

No. 26-60344

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

MAHMOUD KHALIL,

Petitioner,

v.

TODD WALLACE BLANCHE, U.S. ATTORNEY GENERAL,

Respondent.

**Petition for Review from a Final Order Entered by the Board of Immigration
Appeals (Agency No. A233 698 925)**

**BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
AS *AMICUS CURIAE* SUPPORTING PETITIONER AND REMAND**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

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Respondent Todd Wallace Blanche, U.S. Attorney General, is a government official.

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Dated: August 21, 2026

/s/ Amanda Waterhouse
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STATEMENT OF CONSENT

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a) and Circuit Rule 29-3, attorneys representing Petitioner and Respondent have consented to the filing of this amicus brief.

Dated: August 21, 2026

/s/ Amanda Waterhouse
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**STATEMENT REGARDING AUTHORSHIP OF THIS BRIEF AND
FINANCIAL CONTRIBUTIONS**

This brief was written by Amanda Waterhouse and Joshua A. Altman, members of the Amicus Committee of the American Immigration Lawyers Association (“AILA”), acting on behalf of and as counsel for AILA, the amicus curiae herein. No counsel for a party authored this brief in whole or in part. No counsel for a party or a party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person or entity other than AILA, its Amicus Committee, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Dated: August 21, 2026

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I. INTRODUCTION & INTEREST OF AMICUS CURIAE.

The American Immigration Lawyers Association (“AILA”) is a national, nonpartisan association of more than 18,000 immigration attorneys and law professors who practice regularly before the U.S. Department of Homeland Security, the immigration courts, the Board of Immigration Appeals, and the federal courts.

AILA has a strong interest in the correct and neutral interpretation of the Immigration and Nationality Act and writes to explain how the process that produced Petitioner Mahmoud Khalil’s removal order departed from the full and fair hearing the INA promises.

This brief does not address all of the issues being litigated in this matter (e.g., the First and Fifth Amendment arguments, the lack of notice of uncharged allegations, and the motion to suppress and terminate based on Khalil’s warrantless arrest), several of which could potentially result in the complete reversal of the underlying agency decision and termination of proceedings, such that Khalil would remain a lawful permanent resident.

It focuses on the process through which the government arrived at its order directing Khalil’s removal, which was fatally flawed for the reasons explained below.

The government’s initial theory of removability rested on a foreign-policy determination signed by the Secretary of State on March 8, 2025, immediately after the underlying, essentially one-day “investigation” concluded (*Am. Ass’n of Univ.*

Professors v. Rubio, 802 F. Supp. 3d 120, 141-45 (D. Mass. 2025)). Only after that theory came under judicial challenge did DHS lodge a misrepresentation charge its own investigators had rejected (*Matter of M-K-*, 29 I. & N. Dec. 556, 557 (BIA 2026)).
See infra Part II.A.

Before the immigration judge, the process then foreclosed the record Khalil needed. The IJ denied discovery and subpoenas, and she declined an evidentiary hearing on the 8 U.S.C. § 1227(a)(1)(H), INA § 237(a)(1)(H) waiver. *See infra* Part II.B. The IJ entered a decision that incorporated her prior rulings, some issued unlawfully under an injunction and a partial vacatur, leaving no single, complete set of findings, as ruling law requires (*Matter of M-K-*, 29 I. & N. Dec. at 558). *See infra* Part II.C.

The BIA compounded those errors rather than correct them. It saw no error in the IJ's failure to render a complete set of findings. It made findings of fact in the first instance in violation of 8 C.F.R. § 1003.1(d)(3)(iv). *See infra* Part II.D. It misapplied the materiality standard for the misrepresentation charge. *See infra* Part II.E. It resolved the appeal on the merits in record time, deciding this appeal on the merits only 9 days after briefing ended. *See infra* Part II.F. And those errors were not harmless. *See infra* Part II.G.

AILA urges this Court to vacate the BIA's decision and hold that DHS did not prove removability by clear, convincing, and unequivocal evidence, *see infra*, or remand for proceedings that permit a fully developed record and meaningful appellate review.

II. ARGUMENT.

The INA promises each noncitizen an opportunity for a full and fair hearing before an IJ and meaningful review before the BIA. But the process that produced Khalil’s removal order failed at every stage: the post-hoc charge, the IJ’s truncated record, the incorporation of void rulings, the BIA’s impermissible fact-finding, the BIA’s rush to judgment, and the designation as precedent. Because this Court’s review is confined to the administrative record, 8 U.S.C. § 1252(b)(4)(A), INA § 242(b)(4)(A), the proper remedy to address many of these errors, assuming this Court does not terminate proceedings following the complete reversal of the agency’s decision, is transfer of the proceeding to a district court under 28 U.S.C. § 2347(b)(3) for a hearing and determination, *see Khalil v. President, United States*, 164 F.4th 259, 280 (3d Cir. 2026), or remand to the agency. *See Gonzales v. Thomas*, 547 U.S. 183, 187 (2006) (per curiam); *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam).

A. The Amended Charge Was a Post-Hoc Litigation Response

The government’s initial theory of removal rested on a single foundation: a foreign-policy determination signed by Secretary of State Marco Rubio on March 8, 2025. *Am. Ass’n of Univ. Professors*, 802 F. Supp. 3d at 144-45. The Homeland Security Investigations (“HSI”) referral and Action Memo advised that no alternative ground of removability applied. *Id.* at 143–44 (“DHS has not identified any alternative grounds of removability that would be applicable.” (quoting Action Memo)). Only

after that theory of removability came under judicial challenge (*Khalil v. Joyce*, No. 2:25-cv-01963 (D.N.J. filed Mar. 9, 2025)), as the government’s report warned was likely, did DHS add a second theory. *Matter of M-K-*, 29 I. & N. Dec. at 557.

That the government responded to judicial scrutiny over the foreign-policy charge by searching the lawbooks for a weak technical violation—overruling HSI’s determination that no other charge applied—suggests that political or otherwise unconstitutional motivations drove the new charging decision. *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology 3, 5 (1940) (“Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”).

And the IJ’s own findings support why HSI determined no alternative ground of removability applied. The IJ accepted that United Nations Relief and Works Agency for Palestinian Refugees (“UNRWA”) “is not a membership-based organization” and that Khalil was an intern, not the “political affairs officer” alleged; she credited that he “was never a member of CUAD,” as alleged; and the IJ declined to sustain the British-Embassy allegation as the Embassy’s letter showed Khalil’s contract ended in 2022. And while the IJ found that Khalil had a connection to Columbia University Apartheid Divest (“CUAD”), she based that finding solely on facts post-dating the alleged false statement (but note that the BIA never reached this particular finding). IJ Decision at 6–8 (June 20, 2025).

B. The IJ Improperly Limited Record Development

The IJ repeatedly denied Khalil the opportunity to create the record he needed to defend himself. The BIA’s decision confirms each denial. It held that Khalil was “not entitled to conduct discovery” directed at DHS, the Department of Justice, or the Department of State, 8 C.F.R. § 1208.12(b); *Matter of Benitez*, 19 I. & N. Dec. 173, 174 (BIA 1984), and that his document request “did not comply with the subpoena requirements” of 8 C.F.R. § 1003.35(b)(2). *Matter of M-K-*, 29 I. & N. Dec. at 561–62.

But § 1208.12(b)’s bar reaches only “this part”—Part 1208, the asylum regulations—and Khalil sought discovery on removability. And *Matter of Benitez*’s holding addresses statutory entitlement, not constitutional sufficiency. The Fifth Amendment entitles noncitizens to due process in removal proceedings (*Anwar v. INS*, 116 F.3d 140, 144 (5th Cir. 1997)), and a proceeding that denies the noncitizen a reasonable opportunity to examine evidence in the government’s exclusive control that is material to his defense is not fundamentally fair—and here, the evidence bearing on the government’s burden and motive resides solely with DHS, DOJ, and the Department of State. And § 1003.35(b)(2)’s diligent-effort requirement is a procedural precondition to a party-initiated subpoena, not a substantive bar: § 1003.35(b)(1) empowers the IJ to issue subpoenas “upon . . . application of . . . the alien” or sua sponte, and (b)(3) commands that a subpoena “shall issue” if the evidence is essential—an issue the IJ and BIA declined to address.

