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

In the matter of:	)	**A #: [NOT PROVIDED]**
Respondent [NOT PROVIDED]	)	

REQUEST TO APPEAR AS *AMICI CURIAE* AND *AMICI CURIAE* BRIEF OF THE AMERICAN IMMIGRATION COUNCIL, THE UNIVERSITY OF HOUSTON LAW CENTER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND OTHERS

AMICUS INVITATION No. 16-09-19

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REQUEST TO APPEAR AS AMICI CURIAE

Amici curiae the American Immigration Council (the Immigration Council), University of Houston Law Center Immigration Clinic, American Immigration Lawyers Association (AILA), National Immigration Project of the National Lawyers Guild, National Immigrant Justice Center (NIJC), NYU Immigrant Rights Clinic (NYU-IRC) at Washington Square Legal Services, Inc., Columbia Law School Immigrants' Rights Clinic, Loyola Law School's Stuart H. Smith Law Clinic and Center for Social Justice, Loyola Law School's Immigrant Justice Clinic, and YMCA International Legal Services request permission to submit this *Amicus Curiae* Brief in response to the Board's *Amicus* Invitation No. 16-09-19.

The issue addressed below is whether a lawful permanent resident (LPR) whose initial entry was via a wave-through pursuant to *Matter of Quilantan*, 25 I.&N. Dec. 285 (BIA 2010), was admitted "in any status" as required in § 240A(a)(2) of the Immigration and Nationality Act (INA). Because the phrase "in any status" unambiguously includes both lawful and unlawful status, the Board must follow Congress's mandate and may not restrict "in any status" to only lawful status. The phrase "in any status" was included primarily to foreclose any competing interpretations that would limit access to cancellation of removal under INA § 240A(a)(2). As explained below, Congress intended that INA § 240A(a)(2) be read as a liberal provision that provides for eligibility for cancellation of removal to anyone whose admission was procedurally lawful. Congress's extensive references in the INA to specific forms of status shows that, had it intended to restrict INA § 240A(a)(2) to only lawful status, it easily could have done so. Therefore, the Board should hold that anyone admitted via a wave-through was admitted in any status and thus is eligible for relief under INA § 240A(a)(2).

Amicus the Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council has previously appeared as *amicus* before the Board and the federal courts of appeals on issues relating to the interpretation of federal immigration laws and policies, and has a direct interest in ensuring that LPRs have the fullest possible opportunity to apply for cancellation of removal in accordance with the law.

Amicus Immigration Clinic at the University of Houston Law Center advocates on behalf of immigrants in a broad range of complex legal proceedings before the immigration and federal courts and the Department of Homeland Security (DHS) and collaborates with other immigrant and human rights groups on projects that advance the cause of social justice for immigrants. Under the direction of law school professors who practice and teach in the field of immigration and nationality law, the Clinic provides legal training to law students and representation in asylum cases on behalf of victims of torture and persecution, victims of domestic violence, human trafficking and crime, children and those fleeing civil war, genocide and political repression, including representation of detained and non- detained individuals in removal proceedings. [1]

Amicus AILA is a national association with more than 14,000 members, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of

[1] The following law students at the University of Houston Law Center contributed to this *Amici* Brief: Diana Melendez, Douglas Evans and Tong Jin.

those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeals, and Supreme Court.

Amicus the National Immigration Project of the National Lawyers Guild is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrant rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project has been promoting justice and equality in all areas of immigration law for over forty-five years, and has a direct interest in ensuring that immigration judges adjudicate applications for cancellation of removal consistent with the intent, purpose, and manner Congress intended.

Amicus NIJC is a non-profit agency that is accredited by the Board to represent individuals in immigration matters. Together with over 1500 pro bono attorneys, NIJC represents thousands of individuals annually, including individuals seeking Cancellation of Removal and individuals who have been "waved through" at a port of entry.

Amicus NYU-IRC is a leading institution in both local and national struggles for immigrant rights. Its students engage in direct legal representation of immigrants and community organizations in litigation at the agency, federal court, and where necessary Supreme Court level, and in immigrant rights campaigns at the local, state, and national level.

Amicus Columbia Law School Immigrants' Rights Clinic offers students an opportunity to develop lawyering and advocacy skills in the context of both direct client representation and cutting edge projects related to immigration reform. The clinic also works with national and local organizations to further immigrants' rights issues.

Amicus the Stuart H. Smith Law Clinic and Center for Social Justice at Loyola Law School is a live-client legal clinic which allows third-year law students the opportunity to represent indigent clients under the supervision of experienced attorneys. Its Immigration Law Section represents noncitizens in a variety of issues before the U.S. Department of Justice Immigration Courts and the Board of Immigration Appeals as well as the U.S. Department of Homeland Security.

Amicus the Loyola Immigrant Justice Clinic has a mission to advance the rights of the indigent immigrant population in East Los Angeles through direct legal services, education, and community empowerment, while teaching law students effective immigrants' rights lawyering skills in a real world setting.

Amicus YMCA International Services is a unique center of the YMCA of Greater Houston that delivers client-centered programs to refugees, immigrants and other vulnerable populations to advance their economic independence, social integration and civic participation. YMCA International Services is continuously recognized as a leader in the Houston immigrant community.

