

CHAPTER 1
INTRODUCTION

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§ 1.1 Introduction

This manual is designed as an overview of the inadmissibility and deportability grounds, and an introduction to preparing waivers of inadmissibility. The grounds of inadmissibility and deportability are set out in their entirety in the Immigration and Nationality Act (INA). Together, the grounds of inadmissibility and deportability describe the classes of people the U.S. government will exclude from entering the United States and the classes of people our government will remove from the United States after entering.

In order to properly assess whether your client faces issues of deportability or inadmissibility, it is important to understand the concept of an “admission” in immigration law. Those seeking to lawfully enter the United States, applying for many forms of immigration relief within the United States, or adjusting status to lawful permanent residence are generally subject to the grounds of inadmissibility, while those who have already been admitted into the United States face grounds of deportability. In **Chapter 1**, we will explore the concept of admission and the various burdens of proof for those facing charges of removability. Thereafter, this manual will introduce the grounds of inadmissibility and deportability, provide a framework for analyzing the immigration consequences of criminal conduct, and describe the various waivers for these grounds of removal. This manual is divided into six chapters, which are described below:

CHAPTER 1 contains an overview of inadmissibility and deportability, discusses who is subject to the grounds of inadmissibility versus the grounds of deportability, and explains the differing burdens of proof. It also discusses what immigration law was like before our current system was established, and how the government’s interpretation of these concepts is changing in the current political climate.

CHAPTER 2 covers the grounds of inadmissibility relating to health issues, public charge, alien smuggling,¹ misrepresentations and fraud, terrorism, and some other miscellaneous grounds.

¹ The ILRC recognizes and condemns the derogatory and xenophobic connotations of the word “alien.” and only uses the term to be explicit about specific concepts and legal standards. Throughout this manual we will generally use “noncitizen” unless discussing a specific statutory provision or legal concept that requires us to use “alien.”

CHAPTER 3 covers the grounds of inadmissibility relating to unlawful presence, removal orders, and illegal re-entry. These grounds are unique to inadmissibility.

CHAPTER 4 covers the grounds of deportability (except for crimes).

CHAPTER 5 describes the criminal grounds of inadmissibility and deportability and discusses how crimes and criminal records affect those grounds. This chapter includes information on how to analyze a crime for immigration purposes and assess its impact on your client's immigration situation.

CHAPTER 6 introduces the waivers available to overcome common grounds of inadmissibility, as well as statutory waivers for certain grounds of deportability.

NOTE: Throughout this manual, because the grounds of inadmissibility and deportability come up before various agencies depending on the context, we will refer generally to DHS (Department of Homeland Security). In practice, however, you will need to identify the specific component with whom you are dealing, such as U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), or Customs and Border Protection (CBP). Some older case law may refer to the INS (the Immigration and Naturalization Service), which has now been restructured, and its functions are divided among the new agencies under DHS.

Appendix A also contains links to additional resources.

§ 1.2 The Concept of Admission and the Grounds of Inadmissibility and Deportability

A. The current immigration legal framework and how we got here

To understand how noncitizens are treated in our immigration laws, it is helpful to think of three different groups: those who are at the border seeking admission; those who are inside the United States but have not been admitted; and those who have already been admitted. Prior to April 1, 1997, the INA distinguished between noncitizens who had made an **entry** to the United States and those who had not. Those who had entered were inside the United States and subject to the grounds of *deportability*, whether they had been formally inspected and admitted or not. Those who had not yet entered and were outside the United States were subject to a different set of grounds, the grounds of *exclusion*. Prior to 1997, the INA defined “entry” as “any coming of [a noncitizen] into the United States” except for certain returning lawful permanent residents.² On a fundamental level, the basis for this distinction was the difference in due process rights afforded to persons who have entered the United States versus those who have not. The Supreme Court has held that this distinction “runs throughout immigration law,” noting that “once [a noncitizen] enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.”³

² INA § 101(a)(13) (1952).

³ *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional

PRACTICE TIP: Understanding the Old Framework. Understanding the system that was in place before several changes created by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) went into effect is helpful in understanding pre-IIRIRA case law, and it can shed light on certain ambiguities in current immigration law today. In some instances, this case law is still the guide for establishing who is deportable and admissible. Also, even though IIRIRA is now almost 30 years old, there are still some cases pending in immigration court that began before April 1, 1997. These cases will continue under the old system, in **deportation or exclusion proceedings**, so it is useful to understand the prior framework.

IIRIRA, enacted on September 30, 1996, complicated the entry-based framework that had previously governed.⁴ IIRIRA introduced the concept of **admission**, which can include a physical entry or approval of certain applications inside the United States; the key requirement is that the person has been inspected and authorized by immigration personnel.⁵ Post-IIRIRA, individuals who have already been admitted to the United States are subject to the grounds of *deportability*, while those who have not been admitted are subject to the grounds of *inadmissibility*. Those who are subject to the grounds of inadmissibility must generally show that they are admissible to the United States. For those who have already been admitted, the government must show that they are deportable.

Although IIRIRA removed the formal definition of **entry** from the INA, it did not eliminate the concept from our immigration system entirely. Pre-IIRIRA and today, many noncitizens who are apprehended inside the United States, i.e. those who have already **entered**, are placed in formal removal proceedings in immigration court, where they are afforded certain procedural protections.⁶ But in addition to this court process, IIRIRA added a new, separate procedure for processing noncitizens who are “arriving” at the United States border or are apprehended shortly after entering.⁷ Because these noncitizens have not been **admitted**, they are subject to the grounds of inadmissibility; because they have not **entered**, they are afforded fewer procedural protections and may be subject to mandatory detention if they choose to fight their cases.

protection.”); *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 212 (1953) (noting that noncitizens “on the threshold of initial entry stand] on a different footing” than those who have “passed through our gates”).

