date and time of proceedings. . . . Taken together, the Notice to Appear and each Notice of Hearing contained all the statutorily required information.") (Sessions, A.G.). Therefore, removal proceedings may be initiated even if a Form I-862 does not contain allegations regarding the details of an alien's arrival in the United States: this information is not on the INA's list of information required for written notice in removal proceedings.

Information that is not expressly required under the INA may be excluded from Form I-862, even if it would more completely describe DHS's reasons for removing an alien. "[T]here is no requirement that the government name every possible ground for removability in the original NTA." *Ka Cheung v. Holder*, 678 F.3d 66, 70 (1st Cir. 2012). "[T]here is no requirement that the INS advance every conceivable basis for deportability in the original show cause order. As the IJ explained, such a rule would needlessly complicate proceedings in the vast majority of cases." *De Faria v. INS*, 13 F.3d 422, 424 (1st Cir. 1993). As long as the Form I-862 includes the INA's categories of information required for written notice under 8 U.S.C. § 1229, then the Form is sufficient to initiate removal proceedings even without an allegation about the circumstances of an alien's arrival. "Once a notice to appear has been properly filed with the Immigration Court, jurisdiction vests." *In re Sanchez-Herbert*, 26 I. & N. Dec. 43, 44 (B.I.A. 2012) (citing 8 C.F.R. § 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.")). Then, after jurisdiction vests with the Immigration Judge, "[a]s long as the allegations and charges stated in the notice to appear continue to be applicable, the alien remains subject to removal." *Id.* (citing *Matter of Brown*, 18 I. & N. Dec. 324, 325 (B.I.A. 1982) ("The reason for issuance of an Order to Show Cause is to inform an alien of the deportation charges against him and to notify him that he must show why he should not be deported. . . . As long as the allegations and charges stated in the Order to Show Cause continue to be applicable, the alien remains subject to deportation.")).

Even if a Form I-862 lacks statutorily required information, it is still sufficient to initiate removal proceedings. Additional information necessary for written notice under 8 U.S.C. § 1229 can be provided to an alien after removal proceedings have been initiated, perfecting an otherwise deficient Form I-862. The INA "does not necessarily require that the notice be given in a single document. Rather, there may be multiple communications that, when considered together,

constitute 'a notice' under the statute." *Garcia-Romo v. Barr*, 940 F.3d 192, 201 (6th Cir. 2019) (holding that written notice can occur "through service of more than one written communication and still constitute such 'notice' if those multiple installments collectively give the noncitizen all of the information required to be provided by § 1229(a)(1)(A)–(G)."). "We do not read the statute as requiring that the 'written notice' be in a single document." *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520, 531 (B.I.A. May 1, 2019). Removal proceedings are initiated even when a Form I-862 offers incomplete written notice under the INA. Additional information can be provided to an alien later in time.

Such additional information does not even need to come from DHS. It can be provided to the alien by the Immigration Judge himself. "Accordingly, a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of . . . the Act, so long as a notice of hearing specifying this information is later sent to the alien." *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 447 (B.I.A. 2018). *Matter of L-E-A-*, 2019 BIA LEXIS 11, *11-12, 27 I. & N. Dec. 581 (B.I.A. July 29, 2019) ("Although that information was not contained in the initial notice to appear, the immigration court subsequently issued a notice of hearing with all the required information.") (Barr, A.G.). Even contrary authority concedes that "[i]f a notice is sent to the noncitizen with only a portion of the statutorily required information, a valid NTA can easily be sent later which contains all the required information in one document—at such time as the government has gathered all that information together." *Guadalupe v. Att'y Gen. Of The United States*, 951 F.3d 161 (3d Cir. 2020) (holding that "[t]he complete NTA would then trigger the stop-time rule."). So, even if factual information about the circumstances of an alien's arrival were required completely to satisfy the INA's requirements for written notice under 8 U.S.C. § 1229,

that information could be provided later in time. It would not need to appear on a Form I-862 in order for removal proceedings to be initiated.

II. Form I-862 presents sufficient information to establish removability when it does not include allegations about the circumstances of an alien's arrival, because the INA allows removal based upon written notice alone.

An alien is removable from the United States for any of many reasons described in the INA. *E.g.* 8 U.S.C. §1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). Form I-862 provides evidence establishing an alien's removability regardless of whether it also describes the circumstances of an alien's arrival.

Once an alien has been provided written notice of removal proceedings, he is removable. "The written notice provided by the Attorney General shall be considered sufficient" to remove an alien *in absentia* if he fails to appear at removal proceedings. 8 U.S.C. § 1229a(b)(5)(A). The mere fact that the notice does not include specific allegations about an alien's arrival does not prevent this outcome. *Supra* Part I. Form I-862 is sufficient to establish removability.

