U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
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Falls Church, Virginia 22041

Office of the Chief Clerk

December 31, 2020

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1919 M Street NW, 8th Floor
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Re: Amicus Invitation No. 20-04-12

[redacted]

Dear Amici:

The Board of Immigration Appeals received on December 22, 2020 your request for extension of time in which to file your amicus curiae brief. Your request is hereby **GRANTED** as follows:

Your brief and two copies should be submitted to the Board, no later than **January 25, 2021.** In addition please attach a copy of this letter to the front of your brief.

Respectfully,

Latonya Latney
Appeals Examiner
Information Management Team

cc:

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NON-DETAINED

BOARD OF IMMIGRATION APPEALS
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
FALLS CHURCH, VA

Amicus Invitation No. 20-04-12	)

CATHOLIC LEGAL IMMIGRATION NETWORK, INC.'S REQUEST TO APPEAR AS *AMICUS CURIAE* AND SUPPORTING BRIEF

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REQUEST TO APPEAR AS *AMICUS CURIAE*

The **Catholic Legal Immigration Network, Inc. ("CLINIC")** is the nation's largest network of nonprofit immigration legal services providers, with more than 370 programs in 49 states and the District of Columbia. Agencies in CLINIC's network employ approximately 2,300 attorneys and accredited representatives who, in turn, serve hundreds of thousands of low-income immigrants each year. CLINIC's promotion of the dignity and rights of immigrants is informed by Catholic Social Teaching and rooted in the Gospel value of welcoming the stranger. In 2019, CLINIC established the Estamos Unidos Asylum Project in Ciudad Juárez, Mexico to respond to the crisis in legal counsel created by the Migrant Protection Protocols ("MPP"). Through this project, CLINIC provides "know your rights" sessions and, in limited situations, seeks *pro bono* counsel for asylum seekers awaiting U.S. court dates in Mexico.

CLINIC requests to appear as *amicus curiae* in response to the Board's *amicus* invitation number 20-04-12, inviting public comment on whether an individual who, despite having already come approximately fifty miles into the United States, can nevertheless be designated as "arriving" under § 235(b)(2)(C) of the Immigration and Nationality Act ("INA"), and relatedly, whether the distinction in prior law between exclusion and deportation proceedings has any bearing on this matter.[1] CLINIC has a significant interest in the outcome of this decision because it is critical for the legal services providers in its network to appropriately advise arriving immigrants of their rights under the law.

[1] The deadline for submission of *amicus* briefs in response to the invitation was January 4, 2021. The Board granted CLINIC an extension of the deadline to January 25, 2021.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A noncitizen who is apprehended more than approximately fifty miles into the United States is no longer "arriving" in this country. Because he has exceeded the geographic (and likely temporal) scope of what is understood under the law to be "arriving," he is not subject to INA § 235(b)(2)(C) and may not be ordered to remain in a territory contiguous to the United States to await his removal proceeding. Throughout the INA, the term "arriving" is most often used in connection to a specific geographic point. It is frequently used to describe an aircraft landing, a ship docking, or a noncitizen entering at a port of entry or crossing the border. A noncitizen fifty miles into the United States has lost his connection to a port of entry or the border. Thus, as the reasoning of *Matter of M-D-C-V*, 28 I&N Dec. 18 (BIA 2020) directs, a commonsense interpretation of "arriving" in INA § 235(b)(2)(C) would not encompass an individual more than fifty miles into the United States.

The distinction under INA § 235 between the treatment of those who are arriving and those who are already present in the United States parallels a prior distinction in the INA: the treatment of those entering the United States (who were subject to exclusion hearings) and those already present in the United States (who were subject to deportation hearings). Although the INA was amended in 1996 so that current removal hearings replaced both exclusion and deportation hearings, the division of these two categories of noncitizens—those who are physically present and those who are entering the United States—has been imported into the current version of the INA. Although it no longer affects the *kind* of hearing a noncitizen receives, the distinction is crucial for the application of INA § 235(b)(2)(C). Thus, past Board decisions examining the distinction between noncitizens who are physically present and those

who are entering the United States inform the proper interpretation of "arriving" under INA § 235(b)(2)(C).