The IJ likewise refused to permit the required evidentiary hearing on the § 1227(a)(1)(H) waiver, ruling the record made one unnecessary.¹ IJ Amended Decision at 2 (Sept. 12, 2025).

The IJ also limited record development on the misrepresentation charge, which was dispositive, as the IJ had vacated her foreign-policy determination consistent with the district court’s injunction. Materiality is an element of the misrepresentation charge. Yet, the IJ only conducted fact-finding to support a mere relevance, “shut off a line of inquiry” standard with no basis in this Court’s case law; and the BIA affirmed on that basis. *Matter of M-K-*, 29 I. & N. Dec. at 560–61; *see infra* Part II.E. Nothing in the administrative record establishes the facts that a fully developed record would have provided on materiality so the adjudicator could assess it under the proper standard from *Kungys v. United States*, 485 U.S. 759, 770 (1988).

Absent a remand or transfer, and if the Court were to rule in favor of the government on the incomplete record as opposed to in favor of Khalil, the loss would be permanent. This Court reviews only the administrative record, 8 U.S.C.

¹ The IJ rested this ruling on *Matter of Andrade*, 27 I. & N. Dec. 557, 559 (BIA 2019), and *Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir. 2004), which do not address the statutory framework governing relief adjudication. IJ Amended Decision at 2 n.2 (Sept. 12, 2025). The statute, 8 U.S.C. § 1229a(c)(4)(B), INA § 240(c)(4)(B), directs the IJ to evaluate “the testimony of the applicant or other witness” and “weigh the credible testimony along with other evidence of record”—language that presupposes the evidentiary hearing the IJ denied—and 8 C.F.R. § 1240.11(d)–(e) requires the application to be made during the hearing and bars the IJ from refusing to receive it.

§ 1252(b)(4)(A), and may not “look outside” it. *Terrasas-Hernandez v. Barr*, 924 F.3d 768, 774 (5th Cir. 2019); *Kane v. Holder*, 581 F.3d 231, 242–43 & n.44 (5th Cir. 2009).²

This Court may transfer the proceeding to the district court under § 2347(b)(3) for a hearing and determination, *see Khalil*, 164 F.4th at 280, or remand to the agency for the hearing the IJ refused—which could resolve the foreign policy, waiver, and materiality issues without reaching the constitutional claims. Thus, if this Court does not terminate proceedings entirely, it should grant the transfer, ECF No. 28, or remand.

C. The IJ’s Decision Was Really a Series of Citations to Previously Embedded IJ Decisions

The BIA’s own precedents require a single, self-contained IJ decision with clear, complete findings. *Matter of A-P-* requires the IJ’s decision to be “separate and distinct . . . from the transcript of the proceedings,” so the findings are identifiable without “min[ing] the transcript to reconstruct the IJ’s decision”; piecemeal findings are impermissible. 22 I. & N. Dec. 468, 476 (BIA 1999). *Matter of S-H-* adds that the BIA’s bar on fact-finding “heightens the need for Immigration Judges to include in their decisions clear and complete findings.” 23 I. & N. Dec. 462, 464 (BIA 2002).

Yet the September 12 decision the BIA reviewed “incorporate[d]” the June 20 decision and the July 31 order “by reference,” “re-enter[ing] its previous orders, in

² The Court can “look behind” the determination by Secretary of State Rubio given the “affirmative showing of bad faith” on the part of the government. *See Kerry v. Din*, 576 U.S. 86, 104-05 (2015) (Kennedy, J. concurring)).

addition to its finding today,” without itself sustaining any charge. IJ Amended Decision at 2, 7 (Sept. 12, 2025). The June 20 decision rested on findings made orally at the April 11 hearing (Tr. at 104–07), even though a preliminary injunction barred removal on the foreign-policy ground (*Khalil v. Trump*, 786 F. Supp. 3d 871, 880–81 (D.N.J. 2025), *vacated sub nom. Khalil v. President*, 164 F.4th 259 (3d Cir. 2026)), and the July 31 order was compelled by the district court’s clarification order (*Khalil v. Trump*, No. 25-cv-01963 (MEF)(MAH), 2025 LX 236615, at *3–4 (D.N.J. July 17, 2025)). The interlocking incorporations left the controlling facts unattributed across four rulings:

- April 11. The IJ sustained the foreign-policy ground and held the misrepresentation ground in abeyance. She never said whether the abeyance ruling survived the July 31 vacatur.
- June 20. The IJ sustained the misrepresentation ground on Allegations 6 and 8, applying a “shut off a line of inquiry” materiality standard. IJ Decision at 5 (June 20, 2025). On Allegation 8, she found that CUAD involvement post-dated the I-485 yet sustained the charge on a novel “ongoing obligation and duty to update” theory. *Id.* at 7. She also denied asylum in part on the Rubio Determination—despite the district court’s injunction. She never resolved whether the “ongoing duty” theory, its supporting findings, or the asylum denial survived the injunction and the July 31 vacatur.
- July 31. The IJ vacated the foreign-policy-ground determination in her April 11 decision, stating emphatically that she did not make one in the June 20 decision (IJ Decision at 1 n.1 (July 31, 2025)) and apparently left the misrepresentation findings, the letter-based asylum denial, and the waiver untouched.
- September 12. The IJ incorporated the June 20 and July 31 rulings “in their entirety,” denied the § 1227(a)(1)(H) waiver without an evidentiary hearing, and ordered removal—without sustaining any charge or restating any removability finding. She rested the denial primarily on the Secretary of State’s foreign-policy letter and made only cursory alternative findings, discounting the hardship evidence as “consistent with that which would ordinarily be expected.” IJ Amended Decision at 6–7 (Sept. 12, 2025). And the incorporation is contradictory: she incorporated the June 20 ruling “in its entirety”—which

textually includes its own foreign-policy determination—while incorporating the July 31 vacatur, which vacated the April 11 finding on that ground.

No single decision states the removability findings and the standards supporting them. Reconstructing that decision is what *Matter of A-P*- prohibits. The BIA failed to remand for correction of these errors, as it should have done.

D. The BIA Filled the Gaps with Its Own Fact-Finding

The standard of review regulation, 8 C.F.R. § 1003.1(d)(3)(iv), forbids the BIA from engaging in “factfinding” on appeal. *De Rodriguez v. Holder*, 585 F.3d 227, 234 (5th Cir. 2009) (“Under 8 C.F.R. § 1003.1(d)(3)(i), the BIA cannot ‘engage in de novo review of findings of fact determined by an immigration judge.’”); *see also Santos-Zacaria v. Garland*, 126 F.4th 363, 367 (5th Cir. 2025) (“[W]hether the BIA failed to follow its regulations by impermissibly finding facts is a question of law.”).

Where the BIA engages in fact-finding, it contravenes *Accardi* principles (*United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267–68 (1954)), and violates due process (*Francois v. Garland*, 120 F.4th 459, 465–66 (5th Cir. 2024)).

The BIA violated that prohibition here. The IJ’s failure to find facts left the record incomplete, and so the BIA’s duty was to remand under *Matter of S-H*- and *Matter of A-P*-. But rather than remand, the BIA supplied its own facts.

First, the BIA decided that the foreclosed waiver evidence would not have mattered. The IJ declined an evidentiary hearing on the § 1227(a)(1)(H) waiver and denied Khalil’s discovery and subpoena requests (*see supra* Part II.B), so the evidence

he sought to present never entered the record. On that truncated record, the BIA made its own factual determination: that Khalil “has not shown that [the additional] evidence would have materially differed from the evidence he did submit,” and therefore that Khalil “received a full and fair hearing on his waiver application.” *Matter of M-K-*, 29 I. & N. Dec. at 563. That is a finding the IJ never made—and could not have made, because Khalil was prevented from proffering the evidence whose materiality the BIA assessed. The IJ made no finding that the missing evidence was immaterial. The BIA impermissibly supplied the fact-finding itself, deciding what the foreclosed evidence would have shown—which *Matter of A-P-* forbids.

