Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 21, 2026

The Honorable Pamela Bondi
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Attorney General Bondi,

Pursuant to 8 C.F.R. §§ 103.10(c)(1)(iii) and 1003.1(h)(1)(iii), I hereby refer to you for review the Board of Immigration Appeals' (Board) decision, *Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012), decided April 12, 2012, which sustained in part the respondent's appeal and remanded to the Immigration Judge for further proceedings and entry of a new decision. I ask you to vacate the decision insofar as it held that aliens taken into custody for inspection and admission under INA § 209 may not be charged as inadmissible under INA § 212 but rather must be deportable under INA § 237.

Under INA § 209, refugee admission operates in a time-limited manner. Specifically, admission is for a one-year period, and after that period, an alien admitted as a refugee must "return or be returned to the custody of the Department of Homeland Security [(DHS)] for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of [INA §§ 235, 240, and 241]." INA § 209(a)(1). In *Matter of D-K-*, the Board considered the case of a refugee taken into DHS custody following his federal conviction for distribution of cocaine within 1,000 feet of a school. DHS detained the alien, applied INA § 209(a), and found him inadmissible. The Board, however, held that the alien could not be removed based on his inadmissibility. In reaching that conclusion, the Board "acknowledge[d] the *conditional* nature of a refugee's status," *D-K-*, 25 I&N Dec. at 767, but it concluded that "a refugee who ultimately becomes a lawful permanent resident will have been 'admitted' twice," *id.* at 768. As a result, an alien denied the second admission nonetheless retains the first admission and is therefore subject only to deportability grounds and not inadmissibility grounds. The Board's decision is plainly wrong.

Section 209(a) of the INA directs:

> (1) Any alien who has been admitted to the United States [as a refugee]-
> (A) whose admission has not been terminated . . . ,
> (B) who has been physically present in the United States for at least one year, and
> (C) who has not acquired permanent resident status,

> shall, at the end of such year period, return or be returned to the custody of [DHS] for inspection and examination for admission to the United States as an immigrant in accordance with [INA §§ 235, 240, and 241].
>
> (2) Any alien who is found upon inspection and examination by an immigration officer pursuant to paragraph (1) or after a hearing before an immigration judge to be admissible (except as otherwise provided under subsection (c)) as an immigrant under this chapter at the time of the alien's inspection and examination shall, notwithstanding any numerical limitation specified in this chapter, be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien's arrival into the United States.

The Board's decision is erroneous for several reasons. Most important, it fails to acknowledge that a refugee returned to custody under INA § 209 is to be inspected for admission "in accordance with" INA §§ 235, 240, and 241. INA § 209(a)(1). Each of these references indicates that an alien found inadmissible during this process is to be removed rather than allowed to remain based on his previous admission as a refugee.[1] *Matter of D-K-*, by contrast, holds that a refugee denied admission under INA § 209 may remain in the United States unless DHS can establish a ground of deportability. The decision prevents DHS from using its statutory authority to ensure that aliens who are not admissible to the United States are promptly removed in accordance with the law. That flaw is evident from the plain language of the very provisions to which INA § 209 refers, beginning with § 235.

As to § 235, that section by definition only applies to aliens "who arrive[]"in the United States or who otherwise have "not been admitted." INA § 235(a)(1). As such, the fact that INA § 209 directs DHS to consider aliens for admission "in accordance with" INA § 235 necessarily means that any refugee returned to custody under INA § 209 is, as a matter of law, no longer "admitted." Were it otherwise, INA § 235 could not apply because the refugee in custody would be outside the definitional provisions of INA § 235. Moreover, the directive to apply INA § 235 means that an alien deemed inadmissible must be removed. That provision directs that certain inadmissible aliens "shall [be] order[ed] . . . removed" and that other inadmissible aliens "shall be detained for a" removal proceeding. INA §§ 235(b)(1)(A)(i), 235(b)(2)(A). In other words, it makes zero sense that Congress would reference INA § 235 if it thought this population of aliens could remain in the United States even if they are found inadmissible because INA § 235 directs DHS to do the opposite.