BACKGROUND

INA § 235 provides for the inspection of "applicants for admission." Under INA § 235, there are two categories of applicants for admission: those who are "present in the United States who ha[ve] not been admitted," and those "who arrive [ ] in the United States (whether or not at a designated port of arrival and including [those] brought to the United States after having been interdicted in international or United States waters)." INA § 235(a)(1). Under INA § 235(b)(2), if an immigration officer determines that an applicant for admission is "not clearly and beyond a doubt entitled to be admitted," the immigration officer shall detain the applicant for a removal proceeding. *Id.* § 235(b)(2)(A). INA § 235(b)(2) provides a specific procedure for those applicants for admission who are "not clearly and beyond a doubt entitled to be admitted" and who are "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States." *Id.* § 235(b)(2)(A) and (C). For such INA § 235(b)(2) applicants, DHS "may return" them to the contiguous territory from which they arrived pending their removal proceeding. *Id.* § 235(b)(2)(C).

INA § 235(b)(2) specifically excludes individuals who are subject to the expedited removal process authorized by § 235(b)(1), are found to be inadmissible under INA § 212(a)(6)(C) or (a)(7), and, oftentimes, come to the United States to seek asylum. *See id.* § 235(b)(2)(B)(ii); *see also id.* § 235(b)(1)(A); *see also Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1085 (9th Cir. 2020) ("The 'return-to-a-contiguous-territory' provision of [INA § 235(b)(2)(C)] is thus available only for § (b)(2) applicants."), *cert. granted* No. 19-1212, 2020 WL 6121563 (U.S. Oct. 19, 2020)).

Relying on its apparent authority under § 235(b)(2)(C), DHS announced the Migrant Protection Protocols ("MPP") in January 2019. Under MPP, DHS orders certain individuals "entering or seeking admission to the U.S. from Mexico" to be "returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings." U.S. Department of Homeland Security, *Migrant Protection Protocols*, https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols (Jan. 24, 2019). According to DHS's statement on the program, "MPP applies to aliens arriving in the U.S. on land from Mexico (including those apprehended along the border) who are not clearly admissible and who are placed in removal proceedings." *Id.*[2] Although the legality of MPP is beyond the scope of the issues presented in the *amicus* invitation, *amicus* objects to MPP and its application to all noncitizens arriving at the border, regardless of their intent to seek asylum. As the Ninth Circuit held in *Innovation Law Lab v. Wolf*, MPP is likely inconsistent with the INA. 951 F.3d at 1084.[3]

The regulations implementing INA § 235(b)(2)(C) provide in relevant part, "[i]n its discretion, the [DHS] may require any alien who appears inadmissible and who arrives at a land border port-of-entry from Canada or Mexico, to remain in that country while awaiting a removal hearing." *See* 8 C.F.R. §§ 235.3(d) and 1235.3(d). As the Board reasoned in *Matter of M-D-C-V*, these regulations and the regulation defining "arriving alien"—8 C.F.R. § 1001.1(q)—do not specifically square with how the term "arriving" is used in INA § 235(b)(2)(C). 28 I&N Dec. at

[2] On January 20, 2021, DHS announced the suspension of new enrollments in MPP. U.S. Dept. of Homeland Security, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*, https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program (Jan. 20, 2021).

[3] The United States Supreme Court granted the government's petition for a writ of certiorari for review of *Innovation Law Lab v. Wolf* and CLINIC has joined an *amicus* brief filed in support of respondents. *See* Brief of the United States Conference of Catholic Bishops, et al. Supporting Respondents, *Wolf v. Innovation Law Lab*, No. 19-1212 (U.S. Jan. 22, 2021). Oral argument is set for March 1, 2021.

23. In relevant part, an "[a]rriving alien" is defined in 8 C.F.R. § 1001.1(q) as an

> applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.

8 C.F.R. § 1001.1(q). The Board noted in *Matter of M-D-C-V* that the term "arriving" is used in INA § 235(b)(2)(C) in a sense broader than in the definition in 8 C.F.R. § 1001.1(q) because INA § 235(b)(2)(C) explicitly includes those who are arriving "whether or not at a designated port of arrival." *See* 28 I&N Dec. at 24. At the same time, INA § 235(b)(2)(C) uses the term "arriving" more narrowly than in 8 C.F.R. § 1001.1(q) because it refers to only those individuals who are "arriving by land." *Id.* The Board held that the definitions in 8 C.F.R. §§ 1001.1(q), 235.3(d), and 1235.3(d) do not limit the ability of DHS to apply the procedure under INA § 235(b)(2)(C) to individuals arriving between ports of entry. *Id.* at 27. [4]