Second, the BIA decided that the Secretary’s determination was factually supported—and then made it dispositive—on a record Khalil was prevented from building. The IJ denied Khalil’s document requests and subpoenas directed at DHS, DOJ, and the State Department, foreclosing evidence that the Secretary’s foreign-policy determination lacked factual support or turned on unconstitutional motivations. Yet the BIA affirmed on the ground that “DHS demonstrated reasonable grounds to find that the respondent is a danger to national security through submission of Secretary Rubio’s letter,” *Matter of M-K-*, 29 I. & N. Dec. at 565—a determination resting on the very record the IJ prevented Khalil from testing. From that unsupported premise, the BIA proceeded to treat the letter as conclusive in the waiver balance: it affirmed the IJ’s determination “that the negative factor of

Secretary Rubio’s letter alone outweighs” Khalil’s equities—his U.S. citizen wife and son and his supporting declarations—and then purported to affirm the denial “even without considering the Secretary of State’s letter.” *Id.* at 564. The two holdings are irreconcilable. If the letter “alone” outweighs the equities, the alternative analysis is surplusage; if the alternative holds, the letter did no independent work. *Ndifon v. Garland*, 49 F.4th 986, 990–91 (5th Cir. 2022). The BIA adopted the Secretary’s determination as its own fact-finding on a record that, by the IJ’s rulings, could not contain the contrary evidence, and it used that fact-finding to treat a single factor as dispositive. Sections 1227(a)(1)(H) and 1229a(c)(4)(B) and 8 C.F.R. § 1240.11 require a hearing where evidence can be presented and weighed and the genuine balancing of adverse and favorable factors. *Matter of Tijam*, 22 I. & N. Dec. 408, 412 (BIA 1998).

Third, the BIA created disputed facts the IJ never had the opportunity to consider, much less resolve—by adding a national-security inference no IJ decision contains. The June 20 decision found that Khalil’s omission “shut off a line of inquiry that would predictably have disclosed other relevant facts regarding his activities with UNRWA” and would have triggered “discretionary decision-making” by the officer. IJ Decision at 5, 8 (June 20, 2025). That was the extent of the IJ’s finding. The BIA, however, said the omission “predictably could have led an immigration officer to inquire regarding related matters of discretion *or security-related grounds of inadmissibility*.” *Matter of M-K*, 29 I. & N. Dec. at 561 (emphasis added). The phrase “security-related

grounds of inadmissibility” appears in no IJ decision. In characterizing the omission as one the officer would have linked to national-security grounds—rather than to discretion alone—the BIA impermissibly created a disputed fact regarding the omission’s effect on the officer’s inquiry into Khalil’s qualifications. *See infra* Part II.E. For this reason also the BIA’s decision must be reversed.

E. The BIA Applied Too Low a Materiality Standard

Even after making up its own facts, the BIA could not reach its desired result without applying an incorrect legal standard to those facts. The BIA recited the correct standard—a misrepresentation is material if it “‘has a natural tendency to influence’ the decisions of the agency,” *Matter of B-Y-*, 25 I. & N. Dec. 236, 244 (BIA 2010) (quoting *Kungys*, 485 U.S. at 770)—but applied a lower one: Khalil’s omission was material because it “shut off a line of inquiry” that “predictably could have led an immigration officer to inquire,” *Matter of M-K-*, 29 I. & N. Dec. at 561. That standard appears nowhere in this Court’s published petition-for-review decisions; this Court has applied only *Kungys*, which requires that a misrepresentation have “a natural tendency to influence, or [be] capable of influencing,” the official decision—in the immigration context, the determination whether “the applicant was qualified,” 485 U.S. at 770-72. By contrast, the BIA’s gloss collapses materiality into mere relevance.³

³ This Court’s prior decisions have left open whether the BIA’s lower standard conflicts with *Kungys*. *Said v. Gonzales*, 488 F.3d 668, 671 & n.4 (5th Cir. 2007); *Njenga v. Barr*, 831 F. App’x 123, 124 (5th Cir. 2020). The Court should hold that it does.

If this Court does not simply find that DHS did not meet its burden to prove removability on the misrepresentation charge, it should at a minimum enter a remand for findings under the correct standard.

F. The BIA Rushed the Decision—and Then Published It

Khalil filed his appeal brief on March 2, 2026, and briefing closed on March 31, 2026. The BIA decided the appeal on April 9, 2026, and designated the decision as precedent on April 15, 2026. *Matter of M-K-*, 29 I. & N. Dec. at 556. A merits ruling on three new national rules—just 9 days after briefing ended.

Normal processing tells a different story. Non-detained BIA appeals like this case take, on average, 795 days to reach a merits disposition; the median is 565 days; 26.6% take four or more years. Declaration of Zabdi J. Salazar on BIA Non-Detained Case Appeals Processing Times, Cohort Composition, and Outcome Patterns ¶ 12 (Apr. 22, 2026) (attached as Exhibit A). This was not a procedural dismissal; it was a merits ruling announcing new law.

And then, six days after the unpublished ruling, the BIA bound every IJ, every panel, and every DHS officer to the rules announced in *Matter of M-K-*. 8 U.S.C. §§ 1103(a), (g), INA §§ 103(a), (g). The timeline also raises an *Accardi* concern—an agency is bound to afford the process its own regulations contemplate.

In this case, though, the agency abandoned normal procedure, driven by an unacknowledged preference for speed so as to effectuate DHS' goal of deporting

Khalil as quickly as possible to make an example of him.

That is not inference. It is what the officials running the process said—and what a federal court found they did. Three days after Khalil’s arrest, White House Press Secretary Karoline Leavitt claimed he “distributed” pro-Hamas fliers on Columbia’s campus, even though HSI had reported no evidence of that. *Am. Ass’n of Univ. Professors*, 802 F. Supp. 3d at 147–48. Secretary Rubio announced: “we’re going to kick you out. It’s as simple as that.” *Id.* at 148. Vice President Vance framed the process as pure executive fiat: “if the Secretary of State and the President decide this person shouldn’t be in America, and they have no legal right to stay here, it’s as simple as that.” *Id.* at 150. After a bench trial, Judge William G. Young found “by clear and convincing evidence” that “Secretaries Noem and Rubio and their several agents and subordinates acted in concert to misuse the sweeping powers of their respective offices to target non-citizen pro-Palestinians for deportation primarily on account of their First Amendment protected political speech,” doing so “in order to strike fear into similarly situated non-citizen pro-Palestinian individuals.” *Id.* at 131, 194.

G. Harmless Error Cannot Apply Here

Matter of M-K- announces three new rules on the basis of a record the IJ never developed and findings the BIA supplied itself. This Court can affirm notwithstanding those errors only if “there is no realistic possibility” the agency would have reached a different result absent the errors. *Cardenas v. Garland*, 70 F.4th

232, 243–44 (5th Cir. 2023); *Enriquez-Gutierrez v. Holder*, 612 F.3d 400, 407 (5th Cir. 2010); *see also Calcutt v. FDIC*, 598 U.S. 623, 628–30 (2023) (per curiam).

That standard is not met here. Harmless error asks whether the same result would obtain absent the error; here the BIA created the errors itself—supplying factual findings the IJ never made and applying a flawed materiality standard—then used the undeveloped record to ratify the result. *Cf. Francois*, 120 F.4th at 466 (prejudice “an easy case” where error changed the outcome). Consistent with *Santos-Zacaria*, unless reversal of the BIA’s decision and termination is ordered, this Court has remanded—rather than affirmed as harmless—where the BIA order lacked record support. *Casildo v. Garland*, 851 F. App’x 520, 521–22 (5th Cir. 2021).

Nor is the missing record reconstructable absent a transfer or remand. Under 8 U.S.C. § 1252(b)(4)(A), this Court cannot supplement the record. Where, as here, the error concerns disputed, material facts never found by the IJ, the error is not harmless. Unless this Court grants the pending Hobbs Act motion or remands to permit fact-finding, only the agency can reopen it. *Santos-Zacaria*, 126 F.4th at 369–70; *Miranda-Lores v. INS*, 17 F.3d 84, 85–86 (5th Cir. 1994).

III. CONCLUSION.

For these reasons, AILA urges this Court to grant Khalil’s petition, vacate *Matter of M-K*, and remand for proceedings consistent with the INA’s promise of a full and fair hearing.

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Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7) because it contains no more than 3,998 words and complies with the typeface and style requirements of Rule 32(a)(5) and (a)(6) because it was prepared in Microsoft Word using 14-point Garamond typeface.

