

CHAPTER 1
INTRODUCTION TO REMOVAL PROCEEDINGS

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§ 1.1 Introduction

To be an effective immigration advocate, it is essential to have a thorough understanding of the laws affecting your clients and an understanding of the legal system in which they must present their claims. While many immigration processes do not reach the courtroom, an immigrant may find themselves in front of an immigration judge for various reasons. They might be apprehended by law enforcement, and Immigration and Customs Enforcement (ICE) learns that they are here in violation of immigration laws; they might file a case before U.S. Citizenship and Immigration Services (USCIS) and get referred to immigration court; or they might get referred after apprehension at the border or upon expiration of status. Many practitioners feel ill-equipped to help their clients when the case takes this turn. This manual is designed to give practitioners an introduction to removal proceedings so that they may better assist their clients who have been charged with being removable and placed in removal proceedings.

This manual is designed as a “how to” manual: it contains clear, concise, and detailed explanations of the various stages of a case before an immigration judge with helpful tips and pointers to guide a practitioner through proceedings. As such, this manual will consider both substantive law, such as the grounds of inadmissibility and deportability, and guidance on removal procedure.

§ 1.2 What’s Inside

Our goal in writing this manual is to provide practitioners with an easy, practical way to find information that is specific and relevant to the situations faced by clients in immigration court proceedings. Each chapter is described below:

CHAPTER 1, INTRODUCTION TO REMOVAL PROCEEDINGS. This chapter contains a general discussion of what removal proceedings are, and how an immigrant is charged with being removable from the United States. This chapter discusses what is meant by inadmissibility and deportability and the concept of admission. Next, we focus on the burden of proof, how it differs depending on whether your client is charged with being inadmissible or deportable, the particular

rules for lawful permanent residents (LPRs), and the burden of proof when an immigrant is seeking relief from removal. We also pause to distinguish expedited removal and administrative removal processes which provide less due process than removal proceedings.

CHAPTER 2, CASE ASSESSMENT AND DISCOVERY. Chapter 2 discusses important aspects of working with your client and assessing your client’s case. This chapter discusses the attorney-client relationship as well as important discovery steps one can take to fully prepare for court, such as Freedom of Information Act (FOIA) requests and obtaining criminal documents. See **Appendices D through G** for related sample materials.

CHAPTER 3, NON-CRIMINAL GROUNDS OF INADMISSIBILITY. This chapter covers the non-criminal grounds of inadmissibility, including unlawful presence bars, prior deportation orders, misrepresentation, and alien smuggling.

CHAPTER 4, NON-CRIMINAL GROUNDS OF DEPORTABILITY. This chapter covers some of the more common non-criminal grounds of deportability, such as deportability for being inadmissible at the time of admission, alien smuggling, and false claim to U.S. citizenship and unlawful voting.

CHAPTER 5, CRIMINAL GROUNDS OF REMOVAL. This chapter covers the criminal grounds of inadmissibility and deportability. These are the most common grounds alleged for removal of LPRs and can pose barriers to relief from removal for many clients. This chapter provides an in-depth analysis of these grounds, the differences between them, and when they apply. It also includes an analysis of how the terms “conviction” and “sentence” are defined under the Immigration and Nationality Act (INA), the documents that can be produced to prove that a conviction exists, divisible statutes and the record of conviction (documents that can be used to prove a conviction triggers a ground of removal), the effect of post-conviction relief and appeals, federal versus state definitions of crimes, and more.

CHAPTER 6, REPRESENTING DETAINED CLIENTS AND BOND HEARINGS. This chapter includes practice tips for working with detained clients and a look at bond hearings. This chapter includes a breakdown of what elements your client must prove to be successful with a bond request in front of the immigration judge. It also discusses mandatory detention and special bond hearings that might occur after a prolonged detention. See **Appendix H and I** for related sample materials.

CHAPTER 7, PRELIMINARY MATTERS: THE NTA AND ENTERING PLEADINGS. This chapter discusses preliminary issues and procedures in the early stages of removal proceedings. It includes practical information to assist with the master calendar hearing, including a discussion of the notice to appear, taking pleadings, and contesting removal. This chapter provides a detailed discussion on bases for filing motions to suppress. See **Appendices J, K, M, and P** for related sample materials.