BACKGROUND AND HISTORY

The Board has asked for *amicus* briefs on the question of whether an individual who has been admitted pursuant to a wave-through inspection satisfies the requirement under INA § 240A(a)(2) that an applicant for cancellation of removal have resided in the United States after having been "admitted in any status." A noncitizen who seeks admission at a port of entry (POE) into the United States is required by law to be inspected by an immigration officer. INA § 235(a)(3). Although immigration officers are prohibited from admitting noncitizens who do not possess visas or other entry documents, *see, e.g.*, INA § 214, they may—and often do—wave a

noncitizen through the POE without questioning the individual. These "wave-through" entries have been a common occurrence at crowded POEs for decades, continuing into the modern era. *See*, *e.g.*, Richard M. Stana, Director of Homeland Security and Justice Issues, *Despite Progress, Weaknesses in Traveler Inspections Exist at Our Nation's Ports of Entry*, U.S. Gov. Accountability Off. 5 (2008) (describing situations in which CBP officers waved both pedestrians and vehicles through POEs without first checking immigration status), *available at http://www.gao.gov/new.items/d08219.pdf*.

Beginning with *Matter of Areguillin*, 17 I.&N. Dec. 308 (BIA 1980), and continuing most recently with *Matter of Quilantan*, 25 I.&N. Dec. 285 (BIA 2010), the Board has held that a "wave-through" constitutes a procedurally regular and lawful "admission" as defined in INA § 101(a)(13)(A). *See Matter of Quilantan*, 25 I.&N. Dec. at 290 ("We find that … the terms 'admitted' and 'admission' … denote procedural regularity for the purposes of adjustment of status, rather than compliance with substantive legal requirements."). Thus, a person who is waved through at a POE satisfies the "inspected and admitted" requirement under INA § 245(a) and, if otherwise eligible, subsequently may adjust to the status of an LPR. *Id.* at 293; *Matter of Areguillin*, 17 I.&N. Dec. at 810.

An LPR may apply for cancellation of removal as long as he or she meets two different timelines. Pursuant to INA § 240A(a)(1), the applicant must be "an alien lawfully admitted for permanent residence for not less than 5 years," and under INA § 240A(a)(2), the applicant must have "resided in the United States continuously for 7 years after having been admitted in any status." It is the second, seven-year rule that is at issue in this case. Because *Matter of Quilantan* and *Matter of Areguillin* hold that a noncitizen waved through a POE has been admitted, the sole issue before the Board is whether such an admission satisfies § 240A(a)(2)'s requirement that the

admission be "in any status." Relying on the plain language of § 240A(a)(2), the Fifth Circuit—the only court to address the issue to date—has definitively held that an individual who is in unlawful status following a wave-through admission satisfies the "in any status" requirement and thus is eligible for cancellation. *Tula-Rubio v. Lynch*, 787 F.3d 288 (5th Cir. 2015).

In *Tula-Rubio*, the Government argued that the words "in any status" required LPRs to have been "admitted in a legal status" to be eligible for cancellation. *Id*. at 294, n5. The Court rejected this argument, noting that "Congress unambiguously stated 'any status' instead of specifying that the status must be a 'legal' status." *Id.* The court further concluded that because the word "status" included both lawful *and* unlawful status, "a plain reading of § 1229b(a)(2) makes clear that it is satisfied so long as an alien has resided in the United States continuously for seven years after being admitted … regardless of the precise legal state or condition of the alien at the time of admission." *Id.* at 295.

ARGUMENT

An agency interpretation of a statute is bound by two basic premises: (1) it must follow the intent of Congress if "Congress has directly spoken to the precise question at issue," and (2) if Congress has not directly spoken to the question, the interpretation must be "based on a permissible construction of the statute.'' *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). "Where the statute is unambiguous and congressional intent is clear … the agency must give effect to the unambiguously expressed intent of Congress." *Garcia v. Holder*, 659 F.3d 1261, 1266 (9th Cir. 2011) (quoting *Garcia–Quintero v. Gonzales*, 455 F.3d 1006, 1011 (9th Cir.2006)). Here, the plain language of INA § 240A(a)(2) leaves no ambiguity that a person admitted in "unlawful status"—a status not only codified in the INA but accepted

as its own status by all relevant authorities—was admitted "in any status." The Board is bound by Congress's clear language and may not interpret the non-ambiguous phrase "in any status" as additionally requiring that such status be "lawful status."

A detailed examination of Title 8 of the United States Code shows that there are more than three hundred references which limit the term "status" to a specific status or set of statuses; in contrast, Congress' use of the broad non-specific term "any" in INA § 240A(a)(2) shows that Congress intended the provision to be read broadly. In addition, legislative history shows a clear intent by Congress to carefully balance the strict requirement of INA § 240A(a)(1) with the more liberal requirement of INA § 240A(a)(2), and any interpretation of § 240A(a)(2) which restricts it would upset that delicate balance. Finally, because the Fifth Circuit's decision in *Tula-Rubio* was based on the unambiguous plain language of the statute, the Board is bound to follow it in that circuit, *see Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005), and should avoid issuing a decision that would obstruct national uniformity.

I. THE PLAIN LANGUAGE OF INA § 240A(a)(2) SHOWS THAT AN ADMISSION "IN ANY STATUS" INCLUDES AN ADMISSION IN UNLAWFUL STATUS.

