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

In the Matter of:	)	
Alla Adel ALYAZJI	)	File No.: **A09-206-662**
In removal proceedings	)	

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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I. INTRODUCTION

The term "admission" is used dozens of times throughout the Immigration and Nationality Act (INA). Its use is not always consistent, and in rare instances even does not correspond with the definition of the term provided by Congress at 8 U.S.C. § 1101(a)(13)(A). *Matter of Rosas-Ramirez,* 22 I&N Dec. 616 (BIA 1999) (holding that the statutory definition did not apply in one circumstance because it produced an absurd result); *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133 (9th Cir. 2001) (same); *see also Abdelqadar v. Gonzales,* 413 F.3d 668 (7th Cir. 2005); *Shivaraman v. Ashcroft,* 360 F.3d 1142, 1147 (9th Cir. 2004) (explaining that *Matter of Rosas- Ramirez* and *Ocampo-Duran* were premised on the "absurd results" doctrine).

These instances are the exception, however, and cannot swallow whole the fundamental rule of statutory construction that when a statute is unambiguous – as the statutory definition of "admission" is – it must be applied in accord with its plain meaning. That rule applies to the application of 8 U.S.C. § 1227(a)(2)(A)(i)(I) in the present case. Section 1227(a)(2)(A)(i) provides that a person is removable if he or she is convicted of a crime involving moral turpitude committed within five years after the date of "admission" for which a sentence of one year longer may be imposed. Not only is use of the statutory definition of "admission" for purposes of 8 U.S.C. § 1227(a)(2)(A)(i)(I) not ambiguous, but it clearly is applicable to the respondent's lawful entry into the United States. Just as clearly, the definition does not encompass his subsequent adjustment of status. All four courts of appeals to have decided the precise issue presented here agree that the plain language of the statute governs application of § 1227(a)(2)(A)(i)(I). Thus, they held that when a noncitizen is lawfully admitted to the United States and

subsequently adjusts his or her status, the lawful entry with inspection and authorization, and not the adjustment of status, is the "admission" referred to in 8 U.S.C. § 1227(a)(2)(A)(i)(I). *Zhang v. Mukasey*, 509 F.3d 313 (6th Cir. 2007); *Aremu v. DHS*, 450 F.3d 578 (4th Cir. 2006); *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005); *Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004). The Board should vacate *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), which held to the contrary, and instead follow the courts of appeals.

American Immigration Council is a non-profit organization established to advance fundamental fairness, due process, and constitutional and human rights in immigration law. Immigration Council has a direct interest in ensuring that the provisions of the INA relating to removal are fairly and accurately interpreted to achieve Congress' intent. Immigration Council has appeared in numerous cases before this Board as *amicus curiae*.

II. OVERVIEW OF THE CASE LAW

In *Matter of Rosas-Ramirez*, 22 I&N Dec. 616, 616-17 (BIA 1999), the Board considered whether a respondent, who had entered the United States without inspection, then adjusted to lawful permanent resident status, and later committed an aggravated felony, could be deportable under 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien who was convicted of an aggravated felony "at any time after admission." The Board addressed whether the respondent had effected an "admission" under § 1227(a)(2)(A)(iii) when she adjusted to lawful permanent resident status. *Id*. at 617. The Board recognized that "the respondent's adjustment of status does not meet the literal terms of the definition of

'admission' or 'admitted' contained in section 1101(a)(13)(A)," as it did not involve a lawful entry. *Id*.

Considering the absurd results that would follow if the Respondent's adjustment of status was not considered an admission, since she had no other "admission" and would not be subject to this deportation ground otherwise, the Board reasoned that the definition of "admission" set forth in § 1101(a)(13)(A) did *not* adequately resolve the intended scope of "admission" in § 1227(a)(2)(A)(iii). *Id*. at 618. After looking at other provisions in the INA, the Board concluded that "admission" in § 1227(a)(2)(A)(iii) encompasses not only those aliens who are admitted at the time of entry under § 1101(a)(13)(A), but also those who are lawfully admitted for permanent residence at some time after entry. *Id.* at 622-23. Because the Board found that the respondent's *adjustment of status* constituted an "admission," it also found her deportable for having been convicted of an aggravated felony "at any time after admission." *Id.* The Ninth Circuit subsequently reached the same result in *Ocampo Duran v. Ashcroft*, 254 F.3d 1133, 1134 (9th Cir. 2001).