CHAPTER 8, TRIAL PRACTICE: MOTIONS AND THE INDIVIDUAL HEARING. This chapter covers preparation for the merits hearing, or individual hearing. In addition, it covers possible motions one might file before the immigration court. Motions to continue, as well as common motions to change venue and for telephonic testimony are discussed. See **Appendices M, R, S and Y** for related sample materials.

The next four chapters provide a brief look at the various relief options available to an immigrant facing removal. These chapters are designed for initial case assessment and analysis. The first of

these chapters discuss procedures and practical tips on filing, as well as a discussion of prosecutorial discretion and voluntary departure. Additionally, there are various materials throughout the appendices related to appearing in court and preparing for trial. Chapters 10, 11, and 12 highlight forms of relief that arise frequently in complex removal proceedings.

CHAPTER 9, FILING FOR RELIEF. This chapter includes information to assist the practitioner in considering options and filing for relief from removal. We discuss prosecutorial discretion, and threshold issues, such as who has jurisdiction over the relief you wish to seek. In addition, this chapter discusses voluntary departure as an option. See **Appendices O, M, and R** for related sample materials.

CHAPTER 10, NON-LPR CANCELLATION OF REMOVAL AND RELATED RELIEF. This chapter discusses non-lawful permanent resident cancellation of removal, a form of relief that one may only apply for in removal proceedings. In addition, we briefly discuss related forms of relief, including cancellation and suspension under the Nicaraguan Adjustment and Central Americans Relief Act (NACARA), and the former suspension of deportation. See **Appendix T** for related sample materials.

CHAPTER 11, LPR CANCELLATION AND FORMER 212(C). This chapter covers relief for lawful permanent residents, including cancellation of removal and the former waiver provision, INA § 212(c). See **Appendix X** for related sample materials.

CHAPTER 12, ASYLUM. This chapter provides an overview of common issues that arise when representing an asylum applicant in removal proceedings. This chapter discusses the differences between withholding of removal and asylum and provides an overview of the bars to relief, in order to properly screen and prepare your client for questions in court. See **Appendix W** for related sample materials.

CHAPTER 13, APPEALS. This chapter covers appeals to the Board of Immigration Appeals, including the process of filing the Notice of Appeal, identifying legal errors in the immigration judge's decision to raise on appeal, and drafting the appeal brief. It also includes tips on creating a strong record before the immigration judge, and next steps if the respondent loses on appeal. See **Appendix BB** for related sample materials.

CHAPTER 14, MOTIONS TO REOPEN. This final chapter discusses motions to reopen removal proceedings after the judge has already made a decision. We discuss the various rules and bases pertaining to motions to reopen. This chapter includes a discussion of motions to pursue asylum, motions to reopen *in absentia* orders, and motions based on ineffective assistance of counsel. Sample motions are provided in **Appendix CC**.

In addition, this manual includes sample materials and useful resources within the appendices.

§ 1.3 Immigration Proceedings: A Quick Overview

Removal proceedings under INA § 240

Removal proceedings begin when the U.S. Department of Homeland Security (DHS) files a notice to appear with the immigration court. One of many officers within DHS may create a Notice to Appear (NTA), which is an official charging document stating the factual basis for the

charges against the noncitizen and stating the charges or reasons under the law which make the person removable from the United States. You can look at a sample NTA at **Appendix A**. Once a person is served with an NTA, *and* the NTA is filed with the immigration court, the person is in removal proceedings.

In the U.S. immigration system, removal proceedings are administrative, meaning the purpose is to render a decision executing the laws and regulations on behalf of a federal agency. The immigration courts are part of the Executive Office for Immigration Review, which falls under the U.S. Department of Justice. Although proceedings are administrative proceedings, they are adversarial (meaning that there are two sides present in court that argue against each other, and the judge makes a final determination.) The immigrant facing removal may be represented by an attorney or accredited representative, but the majority of immigrants proceed without any representative. The opposing party against the person in removal proceedings is DHS, which is represented by the Office of the Principal Legal Advisor (OPLA) for ICE. (The attorney for the government in court is an OPLA attorney, though they still refer to themselves as an “Assistant Chief Counsel.” You will hear advocates refer to ICE counsel as the “TA,” which stands for trial attorney.