Written notice to appear satisfies even the highest evidentiary burden necessary for the removal of an alien. Generally, an alien "has the burden of establishing" either "by clear and convincing evidence[] that the alien is lawfully present in the United States" or that he is an applicant for admission "clearly and beyond doubt entitled to be admitted." 8 U.S.C. § 1229a(c)(2). But after an alien "has been admitted to the United States," DHS "has the burden of establishing by clear and convincing evidence" that "the alien is deportable." 8 U.S.C. § 1229a(c)(3). The INA states that written notice is satisfactory evidence of removability even under this heightened evidentiary burden. For example, an alien "shall be ordered removed" if DHS "establishes by clear, unequivocal, and convincing evidence" that "the alien is removable" and also that the alien was provided written notice yet did not attend his removal proceeding. 8 U.S.C. § 1229a(b)(5)(A). A properly served written notice to appear "shall be considered sufficient" to overcome this burden

of "clear, unequivocal, and convincing evidence" to establish an alien's removability. *Id*. This satisfies DHS's burden of proof for removing aliens that have been admitted into the United States, let alone for removing illegal aliens and applicants for admission, who themselves bear the burden of proof to prevent their removal.

Of course, during removal proceedings, an alien may present facts to refute the "clear, unequivocal, and convincing evidence" otherwise sufficiently established by written notice under Form I-862. Then, "[at]t the conclusion of the proceeding the immigration judge shall decide whether an alien is removable … based only on the evidence produced at the hearing." 8 U.S.C. § 1229a(c)(1)(A). When reaching this determination, Form I-862 is among the evidence that an Immigration Judge may consider. "[I]nformation on an authenticated immigration form is presumed to be reliable in the absence of evidence to the contrary presented by the alien." *Espinoza v. INS*, No. 94-70094, 1995 U.S. App. LEXIS 7699, at *8 (9th Cir. Jan. 12, 1995). "The burden of establishing a basis for exclusion of evidence from a government record falls on the opponent of the evidence, who must come forward with enough negative factors to persuade the court not to admit it." *Id.* (citing *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir. 1992) ("If the Johnsons seriously think the documents are untrustworthy, they can challenge them on that ground.")). *See also* FED. R. EV. 803(8)(A)(iii) ("[I]n a civil case . . . factual findings from a legally authorized investigation" "are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness."). The contrary position—that Form I-862 is insufficient on its own and requires corroboration—is inconsistent with the INA and has, for at least 35 years, been absurd in the context of immigration enforcement. As the Supreme Court of the United States noted in 1984, "In the course of a year the average INS agent arrests almost 500 illegal aliens." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984) (holding that Fourth Amendment suppression hearings are not required in immigration removal proceedings).

> Immigration officers apprehend over one million deportable aliens in this country every year. . . . A single agent may arrest many illegal aliens every day. Although the investigatory burden does not justify the commission of constitutional violations, the officers cannot be expected to compile elaborate, contemporaneous, written reports detailing the circumstances of every arrest. At present an officer simply completes a "Record of Deportable Alien" that is introduced to prove the INS's case at the deportation hearing; the officer rarely must attend the hearing.

Id. at 1049.

Here, the immigration form I-862 is authenticated by the signature of the Form's issuing officer, a "government official." *See Espinoza* at *7. (finding that in "cases in which official reports were found untrustworthy and excluded . . . there was either strong evidence of unreliability, or the source of information was neither a government official nor the subject of the report."). So, although an Immigration Judge may consider evidence in addition to that contained in a Form I-862, and although an alien may submit evidence to rebut removability, Form I-862 is nonetheless sufficient to establish that removability. An Immigration Judge may credit it accordingly.

III. DHS may apprehend and return an alien to a contiguous foreign territory pending removal proceedings when the alien is not alleged in the Form I-862 to be an arriving alien, or to have entered the United States via a port of entry or by interdiction, because the INA does not require such allegations for written notice under 8 U.S.C. § 1229.

The INA describes, in 8 U.S.C. § 1225(b)(2)(C), a process under which DHS may apprehend and return an alien to a contiguous foreign territory "pending a proceeding under" 8 U.S.C. § 1229a. ("Removal proceedings"). The written notice requirements of removal proceedings under 8 U.S.C. § 1229 still apply. 8 U.S.C. § 1229(a)(1). So, regardless of whether Form I-862 alleges an alien to be an arriving alien, the Form provides sufficient notice under the INA as long as it contains the INA's specified list of written notice information. *Supra* Part I. And when a Form I-862 lacks statutorily-required information, written notice subsequently can be perfected through additional communications to the alien from DHS or an Immigration Judge. *Id.*

The INA does not provide a special notice requirement for the apprehend-and-return process under 8 U.S.C. § 1225(b)(2)(C). The suggestion that 8 U.S.C. § 1225(b)(2) necessitates special notice and hearings was already considered and rejected by the Supreme Court. *Jennings v. Rodriguez*, 138 S. Ct. 830, 839 (2018) ("In their prayer for relief, respondents thus asked the District Court to require the Government 'to provide, *after giving notice*, individual hearings before an immigration judge for . . . each member of the class, at which [the Government] will bear the burden to prove by clear and convincing evidence that no reasonable conditions will ensure the detainee's presence in the event of removal and protect the community from serious danger, despite the prolonged length of detention at issue.'") (emphasis added). Instead, written notice under 8 U.S.C. § 1229, which initiates the alien's pending removal proceedings under 8 U.S.C. § 1229a, sufficiently communicates to the alien (and his counsel) the nature of the proceedings.