In *Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004), the Ninth Circuit next considered the meaning of "admission" as used in the phrase "the date of admission" in 8 U.S.C. § 1227(a)(2)(A)(i)(I). The court held that in cases in which there was both an "admission" at entry and an adjustment of status, the admission at entry constituted "the date of admission" for § 1227(a)(2)(A)(i)(I). *Shivaraman*, 360 F.3d at 1148-49. Because this result was dictated by both the plain language of the statute and the intent of Congress, the court reasoned that it owed no deference to the Board's interpretation. In particular, the court found that the Board erred first in concluding that there could be

multiple dates of entry, any one of which could trigger the five year period in § 1227(a)(2)(A)(i)(I); and second, in relying on the adjustment of status as the triggering date, rather than the earlier admission at entry. *Id*. at 1147. The court concluded that such an interpretation would not constitute a permissible interpretation of the statute even in cases in which the definition of "admission" might be deemed to be ambiguous. *Id.* The court emphasized that the statute specifies "the" date of admission and that there could be only one "the" date. *Id.* at 1148. *Shivaraman* distinguished *Ocampo Duran, supra,* concluding that it was based upon the maxim that a court must interpret a statute to avoid an absurd result. *Shivaraman* found that while *Ocampo Duran* rejected the overly narrow interpretation of admission in cases in which § 1101(a)(13)(A) clearly was not applicable to avoid an absurd result, it nevertheless recognized § 1101(a)(13)(A) as the primary controlling definition. *Id*. at 1147.

In *Matter of Shanu,* 23 I&N Dec. 754 (BIA 2005), the Board dealt with the same issue as that in *Shivaraman*, specifically addressing whether an adjustment constitutes an "admission" for § 1227(a)(2)(A)(i)(I); and also whether the adjustment triggers the five year period rather than the respondent's previous admission at entry. While the Board acknowledged again that the statutory definition of admission did not include adjustment of status, it found that *Matter of Rosas-Ramirez* held that this definition was not exhaustive and that an adjustment was an admission. It interpreted *Matter of Rosas-Ramirez* as only partially relying on the "absurd results" doctrine, but also on other statutory provisions. *Matter of Shanu*, 23 I&N Dec. at 756-58.

The Board, in *Matter of Shanu*, next turned to the second issue, whether the "admission" by adjustment of status was the date that triggered the five year period in §

1227(a)(2)(A)(i)(I) when the respondent earlier had been "admitted" upon entry. The Board noted that the respondent's earlier admission satisfied the statutory definition, and could constitute the "date of admission" for § 1227(a)(2)(A)(i)(I), but held that Congress intended that each and every date of admission qualify as a potentially relevant date of admission under § 1227(a)(2)(A)(i)(I). Thus, the date of "*any* admission, whether it be the first, last or any other admission" could trigger the five-year vulnerability period. *Matter of Shanu*, 23 I&N Dec. at 759 (emphasis in original).

As in *Shivaraman*, the court in *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005), addressed the issue of "the date of admission" under § 1227(a)(2)(A)(i)(I) in a case in which the noncitizen was lawfully admitted at entry and subsequently adjusted status. The court interpreted *Matter of Rosas-Ramirez* as reading § 1101(a)(13)(A) as if the phrase "unless the context otherwise requires" preceded the definition of admission. *Abdelqadar*, 413 F.3d at 673. It stressed, however, that even if this was acceptable in the *Matter of Rosas-Ramirez* context, it did not establish a new meaning for the term "admission" as used in § 1227(a)(2)(A)(i)(I). The court also faulted the Board for assuming that each new "admission" serves to reset the clock for § 1227(a)(2)(A)(i)(I). The court concluded that "the Board's transposition of *Rosas-Ramirez* to a different context, and its casual assumption that the latest of multiple admissions starts a new five-year period, show that the Board has not given this question the attention that it requires." *Id.*, 413 F.3d at 674.

In *Aremu v. DHS*, 450 F.3d 578 (4th Cir. 2006), the court reversed *Matter of Shanu*, holding instead that the term "admission" as used in § 1227(a)(2)(A)(i)(I) did not encompass an adjustment of status in a case in which there was both a lawful admission

and a subsequent adjustment. The court followed both the Seventh and Ninth Circuits and found that the plain language of the statute compelled this result. Finally, the court reserved ruling on whether an adjustment could be treated as an admission under this statute in a case in which there was no lawful admission. *Aremu*, 450 F.3d at 583.