The immigrant charged with removal is considered the *respondent* in proceedings because they must respond or answer to the charges brought against them by DHS. Because removal proceedings are administrative in nature, respondents do not have the same rights as they might in criminal proceedings. Nonetheless, noncitizens have the following rights in removal proceedings:

- Right to representation at no expense to the Government.¹ However, mentally ill noncitizens may be able to secure an attorney.²
- Right to be provided a list of available legal services.³
- Right to contact their consulate.⁴
- Right to an interpreter.⁵
- Right to examine and present evidence, call witnesses, etc.⁶
- Right to due process.

Once in removal proceedings, the chronology of a case is illustrated below. Assuming the noncitizen has a right to present a case before an immigration judge, the client will find

¹ INA § 240(a)(4)(A).

² *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011); *see also Matter of E-S-I-*, 26 I. & N. Dec. 136 (BIA 2013). *See also, Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG (DTBx), 2013 WL 3674492, at *5 (C.D. Cal. Apr. 23, 2013); *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG DTBX, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014); Brian M. O’Leary, Chief Immigration J., Exec. Office for Immigration Review (EOIR), U.S. Dept. of Justice (DOJ), *Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions* (Apr. 22, 2013).

³ 8 CFR § 1003.61.

⁴ 8 CFR § 1236.1(e).

⁵ 8 CFR § 1240.5.

⁶ INA § 240(a)(4)(B).

themselves before an immigration judge in immigration court.⁷ If the client is not detained, the case may take years to adjudicate. If detained, the case will likely take months, depending on the jurisdiction. Hearings before the immigration judge include bond hearings, master calendar hearings, prehearing or status conferences, and individual or merits hearings (trial). Detained clients might have an opportunity to request a bond be set or reconsidered by an immigration judge. This would take place in a bond hearing. See **Chapter 6** for more information on bond and detention. Otherwise, proceedings generally begin with a master calendar hearing in which the respondent must appear and answer the charges. (For those represented, preliminary matters and pleading to charges might take place in writing in lieu of the master calendar hearing.) See **Chapter 7** for more information about the master calendar hearing and responding to the charges in the NTA. In the master calendar hearing, the judge will also ask if the respondent has any relief from removal. Thereafter, an individual or merits hearing will be set to hear testimony and present evidence in support of the respondent's case.

After the judge issues a decision, either party may reserve appeal to the Board of Immigration Appeals (BIA or Board). The BIA is an administrative appellate body, meaning it is the last review by the federal agency in charge of the case: Executive Office for Immigration Review, which falls under the U.S. Department of Justice. If an appeal is filed with the BIA, the BIA's decision becomes the agency's final decision. So long as the appeal is pending with the Board, the immigration judge's decision is not final. An appeal must be filed within thirty days from the immigration judge's decision for the appeal to be heard. In some cases, it is possible to appeal the Board's decision to the relevant Circuit Court of Appeals, though not all cases may be appealed.⁸ However, if the respondent appeals a removal decision to a Circuit Court of Appeals, the noncitizen must request a stay of removal or they may be deported despite a pending appeal (assuming the immigration judge ordered removal). Federal district courts generally do not have jurisdiction to hear immigration cases, though in limited circumstances may do so, such as hearing a *habeas corpus* petition challenging detention, certain citizenship claims as well as *mandamus* and claims under the Administrative Procedure Act (APA).