Dated: August 21, 2026

/s/ Amanda Waterhouse
WATERHOUSE DOMINGUEZ &
STROM, PLLC

CERTIFICATE OF SERVICE

I certify that, on August 21, 2026, a true and correct copy of this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system, and on all counsel of record.

Dated: August 21, 2026

/s/ Amanda Waterhouse
WATERHOUSE DOMINGUEZ &
STROM, PLLC

INDEX OF EXHIBITS

Exhibit A: Declaration of Zabdi J. Salazar on BIA Non-Detained Case Appeals
Processing Times, Cohort Composition, and Outcome Patterns (Apr. 22, 2026)..... 1

EXHIBIT A

**DECLARATION OF ZABDI J. SALAZAR
ON BIA NON-DETAINED CASE APPEALS PROCESSING TIMES, COHORT
COMPOSITION, AND OUTCOME PATTERNS**

I, Zabdi J. Salazar, do depose and state:

INTRODUCTION

1. I am a Ph.D. candidate in Jurisprudence and Social Policy at Berkeley Law, where I conduct empirical analysis of immigration adjudication using EOIR administrative case data. A true and correct copy of my curriculum vitae is attached as Exhibit A.
2. For this declaration, I analyzed non-detained case appeals before the Board of Immigration Appeals (“BIA”), focusing on processing times, filing-cohort composition, and outcome patterns in 2024 and 2025 decisions. My analysis shows that these appeals generally take hundreds of days—and often years—to resolve. Against that backdrop, the 2025 decided docket was more heavily weighted toward recently filed appeals than the 2024 docket, even as older cohorts remained pending in substantial numbers. It also included a higher concentration of procedural dismissals. That pattern was especially sharp among appeals filed and decided in 2025, where procedural dismissals were substantially more common than in the corresponding 2024 same-year cohort and favorable outcomes were nearly nonexistent. Within the 2025 decided docket, the fastest resolutions were overwhelmingly procedural or administrative, while remands and substantive adverse outcomes generally took longer to resolve.

METHODOLOGY

3. I analyzed the Deportation Data Project’s processed EOIR removal case-level dataset, a file derived from EOIR administrative records that consolidates selected variables from multiple EOIR source tables, including appeal-related variables, into a single row per removal case. For this declaration, I focused on direct BIA case appeals in non-detained removal cases, defined here as cases coded N or R for custody status. Custody status may change over the course of proceedings. This analysis uses the custody_at_appeal code from the Deportation Data Project’s processed EOIR case-level dataset, which reflects custody status at the time of the most recent BIA appeal.
4. I measured completed-case processing time as the number of calendar days between the appeal filing date and the BIA decision date, and pending time as the number of calendar days between the appeal filing date and February 27, 2026. For the recency analysis, I compared the filing-year composition of non-detained case appeals decided in 2024 and 2025, and separately examined the 2025 filing-

cohort composition of both decided appeals and still-pending appeals as of February 27, 2026.

5. For the outcome analysis, I examined filing year, decision year, and BIA decision code, and grouped completed appeals into six categories: Procedural Dismissal, Substantive Adverse, Admin / Withdrawal, Remand, Favorable Merits, and Favorable Non-Merits, as set out in Exh. E (Outcome Category Mapping). “Favorable Non-Merits” captures dispositions that are non-adverse in practical effect but are not merits grants. Remand is treated as a separate category because it returns the case for further proceedings and does not map cleanly onto a simple favorable/unfavorable framework. For the remand-rate analysis, I also examined who filed the appeal, using the filer-type field in the processed EOIR case-level dataset to compare remand patterns by filer type in non-detained BIA case appeals decided in 2024 and 2025.

FINDINGS: NON-DETAINED CASE APPEAL PROCESSING TIMES

6. The processing-time data show that non-detained BIA case appeals generally take hundreds of days to resolve, with a strongly right-skewed distribution. Between January 1, 2024 and February 27, 2026, I identified 45,135 completed non-detained case appeals. Exh. B (BIA Appeal Processing Timetables), Table 1. Their mean processing time was 795.4 days and their median processing time was 565 days. The 25th percentile was 157 days, the 75th percentile was 1,520 days, the 90th percentile was 1,797 days, the 95th percentile was 1,982 days, and the maximum observed processing time was 4,130 days. Exh. B, Table 3. The completed docket also skewed older: the largest age bucket consisted of appeals that took more than four years to resolve (26.6%), and 57.3% of completed appeals took more than one year to resolve. Exh. B, Table 4.
7. As of February 27, 2026, I identified 181,972 pending non-detained case appeals. Exh. B, Table 2. The mean pending time was 740.6 days, and the median was 452 days. The 25th percentile was 206 days, the 75th percentile was 1,158 days, the 90th percentile was 1,947 days, the 95th percentile was 2,205 days, and the oldest pending case had been awaiting a decision for 2,613 days. Exh. B, Table 5. The pending docket was also deeply aged: 38.1% of pending non-detained appeals had been awaiting a decision for more than two years, and 17.1% for more than four years. Exh. B, Table 6.
8. These results show that non-detained BIA case appeals often remain pending for long periods and commonly take hundreds of days—and often years—to resolve.

FINDINGS: RECENCY SHIFT IN THE 2025 DECISION DOCKET

9. The 2025 decision docket was more heavily weighted toward recently filed appeals than the 2024 docket. Appeals filed in 2025 accounted for 30.6% of non-

detained case-appeal decisions in 2025; by comparison, appeals filed in 2024 accounted for 21.3% of such decisions in 2024. Exh. C (BIA Appeal Cohort and Timing Tables), Table 1. A rolling measure shows the same pattern: among appeals decided in each year, the share filed within the preceding 365 days rose from 38.1% in 2024 to 46.0% in 2025, a statistically significant increase. Exh. C, Table 2.

10. That recency shift appeared alongside an unresolved older docket. Among appeals decided in 2025, only 4.2% came from the 2019 filing cohort, even though 5,652 2019-filed appeals remained pending as of February 27, 2026. Large numbers of older cohorts likewise remained unresolved. Exh. C, Table 3.
11. These patterns are consistent with a 2025 decision docket disproportionately concentrated on recently filed appeals even while many older appeals remained pending.

FINDINGS: OUTCOME MIX AND DECISION-CODE PATTERNS

Same-year cohorts

12. Among non-detained case appeals filed and decided in the same year, the share ending in procedural dismissal rose from 29.8% in the 2024 cohort to 47.7% in the 2025 cohort—a statistically significant increase of 17.9 percentage points, making the procedural dismissal share in the 2025 cohort about 60% higher than in the 2024 cohort. Exh. C (BIA Appeal Cohort and Timing Tables), Table 4. In the 2025 same-year cohort, 96.6% of cases ended in procedural dismissal, substantive adverse, or administrative/withdrawal dispositions; favorable outcomes were nearly absent. Exh. C, Table 4.
13. A related breakdown of adverse outcomes shows that procedural adverse dispositions were concentrated in the newest filing cohorts within 2025 decisions. Among adverse decisions issued in 2025, 35.8% of the 2024 filing cohort and 52.4% of the 2025 filing cohort were resolved procedurally rather than substantively. Exh. C, Table 7. This indicates that procedural dismissals were especially common in the newest adverse cohorts, and that among adverse appeals both filed and decided in 2025, procedural dismissals outnumbered substantive adverse outcomes. Exh. C, Table 7.

Full 2024-versus-2025 decision-year comparison

14. Looking across all non-detained case appeals decided in 2024 and 2025, regardless of filing year, the overall outcome distribution also shifted significantly. Procedural dismissals rose from 15.1% to 23.4%, substantive adverse outcomes fell from 64.0% to 55.2%, administrative or withdrawal

dispositions rose from 1.9% to 3.9%, and remands rose from 11.8% to 14.3%.
Exh. C, Table 5.

15. The code-level comparison helps explain that broader change. DIS-coded decisions (dismiss / affirm IJ) fell from 2024 to 2025 while procedural dismissal-coded decisions increased. SDG (summary dismissal—untimely or waived) rose from 3.6% to 8.7%, and SUD (summarily dismissed) rose from 5.8% to 9.2%.
Exh. C, Table 6.
16. The rise in the remand share in the full 2025 decision-year docket appears to have been influenced in substantial part by filer mix. Among noncitizen-filed appeals, the remand rate fell from 10.6% in 2024 to 6.2% in 2025. Among DHS-filed appeals, by contrast, the remand rate rose from 53.5% to 82.2%. DHS-filed appeals decided in 2025 were concentrated primarily in the 2023 and 2024 filing cohorts, rather than in same-year 2025 filings. Exh. D (Remand Patterns by Filer Type).