⁴ Pub. L. No. 104–208, div. C, 110 Stat. 3009, 3009–546–3009–724 (1996).

⁵ Adjustment of status to lawful permanent residence is an admission. But whether a grant of certain other forms of relief constitutes an “admission” is the subject of much litigation. The Supreme Court recently resolved a circuit split to find that a grant of temporary protected status (TPS) is not an admission. *Sanchez v. Mayorkas*, 593 U.S. 409 (2021). On the other hand, however, in an unpublished case the BIA has found that a grant of U nonimmigrant status is an admission. *Matter of Garnica Silva*, A098 269 615 (BIA June 29, 2017).

⁶ INA § 240.

⁷ INA § 235. After IIRIRA, the regulations introduced and defined the term “arriving alien,” see 8 CFR § 1.2, as an “applicant for admission coming or attempting to come into the United States at a port-of-entry” This term is used, but not defined, in the INA itself.

Some of these noncitizens—those who lack valid entry documents or have committed fraud, can be placed in a process called “expedited removal.”⁸ In expedited removal proceedings, there is no right to an attorney and no opportunity to see an immigration judge, except where the noncitizen expresses a fear of persecution in their country of origin, or where the noncitizen claims to be a U.S. citizen, LPR, or refugee or asylee.⁹ Other noncitizens who are seeking to enter, such as those with valid entry documents but who may be inadmissible for a different reason, are entitled to full-scope removal proceedings if they wish to fight their case, but they may be detained without bond during that process.¹⁰

WARNING! DHS’s distortion of the statutory framework to expand enforcement.

Historically, persons already within the United States whom the government believes are here illegally have been placed in removal proceedings before an immigration judge under INA § 240 where they can either show that they are admissible or defend themselves against charges of deportability. Until recently, proceedings under Section 235 were limited to noncitizens who were physically at the border and seeking to enter, and those who recently entered and are still geographically close to the border.¹¹ Under the current administration, however, DHS has expanded its interpretation of Section 235, attempting to eliminate the Due Process distinction between those who have entered the United States and those who have not. Instead, DHS is asserting that anyone who has not been formally admitted can be processed as if they are at the border seeking admission. To this end, DHS has expanded the use of expedited removal under Section 235(b)(1)(A). DHS and EOIR have also adopted an expanded interpretation of INA §235(b)(2)(A), asserting that anyone who has not been “admitted” is subject to mandatory detention as an “applicant for admission” under Section 235(b)(1).¹² In doing so, the agencies confuse two terms of art in the INA—“applicant for admission” and “application for admission”—which are not interchangeable. These interpretations are a departure from congressional intent, longstanding judicial interpretation and agency policy and are the subject of

⁸ INA § 235(b)(1)(A) (applying expedited removal to noncitizens who are inadmissible under INA §§ 212(a)(6)(C) or 212(a)(7) and either “arriving” or who can not affirmatively establish that they have been physically present in the United States for two years prior to being determined inadmissible under these sections).

⁹ *Id.*; 8 CFR §§ 235.3(b)(4)(i)-(2), 235.3(b)(5)(iv).

¹⁰ *See* INA § 235(b)(2)(A).

¹¹ *See Jennings v. Rodriguez*, 583 U.S. 281, 297 (2018) (“As noted, § 1225(b) applies primarily to [noncitizens] seeking entry into the United States (‘applicants for admission’ in the language of the statute.)”). *Jennings* also clarified that “[Section 236] applies to noncitizens already present in the United States.” *Id.* at 303. *See also Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (finding that the statute’s reference to “the time of application for admission” refers “only to the moment in time when the immigrant actually applies for admission to the United States”); *U.S. Dep’t of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 140 (2020) (holding that noncitizens who are detained close to the border “after unlawful entry” have not yet “effected an entry”) and therefore have only limited rights as prescribed by Congress).

¹² *See Matter of Yajure-Hurtado*, 29 I&N Dec. 216 (BIA 2025).

litigation in federal courts throughout the country. Advocates should stay informed of how these lawsuits progress and advise clients according to the most up-to-date information.¹³

B. The definition of admission

Under the current INA framework, a key question in understanding which grounds for removal will apply in a particular case is whether the person has been **admitted** into the United States. Generally speaking, the terms “admission” and “admitted” are defined in INA § 101(a)(13). INA § 101(a)(13)(A) defines admission as “the lawful entry of [a noncitizen] into the United States after inspection and authorization by an immigration officer.” Those who have been admitted are subject to the grounds of deportability. Note that, as discussed in the previous section, the definition of “admission” is distinct from an “entry,” which can be either lawful or unlawful.¹⁴ In contrast, those who have not been admitted are considered “applicants for admission” and are subject to the grounds of inadmissibility.

The grounds of inadmissibility are found at INA § 212(a), and the grounds of deportability are found at INA § 237(a). Though they are similar, they are not identical. The differences between them can have a serious impact on your client’s eligibility for relief from removal.

Often we will use the word “people” instead of “noncitizens” or “immigrants” in this manual. It is important to understand, however, that U.S. citizens are *never* affected by any ground of inadmissibility or deportability. On the other hand, *all* noncitizens—including lawful permanent residents—are potentially subject to these grounds, and therefore can be refused admission to or removed from the United States if one of the grounds of inadmissibility or deportability applies.