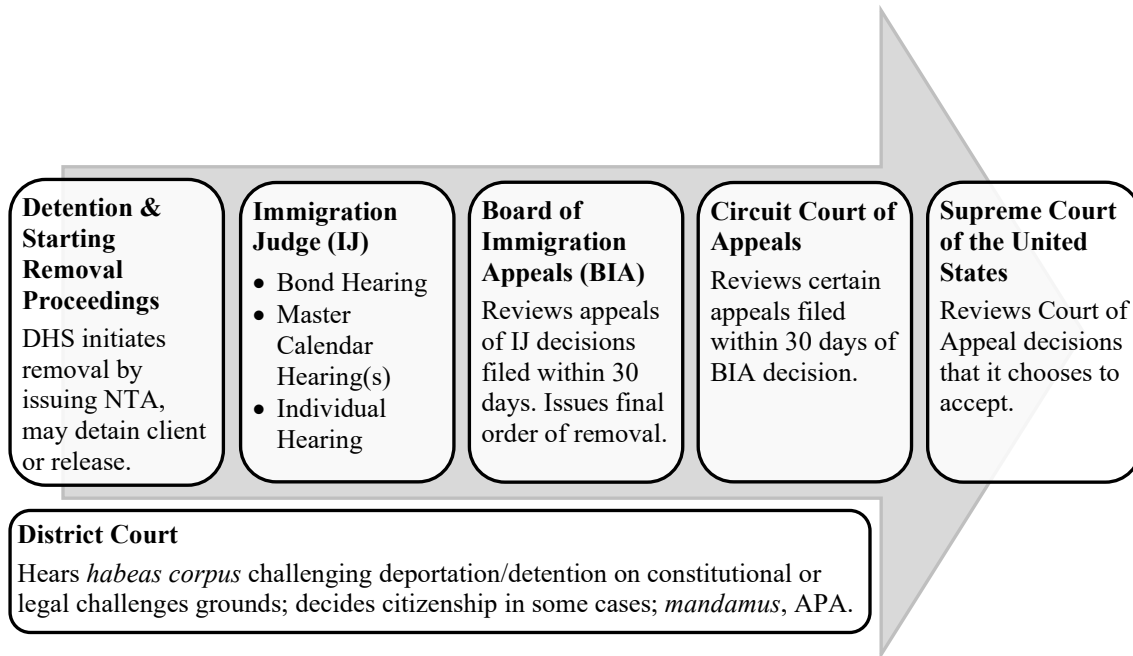
Most "arriving aliens,"⁹ a term describing those requesting entry at U.S. borders, generally do not have a chance to present their case in removal proceedings, with important exceptions including

⁷ Some immigrants do not have the right to removal proceedings before an immigration judge: those facing expedited removal (see § 1.3); those who entered as a visa waiver entrant (see INA § 217(b)); and generally those that have already received an order of deportation or removal from the U.S. (see reinstatement provisions at INA § 241(a)(5)), with certain exceptions. Additionally, in certain circumstances, those convicted of a crime determined to be an aggravated felony may be subject to administrative removal. See INA § 238(b).

⁸ For example, a Circuit Court of Appeals does not have jurisdiction to hear a case appealing only a discretionary decision of the agency. See INA § 242(a)(2)(B).

⁹ The ILRC recognizes and condemns the derogatory and xenophobic connotations of the word "alien" and only uses the term to be explicit about which specific statutory concept this section is discussing. Within this manual, we will use the terms noncitizen or foreign-born individuals. "Arriving alien" is defined in regulations as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or [a noncitizen] seeking transit through the United States at a port-of-entry, or [a noncitizen] interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport." 8 CFR § 1.2, 1001.1(q).

lawful permanent residents, parolees, or asylum seekers who successfully demonstrate a “credible fear.” Removal proceedings as just described are, for the most part, for those already within the United States that come to the attention of immigration authorities. Noncitizens presenting themselves at the border may be subject to “expedited removal” if they are not admissible.



A. Expedited removal

Expedited removal allows DHS to remove arriving aliens without full removal proceedings.¹⁰ This process can only be applied in limited circumstances. Generally, this provision allows DHS officers to remove a person at a port of entry (such as at the border or at an airport) who either does not have proper documentation or has committed fraud or falsely claimed U.S. citizenship. In other words, a person who attempts to enter, who is inadmissible under INA § 212(a)(6) or INA § 212(a)(7). While the statute provides the Attorney General may apply this provision to anyone who has not been admitted or paroled and has been present in the U.S. for less than two years, this provision has never been used to this extent. In 2004, DHS used this provision to announce that expedited removal will be applied to those detected by immigration enforcement officers within one hundred miles of the border within fourteen days of entry.¹¹

During the Trump administration, DHS issued a notice announcing the intention to implement expedited removal to the full extent allowed by statute, applying expedited removal to individuals who have been living in the United States for two years or less, and who live anywhere in the United States. This would have allowed noncitizens to be deported without an opportunity to gather evidence or to present their case to a judge. However, the expansion was blocked because

¹⁰ Expedited removal provisions are located at INA § 235(b).