The Sixth Circuit also has rejected the conclusion that an adjustment of status constitutes an "admission" for purposes of § 1227(a)(2)(A)(i)(I). In *Zhang v. Mukasey*, 509 F.3d 313 (6th Cir. 2007), the court agreed with the reasoning of its sister circuits that where there is both an initial lawful entry into the U.S. and a subsequent adjustment of status, the plain language of § 1101(a)(13)(A) dictates that the initial entry is the "admission" for § 1227(a)(2)(A)(i)(I). The court concluded that there is "only one 'first lawful admission,' and that it is based on physical, legal entry into the United States." *Zhang*, 509 F.3d at 316.

III. ARGUMENT

A. The Board Should Vacate Matter of Shanu to Ensure a Nationally Uniform Interpretation and Application of § 1227(a)(2)(A)(i)(I) in Cases in Which the Respondent Enters the United States Following Inspection and Authorization and Subsequently Adjusts Status.

As a federal statute, the INA should be administered consistently throughout the United States. Currently, § 1227(a)(2)(A)(i)(I) is applied differently in different jurisdictions. In the 20 states within the jurisdictions of the Fourth, Sixth, Seventh and Ninth Circuits – which all have rejected *Matter of Shanu*, *see supra* – a Respondent's lawful entry is "the date of admission" for § 1227(a)(2)(A)(i)(I), even where there has been a subsequent adjustment of status. Because the four courts of appeals all held that the statutory language is plain, the Board is bound to follow those decisions in the states in those circuits. In all other states, *Matter of Shanu* currently is

binding and thus the subsequent adjustment of status constitutes "the date of admission. Thus, only by vacating *Matter of Shanu* and adopting the interpretation of the courts of appeals in a precedent decision can the Board ensure the uniform administration of § 1227(a)(2)(A)(i)(I).

A "principal mission" of the Board "is to ensure as uniform an interpretation and application of this country's immigration laws as is possible." *Matter of Cerna*, 20 I&N Dec. 399, 405 (BIA 1991); *see also id.* at 409 ("[T]o the greatest extent possible our immigration laws should be applied in a uniform manner nationwide"); *Matter of Burbano,* 20 I&N Dec. 872, 873-74 (BIA 1994) (reaffirming the importance of the Board's role in the uniform application of immigration law). As long ago as 1956, the Board amended its interpretation of an INA provision to avoid a conflict with a federal court interpretation. *Matter of U,* 7 I&N Dec. 380, 381 (BIA 1956) (noting that "a uniform interpretation of th[e] provision … can best be served" by adopting a federal court interpretation); *see also Matter of G,* 8 I&N Dec. 315, 316 (BIA 1959) (interpreting a federal law to ensure consistency for immigration purposes). The Board should do the same here to end the present conflict.

Shivaraman, Aremu and Zhang all found that the plain language of the statute compelled their decisions, and the Seventh Circuit, in *Abdelqadar*, implied the same. *Shivaraman*, 360 F.3d at 1146*; Zhang,* 509 F.3d 315-16; *Aremu,* 450 F.3d at 582; *Abdelqadar,* 413 F.3d at 673. As such, these decisions rested on step-one of the analysis set forth in *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), and three of the courts specifically found that no deference was due the Board's differing interpretation. *Shivaraman,* 360 F.3d at 1146*; Zhang,* 509 F.3d 315-16; *Aremu,* 450 F.3d at 582. At *Chevron* step one, a court determines whether Congress's intent is expressed in the statute's plain language; if so, that intent must be given effect. *Chevron*, 467 U.S. at 843-44. If the intent is ambiguous, the *Chevron* step-two

inquiry is whether the agency's interpretation is reasonable and thus subject to controlling weight. *Chevron*, 467 U.S. at 843-44.

In addition, even if the Board were to issue a new decision reaffirming its interpretation of § 1227(a)(2)(A)(i)(I) from *Matter of Shanu*, court decisions relying on a Chevron step-one analysis would continue to prevail. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Supreme Court applied the *Chevron* test to a case in which an agency interpretation of a statute differed from a pre-existing court interpretation. The Court instructed that in such a situation, a "court's prior judicial construction of a statute trumps an agency construction" only if the court holds that the statute is "unambiguous … and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982. Consequently, where a court finds a statute unambiguous, an agency is bound and cannot interpret it differently in that jurisdiction.