A. Unlawful Status is a Widely-Accepted Immigration Status Explicitly Included in the INA.

Although the word "status" is used hundreds of times throughout the INA, Congress has not formally defined the term. *See, e.g.*, *Matter of Blancas-Lara*, 23 I.&N. Dec. 458, 460 (BIA 2002) ("no specific definition of the word 'status' is included in section 101 of the Act"). Dictionaries define the term as "the legal relation of an individual to the rest of the community," *Id.* (citing BLACK'S LAW DICTIONARY 1264 (5th ed. 1979)), or similarly, "a person's legal condition." *Tula-Rubio*, 787 F.3d at 293 (citing BLACK'S LAW DICTIONARY 1542 (10th ed. 2014)). As used in the immigration context, it "denotes someone who possesses a certain legal

standing." *Matter of Blancas-Lara*, 23 I.&N. Dec. at 460. Pursuant to these definitions, all noncitizens within the United States have some form of status; either lawful status as a nonimmigrant, an immigrant, a Temporary Protected Status recipient, a parolee, etc., or unlawful status, which may occur because a person who had lawful status fell out of that status or because he or she entered the country without any lawful status (whether pursuant to a wave-through admission or by entering without inspection). A person's unlawful status identifies his or her "legal relation [ ] to the rest of the community" and similarly identifies his or her "legal condition" and "legal standing" within the United States. Thus, unlawful status satisfies the definition of "status" according to its plain meaning as recognized by the Board, just as does a person's lawful status.

Moreover, that "unlawful status" is a recognized "status" is confirmed by use of the term within in the INA, in regulations, in Board precedent, and in guidance issued by U.S. Citizenship and Immigration Services (USCIS). As the Fifth Circuit noted in *Tula-Rubio*, the concept of "unlawful status" as a separate and distinct status—rather than a legal nullity—is embedded deeply within the INA. 787 F.3d at 295, 295 n6.[2]

Specifically, Congress incorporated the concept of unlawful status into the Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99–603, which provided a path towards

[2] The Fifth Circuit collated multiple references to "lawful status," "unlawful status," and "lawful nonimmigrant status" contained within the INA, including INA §§ 214(k)(3) ("lawful status"), 244(f)(4) ("lawful status as a nonimmigrant"), 245(c) ("unlawful immigration status"), 245A(a)(2)(A)-(B) (two instances of "unlawful status"), and 322(a)(5) ("lawful status"). An additional reference not cited by the Fifth Circuit is INA § 245(k)(2)(A) (requiring that certain adjustment applicants "maintain, continuously, a lawful status"). There are multiple additional references to "unlawful status" contained in immigration provisions that are not codified in the INA. *See*, *e.g.*, 8 U.S.C. §§ 1365(b)(2)(B) (concerning federal reimbursement to states for certain individuals whose "unlawful status was known to the Government"); 1373(a)-(b) (prohibiting governmental restrictions on sharing certain "information regarding the citizenship or immigration status, lawful or unlawful, of any individual"); 1644 (same).

LPR status for noncitizens who were in unlawful status. INA § 245A(a)(2).[3] Under IRCA, Congress defined both those who entered without inspection and those who entered as nonimmigrants but failed to maintain lawful status as residing in "unlawful status." Specifically, INA § 245A(a)(2)(A) applies to those who "entered the United States," even without inspection, before January 1, 1982, and then "resided continuously in the United States in an unlawful status." *See* 8 C.F.R. § 245a.15(d)(1) (aliens "who entered the United States without inspection" are residing in unlawful status). INA § 245A(a)(2)(B) applies to those who "entered the United States as a nonimmigrant" before January 1, 1982 and whose authorized stay as a nonimmigrant expired or whose "unlawful status was known to the Government."

By declaring that persons who entered without inspection *and* those who overstayed their visas are both in "unlawful status," Congress was clear that "unlawful status" is a status that is distinct and separate from the manner of entry. *See Gomez v. Lynch*, 831 F.3d 652, No. 14-60661, 2016 U.S. App. LEXIS 14416, *13 (5th Cir. Aug. 5, 2016) ("Admission and status are fundamentally distinct concepts.").[4] Therefore, a person who enters via a wave-through, as in

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[3] The dissent from denial of rehearing en banc in *Tula Rubio* dismisses "unlawful status" as used in IRCA as a "unique" provision included for the "obvious [reason that] residents who already had lawful status didn't need to resort to the amnesty law since ordinary immigration law channels were available to them." *Tula Rubio v. Lynch*, 805 F.3d 185, 190 (5th Cir. 2015) ("*Tula II*"). This is wrong for at least two reasons. First, IRCA is far from unique in creating a provision that only applies to noncitizens lacking lawful status." *See*, *e.g.*, INA §§ 240A(b) (providing a path to lawful permanent resident status for "certain nonpermanent residents"); 245(i)(1)(A)(i) (extending eligibility for adjustment of status to noncitizens who entered without inspection). Second, the dissent's interpretation flies in the face of the "presumption that a given term is used to mean the same thing throughout a statute." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

[4] This distinction undermines the argument that, if unlawful status falls within the phrase "any status," then many cases "discussing the sufficiency of 'status' would have wasted the courts' time." *Tula II*, 805 F.3d at 189. The controlling issue in all of the cases cited in support was one of "admission" rather than status. *See Vasquez de Alcantar v. Holder*, 645 F.3d 1097 (9th Cir. 2011) (holding that an individual who had entered without inspection was not "admitted" when the I-130 petition filed on her behalf was approved); *Garcia v. Holder*, 659 F.3d 1261 (9th Cir. 2011) (holding that the parole of a Special Immigrant Juvenile was the

Matter of Quilantan, and has no visa or other valid entry document, would be in "unlawful status" upon entering. In fact, the respondent in *Matter of Areguillin* would have satisfied this IRCA requirement had she not adjusted under INA § 245.