The following people are subject to the grounds of inadmissibility:

- People who are undocumented and entered without inspection;
- Applicants for admission at the border, such as nonimmigrant visa holders, those eligible for a visa waiver, and immigrant visa holders arriving for the first time;¹⁵
- Applicants for adjustment of status;
- Applicants for certain other forms of relief, such as U visas and T visas;
- Parolees;¹⁶
- Alien crewmen;¹⁷

¹³ See, e.g., *Make the Road New York, et al. v. Noem, et al.*, Case No. 25-cv-190, 2025 WL 2494908 (D.D.C. Aug. 29, 2025); *Coal. for Humane Immigrant Rts.*, Case No. 25-cv-872, 2025 WL 2192986 (D.D.C. Aug. 1, 2025).

¹⁴ Prior to IIRIRA, the INA defined “entry” as “any coming of [a noncitizen] into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise.” See Former INA § 101(a)(13) (1952). The INA post-IIRIRA does not define the term “entry.”

¹⁵ A person with an immigrant visa from a U.S. consulate abroad does not become an LPR until and unless they are admitted at a U.S. border while the immigrant visa is valid, and within six months of the date the visa was granted. See 22 CFR §§ 42.72–42.74(b).

¹⁶ See INA § 101(a)(13)(B).

¹⁷ See *id.*

- Certain lawful permanent residents, including conditional residents, who fall within INA § 101(a)(13)(C). See below.

NOTE: Parole. DHS has the power to “**parole in**” persons who are outside the United States or at the border and are charged with being inadmissible. A person who is paroled in can physically enter the United States, but legally they have not been admitted. DHS can grant humanitarian parole to bring in persons for humanitarian reasons, for example to permit them to obtain medical care in the United States. Some people who are physically in the United States can receive “parole in place” which is a grant of parole even if the person is already here.¹⁸

A person in the United States who is in the middle of applying for adjustment of status or in certain other statuses can apply for “advance parole,” which is advance permission to go outside of the United States and be paroled back in.¹⁹ Additionally, some inadmissible persons who are detained at the border can be released from detention and come into the United States if DHS grants parole.²⁰ DHS’s position has traditionally been that once in the United States, all of these persons have not been admitted, and therefore if placed in removal proceedings, they will be subject to the grounds of inadmissibility. In 2025, DHS has also asserted that parolees can be placed in expedited removal once their parole expires or is terminated.²¹

The following people are subject to the grounds of deportability:

- Nonimmigrant visa holders within the United States following a lawful admission;²²
- People admitted as visa waiver entrants;
- Visa holder and visa waiver overstays in the United States;
- Refugees;²³
- Lawful permanent residents, including conditional residents, except those who fall within INA § 101(a)(13)(C).

¹⁸ See INA § 212(d)(5). Currently, parole in place is granted primarily to certain family members of military or former military. See <https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families>. There is also a federal court settlement in the case of *Ms. L v. ICE*, Case No. 3:18-cv-00428 (S.D. Cal. Dec. 11, 2023), that allows for parole in place for certain noncitizens who were impacted by family-separation policies under the first Trump administration. This settlement agreement remains in place until December 10, 2029.

¹⁹ See 8 CFR § 212.5(f).

²⁰ See generally 8 CFR § 212.5.

²¹ As noted above, DHS’s application of expedited removal to parolees is the subject of ongoing federal litigation at the time of writing. *Coal. for Humane Immigrant Rts.*, Case No. 25-cv-872, 2025 WL 2192986 (D.D.C. Aug. 1, 2025).

²² In an unpublished case, the BIA has found that a grant of U nonimmigrant status is an admission, subjecting the holder to the grounds of deportability. *Matter of Garnica Silva*, A098 269 615 (BIA June 29, 2017).

²³ See *Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012), holding that refugees are subject to the grounds of deportability because they have been admitted to the United States.

C. Lawful permanent residents who travel

Lawful permanent residents (LPRs) are generally considered “admitted” when they are granted status, either through adjustment of status or consular processing. Generally, an LPR who travels abroad is not making a new admission upon re-entry into the United States. Most of the time, therefore, they are subject to the grounds of deportability rather than the grounds of inadmissibility.

However, there are circumstances in which an LPR will be considered an applicant for admission upon return from a trip abroad. These circumstances are described in INA § 101(a)(13)(C).

1. *Special rules governing admission of returning LPRs under INA § 101(a)(13)(C)*

As noted above, LPRs are considered “admitted” when they are granted status either through adjustment or consular processing, and after that they are not generally deemed to be “seeking admission.” Under INA § 101(a)(13)(C), however, an LPR returning from a trip outside the United States is seeking admission if they:

1. Have abandoned or relinquished LPR status;
2. Have been absent from the United States for a continuous period of more than 180 days;
3. Have engaged in illegal activity after departing the United States;
4. Have left the United States while under removal or extradition proceedings;
5. Have committed an offense identified in INA § 212(a)(2) (grounds of inadmissibility relating to crimes), unless the person was granted § 212(h) relief or § 240A(a) cancellation of removal to forgive the offense; *or*
6. Are attempting to enter or have entered without inspection.

LPRs who fall within any of these six exceptions will be in the same position as other noncitizens seeking admission and will be considered “arriving aliens.” In order to be admitted, they must prove that they are not subject to any ground of inadmissibility.