This Board has applied these principles and either deferred to or rejected federal court precedents depending upon whether the court found the relevant statute ambiguous. *See e.g.*, *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008) (refusing to follow a Ninth Circuit interpretation that found a regulation ambiguous, but acknowledging it was bound by Fourth Circuit precedent addressing the same issue because the Fourth Circuit had found the statute was unambiguous); *Matter of Velasquez-Herrera*, 24 I&N Dec. 503, 514 (BIA 2008) (holding that it is bound by Ninth Circuit precedent in cases arising within that circuit because the court found no ambiguity in the relevant statute).

Under the *Chevron* and *Brand X* framework, the circuit courts' *Chevron* step-one decisions in *Shivaraman, Abdelquadar, Aremu and Zhang* each foreclose the Board from applying a different interpretation of § 1227(a)(2)(A)(i)(I) in cases arising within those

jurisdictions. In accord with *Brand X*, in unpublished decisions, the Board has followed these circuit court decisions on this issue within each of these circuits. *See In re Katongole*, 2009 WL 5252677 (BIA Dec. 9, 2009) (following *Aremu*); *In re Tudem*, 2008 WL 5477673 (BIA Dec. 12, 2008) (following *Zhang*); *In re Ruiz Villela*, 2008 WL 486947 (BIA Jan. 31, 2008) (following *Shivaraman*); *In re Khan*, 2006 WL 901375 (BIA Feb. 23, 2006) (following *Abdelqudar*).[1]

Unless this Board vacates *Matter of Shanu*, the non-uniform application of § 1227(a)(2)(A)(i)(I) will continue, with a resulting unequal imposition of the deportation statute on similarly situated respondents, based solely on geography. The Board can, and should, fulfill its obligation to ensure the uniform application of the law by vacating *Matter of Shanu* and following the decisions of the courts of appeals.

B. In Cases in Which There is Both a Lawful Entry With Inspection and Authorization and a Subsequent Adjustment of Status, Only the Lawful Entry Constitutes "the date of admission" Under § 1227(a)(2)(A)(i)(I).

The Board's first question concerns which of the following events constitutes "the date of admission" for purposes of 8 U.S.C. § 1227(a)(2)(A)(i)(I): 1) a noncitizen's initial admission to the United States after inspection and authorization by an immigration officer; 2) his or her subsequent adjustment of status to lawful permanent residence; or 3) either of the above. In *Matter of Shanu*, the Board chose number three, holding that *both*

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[1] Amicus contends that the Board is also bound by *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008) which held that an adjustment of status did not constitute an "admission" as that term is used in § 1182(h), for much the same reasons the Fourth, Sixth, Seventh and Ninth Circuits found that an adjustment was not an "admission" under § 1227(a)(2)(A)(i)(I). The Board, however, has taken conflicting positions in unpublished cases on whether it is bound by *Martinez* for purposes of interpreting the term "admission" in § 1227(a)(2)(A)(i)(I). *See In re Zhao*, 2008 WL 5477759 (BIA Dec. 4, 2008) (finding *Martinez* inapplicable to § 1227(a)(2)(A)(i)(I) and instead applying *Shanu)*; *In re Romero Blanco*, 2008 WL 3919057 (BIA July 25, 2008) (finding that *Martinez* controlled its interpretation of § 1227(a)(2)(A)(i)(I) and refusing to apply *Shanu*).

an admission following inspection *and* a subsequent adjustment of status qualified as an "admission" and that *either* could constitute "the date of admission" for purposes of the five year penalty period. *Matter of Shanu,* 23 I&N Dec. 754, 762 (BIA 2005). Four courts of appeals have rejected this holding explicitly, *Zhang v. Mukasey,* 509 F.3d 313 (6th Cir. 2007); *Aremu v. DHS,* 450 F.3d 578 (4th Cir. 2006); *Abdelqadar v. Gonzales,* 413 F.3d 668 (7th Cir. 2005); *Shivaraman v. Ashcroft,* 360 F.3d 1142 (9th Cir. 2004), and a fifth has done so through its interpretation of a comparable provision. *Martinez v. Mukasey,* 519 F.3d 532, 541-546 (5th Cir. 2008) (holding that, according to statute's plain language, the definition of "admission" in § 1101(a)(13)(A) applied to its use in 8 U.S.C. § 1182(h) and that an adjustment of status was not an admission under this provision).