In addition, INA § 245(a), by its plain language, presupposes that all applicants have a pre-existing status that must be "adjusted" to that of lawful permanent resident. *Tula-Rubio*, 787 F.3d at 295. Specifically, the statute states that the "the status" of an alien who was inspected and admitted may be adjusted to that of an LPR. It is tautological that a person must have a status already if that status is to be adjusted.[5] The respondents in both *Areguillin* and *Quilantan* were in unlawful status upon their wave-through admissions, yet both were eligible to adjust. Consequently, their unlawful status was the status which they subsequently adjusted.[6]

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equivalent of an admission); *Guevara v. Holder*, 649 F.3d 1086 (9th Cir. 2011) (holding that the grant of employment authorization to an adjustment applicant who had entered without inspection did not confer admission status); *Matter of Reza Murillo*, 25 I.&N. Dec. 296 (BIA 2010) (holding that a grant of family unity to an individual who entered without inspection was not an admission).

[5] The dissent in *Tula-Rubio* erroneously argues that noncitizens in unlawful status *lack* a status "defined by the INA" and thus are "without status." *Tula II*, 805 F.3d at 189 (internal quotation marks omitted). Notably, there is not a single reference in the INA to the concept of a person being "without status" (or "lacking status," "no status," "with no status," etc.). Instead, as discussed above, there are multiple references to being "in" unlawful status, demonstrating that Congress specifically recognized "unlawful status" as a status. As with the adjustment of status provisions, it would be a linguistic absurdity to conclude that a noncitizen can both be "in" unlawful status while simultaneously being entirely "without status." *Tula II*, 805 F.3d at 189. Instead, the various cases that the dissent cites in support use the term "without status" as a shorthand for "without *legal* status." 805 F.3d at 188-89. None of these cases addresses the distinct concept of whether "unlawful status" falls within the term "any status."

[6] Further support is found in INA § 245(c), which bars eligibility for adjustment for both those noncitizens "in unlawful immigration status on the date of filing the application" *and* those "who [have] failed (other than through no fault of [their] own or for technical reasons) to maintain continuously a lawful status since entry." This use of "unlawful status" is fatal to the *Tula-Rubio* dissent's argument that "unlawful status" is synonymous with failure to maintain lawful status. *Tula II*, 805 F.3d at 190 ("These provisions demonstrate that 'unlawful status' means one has forfeited 'lawful status'"). Because any person who had "forfeited lawful status" on the date of filing an application for adjustment would *necessarily* have "failed [] to maintain

References to unlawful status also are commonplace within the INA's implementing regulations. In total, roughly twenty regulations reference "unlawful status."[7] These regulations further demonstrate that unlawful status is a distinct status. *See, e.g.*, 8 C.F.R. § 245a.2(u)(4) ("Return to unlawful status after termination. Termination of the status of any alien previously adjusted to lawful temporary residence under section 245A(a) of the Act shall act to return such alien to the unlawful status held prior to the adjustment"); 8 C.F.R. § 245a.15(d)(4)(ii) ("Pursuant to section 1104(c)(2)(B)(iv) of the LIFE Act, [a Cuban or Haitian entrant described in 8 C.F.R. § 212.5(g)] is considered to be in an unlawful status in the United States").

This Board also has used the term "unlawful status" multiple times as a way of discussing a noncitizen's current status. The Board has referred to unlawful status in discussing legal principles, *see, e.g.*, *Matter of Fereira*, 14 I.&N. Dec. 509, 509 (BIA 1973) (discussing "the presumption of unlawful status established by section 291 of the Act"); *Matter of Benitez*, 19 I.&N. Dec. 173, 176 (BIA 1984) (noting that "section 291 does not specify the precise nature of the presumed unlawful status"); *Matter of Sosa-Hernandez*, 20 I.&N. Dec. 758, 759 (BIA 1993) (noting that "it is well settled that an immigrant found to be excludable at entry has not been lawfully admitted to the United States but remains in an unlawful status"), and in describing a particular respondent's status. *See, e.g.*, *Matter of B—*, 4 I.&N. Dec. 5, 14-15 (BIA 1950) (noting that the respondent "was residing here in an unlawful status"); *Matter of Sandoval*, 17 I.&N. Dec. 70, 73 (BIA 1979) (stating that respondent and her husband "admit[ed] their unlawful

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continuously a lawful status," the dissent's definition would make the unlawful status bar of § 245(c) surplusage.

[7] The phrase "unlawful status" is used in 8 C.F.R. §§ 245a.1(d), 245a.2(b)(1)-(4), (9), (11), (12), (14), (c)(4), and (u)(4), 245a.4(b)(20)(iv), 245a.11(b), 245a.12(d)(8), 245a.15(d), (d)(2), (d)(4), (d)(4)(ii), and 245a.18(d)(2). Other immigration-related regulations use similar terms. *See, e.g.* 45 C.F.R. § 411.5 ("Unaccompanied child (UC) means a child: (1) Who has no lawful immigration status in the United States").

status"); *Matter of Lemus-Losa*, 25 I.&N. Dec. 734, 735 (BIA 2012) (noting the respondent's "unlawful status"). The Commissioner of the legacy Immigration and Naturalization Service also has interpreted the meaning of unlawful status in INA § 245A. *Matter of S—*, 19 I.&N. Dec. 823 (BIA 1988) (interpreting the phrase "unlawful status" as contained in INA 245A).