¹¹ 69 Fed. Reg. 48877, 48880 (2004).

of litigation,¹² and eventually the policy was rescinded by the Biden administration.¹³ Thus, the expedited removal process continues to apply only to those within 100 miles from the border and who have been in the U.S. for 14 days or less, and to those who arrive by sea. Outside of this limited context, immigration officers cannot process someone for expedited removal and accordingly, most noncitizens within the U.S. will have an opportunity to present their case in front of an immigration judge.

An officer of DHS has authority to issue an order of expedited removal. Most often officers within U.S. Customs and Border Protection (“CBP”) issue these orders—acting as law enforcement, prosecutor, and judge. Individuals facing expedited removal do not have a right to counsel or to a hearing before an immigration judge.

Noncitizens subject to expedited removal who indicate an intention to apply for asylum or who assert a fear of persecution or torture are to be interviewed regarding their fear, and if found to have a “credible fear,” will be issued a Notice to Appear (NTA), which will be filed with the Immigration Court to commence removal proceedings, for full consideration of the asylum and withholding claim.¹⁴ Alternatively, USCIS may choose to enroll the person in the Asylum Merits Interview (AMI) process.¹⁵ DHS officers are required to read a script explaining that they have a right to speak to an asylum officer if they express a fear of return.¹⁶ There have been various reports of abuses of this process, and as advocates, it is important that we educate the community about their right to express a fear of return and seek a private interview with the asylum office.¹⁷

Individuals subject to expedited removal who claim lawful permanent resident, refugee, or asylee status or U.S. citizenship also may have their claims reviewed by an immigration judge. Additionally, children classified as unaccompanied are not to be removed through this process.

¹² *Make the Road New York v. McAleenan*, Case 1:19-cv-02369 (D.C. Cir.).

¹³ *See Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal*, 87 Fed. Reg. 16022 (Mar. 21, 2022).

¹⁴ 8 CFR § 208.30(f).

¹⁵ The AMI process was created pursuant to a 2022 Interim Final Rule overhauling the asylum process for people who are subject to expedited removal and pass a credible fear interview. *See Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18,078 (Mar. 29, 2022). Asylum seekers who are placed in the AMI process are automatically scheduled for a non-adversarial asylum interview before the USCIS Asylum Office. The person will be interviewed to determine whether they meet the requirements for asylum based on the credible fear interview, without filing a separate asylum application. The asylum officer may grant asylum outright, and make findings of eligibility for withholding of removal, or relief under the Convention Against Torture (CAT) based on the credible fear interview and information obtained during the AMI. If the asylum officer grants asylum, the person will receive an I-94 and no further hearing with the court is needed. If the officer determines that the applicant is ineligible for asylum, they are referred to “streamlined” removal proceedings before EOIR. While the possibility of initial asylum office jurisdiction is a positive aspect of the rule, the accelerated timeline of streamlined removal proceedings, diminished opportunities to present evidence or secure counsel, and possibility of summary rulings without a full evidentiary hearing raise serious due process concerns.

¹⁶ *See* 8 CFR § 235.3(b)(2)(i).

¹⁷ *See* AILA Brief in BIA Artesia Case on Border Statements and CFI Q&A’s, AILA Doc. No. 15061201 (Jun. 2, 2015).

Instead, they are required to be placed into INA § 240 proceedings.¹⁸ Individuals placed in expedited removal proceedings are detained without bail, and they are not eligible for parole except in very limited circumstances (i.e., as a matter of discretion for a medical emergency or for a law enforcement purpose). See **Chapter 12** for more information on the asylum process. See **Chapter 6** for more information on challenging prolonged detention.