As these courts have all correctly held, fundamental rules of statutory interpretation dictate that *only* the initial entry following inspection constitutes "the date of admission" under § 1227(a)(2)(A)(i)(I) in a case such as this, in which there is both an admission at entry and a subsequent adjustment of status. This is so for three reasons: 1) Congress has set forth an unambiguous statutory definition for the term "admission" and made clear its intent that this definition apply to the term's use throughout the statute; 2) the initial entry with inspection in this case and others like it unambiguously satisfies this statutory definition while an adjustment of status does not; and 3) the application of the statutory definition in these circumstances does not thwart Congressional intent or produce an absurd result. While there may be other instances in which Congress's use of "admission" cannot be reconciled with the statutory definition, this is not such an instance. Additionally, § 1227(a)(2)(A)(i)(I) specifies that it is "the date" of admission

that triggers the five-year vulnerability period. There can be only one "the date." In a case involving both an admission at entry that meets the statutory definition and an adjustment of status that does not, the admission at entry must be found to be "the date of admission."

1. The Statutory Definition of "Admission" is Clear and Unambiguous and Must Be Strictly Applied in Cases Such as This Where Respondent is Allowed to Enter the United States Following an Inspection and Admission.

Statutory interpretation is fundamentally an exercise in determining Congress's intent; thus, the cardinal rule is that "[i]f the intent of Congress is clear, that is the end of the matter; for …. the agency [] must give effect to th[is] unambiguously expressed intent." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (footnotes omitted). The "starting point" for determining Congressional intent is "the language employed by Congress" and courts and agencies must assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Phinpathya v. INS*, 464 U.S. 183, 189 (1984) (quotations omitted).

The specific issue here is the meaning of the term "admission" in 8 U.S.C. § 1227(a)(2)(A)(i)(I) as applied to a noncitizen who entered the United States following inspection and authorization, and then subsequently adjusted his status to lawful permanent residence. Section 1227(a)(2)(A)(i)(I) renders a noncitizen deportable if, *inter alia*, he or she "is convicted of a crime involving moral turpitude committed within five years … after *the date of admission*." *Id.* (emphasis added). Congress specifically defined the term "admission" in 8 U.S.C. § 1101(a)(13)(A). This section reads:

(a) As used in this Act—

> (13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

As relevant here, this definition is unambiguous in its requirement that an "admission" include an "entry." *See Aremu*, 450 F.3d at 581 (citing *Matter of Rosas-Ramirez*, 22 I&N Dec. at 617-618). Moreover, Congress specified that the "entry" be "into the United States" and that it be "after" inspection and authorization by an immigration officer. From these specifications, it is clear that Congress intended to define the term "admission" as the process that occurs when a non-citizen presents at a port of entry and requests permission to enter the United States. *See* 8 U.S.C. § 1225 (describing inspection by immigration officers of applicants for admission); *see also Shivaraman*, 360 F.3d at 1146 ("This statutory text leaves no room for doubt, unambiguously defining admission as the lawful entry into the United States); *Zhang*, 509 F.3d at 316 (summarizing and agreeing with the other courts' conclusions that statute was plain).

"'[A] definition which declares what a term 'means' excludes any meaning that is not stated.'" *Aremu*, 450 F. 3d at 582-583 (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 n. 10 (1979)). Moreover, as the Fourth Circuit explained, where Congress uses a term in a manner that appears inconsistent with its statutory definition, "an interpreting body is not entitled to adopt the seemingly inconsistent use of the term in lieu of the term's express statutory definition." *Id.*[2]

[2] All of the circuits that have not yet ruled on the issue of what constitutes an "admission" for purposes of § 1227(a)(2)(A)(i)(I) – including the Third Circuit in which this case arises – nevertheless have held in other contexts that an unambiguous statutory definition must be applied in accord with its plain language. *See, e.g., Biskupski v. A.G.*, 503 F.3d 274, 280 (3d Cir. 2007) (strictly applying the term "aggravated felony" in

Here, the Board and the courts all agree that an initial entry into the United States following an inspection and authorization constitutes an "admission" under § 1227(a)(2)(A)(i)(I) because such an entry satisfies the definition of "admission" in § 1101(a)(13)(A). *Matter of Shanu*, 23 I&N Dec. at 759 ("There is no serious doubt that Congress intended the phrase 'date of admission' to apply to the date when an alien makes a section 101(a)(13)(A) admission."); *Zhang*, 509 F.3d at 316 (discussing all other cases). All also agree that an adjustment of status does not satisfy this definition because it cannot "be characterized as an entry into the United States." *Aremu*, 450 F.3d at 581 (citing *Matter of Rosas-Ramirez*, 22 I&N Dec. at 617-618); *Zhang*, 509 F.3d at 316 (discussing other cases).