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[1] The grounds of deportability at INA § 237 generally are narrower than the grounds of inadmissibility at INA § 212, as deportability generally focuses on an alien's conduct after admission, while inadmissibility grounds cover a broader range of conduct, including conduct prior to the alien's arrival in the United States. The grounds of deportability generally require more serious criminal offenses and often prescribe time limits on conduct. *See, e.g.*, INA §§ 237(a)(2)(A)(i) (deportability for being convicted of a crime involving moral turpitude (CIMT) within five or ten years after admission, where the offense is one for which a sentence of one year or longer may be imposed), 237(a)(2)(A)(iii) (deportability for being convicted of an aggravated felony at any time after admission), 237(a)(2)(B) (deportability for a conviction of a controlled substance offense). In addition, in removal proceedings, DHS bears the burden of establishing that the alien is deportable, INA § 240(c)(3); 8 C.F.R. § 1240.8(a), while the alien bears the burden of establishing that he or she has been admitted or is admissible, INA § 240(c)(2); 8 C.F.R. § 1240.8(b), (c).

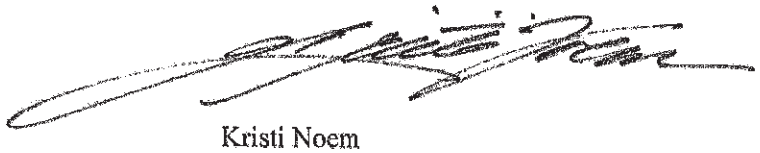
In addition to INA § 235, INA § 209(a) directs DHS to inspect detained refugees for admission "in accordance" with INA §§ 240 and 241. Those provisions govern removal proceedings and physical removal from the United States, respectively. When Congress directed DHS to inspect aliens for admission "in accordance with" those provisions, it could only have meant that aliens found inadmissible during that process must be removed.

In addition to the "in accordance with" language the Board ignored, the Board also ignored the requirement that refugees must "return or be returned" to the custody of DHS after the one-year period. The requirement that aliens be detained during this process strongly suggests that an alien found inadmissible will be removed. Civil immigration detention, as a concept, exists only for purposes of removing an alien or determining if an alien should be removed. If INA § 209(a) were only about granting an admitted alien an additional benefit, Congress would not have mandated detention. Moreover, the phrase "or be returned" indicates that aliens who refuse to return voluntarily are to be treated as fugitives and affirmatively tracked down for arrest. There is no reason to use such strong language if refugee status is a durable status and adjustment to a lawful permanent resident is optional. Notably, however, as a result of the erroneous interpretation adopted in *Matter of D-K-*, many refugees never bother seeking to adjust status because they know there is no consequence for failing to do so.

Finally, the Board ignored the fact that, under INA § 209(a)(2), the admission as a lawful permanent resident relates back to "the date of such alien's arrival into the United States." This further indicates that refugee status is a temporary and time-limited form of protection. It is a stop gap until the United States can determine whether the alien should be permitted to remain in the United States. If that question is answered in the affirmative, the alien is treated as if he entered as a lawful permanent resident at the time of his initial entry. If the answer is no, the alien must leave the country. The Board's erroneous holding has obliterated this scheme, allowing refugees to remain in the United States forever without complying with the clear mandates of INA § 209(a).

Vacatur of this decision will ensure that aliens conditionally and temporarily admitted to the United States as refugees are not permitted to remain indefinitely, in contravention of INA § 209(a)(1), which mandates that these aliens return to DHS custody to seek admission or be removed as inadmissible. Accordingly, I ask you to refer the decision to yourself and vacate the decision insofar as it erroneously holds that aliens admitted as refugees may not be taken back into DHS custody under INA § 209(a)(1), charged with inadmissibility under INA § 212, and promptly removed.

Sincerely,



Kristi Noem
Secretary of Homeland Security

CERTIFICATE OF SERVICE

Respondent/Respondent's Counsel:

Kara Hartzler, Esq.
Federal Defenders of San Diego, Inc.
225 Broadway #900
San Diego, CA 92101

I certify under penalty of perjury that a true and correct copy of this *Referral of Decision to the Attorney General* was served by first-class U.S. Mail, postage prepaid, on the opposing party's counsel, named at left, on the date indicated below.

Date: 01/21/2016
Department of Homeland Security