Similarly, USCIS's policy manual makes frequent reference to "unlawful status," especially in regard to adjustment of status: "Unlawful Immigration Status: A foreign national is in unlawful immigration status if he or she is in the United States without lawful immigration status either because the foreign national never had lawful status or because the foreign national's lawful status has ended." 7 U.S. Citizenship & Immigration Serv., *USCIS Policy Manual*, pt. B, ch. 3, § 3 (2016).[8] In addition, seven different USCIS forms—all of which are incorporated into the regulations, *see* 8 C.F.R. § 103.2(a)—include prompts that treat unlawful status as a form of status. Form I-765, Application for Employment Authorization, Question 14 asks "Status at last entry (B-2 Visitor, F-1 Student, No Lawful Status, etc.)." Form I-821d, Consideration of Deferred Action for Childhood Arrivals, Part 3.4, asks for "Immigration Status on June 15, 2012 (*e.g., No Lawful Status, Status Expired, Parole Expired*)" (emphasis in original). Other USCIS forms prompt applicants to write a variant of "entry without inspection" in the box where an applicant is required to list an immigration status.[9]

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[8] *Available at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter3.html*.

[9] In total, five other USCIS forms explicitly include a variant of "entry without inspection" as the answer to a question asking for immigration status: Form I-485, Part 3, Section A ("In what status did you last enter? *Visitor, student, exchange visitor, crewman, temporary worker, without inspection, etc.*") (emphasis in original), Form I-589 Instructions, p5 ("If you entered without being inspected by an immigration officer, write 'no inspection' in Question 18c in the current status or status section."), Form I-918, p3 ("U. Current Immigration Status – give your current immigration status, regardless of how you entered the United States (visitor, student, entry without inspection, etc.)"), Form I-914, p2 ("18. Current Immigration Status – give your current immigration status, regardless of how you entered the United States (visitor, student,

The multiple references in the INA, the regulations, BIA precedent and USCIS policies are consistent with—and further confirm—an interpretation of the term "in any status" in accord with its plain meaning. Moreover, in light of the long history of treating unlawful status as a status in its own right, any interpretation of the term "any status" which treated unlawful status as a nullity would be contradictory at best.

B. The Phrase "In Any Status" Must Necessarily be Read to Include Unlawful Status.

i. Basic canons of statutory interpretation show that "any status" includes all statuses.

Although the word "any" is not defined in the INA, the Supreme Court has made clear that "read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *see United States v. Blixt*, 548 F.3d 882, 887 (9th Cir. 2008) ("using the word 'any' … reflects Congress's intention to construct an expansive definition."). Where "Congress 'did not add any language limiting the breadth of the word,' any 'must' be read 'as referring to all' of the type to which it refers." *Tula-Rubio*, 787 F.3d at 293. Dictionaries further support the extremely broad nature of the word "any." *See*, *e.g.*, OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/any ("Whichever of a specified class might be chosen"); DICTIONARY.COM, http://www.dictionary.com/browse/any ("[O]ne or more without specification or identification"). Common to all of these definitions is the principle that when Congress uses the word "any," it intends to refer to "all." *See*, *e.g.*, *Utica Mut. Ins. Co. v. Herbert H. Landy Ins. Agency, Inc.*, 820 F.3d 36, 45 (1st Cir. 2016) ("Read naturally, the phrase 'any type' refers to every kind of the noun that it modifies."); *Fleck v. KDI*

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entry without inspection, etc.)"), and Form I-821, Part 2, Q22 ("Immigration status when you last entered the United States, *e.g., visitor, student, entered without inspection (EWI)*") (emphasis in original).

Sylvan Pools, Inc., 981 F.2d 107, 115 (3d Cir. 1992) ("'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive."). Therefore, as the Fifth Circuit held in *Tula-Rubio*, there is "no basis" to conclude that "any status" is limited to lawful status, because "far from being further limiting, the word 'any' is expansive." 787 F.3d at 293.

As noted above, "status" generally means a "legal condition . . . the sum total of a person's legal rights, duties, liability, and other legal relations. . ." BLACK'S LAW DICTIONARY (10th ed. 2014). Therefore, put together, the plain meaning of "any status" would be "a person's legal condition, indiscriminately of whatever kind of legal condition." Such a definition naturally includes those who are admitted, regardless of whether their status is an "unlawful immigration status" or a "lawful status." *See* INA § 245(c) (using both of those terms).

ii. The Board cannot limit the plain meaning of the phrase "in any status" by reading it as "in any lawful status."

An interpretation of "admitted in any status" as meaning "admitted in lawful status" would impermissibly add words to a statute.[10] It is a fundamental rule that courts should "resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). Where, as here, there is "a plain, nonabsurd meaning in view," a court cannot "read an absent word into the statute." *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004). As noted above and as the Fifth Circuit held in *Tula-Rubio*, the plain meaning of "in any status" includes both lawful and unlawful statuses. The Board is not at liberty to limit this plain meaning by interpreting it as applying only to those in lawful status; to do so would require the impermissible insertion of "lawful" into the phrase.

[10] The dissent to the denial of rehearing en banc in *Tula-Rubio* erroneously suggested this interpretation. *Tula II*, 805 F.3d at 187.