Beyond agreeing on these two basic points, however, the courts and the Board part company. The courts hold unanimously that where a noncitizen made an admission into the United States in conformance with the statutory definition, such admission had to be treated as the relevant admission for purposes of § 1227(a)(2)(A)(i)(I). *Zhang*, 509 F.3d at 316 (discussing other cases). An adjustment of status could not be treated as an admission in these circumstances because doing so would be contrary to the express statutory language and Congress's clear intent. *Id.* Thus, the courts unanimously

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accord with its definition in the INA); *U.S. v. Kennedy*, 554 F.3d 415, 419 (3d Cir. 2009) (reversing district court where it applied a "commonsense or dictionary definition" rather than a statutory definition); *U.S. v. Roberson*, 459 F.3d 39, 53 (1st Cir. 2006) (finding that the statutory definition of a term must be applied regardless of the ordinary meaning of the word); *U.S. v. Ramirez*, 344 F.3d 247, 253 (2d Cir. 2003) (same); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008) (same); *NISH; RCI, Inc. v. Rumsfeld*, 348 F.3d 1263, 1268 (10th Cir. 2003) (finding no need to resort to aids to statutory construction when there is an unambiguous statutory definition); *U.S. v. Griffith*, 455 F.3d 1339, 1345 (11th Cir. 2006) (refusing to add a word not included by Congress to a statutory definition).

rejected the Board's conclusion that because use of the statutory definition of "admission" had been found to produce absurd results in another statutory provision, *see Rosas-Ramirez*, 22 I&N Dec. at 621,[3] the definition was not exhaustive and need not be applied in this circumstance, even though it produced no absurd results here. *See, e.g.*, *Aremu*, 450 F.3d at 581 (citing and rejecting Board's conclusion in *Matter of Shanu*, 23 I&N Dec. at 756).

Finally, the courts also held that the Board's construction ignored the words "the date" in the phrase in § 1227(a)(2)(A)(i)(I) which reads "the date of admission." As the court in *Shivaraman* explained, "there can only be one "the date." 360 F.3d at 1147. Consequently, an interpretation that results in multiple dates of admission satisfying the definition is untenable, as it conflicts with the statutory language and with Congress's intent behind the provision. *See Abdelqadar*, 413 F.3d at 674 (finding that the purpose of 1227(a)(2)(A)(i)(I) was to "ensure[] that people who turn to crime soon after their arrival are ejected").

In sum, where an unambiguous statutory definition can be applied without producing absurd results, it must be applied.

2. <u>The Plain Language of the Statute Should Govern Because Applying the Statutory Definition of "Admission" in a Case Such as This Will Not Produce Absurd Results, and Applying a Broader Definition of "Admission" that Includes Adjustment of Status Will Produce Absurd Results</u>

[3] While the Board stated in *Matter of Shanu* that avoidance of absurd results was only one factor in its decision, 23 I&N Dec. at 758, both the courts and the application of statutory construction rules make clear that it was, in fact, the only permissible factor. *See, e.g.*, *Shivaraman*, 360 F.3d at 1148.

The Board's analysis of § 1227(a)(2)(A)(i)(I) should end with the plain language of the statute. *Fogleman v. Mercy Hosp.*, 283 F.3d 561, 569 (3d Cir. 2002) (even when a case presents a conflict between a statute's plain meaning and its general policy objectives, this conflict ought to be resolved in favor of the statute's plain meaning). An exception only would exist if reliance on the plain language of the statute would clearly lead to absurd results. As the Third Circuit has observed, "a blind adherence to the literal meaning of a statute [could] lead to a patently absurd result that no rational legislature could have intended." *Barrios v. Att'y Gen. of the United States*, 399 F.3d 272, 277 n.11 (3d Cir. 2005) (citations omitted).

Here, no absurd results exception exists. The statutory language defining "admission" in § 1227(a)(2)(A)(i)(I) and § 1101(a)(13)(A) is clear, and adherence to the plain language of the statute does not frustrate Congress's intent. However, if the Board were to continue to uphold *Matter of Shanu* and to interpret "admission" to include "adjustment of status" in cases such as the respondent's, it would contradict Congress's intent and produce absurd results.