In the case underlying this *amicus* invitation, the immigration judge terminated the respondents' removal proceeding because the respondents were improperly placed in MPP. The immigration judge noted that the respondents were arrested after they had entered the United States and DHS did not indicate on their "Notice to Appear" that they were "arriving aliens." IJ Opinion at 4. The immigration judge determined that this evidence demonstrated DHS did not

[4] CLINIC joined an *amicus* brief filed in support of the petitioner in the appeal of *Matter of M-D-C-V* to the Ninth Circuit, arguing an individual already on United States soil is not arriving and should not be subject to MPP. *See* Brief of Immigrant Rights Organizations as *Amici Curiae* in Support of Petitioner-Appellant at 9–10, *M.D.C.V. v. Barr*, No. 20-72071 (9th Cir. Oct. 26, 2020). CLINIC maintains this position but recognizes the precedent set by the Board's holding in *Matter of M-D-C-V* for purposes of responding to this *amicus* invitation.

believe the respondents were arriving to the United States and thus were not properly placed in MPP. *Id.* at 6–7. The immigration judge properly terminated the underlying proceeding.

ARGUMENT

I. A noncitizen more than fifty miles from the border is not "arriving" under INA § 235(b)(2)(C).

A noncitizen who has come more than approximately fifty miles into the United States has arrived—he is no longer "arriving." Although INA § 235(b)(2)(C) does not specifically provide any geographic or temporal limits to signify the end of the arrival process, the term "arriving" is frequently used throughout the INA in relation to a noncitizen's entry into the United States at a port of entry or over the border. Treating a noncitizen more than fifty miles into the United States as arriving under INA § 235(b)(2)(C) is not supported by the text of the INA, the reasoning of prior Board decisions, or common sense.

The plain language of INA § 235(b)(2)(C) covers noncitizens who are arriving, not those who have already arrived. "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). Accordingly, the Board has recognized that the use of the word "arriving" in § 235(b)(2)(C) denotes an important limitation. Specifically, the Board has noted the use of the present progressive "arriving" in § 235(b)(2)(C) instead of the past tense, "arrived," shows "some temporal or geographic limit" on the arrival process. *M-D-C-V*, 28 I&N Dec. at 23. The present progressive tense is used when an activity is still in progress. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1011 (9th Cir. 2020) ("The district court recognized that '[t]he use of the present progressive, like use of the present participle, denotes an ongoing process.'" (quoting *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019))). In *Matter of M-D-C-V*, the Board held that an individual who was "20 yards north of the

southern border" was still in the process of arriving. *M-D-C-V*, 28 I&N Dec. at 23.[5]

INA § 235(b)(2)(C) is silent as to what geographic and temporal limitations denote the end of a noncitizen's arrival process. But because "identical words used in different parts of the same act are intended to have the same meaning," a review of the entire INA is enlightening as to the term's meaning. *See Gustafson v. Alloyd Co.*, *Inc.*, 513 U.S. 561, 570 (1995). Throughout the INA, the term "arriving" is frequently used to describe a boat docking at shore, an aircraft landing at an airport, or an individual crossing into the United States at a port of entry or the border. *See e.g.*, INA §§ 241(d)(2) (describing a vessel arriving with a noncitizen stowaway), 251 (providing rules for arriving vessels or aircraft), 257 (same); 103(a)(10) (noting the powers of the Attorney General in the event of an "actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border"), 232(a) (providing rules for medical examinations for "aliens . . . arriving at ports"), 234 (authorizing the Attorney General to regulate "ports of entry for aliens arriving by aircraft"), 235A(a)(3)(B) (mandating the Attorney General to collect data on "aliens arriving from [specified] foreign airport[s]"), 240C(a) (ordering the Attorney General to record each surrender of every immigrant visa "at the port of entry by the arriving alien"), 241(c)(1) (outlining procedures for the removal by vessels or aircraft of "alien[s] arriving at a port of entry"). In other words, "arriving" is used to denote that the process of entering into the United States is underway. [6]

Thus, throughout the INA, the term "arriving" is often linked to a specific geographic

[5] *See supra* note 4.