§ 1.4 The Legal Framework for Removal Proceedings

Landmark legislation enacted on September 30, 1996 provided a new framework for U.S. immigration law. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)¹⁹ amended the Immigration & Nationality Act (INA) to provide for a whole new structure to address entry, exclusion, deportation, and admission. After IIRIRA, we now have “removal” proceedings as described above. Before IIRIRA passed, immigration proceedings were divided into exclusion and deportation proceedings. This prior framework will be discussed briefly in § 1.6.

A person in removal can either be charged as *inadmissible* or *deportable*. How that person is charged depends on whether they are seeking admission or have already been admitted into the United States.

§ 1.5 The Concept of Admission

A key question in understanding what immigration laws will apply in a particular case is whether the person has been **admitted** into the United States.

Persons already within the United States whom the government believes are here illegally may be placed in removal proceedings before an immigration judge. Depending on their current status in the United States, the immigrant will either be charged under the grounds of *inadmissibility* or the grounds of *deportability*. In order to know whether a person should be charged under laws of inadmissibility or deportability, we must find out whether they have been **admitted** to the United States. If one has already been admitted to the United States, the immigrant will be subject to grounds of deportability. If the person is present in the United States without ever having been admitted, they will be subject to the grounds of inadmissibility. Those who are seeking admission must show that they are admissible to the United States or have a basis for relief. For those that have already been admitted, the government must show that they are deportable.

NOTE: Because the grounds of inadmissibility and deportability come up before various agencies depending on the context, we will refer generally to DHS and the immigration court. In practice, however, you will need to identify the specific sub-agency with whom you are dealing, such as USCIS, ICE, or CBP. Some practitioners may refer to the INS (the Immigration and Naturalization Service), which was dissolved in 2002, when its functions were divided among the new agencies under DHS. In removal proceedings, the immigration judge is part of the Department of Justice, Executive Office for Immigration Review. The opposing party is

¹⁸ 8 U.S.C. § 1232(a)(5)(D)(i).

¹⁹ Pub. L. 104-128 (1996).

represented by attorneys in the Office of the Principal Legal Advisor (OPLA), under Immigration and Customs Enforcement (ICE), which is an agency of DHS.

A. Definition of admission

The legal concept of “admission” is distinct from the idea of “entry.” A person can enter the United States without having formally been “admitted.” 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 the [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. In contrast, those who have not been admitted are considered “applicants for admission” and are subject to the grounds of inadmissibility, even if they are already living within the United States.

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 refer to those grappling with the U.S. immigration system as “people” , those that are “foreign born” or “noncitizens” instead of “aliens” in this manual. It is important to understand, however, that U.S. citizens are *never* subject to removal proceedings. On the other hand, *all* noncitizens—including lawful permanent residents—are potentially subject to grounds of inadmissibility or deportability, and therefore can legally be refused admission to or removed from the United States.

The following people are subject to the grounds of inadmissibility:

- People who are undocumented (those who 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.²⁰
- Applicants for adjustment of status.
- Parolees—see INA § 101(a)(13)(B).
- Alien crewmen—see INA § 101(a)(13)(B).
- Certain lawful permanent residents, including conditional residents, who fall within INA § 101(a)(13)(C) at time of entry. 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 their situation is the same as if they were waiting at the border, applying for admission. 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. See INA § 212(d)(5). A person in the United States who is in the middle of applying for adjustment of

²⁰ A person with an immigrant visa from a U.S. consulate abroad does not become a lawful permanent resident 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 §§ 42.64(b), 42.72(a).

status or for some other application can seek “advance parole,” which is advance permission to go outside of the United States and be paroled back in. *See* 8 CFR § 212.5(e). 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. *See* 8 CFR § 212.5.²¹ The DHS position is that once in the United States all of these persons are still deemed to be seeking admission, and if placed in removal proceedings will be subject to the grounds of inadmissibility. Nonetheless, parole may help a person establish eligibility for adjustment of status.