FINDINGS: TIMING AND OUTCOME SELECTION IN 2025 DECISIONS

17. Among all non-detained case appeals decided in 2025, timing was strongly linked to outcome. Procedural dismissals had a median processing time of 182 days, compared with 209 days for administrative/withdrawal dispositions, 791 days for remands, 1,009 days for substantive adverse outcomes, 1,235 days for favorable merits outcomes, and 1,163.5 days for favorable non-merits outcomes. Exh. C (BIA Appeal Cohort and Timing Tables), Table 8.
18. The processing-time buckets show the same pattern. Among cases resolved in fewer than 90 days, 75.3% were procedural dismissals and 18.6% were administrative/withdrawal dispositions. In the 1- to 2-year bucket, remands accounted for 54.5% of cases. In the 2- to 4-year bucket, 55.6% of cases were substantive adverse outcomes, and in the 4+ year bucket, 77.8% were substantive adverse outcomes. Exh. C, Table 9.
19. These results indicate that the very fastest 2025 resolutions were overwhelmingly procedural or administrative, whereas remands and favorable outcomes generally took longer and substantive adverse outcomes predominated in the longest-resolution-time buckets.

CONCLUSION

20. The data show that non-detained BIA case appeals ordinarily take hundreds of days to resolve, and often years. The data further show that the 2025 decided docket was more heavily weighted toward recently filed appeals than the 2024 docket, with 30.6% of 2025 decisions coming from appeals filed in 2025 itself, even while older cohorts remained pending in substantial numbers. The 2025 decided docket also included a higher concentration of procedural dismissals than

the 2024 docket. That pattern was especially sharp among appeals both filed and decided in 2025, where procedural dismissals outnumbered substantive adverse outcomes and favorable outcomes were nearly nonexistent. Finally, within the 2025 decided docket, the fastest resolved cases were predominantly procedural or administrative outcomes, while remands and substantive adverse outcomes generally took longer to resolve.

INDEX OF EXHIBITS

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 2026, at Berkeley, California.

Zabdi J. Salazar
Zabdi J. Salazar

ZABDI SALAZAR

Berkeley, CA • [REDACTED] • [REDACTED]

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA

Ph.D. Candidate, Jurisprudence & Social Policy (Expected May 2027)

Juris Doctor, May 2024; State Bar of Texas, admitted October 2024

Dissertation: *The Administrative Ratchet: Executive Power and the Courts in U.S. Asylum Adjudication*
Committee: David Hausman (Co-Chair), Calvin Morrill (Co-Chair), Jennifer Chacon, Rachel Stern
Description: Three-article dissertation examining how executive intervention, deferred judicial review, and circuit-level appellate variation interact to shape asylum adjudication over time.

Field Examinations: Public Law (June 2021); Asylum and the Courts (Dec. 2023); Qualifying Exam (Sept. 2024)

Honors: Berkeley Law Dean's Fellowship; Berkeley Center for Law and Business Scholar; Chancellor's Fellowship for Graduate Study; JSP Cooter-Rubinfeld Fellowship

Methods & Training: ICPSR Summer Program (Modern Difference-in-Difference Designs, 2021; Funding Award); IQMR Certificate, 2021 (Funding Award)

Leadership & Service: *California Law Review*, Vol. 112 Managing Editor; J.D.-Ph.D. Joint Program Committee

Trinity University, San Antonio, TX

B.A., *summa cum laude*, in Political Science and Business Administration, May 2019 (Minors in Spanish and Economics)

Honors: Phi Beta Kappa, Beta Gamma Sigma, University Scholar (top 15 students in class)

PROFESSIONAL EXPERIENCE

U.S. District Court for the Southern District of Texas, Houston, TX

Judicial Law Clerk to the Honorable Yvonne Ho Sept. 2024–Sept. 2025

- Drafted memoranda and recommendations, memorandum opinions and orders, and routine civil orders.
- Conducted complex federal civil research and managed daily docket and motion practice.
- Coordinated closely with chambers staff on case administration and opinion production.

EOIR, San Francisco Immigration Court, San Francisco, CA

Law Student Extern Aug. 2023–Dec. 2023

- Drafted a cancellation-of-removal merits order and an asylum decision involving a family-based PSG.
- Prepared oral decision outlines and credibility analyses; conducted asylum-law research; observed hearings.

Berkeley Law: Asylum Law Practicum, Berkeley, CA

Law Student Intern Jan. 2023–May 2023

- Prepared an affirmative asylum application and letter brief for an Afghan family.
- Drafted detailed client declarations and compiled supporting country-conditions evidence.

East Bay Community Law Center: Immigration Clinic, Berkeley, CA

Law Student Intern Aug. 2022–Dec. 2022

- Conducted general consultations with English- and Spanish-speaking clients regarding immigration-related legal issues and prepared legal documents for DACA renewal, DACA advance parole, and family-based petitions.
- Drafted an asylum brief for an applicant and worked with her to revise and update her declaration.

U.S. District Court for the Southern District of Texas, Laredo, TX

Judicial Extern to the Honorable Diana Song Quiroga

Jun. 2022–Jul. 2022

- Researched and drafted memos and orders on civil and immigration-related issues, including alternatives to detention, U-visa certification, hearsay in revocation proceedings, and bond and revocation matters.
- Revised filings in civil discovery disputes, assisted with model rules on court performance standards, and observed daily hearings.

ACADEMIC EXPERIENCE**University of California, Berkeley, School of Law, Berkeley, CA**

Sept. 2023–May 2024

Research Assistant to Professor David Hausman (Immigration Law)

- Conducted empirical research supporting a Central America–U.S. migration estimation model, integrating multi-source administrative data (CBP, INM, COMAR), evaluating recidivism and detection assumptions under Title 8 and Title 42, and compiling cross-national demographic and economic indicators to contextualize regional emigration trends.
- Compiled and synthesized post-2019 federal appellate and district court decisions interpreting 8 U.S.C. § 1252(b)(9), analyzing the scope of jurisdiction-channeling and the treatment of collateral constitutional claims in removal-related litigation.

University of California, Berkeley, Berkeley, CA

Graduate Student Instructor

Aug. 2020–May 2021

- Planned and delivered lessons for weekly undergraduate discussion sections for two courses: Immigration & Citizenship and Membership & Migration - Empirical and Normative Perspectives.
- Graded assignments, research papers, and exams. Held weekly office hours and review sessions.

SELECTED PUBLICATIONS AND PRESENTATIONS

- Salazar, Z. “The Executive Pinch: When Executive Power Outruns Judicial Review in Administrative Adjudication.” Manuscript in preparation.
- “Immigration Judges & Bureaucracy: The Impact of Case Quotas,” *presented at the Berkeley Empirical Legal Studies Fellow Workshop, Center for the Study of Law and Society, Mar. 2, 2023.*
- “The Evolution of the Particular Social Group (PSG) and Domestic Violence Asylum Claims,” *presented at the Graduate Seminar Series, UC Davis Global Migration Center, Apr. 30, 2020.*
- Salazar, Z. “Paradoxes of Gender Equality Policies and Domestic Working Conditions in Madrid,” *Claremont-UC Undergraduate Research Conference on the European Union Journal*. Vol. 2018, Article 11. Web. Oct. 9, 2018. <https://scholarship.claremont.edu/urceu/vol2018/iss1/11>

SELECTED AWARDS AND HONORS

JSP Cooter-Rubinfeld Fellowship, UC Berkeley

Aug. 2026–Dec. 2026

D-Lab AI Latinx Fellow, UC Berkeley

Jan. 2026–May 2026

Social Sciences Research Pathways Graduate Mentor, IRLE

Sept. 2025–May 2026

Teresa K. Lippert Distinguished Service Award (*California Law Review*)

May 2024

BELS Fellow (Berkeley Empirical Legal Studies)

Aug. 2022–May 2023

LEAP Fellow (Berkeley Law, Economics, and Politics Center)

Aug. 2022–May 2023

IRLE Graduate Student Research Award (Institute for Research of Labor and Employment)

Jun. 2021

Prosser Prize in Forced Migration

Dec. 2022

SKILLS**Software:** R; RMarkdown; Git/GitHub; LaTeX; VS Code; command line tools**Languages:** Spanish (Native), French (Intermediate)

Exhibit B. BIA Appeal Processing Timetables (Jan. 1, 2024 to Feb. 27, 2026)

These tables summarize the volume and timing of completed and pending BIA appeals, with Tables 1 and 2 comparing major appeal types and Tables 3 through 6 reporting summary statistics and age distributions for non-detained case appeals. Completed case figures reflect appeals decided by the BIA from January 1, 2024 through February 27, 2026. Pending-case figures reflect appeals that remained awaiting decision as of February 27, 2026. For direct case appeals, detained cases are those with custody code D, while non-detained cases are those with custody codes N or R.