[6] The term "arriving" is also used in the INA—with less frequency—to describe a class of individuals, "arriving aliens," without specific reference to the border or a port of entry. *See, e.g.*, INA §§ 235(b), 240B(a)(4), 241(b)(1). The more frequent usage of "arriving" as used to denote the process of entering into the United States informs the meaning of "arriving" as it is used less frequently to describe a group of individuals.

point such as a port of entry, an airport, or the border. *See, e.g.*, INA §§ 103(a)(10), 232(a), 240C(a), 241(c)(1). Indeed, this usage matches the traditional understanding of "arriving alien" as referring to "aliens who appear at a port of entry." *M-D-C-V*, 28 I&N Dec. at 24. Although INA § 235(b)(2)(C) applies to those arriving "whether or not at a designated port of arrival," the usage of "arriving" throughout the INA demonstrates Congress's intent for the term to describe those geographically close or otherwise proximately connected to the border or a port of entry—a location where one enters into the United States.

An individual more than fifty miles into the United States is no longer geographically close or linked to the border or a port of entry. And noncitizens who are more than fifty miles over the border fit into another category of applicants for admission: those "present in the United States who ha[ve] not been admitted." INA § 235(a)(1). There is *no need* for DHS to widen the category of those "arriving" in the United States to include those fifty miles from the border when such individuals are already accounted for in the second category of applicants for admission.

When determining whether a noncitizen apprehended between ports of entry is "arriving" under INA § 235(b)(2)(C), the Board carefully limited its holding. In *Matter of M-D-C-V*, the Board held that a respondent who "was apprehended 20 yards north of the southern border and 3 miles west of [a] port of entry" was "arriving" such that INA § 235(b)(2)(C) applied. 28 I&N Dec. at 19, 23.[7] The Board noted it had "little difficulty" holding that an individual apprehended "just inside the border upon crossing into the United States" should be considered still in the process of arriving. *Id.* at 23. The Board limited its holding to apply to those "just inside" the border who were apprehended "upon crossing" into the country, noting it did not address

[7] *See supra* note 4.

"whether section 235(b)(2)(C) of the Act could be applied to aliens apprehended well within the interior of the United States or long after crossing the border." *Id.* at 23 n.7. Similarly, in *Department of Homeland Security v. Thuraissigiam*, the United States Supreme Court reasoned that an individual only twenty-five yards north of the border who was apprehended within twenty-four hours after crossing the border was "on the threshold" of the border and had not "effected an entry" into the United States. 140 S. Ct. 1959, 1982–83 (2020) (internal quotation marks and citations omitted). The Court held the individual was not to be afforded the full protections of the Due Process Clause as he would have been had he entered the country. *Id.*

In other cases, the government has recognized this limited interpretation and emphasized a respondent's proximity to the border when arguing in favor of the application of INA § 235(b)(2)(C). *See* Defendant's Supplemental Brief Regarding Jurisdiction and Standing at 4, *Turcios v. Wolf*, No. 1:20-cv-00093 (S.D. Tex. Jul. 28, 2020) (arguing noncitizen respondents who were apprehended "within yards of the border and within hours of their crossing" were arriving under INA § 235(b)(2)(C)). Federal district courts have emphasized geographic and temporal proximity to the border when determining whether a noncitizen was arriving within the meaning of INA § 235(b)(2)(C) as well. *See Adrianza v. Trump*, No. 20-cv-3919 (RPK), 2020 WL 7136813, at *9 (E.D.N.Y. Dec. 7, 2020) (finding plaintiffs were unlikely to succeed with their argument that they were not "arriving" under INA § 235(b)(2)(C) when they had entered the United States only hours before they were apprehended).

When applying the logic of *Matter of M-D-C-V* and *Thuraissigiam*—and prior litigation positions of the government—to the issue presented here, the conclusion is easy to draw. Just as it was not difficult for the Board to conclude that an individual twenty yards north of the border—or at the "threshold" of the border—is arriving, it is also not difficult to conclude that an

individual well into the interior—at least fifty miles inside—has completed his arrival and is no longer subject to INA § 235(b)(2)(C).

II. The reasoning underpinning the "entry doctrine" remains in the current INA and precludes the application of INA § 235(b)(2)(C) on noncitizens who are fifty miles beyond the border.