Notably, Congress previously included a reference to maintenance of "lawful unrelinquished domicile" in former section 212(c)—the precursor to INA § 240A(a)—and chose to eliminate the word "lawful" from the seven-year requirement. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 392-93 (1980). Consistent with this, the Board has previously rejected attempts to read INA § 240A(a)(2) in a way that would insert an additional word between "any" and "status." *Matter of Blancas-Lara*, 23 I.&N. Dec. at 460 (rejecting the government's argument that "the words 'admitted in any status' … means admitted for lawful residence in any 'immigrant' status"). Similarly, the Board should reject an attempt to reshape INA § 240A(a)(2) by imposing a limitation previously discarded by Congress.

Finally, any interpretation of the word "status" which limits it to "lawful status" would render multiple other provisions in the INA superfluous. Courts must "mak[e] every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. United States E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991). For example, INA § 322(a), which sets conditions by which children who did not derive citizenship automatically may request a certificate of citizenship, requires the following condition to be fulfilled: "The child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status." INA § 322(a)(5). If status means lawful status, then the word "lawful" as used here is superfluous. Any attempt to rescue this provision—and other provisions which reference lawful status—by further redefining "lawful status" would fly in the face of the canon of statutory interpretation "that where Congress uses the same [ ] phrase throughout a statute, Congress generally intends the [ ] phrase to have the same meaning

each time." *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1142 (9th Cir. 2002) (citations omitted).

C. The INA Shows Conclusively That Had Congress Intended to Restrict INA § 240A(a)(2) to "Lawful Status" It Could Have Done So.

Throughout the INA and the remainder of Title 8 of the United States Code, Congress uses the term "status" approximately 350 times. The vast majority of these references—over 300 of them—are to a specific form of status, such as "lawful status," "unlawful status," "lawful temporary resident status," "special immigrant status," "nonimmigrant status," etc. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009). That Congress is able to specify a particular status is clear from how it uses the term widely to refer to specific statuses. References to specific statuses range from the general but not unlimited (*see, e.g.*, INA §§ 214(a), "any status subsequently acquired under [§ 248]," and 240A(b)(1), "the status of an alien lawfully admitted for permanent residence"), to the very specific (*see, e.g.*, 8 U.S.C. § 1367(a)(1)(F): "an alien applying for status under [INA § 101(a)(15) (T)], … under section 244(a)(3) of the [INA] … as in effect prior to March 31, 1999, or as a VAWA self-petitioner" (as defined in [INA § 101(a)(51)])"). In each of these 300 uses, Congress knew exactly how to limit or define a reference to status in order to ensure that the provision referred to a specific status or subset of statuses.

In contrast, Congress tied the term "any" to status very rarely. *See* INA §§ 208(a)(1), 240A(a)(2). As the Supreme Court has recognized, courts must presume that Congress made a deliberate decision to omit language that it included in other provisions of the same statute. Moreover, these latter provisions demonstrate that Congress clearly could have included limiting

language had it so chosen. *See, e.g.*, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) ("To start, the statute says '100 or more persons,' not '100 or more named or unnamed real parties in interest.' Had Congress intended the latter, it easily could have drafted language to that effect. Indeed, when Congress wanted [the latter] …, it explicitly said so."). Therefore, the Board should refrain from imposing a limitation to INA § 240A(a)(2) where none exists.

D. Because The Phrase "In Any Status" is a Clarifying Term Used By Congress to Foreclose Competing Interpretations, It Is Not Surplusage.

The *Tula-Rubio* dissent erroneously argues that the panel's interpretation of INA § 240A(a)(2) would make the phrase "in any status" surplusage. *Tula II*, 805 F.3d at 187. In particular, it restricts its analysis to the single sentence contained in INA § 240A(a)(2). *Id.* (arguing that the panel "renders 'in any status' meaningless within Section 1229b(a)(2)"). Surplusage is not evaluated in a vacuum, however, but instead must be considered in the context of surrounding provisions. *See King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (rejecting surplusage argument by invoking "the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *United States v. Zacks*, 375 U.S. 59, 69 (1963) (statutory language is not surplusage where there is "a ready explanation for the inclusion of the additional provisions").

"The canon against surplusage is not an absolute rule." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013). The Supreme Court has consistently rejected the use of the canon against surplusage where admittedly redundant language serves to foreclose a competing interpretation of a statute. *See Ali*, 552 U.S. at 226 (holding that a phrase is not superfluous where it can "remove any doubt" about a competing interpretation). In *Marx v. Gen. Revenue Corp*, the Court analyzed the phrase "and costs" in 15 U.S.C. § 1692k(a)(3). 15 U.S.C. §

1692k(a)(3) referenced costs in two separate sentences: first, by awarding costs to prevailing plaintiffs and second, by awarding costs to defendants if the plaintiff's action was brought in bad faith.[11] Analyzing the second sentence, the Court agreed that the phrase "and costs" in it had no operative function on its own. However, the Court rejected the argument that the words were surplusage, holding that they must be read in context and concluding that doing so foreclosed competing arguments about the second sentence's interpretation:

> If Congress had excluded "and costs" in the second sentence, plaintiffs might have argued that the expression of costs in the first sentence and the exclusion of costs in the second meant that defendants could only recover attorney's fees when plaintiffs bring an action in bad faith. By adding "and costs" to the second sentence, Congress foreclosed that argument, thereby removing any doubt [as to its inclusion].

Marx, 133 S. Ct. at 1176.