Table 1. BIA Completions by Appeal Type (Jan. 1, 2024 to Feb. 27, 2026)

Appeal Type	Total Completions	Average Processing Time (Days)
Case Appeals (Detained)	7,033	293.5
Case Appeals (Non-Detained)	45,135	795.4
Appeal of IJ MTR	2,592	517.6
MTR-BIA	10,781	198.5

Key point: Among the four appeal categories shown here, non-detained case appeals had the longest average processing time during the period, at 795.4 days.

Table 2. Currently Pending Docket by Appeal Type (as of Feb. 27, 2026)

Appeal Type	Pending Cases	Average Days in Queue	Median Days in Queue
Case Appeals (Detained)	6,993	172.7	95
Case Appeals (Non-Detained)	181,972	740.6	452
Appeal of IJ MTR	10,248	539.7	392
MTR-BIA	6,050	431.9	262

Key point: Non-detained case appeals made up by far the largest pending queue and also had the longest average queue time, with 181,972 pending cases and an average of 740.6 days awaiting decision.

Table 3. Summary Statistics for Completed Non-Detained Case Appeals

Metric	Value
Total completions	45,135
Mean processing time	795.4 days (about 2 years and 2 months)
Median processing time	565 days (about 1 year and 7 months)
Standard deviation	685.4 days
25th percentile	157 days
75th percentile	1,520 days
90th percentile	1,797 days
95th percentile	1,982 days (about 5 years and 5 months)
Maximum observed	4,130 days (about 11 years and 4 months)

Key point: Completed non-detained case appeals remained strongly right-skewed: the mean processing time was 795.4 days, the median was 565 days, and the 95th percentile reached 1,982 days.

Table 4. Age Distribution for Completed Non-Detained Case Appeals

Age Bucket	Cases	Percentage
< 90 days	2,377	5.3%
90 - 180 days	10,802	23.9%
181 days - 1 year	6,080	13.5%
1 - 1.5 years	3,021	6.7%
1.5 - 2 years	3,029	6.7%
2 - 3 years	4,725	10.5%
3 - 4 years	3,077	6.8%
4+ years	12,024	26.6%
Total	45,135	100.0%

Key point: Completed non-detained case appeals were not concentrated in very recent cases. The largest single bucket was 4+ years (26.6%), and a majority of completed appeals (57.3%) had been pending for more than one year.

Table 5. Summary Statistics for Pending Non-Detained Case Appeals (as of Feb. 27, 2026)

Metric	Value
Pending cases	181,972
Mean days awaiting decision	740.6 days (just over 2 years)
Median days awaiting decision	452 days (about 1 year and 3 months)
25th percentile	206 days
75th percentile	1,158 days
90th percentile	1,947 days
95th percentile	2,205 days (just over 6 years)
Oldest pending case	2,613 days (about 7 years and 2 months)

Key point: Pending non-detained appeals were also deeply aged: the median case had already been waiting 452 days, the 95th percentile reached 2,205 days, and the oldest pending case had been awaiting decision for 2,613 days.

Table 6. Age Distribution for Pending Non-Detained Case Appeals (as of Feb. 27, 2026)

Age Bucket	Cases	Percent of Pending
< 90 days	20,503	11.3%
90 - 180 days	19,377	10.6%
181 days - 1 year	41,195	22.6%
1 - 1.5 years	18,870	10.4%
1.5 - 2 years	12,735	7.0%
2 - 3 years	20,348	11.2%
3 - 4 years	17,850	9.8%
4+ years	31,094	17.1%
Total	181,972	100.0%

Key point: A substantial share of pending non-detained appeals had already been waiting more than two years (38.1%), and 17.1% had been pending for more than four years.

Exhibit C. BIA Non-Detained Case Appeals: 2024-2025 Cohort, Outcome, and Timing Tables

These exhibit tables summarize year-over-year changes between 2024 and 2025 and the timing patterns of decisions issued in 2025 in non-detained BIA case appeals using the Deportation Data Project's processed EOIR data. Tables 1-3 address docket composition and recency; Tables 4-7 address outcome mix and decision-code patterns in same-year cohorts, full decision-year comparisons, and adverse 2025 filing cohorts; and Tables 8-9 address processing-time patterns based on outcome.

I. Docket Composition and Recency Shift

Table 1. Year-over-Year Filing Cohort Comparison for Non-Detained Case Appeals Decided in 2024 and 2025

Filing Year	2024 Decisions	Share of 2024 Decisions	2025 Decisions	Share of 2025 Decisions
2019	4,840	21.1%	805	4.2%
2020	1,733	7.6%	3,319	17.5%
2021	1,749	7.6%	1,652	8.7%
2022	4,219	18.4%	1,983	10.4%
2023	5,485	23.9%	1,695	8.9%
2024	4,888	21.3%	3,717	19.6%
2025	0	0.0%	5,806	30.6%

Key point: The 2025 docket was more recency-weighted than the 2024 docket: appeals filed in 2025 accounted for 30.6% of decisions issued in 2025, compared with 21.3% for 2024-filed appeals among decisions issued in 2024.

Note: This table compares the filing-year composition of all non-detained case appeals decided in 2024 with those decided in 2025. Rows for 2017 and 2018 are omitted as de minimis.

Table 2. Share of Non-Detained Case Appeals Filed Within 12 Months Before Decision

Decision Year	Total Decisions	Filed Within Prior 12 Months	Share Within Prior 12 Months
2024	22,930	8,737	38.1%
2025	18,999	8,746	46.0%

Key point: The share of decisions involving appeals filed within the prior 12 months increased from 38.1% in 2024 to 46.0% in 2025. These were also the highest shares observed in the 2019–2025 series.

Note: For each decision year, this measure reflects the share of appeals decided in that year that were filed within 365 days before the BIA decision date. This rolling measure provides a calendar-neutral way to assess recency. The increase from 38.1% in 2024 to 46.0% in 2025 is statistically significant (two-sample test of proportions, $p < 0.001$; 95% CI for the difference, 7.0 to 8.9 percentage points).

Table 3. Filing Cohort Distribution of Non-Detained Case Appeals Decided in 2025, with Pending Counts

Filing Year	Decided in 2025	Share of 2025 Decisions	Still Pending (Feb. 27, 2026)
2019	805	4.2%	5,652
2020	3,319	17.5%	14,505
2021	1,652	8.7%	9,164
2022	1,983	10.4%	16,406
2023	1,695	8.9%	20,482
2024	3,717	19.6%	27,776
2025	5,806	30.6%	74,081
2026	0	0.0%	13,906

Key point: The largest share of non-detained case appeals decided in 2025 came from cases filed in 2025 itself (30.6%), while older cohorts remained pending in substantial numbers as of February 27, 2026.

Note: This table displays filing-year cohorts for non-detained case appeals decided in 2025, together with still-pending counts measured as of February 27, 2026. Rows for 2017 and 2018 are omitted as de minimis; the 2026 row reflects appeals filed by February 27, 2026 that remained pending as of that date.