Example: Marc is an LPR. In 2012 he travels to France for two weeks to attend a conference and then returns to the United States. He has active tuberculosis, which is a health ground of inadmissibility. As a returning LPR, Marc is deemed not to be “seeking admission” at the U.S. border. Therefore, even if DHS knows that he is inadmissible for tuberculosis, it cannot charge him with being inadmissible and place him in removal proceedings as a person “seeking admission” because his tuberculosis is not one of the circumstances listed in INA § 101(a)(13)(C) that would make him an “applicant for admission.” Marc should lawfully re-enter the United States without triggering removal proceedings.

Legally, Marc has not made a new admission. His tuberculosis is *not* one of the circumstances that would cause the government to treat him as an arriving alien.

Example: What if LPR Marc takes another trip and this time stays outside the United States for 190 days? In that case, when he returns, he will be “seeking admission” for having been absent for more than 180 days under INA § 101(a)(13)(C)(ii). DHS can place

him in removal proceedings with a Notice to Appear and charge him with being inadmissible for having a communicable disease of public health importance (tuberculosis) in addition to charging him with abandonment of his LPR status. Marc may meet the requirements for a discretionary medical waiver or cancellation of removal.

2. *The continuing validity of entry, re-entry, and the Fleuti exception*

There is a limited exception for LPRs who were convicted of an offense described in INA § 101(a)(13)(C)(v) *before* April 1, 1997.²⁴ Before April 1, 1997, the law allowed LPRs to make “brief, casual and innocent” departures without seeking a new admission to the United States.²⁵ The Supreme Court has held that those who pled guilty to an offense prior to the change in law should be able to rely on the law as it was prior to April 1, 1997. Thus, those that have a conviction described in INA § 101(a)(13) before April 1, 1997 will not be considered to be seeking an admission as long as they can show their departure was brief, casual, and innocent.

Before IIRIRA went into effect on April 1, 1997, there were different rules governing when an LPR returning from a trip abroad made an **entry** (just as IIRIRA created special rules for when a returning LPR is seeking admission). As discussed in § 1.2(A), **entry** is a term of art that was previously defined in the INA and has a long history of judicial interpretation, though it is not defined in the current INA.

Before 1997, the definition of **entry** included a presumption that all LPRs are seeking re-entry to the United States upon return from a trip abroad. In *Rosenberg v. Fleuti*,²⁶ the Supreme Court created an important exception. It stated that LPRs can rebut the presumption that they are making an entry upon return from a trip abroad if they establish that the trip was brief, casual, and innocent and not a meaningful departure interrupting their residency. (In contrast, the statutory definition of admission in INA § 101(a)(13), effective April 1, 1997, presumes that returning LPRs are not seeking admission unless they come within one of the six exceptions.²⁷ These exceptions do not look exclusively at the character of the absence, but also look to unlawful conduct on the part of the LPR.)

The 1997 statutory definition of admission replaced the statutory language defining entry in the INA.²⁸ The old *Fleuti* definition applies to an LPR who is charged with making a new “admission” upon return to the United States based on a conviction by plea from before April 1, 1997. Those who pled guilty before that date, traveled, and then sought to re-enter the United States after that date should still benefit from the *Fleuti* doctrine and should not be considered as applicants for admission.

²⁴ See *Vartelas v. Holder*, 566 U.S. 257 (2012), in which the U.S. Supreme Court held that INA § 101(a)(13)(C)(v) did not apply to LPRs with convictions that pre-dated April 1, 1997, the effective date of IIRIRA. These LPRs are covered under pre-IIRIRA law, in which they are not considered to be making a new admission upon return to the United States as long as the departure was “brief, casual, and innocent.”

²⁵ *Rosenberg v. Fleuti*, 374 U.S. 449, 461-62 (1963).

²⁶ *Id.*

²⁷ See INA § 101(a)(13)(C).

²⁸ IIRIRA § 301(a), amending INA § 101(a)(13).

Example: Mr. Camins is an LPR who was convicted of a crime involving moral turpitude in January 1996. This was before the new definition of “admission” took effect on April 1, 1997. In December 2000, he went abroad for three weeks to visit a sick relative. Upon his return, the government asserted that he was making a new admission to the United States under INA § 101(a)(13), because he was an LPR who traveled while inadmissible for crimes. The government argued that IIRIRA was not impermissibly retroactive because it was enacted before Mr. Camins decided to travel abroad. The court disagreed and held that the new statutory definition did not apply, because Mr. Camins relied on the prior law when he pleaded guilty in 1996: at that time, accepting the plea did not impact his ability to travel abroad without becoming inadmissible. Therefore, applying the new law to Mr. Camins would be impermissibly retroactive.

Example: Susie was admitted as an LPR in 1989. In 2012, Susie was convicted of a crime involving moral turpitude that would make her inadmissible. (A theft offense with a seven-month sentence.) Luckily, while she is here in the United States, as an LPR, Susie is subject to the grounds of deportability. She is not deportable for this one offense and is not subject to removal. Inadmissibility does not impact Susie as an LPR in the United States.

But Susie decides to take a two-week trip in 2019 to visit her mother in Peru. Under INA § 101(a)(13)(C), Susie has a conviction that would make her inadmissible, and thus by traveling, she is now considered to be seeking an admission. She is inadmissible and can be placed in removal proceedings as an arriving alien, where she will be subject to grounds of inadmissibility.

Example: What if, instead, Susie had committed the crime and pled guilty in 1995, then took a two-week trip in 2019 to visit her mother? Under *Vartelas*, she would argue that her trip was brief, casual, and innocent—it was just a short trip to visit her mother—and that she is not subject to INA § 101(a)(13) because her conviction was before April 1, 1997.