Here, the respondent was admitted to the United States as a B-2 visitor on April 26, 2001. He lawfully entered the United States after inspection and authorization by an immigration official; complying with the definition of "admission" set forth in § 101(a)(13)(A). On March 24, 2007, respondent was alleged to have committed a crime involving moral turpitude. According to the plain language of the statute, he would not be deportable unless he was convicted of a crime involving moral turpitude committed before April 26, 2006 for which a sentence of one year or longer may be imposed. 8

U.S.C. § 1227(a)(2)(A)(i). Because he was alleged to have committed a crime *after* April 26, 2006, the respondent is not removable under § 1227(a)(2)(A)(i)(I).

The respondent here, like the respondent in *Matter of Shanu*, adjusted status after his lawful admission. After his entry as a B-2 visitor, he remained lawfully in the United States for five years during which time he did not commit a crime involving moral turpitude. It is not an absurd result that his first and only admission, the admission that complied with § 1101(a)(13)(A), be considered the "admission" for purposes of § 1227(a)(2)(A)(i)(I), and his later adjustment of status *not* be considered an admission. Congress clearly intended that a person may, in fact, commit a crime involving moral turpitude and *not* be removed. Otherwise, it would not have included a five-year timeframe within the statute. *Cf. Dada v. Mukasey*, 128 S. Ct. 2307, 2318-19 (2008) (declining to toll and thereby exceed the strict statutory time limits on the period of voluntary departure).

The Board's line of reasoning in *Shanu* dismissed the five year post-entry period as irrelevant, when it emphasized the significance of an adjustment or lawful permanent residence:

> [l]awful admission to permanent resident in the United States is an important event, signifying this country's acceptance of the alien, and possibly his family, into our national community, potentially for the rest of his life . . . an alien who commits a crime involving moral turpitude within 5 years after adjusting status has betrayed the trust of his national community and violated the immigration laws no less severely than an alien who committed the same crime less than 5 years after being admitted as a lawful permanent resident at the border.

Shanu, 23 I.&N. Dec. at 761. What is overlooked in this comparison is the fact that the respondent, like Mr. Shanu, has already been in the United States for five years after admission. Congress imagined a five year time period after which a person is admitted to

the United States, develops ties to his or her community, and generally puts down roots. Congress necessarily considered that, after a five-year time period starts and stops, a person, even after committing a crime involving moral turpitude, would no longer be deportable. *See Abdelqadar*, 413 F.3d at 674 (finding that Congress's purpose was to impose consequences on those who committed crimes within a short time of entering the United States). The respondent's lawful admission in 1990 after inspection and authorization was exactly the type of entry Congress intended to use as "admission" for the purposes of § 1227(a)(2)(A)(i)(I). Because this "admission" complies with the plain language of the statute and does not produce absurd results, the Board's analysis need go no further.

Absurd results may occur, however, if the Board were to look beyond the plain language of "admission" § 1227(a)(2)(A)(i)(I) to include adjustment of status in cases like the respondent's where a person previously was lawfully admitted. This interpretation would allow Immigration Judges to choose between the adjustment of status date instead of the earlier lawful admission date. Although *Matter of Shanu* found that the respondent's adjustment qualified as admission, it did not disagree that an earlier lawful admission was also an admission for purposes of § 1227(a)(2)(A)(i)(I). It would clearly contravene the intent of Congress to make adjustment of status, which is not defined in the statute as "admission," the *only* admission for purposes of § 1227(a)(2)(A)(i), when there is an earlier lawful entry that meets the definition of admission. Therefore, in every case similar to the respodent's, the Immigration Judge could pick which date to use for purposes of § 1227(a)(2)(A)(i)(I), thereby exercising "unbounded discretion with disparate effects and drastic immigration consequences."

Shivaraman, 360 F.3d 1142, 1147 (9th Cir. 2004) (reasoning that, even in cases where the definition of 'admission' might be ambiguous, a rule that allowed any date of admission to trigger the five-year time period in § 1227(a)(2)(A)(i)(I) would "not constitute a permissible interpretation of the statute"). This unfettered discretion would produce absurd results, where respondents with similar patterns of admission and subsequent adjustment of status could either be removed from the United States or remain as lawful permanent residents at the whim of the Immigration Judge.

IV. CONCLUSION

For all of the reasons stated above, Amicus respectfully urges the Board to rule that the respondent's adjustment of status was not an "admission" within the meaning of § 1227(a)(2)(A)(i)(I).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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