II. Outcome Mix and Decision-Code Patterns

Table 4. Outcome Mix for Non-Detained Case Appeals Filed and Decided in the Same Year (2024 vs. 2025)

Outcome Category	2024 Count	2024 Share	2025 Count	2025 Share	Change (pp)
Procedural Dismissal	1,457	29.8%	2,767	47.7%	+17.9
Substantive Adverse	2,922	59.8%	2,517	43.4%	-16.4
Admin / Withdrawal	87	1.8%	317	5.5%	+3.7
Remand	369	7.5%	196	3.4%	-4.1
Favorable Merits	8	0.2%	0	0.0%	-0.2
Favorable Non-Merits	45	0.9%	9	0.2%	-0.7

Key point: Among same-year cohorts, procedural dismissals rose from 29.8% in 2024 to 47.7% in 2025 (up 17.9 points; 95% CI, 16.0 to 19.7; Holm-adjusted $p < 0.001$), while substantive adverse outcomes fell from 59.8% to 43.4%. In the 2025 same-year cohort, 96.6% of cases ended in procedural dismissal, substantive adverse, or administrative/withdrawal dispositions, and favorable outcomes were nearly nonexistent.

Note: This table compares the disposition mix of non-detained case appeals filed and decided in the same year. The 2024 same-year cohort includes 4,888 cases; the 2025 same-year cohort includes 5,806 cases. Percentages may not sum to exactly 100.0% due to rounding. The overall outcome distribution differs significantly between the 2024 and 2025 same-year cohorts (Pearson's chi-squared test, $p < 0.001$).

Table 5. Outcome Mix for Non-Detained Case Appeals Decided in 2024 and 2025, Regardless of Filing Year

Outcome Category	2024 Count	2024 Share	2025 Count	2025 Share	Change (pp)
Procedural Dismissal	3,466	15.1%	4,447	23.4%	+8.3
Substantive Adverse	14,675	64.0%	10,485	55.2%	-8.8
Admin / Withdrawal	433	1.9%	738	3.9%	+2.0
Remand	2,708	11.8%	2,722	14.3%	+2.5
Favorable Merits	22	0.1%	19	0.1%	+0.0
Favorable Non-Merits	1,626	7.1%	588	3.1%	-4.0

Key point: Across all non-detained case appeals decided in 2024 and 2025, regardless of filing year, procedural dismissals increased from 15.1% to 23.4% (up 8.3 points; 95% CI, 7.5 to 9.1; Holm-adjusted $p < 0.001$), substantive adverse outcomes fell from 64.0% to 55.2%, and remands rose from 11.8% to 14.3%.

Note: The overall 2024-2025 outcome distribution differs significantly (Pearson's chi-squared test, $p < 0.001$). Changes in most categories are also statistically significant (two-sample proportion tests; Holm-adjusted $p < 0.001$). The increase in remands in the full 2025 decision-year docket appears to be substantially influenced by filer mix. Separate analysis shows that DHS-filed appeals in 2025 were far more remand-heavy than noncitizen-filed appeals. Exh. D (Remand Patterns by Filer Type).

Table 6. Decision-Code Comparison for All Non-Detained Case Appeals Decided in 2024 vs. 2025, Regardless of Filing Year

BIA Decision Code	Description	2024 Count	2024 Share	2025 Count	2025 Share	Change (pp)
DIS	Dismiss appeal / affirm IJ decision	12,924	56.4%	9,281	48.8%	-7.6
SDG	Summary dismissal - untimely or waived	819	3.6%	1,662	8.7%	+5.1
SUD	Summarily dismissed	1,326	5.8%	1,750	9.2%	+3.4
SED	Summary dismissal - no brief filed	1,262	5.5%	949	5.0%	-0.5
SAF	Summary affirmance	1,291	5.6%	882	4.6%	-1.0
WDL	Withdrawal of appeal	433	1.9%	738	3.9%	+2.0
WPD	Withdrawal due to voluntary departure	39	0.2%	29	0.2%	+0.0
REM	Remand	2,415	10.5%	2,540	13.4%	+2.9
ACR	Returned to court to correct deficiency	293	1.3%	168	0.9%	-0.4
NJU	Lacks jurisdiction	59	0.3%	86	0.5%	+0.2

Key point: The full decision-year shift was driven primarily by increased use of summary/procedural dismissal codes, especially SDG and SUD, rather than by an increase in DIS-coded decisions.

Note: Shares are calculated out of all non-detained case appeals decided in the indicated year, not only the displayed codes. The displayed codes account for 20,861 of 22,930 decisions in 2024 and 18,085 of 18,999 decisions in 2025. The DIS code may include both full merits decisions and streamlined affirmances; the data do not allow a further distinction within that category.

Table 7. Procedural vs. Substantive Adverse Outcomes by Filing Cohort Among Non-Detained Case Appeals Decided in 2025

Filing Year	Substantive Adverse	Procedural Dismissal	% Procedural
2019	625	31	4.7%
2020	2,564	298	10.4%
2021	1,236	93	7.0%
2022	1,239	157	11.2%
2023	494	98	16.6%
2024	1,795	1,000	35.8%
2025	2,517	2,767	52.4%

Key point: Among adverse non-detained case appeals decided in 2025, 35.8% of adverse 2024-filing decisions and 52.4% of adverse 2025-filing decisions were procedural rather than substantive. This pattern is consistent with more procedural resolution in newer cohorts, though older cohorts consist only of cases that remained unresolved into 2025 and may have had a different procedural/substantive mix in earlier decision years.

Note: The denominator for % Procedural is Procedural Dismissal plus Substantive Adverse among non-detained case appeals decided in 2025 for the indicated filing cohort. Rows for pre-2019 filing years are omitted as de minimis.

III. Timing and Outcome Selection

Table 8. Median Processing Time by Outcome Category for Non-Detained Case Appeals Decided in 2025

Outcome Category	Count	Median Processing Time (Days)	Mean Processing Time (Days)	25th Percentile	75th Percentile
Procedural Dismissal	4,447	182.0	373.0	113.0	300.5
Substantive Adverse	10,485	1009.0	994.1	172.0	1782.0
Admin / Withdrawal	738	209.0	408.2	91.0	639.0
Remand	2,722	791.0	904.1	507.2	1193.2
Favorable Merits	19	1235.0	1540.8	1065.5	2105.5
Favorable Non-Merits	588	1163.5	1181.9	883.2	1549.0

Key point: Timing was strongly outcome-linked in 2025: procedural dismissals had a median processing time of 182 days, compared with 791 days for remands, 1,009 days for substantive adverse outcomes, 1,235 days for favorable merits outcomes, and 1,163.5 days for favorable non-merits outcomes.

Note: This table uses all non-detained case appeals decided in 2025, regardless of filing year. It therefore captures both recently filed appeals and long-running appeals resolved in 2025.

**Table 9. Outcome Mix by Processing-Time Bucket for Non-Detained Case Appeals
Decided in 2025**

Processing-Time Bucket	Procedural Dismissal	Substantive Adverse	Admin / Withdrawal	Remand	Favorable Merits	Favorable Non-Merits	n
< 90 days	75.3%	1.4%	18.6%	3.5%	0.0%	1.1%	960
90 - 180 days	31.7%	61.6%	3.3%	3.2%	0.0%	0.2%	4,686
181 - 364 days	45.6%	41.3%	4.6%	7.9%	0.0%	0.6%	3,097
1 - 2 years	11.3%	22.2%	8.0%	54.5%	0.0%	4.0%	1,458
2 - 4 years	7.5%	55.6%	3.0%	25.6%	0.3%	8.1%	3,885
4+ years	7.5%	77.8%	0.7%	10.2%	0.2%	3.6%	4,913

Key point: The very fastest 2025 decisions were overwhelmingly procedural or administrative, remands concentrated in the 1-2 year bucket, and substantive adverse outcomes predominated among the 2-4 year and 4+ year buckets.

Note: Percentages are row percentages and may not total 100.0% in every row because of rounding. The bucket counts sum to 18,999 cases with assignable processing-time buckets.

Exhibit D. BIA Non-Detained Case Appeals: Remand Patterns by Filer Type

These exhibit tables summarize remand patterns in non-detained BIA case appeals by filer type. Table 1 compares 2024 and 2025 decision-year remand rates for noncitizen-filed and DHS-filed appeals, including percentage-point change. Table 2 provides supplementary outcome-mix context by filer type for decisions issued in 2024 and 2025. Table 3 shows the filing-year composition of appeals decided in 2024 and 2025, by filer type. Table 4 provides a longer-run descriptive context for decision years 2019 through 2025, with a caution that the DHS series is more volatile because DHS-filed appeals represent a smaller and more compositionally variable share of the docket.