The *Fleuti* exception does not apply to LPRs who are found to be seeking admission for other reasons, such as after a trip abroad of more than 180 days, or LPRs who are subject to non-crime grounds of inadmissibility.²⁹ This exception only applies where the returning LPR has been convicted of an offense triggering inadmissibility prior to April 1, 1997.

D. False admission as a U.S. citizen or LPR compared to admission with other fraudulent documents

A noncitizen who gains admission to the United States by pretending to be a U.S. citizen has not been “admitted,” because the person was not admitted and inspected *as a noncitizen*.³⁰ USCIS has also taken the position that a noncitizen who entered the United States after falsely claiming to be a returning LPR is not “admitted,” because returning LPRs are generally not “applicants for

²⁹ See INA § 101(a)(13)(C)(ii).

³⁰ See 7 USCIS PM B.2(A)(2).

admission” unless they fall within the exceptions under INA § 101(a)(13)(C).³¹ On the other hand, in most jurisdictions, a noncitizen who has used a fraudulent visa or other document (e.g., a fake or borrowed border crossing card or foreign passport) has been admitted, even though the admission was not lawful. In *Matter of Quilantan*³², the BIA held that, at least for purposes of an adjustment under INA § 245(a), an “admission” only requires “procedural regularity.” Thus, under *Matter of Quilantan*, someone who enters fraudulently using a fraudulent visa or other false document is considered inspected and admitted for purposes of adjusting status under INA § 245(a).

§ 1.3 The Grounds of Inadmissibility and Grounds of Deportability

The **grounds of deportability** are contained in § 237(a) of the INA. (Until April 1, 1997, they were contained in former § 241(a) of the INA). The grounds of deportability are a list of reasons that a noncitizen who has been admitted can be removed from the United States. A person who falls within a ground of deportability is **deportable**.

The **grounds of inadmissibility (formerly called grounds of exclusion)** are contained in INA § 212(a). These grounds are a list of the reasons a noncitizen can be **refused admission** to and/or **removed** from the United States. A person who falls within a ground of inadmissibility is **inadmissible**. A person who does not fall within any inadmissibility ground is **admissible**.

The grounds of inadmissibility apply both at the border/ports of entry and in removal proceedings. But they are also requirements to establish eligibility for many immigration applications, including adjustment of status, registry, the old amnesty programs, Temporary Protected Status (TPS), and non-immigrant visas, including U and T visas.

A person who falls within certain grounds of inadmissibility—generally the ones that focus on crimes—is also barred from establishing “good moral character” under INA § 101(f) during the period of time that good moral character is required.³³ Good moral character is a requirement for cancellation of removal for certain non-permanent residents, benefits under the Violence Against Women Act (VAWA), naturalization, registry, and some voluntary departures.

Generally, the grounds of inadmissibility and deportability affect people who have committed or been convicted of certain crimes, have violated immigration laws, have certain physical or mental diagnoses, cannot demonstrate that they will not need welfare, or are considered to be a national security threat, terrorist, or subversive. This manual will describe and give examples of some of the most common and important grounds of inadmissibility and deportability, as well as the waivers available to overcome them.

In some situations, certain grounds of inadmissibility and deportability can be **waived** (forgiven) by DHS or an immigration judge. If DHS or a judge grants the person’s application for a waiver, the person will not be refused admission or removed. Waivers are discussed in **Chapter 6**.

³¹ *Id.* The ILRC believes that this interpretation is incorrect. While LPRs are not generally seeking “admission” upon when they arrive at a United States port of entry (except as provided under INA § 101(a)(13)(C)), they remain subject to “inspection” like all noncitizens seeking to enter the United States.

³² 25 I&N Dec. 285 (BIA 2010).

³³ *See* INA § 101(f)(3).

NOTE: Guide to ever-changing citations, and the INS and DHS. In 1990, Congress changed the grounds of exclusion and deportation and created new statutory sections in the INA for them. Cases from before 1990 will use different statutory citations than cases from 1990-1997. The IIRIRA changed the INA again by moving grounds of deportability from INA § 241 to § 237 and moving some of the grounds of inadmissibility. For a chart showing the old and current citations for the Grounds of Inadmissibility/Exclusion and the Grounds of Deportability, see **Appendix B**.

PRACTICE TIP: Read the INA (the “Act”)! Practitioners should reference the statute regularly to determine whether a particular ground applies. You can become familiar with the grounds of inadmissibility at INA § 212(a), and with the grounds of deportability at INA § 237(a). Although it is not necessary to memorize the grounds, it is important to become familiar with where to find things in the statute and to consult the wording of various provisions regularly.

It is important to form your own understanding about what the statute says. You might find arguments by thinking about the language of the actual statute. Interpretation of the statute is also informed by case law and agency regulations, although these sources are entitled to less deference since the Supreme Court’s 2024 decision in *Loper-Bright Enterprises v. Raimondo*.³⁴

§ 1.4 Burdens of Proof

Burden of proof is a complex and confusing subject, largely because the burden of proof shifts depending on the status of the person involved, and the situation in which they find themselves. The following is a synopsis of the differing burdens of proof in removal proceedings under INA § 240, as well as a brief discussion of burdens of proof in benefits applications before USCIS. These analyses are dealt with in more detail in subsequent chapters in the context of specific grounds of removability and forms of relief from removal.