In the context of the INA as a whole, there are frequent references to a specific status.[12] Therefore, where Congress intends to ensure that a provision applies to all noncitizens—not simply those in a *particular* status or set of statuses—it adds clarifying language to ensure that no restrictions would be placed on eligibility. For example, the asylum provision states that "Any alien who is physically present in the United States or who arrives in the United States … irrespective *of such alien's status*, may apply for asylum." INA § 208(a)(1) (emphasis added). Courts have relied upon this language to hold that stowaways—who had no right to an exclusion proceeding under the INA—were still entitled to apply for asylum before an immigration judge.

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[11] 15 U.S.C. § 1692k(a)(3) specifies that a debt collector may be liable for, "in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs."

[12] For example, "lawful permanent resident status," INA § 203(c)(1)(A), "lawful temporary resident status," § 210(a)(2), "special agricultural worker status," § 210(d)(3)(C), "status as an H-1B nonimmigrant," § 212(n)(1)(A)(i), "permanent resident status on a conditional basis," § 216(a)(2), "unlawful immigration status," § 245(c), and many others.

In *Selgeka v. Carroll*, 184 F.3d 337 (4th Cir. 1999), the Fourth Circuit rejected the imposition of diminished asylum protections for stowaways, holding that they "violate[] section 1158(a), which allows aliens, irrespective of 'status,' to apply for asylum and directs the Attorney General to establish a 'procedure' for asylum claims." *Id.* at 345; *see also Yiu Sing Chun v. Sava*, 708 F.2d 869, 872 (2d Cir. 1983) (noting that "it would be plain" that the words "irrespective of such alien's status" applied to stowaways); *Marincas v. Lewis*, 92 F.3d 195, 200 (3d Cir. 1996) (relying on the "plainly stated" words "irrespective of such alien's status" to reject the Attorney General's argument that INA § 208 was satisfied by "establishing one asylum procedure for stowaways and another asylum procedure for other aliens.").[13]

Here, the phrase "in any status" serves the same clarifying purpose. In *Blancas-Lara*, the Government argued that Congress intended to limit cancellation of removal only to those "who have not fallen out of status during the 7 years of continuous residence." 23 I.&N. Dec. at 461. The Board rejected this interpretation, noting the "plain language of section 240A(a)(2) that time in residence in the United States after admission in *any* status may be applied toward the 7 years." *Id.* (emphasis in original). Similarly, here, the words "in any status" foreclose any competing interpretations that would limit cancellation of removal only to aliens admitted in *lawful* status.

II. CONGRESS INTENDED THAT THE SEVEN-YEAR RULE IN INA § 240A(a)(2) BE READ AS LIBERALLY AS POSSIBLE TO COUNTERBALANCE THE STRICT FIVE-YEAR RULE IN INA § 240A(a)(1).

Resort to legislative history is unnecessary where, as here, the statutory language is plain. *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002) ("reference to legislative

[13] These cases also strongly support the argument that "unlawful status" is a status. Stowaways clearly have no lawful status in the United States upon entry, yet these courts had no difficulty in concluding that § 208 unambiguously foreclosed any attempt to limit eligibility based on "status."

history is inappropriate when the text of the statute is unambiguous"). Even though the Board has no need to resort to legislative history, the legislative history of INA § 240A(a)(2) shows Congressional intent to craft a deliberately liberal seven-year residency requirement. In 1996, Congress was faced with the dilemma of how to fix INA § 212(c)'s "lawful domicile" problem. Section 212(c), initially enacted in 1952, provided relief from deportation for LPRs who "return[ed] to a lawful unrelinquished domicile of seven consecutive years." Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 187 (1952). When the BIA first interpreted the lawful domicile language of § 212(c), it held that "a lawful unrelinquished domicile of seven consecutive years" should be interpreted as requiring domicile *in LPR status* for seven years. *Matter of S—*, 5 I.&N. Dec. 116 (1953). However, as courts later came to recognize, there was "another possible reading of § 212(c): the petitioner (1) has been legally domiciled in the United States for seven years,[14] and (2) is a permanent resident at the time of his application, but not necessarily for the entire seven year period." *Madrid-Tavarez v. I.N.S.* 999 F.2d 111, 112 (5th Cir. 1993). Faced with the opportunity to settle the question of these two conflicting interpretations of section 212(c), Congress found a way to reconcile both interpretations and crafted the new INA § 240A(a). *See* Report of the Committee on the Judiciary, House of Representatives, on H.R. 2202, H.R. Rep. No. 104-469, at 232 (1996) ["House Report"] ("Section 240A)(a) is intended to replace and modify the form of relief now granted under section 212(c) of the INA.").