I. Remand Patterns by Filer Type, 2024 vs. 2025

**Table 1. Remand Rate by Filer Type for Non-Detained Case Appeals
Decided in 2024 and 2025**

Filer Type	2024 Total Decisions	2024 Remand Count	2024 Remand Rate	2025 Total Decisions	2025 Remand Count	2025 Remand Rate	Change (pp)
Noncitizen	22,284	2,359	10.6%	16,965	1,051	6.2%	-4.4
Government (DHS)	630	337	53.5%	2,016	1,658	82.2%	+28.7
Both	12	10	83.3%	15	11	73.3%	-10

Key point: Remand patterns differed sharply by who filed the appeal. Among noncitizen-filed non-detained case appeals, the remand rate fell by 4.4 percentage points (95% CI, -4.9 to -3.8; $p < 0.001$), from 10.6% in 2024 to 6.2% in 2025. Among DHS-filed appeals, by contrast, the remand rate rose by 28.7 points (95% CI, 24.5 to 33; $p < 0.001$), from 53.5% to 82.2%.

Note: This table uses a decision-year sample of non-detained case appeals decided in 2024 and 2025, without imposing a lower bound on appeal filing date. The denominator for the remand rate is the total number of appeals decided in the indicated year for the specified filer type. The “Other” filer category is omitted because it was de minimis, comprising only 7 decided appeals across 2024 and 2025 combined. Two-sample tests of proportions indicate that the 2024-to-2025 changes in remand rates within noncitizen-filed and DHS-filed appeals were statistically significant ($p < 0.001$). A case-level logistic regression further indicates that the year-over-year change in remand rates differed significantly between noncitizen-filed and DHS-filed appeals (interaction $p < 0.001$). As a robustness check, limiting the analysis to standard REM-code remands only produced the same directional pattern; ACR and BCR comprised only small shares of remands in these years.

II. Supplementary Outcome-Mix Context, 2024 and 2025

Table 2. Outcome Mix by Filer Type for Non-Detained Case Appeals

Decided in 2024 and 2025

Decision Year	Filer Type	Procedural Dismissal	Substantive Adverse	Admin / Withdrawal	Remand	Favorable Merits	Favorable Non-Merits
2024	Noncitizen	15.4%	65.7%	1.3%	10.6%	0.0%	7.0%
2024	Government (DHS)	5.6%	4.0%	24.1%	53.5%	3.3%	9.5%
2025	Noncitizen	26.0%	61.3%	3.3%	6.2%	0.0%	3.2%
2025	Government (DHS)	1.8%	3.8%	8.7%	82.2%	0.8%	2.6%

Key point: The overall outcome mix differed sharply by filer type. In both years, noncitizen-filed appeals were dominated by substantive adverse and procedural dismissal outcomes, while DHS-filed appeals were much more remand-heavy—especially in 2025, when 82.2% of DHS-filed appeals resulted in remand.

Note: Percentages are row percentages within filer type and decision year: the denominator for each percentage is the total number of non-detained case appeals decided in that year for the specified filer type. Each percentage therefore represents the share of those decided appeals falling into the indicated outcome category. Shares may not total exactly 100.0% because of rounding. Favorable merits outcomes among noncitizen-filed appeals rounded to 0.0% in both 2024 and 2025. The “Both” and “Other” filer categories are omitted from this table because they were de minimis in both years and would yield percentages based on very small denominators.

III. Filing-Year Composition of 2024 and 2025 Decisions, by Filer Type

Table 3. Filing-Year Composition of Non-Detained Case Appeals

Decided in 2024 and 2025, by Filer Type

Decision Year	Filer Type	2019 Filed Share	2020 Filed Share	2021 Filed Share	2022 Filed Share	2023 Filed Share	2024 Filed Share	2025 Filed Share
2024	Noncitizen	21.4%	7.6%	7.5%	18.4%	23.6%	21.4%	-
2024	Government (DHS)	11.7%	4.9%	11.4%	16.8%	37.1%	17.6%	-
2025	Noncitizen	4.6%	19.3%	9.1%	10.6%	4.9%	18.1%	33.2%
2025	Government (DHS)	0.8%	1.5%	5.5%	9.1%	42.6%	32.0%	8.3%

Key point: The 2025 DHS remand-heavy pattern was driven primarily by appeals filed in 2023 and 2024 rather than by same-year 2025 filings. By contrast, noncitizen-filed appeals decided in 2025 were more broadly distributed across filing cohorts and included a much larger same-year 2025 share.

Note: Percentages are row percentages within filer type and decision year. This table is descriptive and uses the same decision-year sample as Table 1. The filing-cohort mix shown here is consistent with the remand-heavy DHS pattern observed in 2025. The “Both” and “Other” filer categories are omitted from this table because they were de minimis in both years.

IV. Longer-Run Decision-Year Context**Table 4. Remand Rate by Filer Type for Non-Detained Case Appeals
Decided in 2019–2025**

Decision Year	Noncitizen Remand Rate	Government (DHS) Remand Rate
2019	8.2%	83.9%
2020	6.5%	97.6%
2021	14.5%	70.2%
2022	22.1%	38.7%
2023	12.6%	57.0%
2024	10.6%	53.5%
2025	6.2%	82.2%

Key point: The longer-run decision-year series shows a general decline in remand rates for noncitizen-filed appeals after 2022, while DHS-filed appeals remained consistently much more remand-heavy, with larger year-to-year swings in annual remand rates.

Note: This table is descriptive context only. Detailed 2024 and 2025 counts appear in Table 1. Annual DHS remand rates should be interpreted cautiously because DHS-filed appeals represent a smaller and more compositionally variable share of the docket than noncitizen-filed appeals, which can produce larger year-to-year swings in DHS remand percentages. DHS-filed appeals were also substantially more remand-heavy than noncitizen-filed appeals in both 2024 and 2025, as shown in Tables 1 and 2. “Both” and “Other” filer categories are omitted because annual counts were de minimis across 2019–2025. The longer-run series is based on decision year rather than filing cohort and may therefore reflect cohort-specific clearance patterns. For example, the 2020 DHS spike appears to coincide with an unusually large cohort of DHS-filed appeals decided that year.

Exhibit E. Outcome Category Mapping for Non-Detained BIA Case Appeals

This appendix summarizes the code-to-category mapping used for the outcome analysis. “Favorable Non-Merits” captures dispositions that are non-adverse in practical effect but are not merits grants. Remand is treated as a separate category because it returns the case for further proceedings and does not map cleanly onto a simple favorable/unfavorable framework.

Outcome Category	Included BIA Decision Codes
Procedural Dismissal	SUD — Summarily Dismissed SED — Summary Dismissal—No Brief Filed SDG — Summary Dismissal—Untimely or Waived Appeal NJU — Lacks Jurisdiction DUT — Dismiss as Untimely REJ — Rejection
Admin / Withdrawal	WDL — Withdrawal of Appeal CON — Continued OTH — Other
Substantive Adverse	DIS ¹ — Dismiss Appeal / Affirm IJ’s Decision SAF — Summary Affirmance SAV — Summary Affirmance / Voluntary Departure DVD — Dismissed (Voluntary Departure Granted) BVD — BIA Grants Voluntary Departure D30 — Dismissed (Grant Voluntary Departure, 30 Days) CFD — Final Denial of EOIR 42B/40 CFV — Final Denial of EOIR 42B/40 with Voluntary Departure
Remand	REM — Remand BCR — Background Check Remand ACR — ROP Returned to Court to Correct Deficiency
Favorable Merits	GNR — Grant with No Remand GRN — Granted CFG — Final Grant of EOIR 42B/40 CGR — Conditional Grant of Relief SUS — Sustain
Favorable Non-Merits	TPS — Temporary Protected Status TER ² — Termination TPD — Terminate — DHS Prosecutorial Discretion ADM — Administratively Closed APD — Administratively Closed—DHS Prosecutorial Discretion CTM — Administratively Closed Other Than ABC WPD — Withdrawal—DHS Prosecutorial Discretion

Note: Residual codes not assigned to these analytic categories, if any, were treated as Other / Unmapped and were not material to the declaration tables.

¹ The DIS code may include both full merits decisions and streamlined affirmances; the data do not allow a further distinction within that category.

² Termination dispositions are not always favorable to the noncitizen. Some may occur at the government’s request to move the case into expedited removal, reinstate a prior removal order, or pursue another procedural path. The data do not permit finer distinctions among termination dispositions.