A. The burden of proof of alienage falls on the government

For noncitizens in the United States who are placed in removal proceedings under INA § 240 and have not been admitted or paroled, DHS bears the burden of proving alienage, i.e. that the person is not a U.S. citizen.³⁵ The evidence required to prove alienage is not specified by regulation, but under 8 CFR § 1240.11(e), even if the person has submitted an application for relief from removal, the information in that application cannot be held to be an admission of alienage.³⁶ Although the rules of evidence do not apply directly to removal proceedings, immigration courts do recognize constitutional rights. If the proof of alienage was obtained by the government

³⁴ 603 U.S. 369, 393 (2024).

³⁵ 8 CFR § 1240.8(c); *see also* *Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995) (holding that the burden of proving alienage always remains on the government because it is a jurisdictional matter).

³⁶ There is an exception for asylum and withholding of removal applications filed before USCIS (affirmative applications) on or after January 4, 1995. *Defensive* applications (first filed before EOIR) cannot be used to establish alienage.

through egregious violation of a person's Fourth or Fifth Amendment rights, the person can argue to suppress the evidence.³⁷

Once alienage has been established, the burden of proof shifts to the noncitizen to show the time, place, and manner of entry.³⁸ If the noncitizen cannot meet this burden of proof, then they are presumed to be in the United States unlawfully.³⁹

B. The burden of proof under the inadmissibility grounds in INA § 212(a)

Once the immigration judge determines that the noncitizen is in the United States unlawfully, the next question is whether the grounds of inadmissibility set forth in the charging document can be sustained.

1. Burdens of proof for noncitizens generally

Under INA § 240(c)(2), noncitizens who are subject to the grounds of inadmissibility, including those who are applying for adjustment of status under § 245, bear the burden of proving either:

1. That they are “clearly and beyond doubt entitled to be admitted and not inadmissible under section 212,” or
2. By clear and convincing evidence, that they are lawfully present in the United States pursuant to a prior admission.⁴⁰

2. Lawful permanent residents and the burden of proof under the inadmissibility grounds

Recall from § 1.3 that, despite the general rule governing the burden of proof for those deemed “applicants for admission” under IIRIRA, LPRs who are subject to the grounds of inadmissibility as arriving aliens have more rights than other noncitizens. For example, under INA § 235(b)(2), a returning resident charged as an “arriving alien” has the right to a removal hearing under INA § 240. The *government* bears the burden of proof in removal proceedings where an LPR is charged with a ground of inadmissibility *as an arriving alien*.⁴¹

Furthermore, in *Kwong Hai Chew v. Colding*,⁴² and *Landon v. Plasencia*,⁴³ the U.S. Supreme Court held that LPRs returning from a trip abroad are entitled to due process protections, meaning that they have the right to a full and fair hearing and the right to confront the evidence against them. In *Kwong*, the Supreme Court additionally held that if the government intends to strip a returning LPR of their status, it may only do so in a proceeding in which the government is both

³⁷ See ILRC, *Motions to Suppress: Protecting the Constitutional Rights of Immigrants in Removal Proceedings* (2018), <https://store.ilrc.org/publications/motions-suppress>.

³⁸ INA § 291; *see also Matter of Benitez*, 19 I&N Dec. 173 (BIA 1984).

³⁹ *Id.*

⁴⁰ 8 CFR § 1240.8(c); *Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995); *see also Lopez-Chavez v. INS*, 259 F.3d 1176 (9th Cir. 2001).

⁴¹ *Matter of Rivas*, 25 I&N Dec. 623 (BIA 2011); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

⁴² *Id.*

⁴³ *Landon v. Plasencia*, 459 U.S. 21 (1982).

the moving party *and* bears the burden of proof.⁴⁴ No statutory scheme invented by Congress can override these constitutional protections.

C. The burden of proof under the deportability grounds in INA § 237

For noncitizens who are subject to the grounds of deportability—those who have been previously inspected and admitted—the *government* bears the burden of proving, *by clear and convincing evidence*, that the noncitizen is deportable.⁴⁵ “No decision on deportability shall be valid unless it is based upon reasonable, substantial and probative evidence.”⁴⁶ In addition, INA § 240(c)(3)(B) contains specific rules governing the type of evidence required to prove the existence of criminal convictions. The government bears the burden of proving both (1) the existence of a criminal conviction; and (2) that the conviction triggers a ground of deportability (or inadmissibility, if the LPR is charged with a ground of inadmissibility as a person “seeking admission” (see § 1.2(C)). These rules, and case law governing the establishment of deportability based on a criminal conviction, are covered extensively in **Chapter 5**.

In *Woodby v. INS*, 385 U.S. 276 (1966), before the enactment of IIRIRA, the Supreme Court held that the standard for proving deportability was clear, *unequivocal*, and convincing evidence. It is not clear whether there is a difference between “clear and convincing” and “clear, unequivocal, and convincing.” In 1996, IIRIRA added statutory language establishing the burden of proof as “clear and convincing.”⁴⁷ Courts and the BIA have differed in their interpretation of these two articulations, sometimes holding that there are differences in specific contexts. For example, in *Ward v. Holder*, the Sixth Circuit held that the *Woodby* “clear, unequivocal, and convincing standard” remains applicable to returning LPRs and is a higher standard than clear and convincing.⁴⁸ In contrast, in *Mondaca-Vega v. Lynch*, the Ninth Circuit held that the “clear, unequivocal, and convincing” standard is interchangeable with the “clear and convincing” standard.⁴⁹ For its part, the BIA has stated that the clear and convincing standard “imposes a lower burden than the clear, unequivocal, and convincing standard applied in deportation and denaturalization proceedings.”⁵⁰ However, because *Woodby* is constitutionally based and is law of the Supreme Court, it should remain the required standard of proof even after IIRIRA.