By the time Congress began debating the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, there was a full-blown circuit split on the interpretation of lawful domicile. The Fourth and Ninth Circuits followed the BIA's interpretation, restricting § 212(c)

[14] That is, residing in the United States in any lawful status, including nonimmigrant status. *Madrid-Taverez,* 999 F.2d at 112.

relief to only those individuals who had at least seven years in LPR status. *See Chiravacharadhikul v. I.N.S.*, 645 F.2d 248, 250-51 (4th Cir. 1981); *Castillo-Felix v. I.N.S.*, 601 F.2d 459, 467 (9th Cir.1979). The Second and Seventh Circuits rejected the BIA's reading, expanding § 212(c) relief to any person who had lawfully resided for seven years in any status, so long as they were an LPR on the date of filing for relief. *See Lok v. I.N.S.*, 548 F.2d 37 (2d Cir. 1977) ("*Lok I*"); *Castellon-Contreras v. I.N.S.*, 45 F.3d 149 (7th Cir.1995); *see also Melian v. I.N.S.*, 987 F.2d 1521 (11th Cir.1993) (agreeing, in *dicta*, with the Second and Seventh Circuits). Still other circuits had noted the split but found ways to avoid ruling on it. *See Graham v. I.N.S.*, 998 F.2d 194, 195 (3d Cir.1993) (resolving the question "without choosing between the conflicting interpretations"); *Madrid-Tavarez*, 999 F.2d at 112; *Onwuneme v. I.N.S.*, 67 F.3d 273, 274 n1 (10th Cir. 1995); *Anwo v. I.N.S.*, 607 F.2d 435, 436-38 (D.C. Cir. 1979).

It was this circuit split that Congress singled out as a primary reason for reforming § 212(c). The sole explanation given for replacing § 212(c) with § 240A came in the House Judiciary Committee's Report:

> [S]ome Federal courts permit aliens to continue to accrue time toward the seven year threshold [for suspension of deportation] even after they have been placed in deportation proceedings. Similar delay strategies are adopted by aliens in section 212(c) cases, where persons who have been in the United States for a number of years, but have only been lawful permanent residents for a short period of time, seek and obtain this form of relief.

House Report at 122. To address this split, Congress compromised by adopting the dual five-year and seven-year provisions of INA § 240A(a)(1) and (a)(2).

First, the requirement in INA § 240A(a)(1) that an applicant must have been in LPR status for "no less than five years" explicitly codified the Board's interpretation of lawful domicile in *Matter of S—*, while lowering the time required in LPR status from seven years to five years. This addressed the House Report's concern about newly-minted LPRs gaining relief

by creating a hard-line rule that all applicants for cancellation of removal *must* have at least five years in the country as LPRs to be eligible.

Next, the requirement in INA § 240A(a)(2) of seven years of continuous "residence"—not domicile—after admission "in any status," reflected the Second and Seventh Circuit's interpretation. Having resolved in § 240A(a)(1) that only long-term LPR's—those with significant equities in the United States—would be eligible, Congress then adopted a more liberal approach with respect to noncitizens who had entered in "any" other status and then become LPRs. For those who were lawfully admitted but were in unlawful status or a nonimmigrant status in the years between lawful admission and becoming an LPR, this approach addressed what the Second Circuit called the "obvious purpose of [§ 212(c)] to mitigate the hardship that deportation poses for those with family ties in this country." *Lok*, 548 F.2d at 41.

Additionally, Congress eliminated the lawful domicile provision entirely. This was done by removing section 212(c)'s requirement that the applicant's domicile in the United States be "lawful." The word "lawful," which was added in the 1952 Act, was "intended to restrict section 212(c) relief to those aliens who 'came in the front door, were inspected, lawfully admitted ... and remained here for 7 years before they got into trouble.'" *Lok v. I.N.S*, 681 F.2d 107, 110 (2d Cir. 1982) ("*Lok II*") (*quoting The Immigration and Naturalization Systems of the United States*, S.Rep. 1515, 81st Cong. 2d Sess. 382 (1950)). By eliminating the word "lawful," Congress chose to extend cancellation of removal to those who had been in an unlawful status during the two years (out of the total seven) in which they were not in LPR status. *See Matter of Blancas-Lara*, 23 I.&N. Dec. 458, 461 (BIA 2002) (holding that Congress chose not to "include maintenance of status as a prerequisite for relief" under INA § 240A(a)). In *Blancas-Lara*, the Board explicitly rejected the Department's argument that INA § 240A(a)(2) should be read strictly, making clear

that if Congress had intended § 240A(a) to "discourage the unlawful residence of aliens in the United States," it could easily have done so. *Id.* at 460.[15]

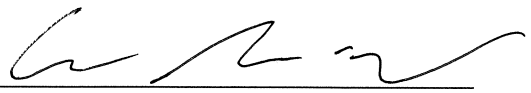
Thus, Congress's balancing act was clear; a strict five-year rule requiring applicants to be lawful permanent residents balances a liberal seven-year rule requiring only that applicants have been admitted and inspected. The intent evident behind this balancing further supports a reading of the statute in accord with its plain language.

CONCLUSION

Since 1980, this Board has repeatedly confirmed that noncitizens "waved through" a POE have been admitted or inspected into the United States. These noncitizens who have been "waved through" should be entitled to the same rights as anyone else who has been lawfully admitted by any other means. As the plain language of INA § 240A(a)(2) shows, a "wave through" entry constitutes an admission in "any status" for the purposes of the seven-year continuous residence requirement under INA § 240A(a)(2). Following the plain language here would allow lawful permanent residents with strong equities to apply for cancellation of removal so long as they had originally presented themselves at the border and applied for admission. Therefore, this Board should follow the holding of *Tula-Rubio* and hold that an LPR admitted pursuant to *Matter of Quilantan* is statutorily eligible for cancellation of removal if he or she has resided continuously in the United States for at least seven years.

[15] As the Board also noted, "in many instances Congress has provided relief for aliens who fell out of status at some point." *Matter of Blancas-Lara,* 23 I.&N. Dec. at 460-461. Congress's choice to eliminate the word "lawful" was one such instance.

Respectfully submitted, this 19th day of October 2016.



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