Rather than create a new notice-and-hearing process, the INA describes two conditions under which the apprehend-and-return process can apply, pending removal proceedings under 8 U.S.C. § 1229a. The first condition is that the apprehend-and-return process applies "in the case of an alien" applicant for admission arriving "from a foreign territory contiguous to the United States." 8 U.S.C. § 1225(b)(2)(C). An "applicant for admission" is "[a]n alien present in the United States who has not been admitted or who arrives in the United States." 8 U.S.C. § 1225(a)(1). The second condition is that such an alien must not "clearly and beyond a doubt" already be entitled to admission into the United States. 8 U.S.C. § 1225(b)(2)(A).

But for his return to a contiguous foreign territory, an alien covered under the apprehend-and return process would otherwise be subject to mandatory detention pending his removal proceedings. *Id.* The apprehend-and-return process is a subcategory under 8 U.S.C. § 1225(b)(2), which prescribes mandatory detention for certain aliens. The apprehend-and-return process

exempts only crewmen, *id.*, and credible aslyees. 8 U.S.C. § 1225(b)(1)(B). By contrast, alien applicants for admission who are stowaways, 8 U.S.C. § 1225(a)(2), who commit fraud, 8 U.S.C. § 1182(a)(6)(C), or who lack valid documentation, 8 U.S.C. §1182(a)(7), do not enjoy any access to removal proceedings under 8 U.S.C. § 1229a, whether through the mandatory detention process or the apprehend-and-return process, even if they are arriving from a contiguous foreign territory. Instead, they are removable immediately. 8 U.S.C. § 1225(b)(1).

It does not matter whether a Form I-862 describes the alien's mandatory detention, or alleges an alien to be an arriving alien or to have entered the United States via a port of entry or by interdiction. Form I-862 may of course include this information, or it may cite the apprehend-and-return subcategory under the mandatory detention provisions of the INA. But the Form need not do so in order for the apprehend-and-return process to proceed; the Form relates only to the pending removal proceedings under 8 U.S.C. § 1229a, not the terms of detention, return, or parole that may occur pending removal proceedings. "A Notice to Appear can charge inadmissibility on *any* ground . . . . And we think that Congress' purpose was to make return to a contiguous territory available during the pendency of § 1229a removal proceedings, as opposed to being contingent on any particular inadmissibility ground." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 508–09 (9th Cir. 2019) (emphasis in original). If an Immigration Judge requires additional information to decide whether an alien was appropriately processed under the apprehend-and-return process, or is otherwise subject to mandatory detention or parole, the Immigration Judge may rely upon information outside the Form I-862 to make that determination. *In re Kotliar*, 24 I. & N. Dec. 124, 126, 2007 BIA LEXIS 9, *4-5 (B.I.A. March 21, 2007) ("[T]he respondent asserts that because the Notice to Appear did not charge that he is removable on the basis of his convictions, he should not be subject to mandatory detention . . . by reason of having committed two crimes involving moral turpitude. We disagree. Where the record reflects that an alien has committed any of the

offenses covered . . . the alien is subject to mandatory detention . . . without regard to whether the Department of Homeland Security ('DHS') has exercised its prosecutorial discretion to lodge a charge based on the offense.").

Likewise, an alien who disputes DHS's determination that he is subject to mandatory detention or the apprehend-and-return process pending his removal proceedings can challenge that determination during removal proceedings; an alien's participation in removal proceedings evinces his receipt of notice. *See Dababneh v. Gonzales*, 471 F.3d 806, 809 (7th Cir. 2006) ("Dababneh clearly received the second notice because he appeared at the scheduled hearing."). If an alien is being mandatorily detained or returned to a contiguous foreign territory, and is also provided with written notice of his pending removal proceedings through Form I-862—let alone other written communication from DHS or the Immigration Judge—then he enjoys notice of the proceedings even if Form I-862 does not state the circumstances of his entry into the United States. In any case, the alien himself knows whether he is an arriving alien, or whether he entered the United States via a port of entry or by interdiction. "This is not a scenario in which the government failed to include any information regarding time and date, or worse, purposefully omitted that information. Rather, DHS informed [the alien] that more information would be forthcoming." *Id.*

Information missing from a Form I-862 can be provided to an alien later in time while his removal proceedings proceed, even if that information is statutorily required for complete written notice. Form I-862 need not contain an exhaustive record of an alien's case. "This contention misses the mark because it focuses only on the NTA. The INA simply requires that an alien be provided written notice of his hearing; it does not require that the NTA . . . satisfy all of § 1229(a)(1)'s notice requirements." *Haider v. Gonzales*, 438 F.3d 902, 907 (8th Cir. 2006).

CONCLUSION

For the foregoing reasons, each of the three questions presented should be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on March 25, 2020, I caused to be submitted the foregoing Request to Appear and *amicus curiae* brief, with three copies, to the Board of Immigration Appeals at the following address:

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