The BIA has also been inconsistent in how it applies this standard of proof for deportability. For example, in *Matter of Pichardo*,⁵¹ the BIA held that the government failed to meet its burden on deportability for conviction of a firearms offense under pre-IIRIRA law. The record of conviction offered to prove the conviction did not specify that the weapon was a firearm, although the respondent testified that he had used a gun during the incident in question.⁵² The BIA found that the evidence did not satisfy the *Woodby* standard for proving deportability.

⁴⁴ *Kwong Hai Chew*, 344 U.S. 590.

⁴⁵ INA § 240(c)(3)(A); 8 CFR § 1240.8(a).

⁴⁶ *Kwong Hai Chew*, 344 U.S. 590; INA § 240(c)(3)(A).

⁴⁷ INA § 240(c)(3)(A).

⁴⁸ 733 F.3d 601 (6th Cir. 2013).

⁴⁹ 808 F.3d 413, 420 (9th Cir. 2015) (applying standard in the context of claim to citizenship).

⁵⁰ *Matter of Patel*, 19 I&N Dec. 774, 783 (BIA 1988).

⁵¹ 21 I&N Dec. 330 (BIA 1996).

⁵² *Id.* at 333.

In *Matter of Vivas*,⁵³ however, the BIA held that where the government has made a *prima facie* case for deportability, the noncitizen may be required to submit evidence that rebuts the government's case if the evidence in question is within the noncitizen's knowledge and control. In *Matter of Vivas*, the respondent was an LPR who supposedly obtained his residence through a U.S. citizen spouse. However, the government produced a witness claiming that the birth certificate allegedly belonging to the respondent's spouse was actually that of the witness, and that she had never met the respondent. Because the respondent did not submit any evidence to rebut the government's proof of deportability, the BIA affirmed the immigration court's decision finding the respondent deportable. Similarly, in *Matter of Guevara*,⁵⁴ the BIA affirmed that once the government submits *prima facie* evidence of deportability, the burden of proof shifts to the respondent to rebut that evidence.⁵⁵

Circuit court cases. There is a conflict among the circuit courts over the degree of certainty required under the "clear and convincing," or "clear, unequivocal, and convincing" standard for establishing deportability. In the Eleventh Circuit, a case called *Adefemi v. Ashcroft* affirmed that a criminal document containing several ambiguities was sufficient to establish deportability for a firearms offense by clear and convincing evidence.⁵⁶ Applying the deferential "substantial evidence" test in reviewing the agency's decision, the court found that it had to affirm the BIA's decision unless there was no reasonable basis for that decision.⁵⁷ This conclusion is inconsistent with the BIA's decision in *Matter of Pichardo*, discussed above, which had found that an ambiguous criminal document was *not* sufficient to meet the "clear and convincing" standard for proving deportability. In contrast, in *Francis v. Gonzales*,⁵⁸ the Second Circuit expressly disagreed with *Adefemi*. According to the Second Circuit, the courts must reverse a finding of deportability where "any rational trier of fact would conclude that the proof did not rise to the level of clear and convincing evidence."⁵⁹ Practitioners should argue that in view of the statutory scheme as well as BIA precedent, courts of appeal should follow the reasoning in *Francis v. Gonzales* rather than *Adefemi v. Ashcroft* when interpreting the clear and convincing or clear, unequivocal and convincing standard for establishing deportability.

PRACTICE ALERT! For many years, under a doctrine called *Chevron* deference, courts generally deferred to agency interpretations of statutes, rejecting agency interpretations only if the statutory language was clear or if the agency's interpretation was unreasonable.⁶⁰ In *Loper-Bright Enterprises v. Raimondo*,⁶¹ the Supreme Court overruled *Chevron* and held that courts must now

⁵³ 16 I&N Dec. 68 (BIA 1977).

⁵⁴ 20 I&N Dec. 238 (BIA 1991).

⁵⁵ Note, however, that *Matter of Guevara* also held that the government cannot meet its burden of proof *solely* based on the respondent's assertion of their Fifth Amendment right to remain silent. In other words, where a noncitizen is subject to the deportability grounds, the government must submit clear and convincing, credible proof of deportability, which the noncitizen then has the burden of rebutting, before the noncitizen's silence can be used against them. See also *Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979).

⁵⁶ *Adefemi v. Ashcroft*, 386 F.3d 1022, 1029 (11th Cir. 2004).

⁵⁷ *Id.*

⁵⁸ *Francis v. Gonzales*, 442 F.3d 131, 138–39 (2d Cir. 2006).

⁵⁹ *Id.*

⁶⁰ *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁶¹ 603 U.S. 369, 393 (2024).

apply independent judgment when interpreting statutes. Several circuit courts have since held that BIA decisions, while still entitled to “due respect” under *Skidmore v. Swift & Co.*,⁶² are now only “persuasive authority.”⁶³ Thus, while *Loper-Bright* did not overrule earlier BIA opinions, federal courts may be more willing to depart from BIA precedent where a different statutory interpretation is possible.

D. The burden of proof in applications for discretionary relief

Burden of proof also comes up in the context of applications for benefits before USCIS, and for relief from removal. Before USCIS, the applicant has the burden of proving eligibility for the benefit they are seeking by a preponderance of the evidence.⁶⁴ “Preponderance of the evidence” generally means that the claim for relief is “probably true” or “more likely than not.”⁶⁵

In immigration court, if the immigration judge determines that the person is either deportable or inadmissible as charged, the next step in the removal hearing process is to determine if your client may be eligible for some form of relief from removal, and if so, to apply for that relief. The burden of proof for determining eligibility for relief from removal is quite different from the burdens of proof for establishing deportability or inadmissibility and should not be confused with them.