Before the Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA") amended the INA in 1996, immigration law provided for two types of removal proceedings: exclusion hearings and deportation hearings. *Torres v. Barr*, 976 F.3d 918, 924 (9th Cir. 2020) (outlining the details of the IIRIRA amendments). Exclusion proceedings were limited to individuals entering the United States, while deportation hearings were for those already physically, but not lawfully, in the United States. *Id.* The IIRIRA eliminated the so-called "entry doctrine" and replaced exclusion and deportation hearings with removal hearings. But the disparate treatment of those entering the United States and those already in the United States in relation to removal proceedings carried forward, reflecting the "longstanding distinction in our immigration law between noncitizens who have entered the United States, even if unlawfully, and those who remain at the threshold." *Bollat Vasquez v. Wolf*, 460 F. Supp. 3d 99, 110 (D. Mass. 2020) (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

The American Immigration Lawyers Association ("AILA")'s *amicus* brief submitted in this matter thoroughly outlines the history of the "entry doctrine," explaining how the concept was defined through agency rules and Board decisions. CLINIC hereby incorporates AILA's arguments about the history of the entry doctrine and its significance in interpreting INA § 235(b)(2)(C). As AILA explains, when Congress added § 235(b)(2)(C) to the INA, the entry doctrine provided context for the meaning of "arriving." Before the INA was amended and the exclusion–deportation dichotomy remained, those classified as "arriving" under the law were treated the same as those who had not made an "entry" and were therefore subject to exclusion

hearings. Congress did not diverge from this understanding when it enacted INA § 235(b)(2)(C).

Because the entry doctrine provided context for the meaning of "arriving," the Board's pre-IIRIRA entry doctrine decisions provide a useful illustration in demonstrating Congress's intent for the application of INA § 235(b)(2)(C). In *Matter of Z*, the Board held the respondent qualified for deportation proceedings instead of exclusion proceedings because he had entered the United States "when he debarked from his vessel at a place other than a port of entry and fled into the interior undetected, with every apparent intention of evading immigration inspection." 20 I&N Dec. 707, 714 (BIA 1993). The respondent in *Matter of Z* had been in the United States for nine hours at most when he was apprehended. *Id.* at 713–14. The respondent was not apprehended at the port of entry but was found "mingl[ing] with the general population of San Francisco." *Id.* On these facts, the Board held the respondent was no longer in the process of entering the United States such that he would instead be subjected to exclusion proceedings. *Id.* at 714. Similarly, in *Matter of G*, the Board reasoned that noncitizens who swam ashore after their vessel ran aground off the shore of New York City and "mix[ed] with the general population" for hours before they were apprehended had entered the United States and thus were subjected to deportation proceedings. 20 I&N Dec. 764, 769 (BIA 1993). And in *Matter of Ching & Chen*, the Board held respondents had entered the country when they had escaped custody at the Los Angeles airport and were apprehended two days later nearly nine hundred miles away in Sierra Blanca, Texas. 19 I&N Dec. 203, 204–05 (BIA 1984).

Applying the same reasoning to the issues presented here, a respondent more than fifty miles into the interior, cannot be "arriving" under INA § 235(b)(2)(C). If a respondent is considered to have made an entry and thus completed his process of arrival after spending hours in the port cities of San Francisco or New York, a noncitizen more than fifty miles into the

interior has certainly completed his arrival process. In both instances, the individuals have lost their connection to the port of entry or the border. As discussed above, Congress maintained this understanding of making an entry or "arriving" when enacting INA § 235(b)(2)(C) and intended that the provision apply only to those geographically and temporally related to the border or, in other words, those that are actually in the process of arriving.

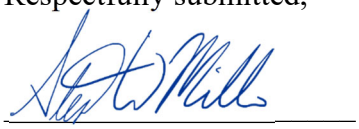
CONCLUSION

For the foregoing reasons, *amicus* concludes a noncitizen more than fifty miles into the United States is not arriving and that INA § 235(b)(2)(C) does not apply. The language of the INA as a whole, common sense, and the reasoning of the Board's prior decisions on this matter support this conclusion. Further, because the separate categories of entering and already-present noncitizens have remained the same in the current version of the INA, past Board decisions discussing the distinction in prior law between exclusion and deportation hearings provide a relevant parallel in determining which noncitizens are arriving and which are already present in the United States.

Thus, *amicus* requests to appear before the Board as *amicus curiae*, for the Board to accept its supporting brief, and for the Board to hold that a noncitizen more than fifty miles into the United States is not arriving so that INA § 235(b)(2)(C) does not apply.

Dated this 25th day of January, 2021.

Respectfully submitted,



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