Under INA § 240(c)(4)(A):

[A noncitizen] applying for relief or protection from removal has the burden of proof to establish that the [noncitizen]—

- i. Satisfies the applicable eligibility requirements; and
- ii. With respect to any form of relief that is granted in the exercise of discretion, that the [noncitizen] merits a favorable exercise of discretion.

In addition, the applicant must submit information or documentation to support the application, as required by law, regulation, or the instructions in the application form.⁶⁶ Where the immigration judge determines that the applicant should provide evidence that corroborates otherwise credible testimony, that evidence *must* be provided unless the applicant shows they do not have it and cannot reasonably obtain it.⁶⁷

Furthermore, 8 CFR § 1240.8(d) states that a noncitizen:

Shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for

⁶² 323 U.S. 135 (1944).

⁶³ See, e.g., *Chavez v. Bondi*, 134 F.4th 207, 213 (4th Cir. 2025); *Lopez v. Garland*, 116 F.4th 1032, 1036 (9th Cir. 2024).

⁶⁴ See 1 USCIS PM E.4.

⁶⁵ *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

⁶⁶ INA § 240(c)(4)(B).

⁶⁷ *Id.*

relief may apply, the [noncitizen] shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

What this means in the context of applications for relief from removal has been the subject of some controversy, particularly where the applicant has criminal history that may impact their eligibility for relief. When an applicant has been convicted under a statute that is “divisible”—meaning it includes several distinct offenses, only some of which trigger inadmissibility or deportability—the immigration judge must determine whether the conviction renders the applicant ineligible for the relief they are seeking. If the statute is divisible, the court can look at the record of conviction to determine the specific offense under which the applicant was convicted. In 2021, the Supreme Court resolved a circuit split in a case called *Pereida v. Wilkinson*⁶⁸ on whether a noncitizen meets their burden of proof with an ambiguous record of conviction on a divisible statute, that is, where the record relating to the conviction does not specify which piece of the divisible statute they violated. Unfortunately, the Court held that an inconclusive record does not satisfy the applicant’s burden of proof to establish eligibility.⁶⁹

One example of divisible statutes are California drug statutes. These statutes are divisible between the different substances—some of which are federally controlled substances (e.g., ecstasy), which would be a controlled substance conviction for immigration purposes, and some of which only appear on California drug schedules (e.g., chorionic gonadotropin), which would not trigger a ground of removal under our federal immigration law.

If a person’s record of conviction says “ecstasy,” it is a controlled substance conviction for immigration purposes. But what if the record is vague and just says “a controlled substance”? The rule remains that ICE has the burden to prove the person deportable, and if the record is inconclusive, the person wins because ICE cannot prove that “a controlled substance” necessarily refers to a federal controlled substance. But what happens in such cases where the person is trying to meet their burden to show eligibility for relief?

In *Pereida v. Wilkinson*, the Supreme Court held that a vague record of conviction is not enough to establish eligibility for relief where the conviction raises a potential bar. Respondents seeking relief from removal bear the burden of proving that a *conviction* does *not* trigger deportability or inadmissibility which would disqualify the noncitizen from eligibility for relief.⁷⁰ Note that this applies to divisible statutes only, and an applicant for relief can use a range of evidence to clarify the conviction; they are not limited to the “reviewable record of conviction.”⁷¹ If evidence is inconclusive or unavailable, the applicant loses. This ruling has unfortunately prevented many

⁶⁸ 592 U.S. 224 (2021). See also *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Syblis v. Att’y Gen.*, 763 F.3d 348 (3d Cir. 2014); *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2018); but see *Mondragon v. Holder*, 706 F.3d 535 (4th Cir. 2013); *Sanchez v. Holder*, 757 F.3d 712 (7th Cir. 2014); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009).

⁶⁹ *Pereida v. Wilkinson*, 592 U.S. 224 (2021).

⁷⁰ *Id.* at 237.

⁷¹ In *Matter of Ortega-Quezada*, 28 I&N Dec. 598, 603 (BIA 2022), the BIA declined to apply *Pereida* in the context of determining deportability under INA § 237(a)(2)(C) (firearms offense). The BIA held that, while *Pereida* addressed the noncitizen’s burden to prove eligibility for relief from removal, the government bears the burden of proving deportability and therefore *Pereida* did not apply. The BIA also noted that, unlike in *Pereida*, the statute at issue in *Ortega-Quezada* was not divisible.

otherwise eligible noncitizens from accessing relief from removal and has affected defense strategies in criminal and immigration proceedings, especially for drug related offenses.

Example: Undocumented Marge whose record shows only that she was convicted of possession of “a controlled substance” in California is no longer eligible to adjust status or apply for non-LPR cancellation after *Pereida*. Deportable LPR Lucy who was convicted of possession for sale of “a controlled substance” in California no longer can apply for LPR cancellation.

In both cases, the generic term “controlled substance” includes both substances on the federal schedules and some that are not. But because the statutes are divisible and the record is vague, *Pereida* now dictates that applicants like Marge and Lucy are barred from relief because they have not met their burden to show that their convictions are not for a disqualifying federally controlled substance—unless they can show definitively that they were not convicted of federally controlled substances offenses.

Case law is ever evolving on this issue. For a complete discussion of criminal grounds of inadmissibility and deportability, see **Chapter 5**.