The following people are subject to the grounds of deportability:

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

B. Lawful permanent residents who travel

Usually, LPRs travel freely and are *not* considered to be making a new application for admission each time they return from a trip abroad. 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) and listed below:

1. *The special rules governing admission of returning lawful permanent residents under INA § 101(a)(13)(C)*

When **lawful permanent residents** travel abroad and then come home to the United States, they generally will *not* be considered to be “seeking admission” at the border and will not be subject to the grounds of inadmissibility. There are six exceptions to this rule. Under INA § 101(a)(13)(C), an LPR returning from a trip outside the United States is seeking admission if they:

1. Have abandoned or relinquished permanent resident 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 INA § 212(h) relief or INA § 240A(a) cancellation of removal to forgive the offense; or

²¹ USCIS distinguishes parole under INA § 212(d)(5) from parole from custody under INA § 236(a).

²² *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 U.S.

6. Are attempting to enter or has entered without inspection.

Lawful permanent residents who come 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 do not come within a ground of inadmissibility.

Example: Marc is a lawful permanent resident. In 2012 he travels to France for two weeks to attend a conference and then returns to the United States. He has tuberculosis, which is a health ground of inadmissibility. As a returning permanent resident, Marc is deemed not to be “seeking admission” at the U.S. border. Therefore, although 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 those things listed in INA § 101(a)(13) 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 regarded as “seeking admission,” because he was 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 his tuberculosis in addition to charging him with abandonment of his residence. Marc might or might not 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 lawful permanent residents who were convicted of an offense described in INA § 101(a)(13)(C)(v) *before* April 1, 1997.²³ The law before April 1, 1997 allowed LPRs to make “brief, casual, and innocent” departures without seeking a new admission to the United States. In a 2012 Supreme Court case, the Court held that those who pled guilty to an offense prior to the April 1, 1997 change in law should be able to rely on the law as it was. Thus, those who would have a conviction described in INA § 101(a)(13) before April 1, 1997 will not be considered to be seeking an admission if they can show that their departure was brief, casual, and innocent.

Before IIRIRA came into effect on April 1, 1997, there were different rules governing when a lawful permanent resident returning from a trip abroad made an **entry** (just as IIRIRA created special rules for when a returning lawful permanent resident is seeking admission). Entry is a term of art with a long history of judicial interpretation.

²³ 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 U.S. as long as the departure was “brief, casual, and innocent.”

Before 1997, the definition of “entry” included a presumption that all lawful permanent residents are seeking re-entry to the United States upon return from a trip abroad. In *Rosenberg v. Fleuti*,²⁴ the Supreme Court created an important exception. It stated that permanent residents 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 lawful permanent residents are not seeking admission unless they fall within one of the six exceptions.²⁵ These exceptions do not look exclusively at the character of the absence, but also look to “bad” behavior on the part of the resident.)

The 1997 statutory definition of admission replaced the statutory language defining entry in the Act.²⁶ The old *Fleuti* definition applies to a lawful permanent resident who is charged with making a new “admission” upon return to the U.S. now, 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 not be considered as applicants for admission.

Example: Mr. Camins is a lawful permanent resident who was convicted of a moral turpitude offense 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 a permanent resident who traveled while inadmissible for crimes. The court disagreed and held that the new statutory definition did not apply, because this would attach new legal consequences to the LPR’s prior guilty pleas (an inability to travel abroad without becoming inadmissible) and thus be impermissibly retroactive if applied to such residents. The court rejected the government’s argument that IIRIRA was not impermissibly retroactive because it was enacted before Mr. Camins decided to travel abroad; it held that Mr. Camins relied on the old law at the time he pleaded guilty, in 1996.

Example: Susie was admitted as a lawful permanent resident in 1989. In 2002, Susie committed one 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 a permanent resident 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 while she is in the United States.

But Susie decides to take a two-week trip in 2013 to visit her mother in Peru. Under INA § 101(a)(13), Susie has a crime that would make her inadmissible, and thus by traveling, she is now considered to be seeking an admission, and is inadmissible. She can be placed in removal proceedings as an “arriving alien,” subject to grounds of inadmissibility.

Example: If instead, Susie had committed the crime and pled guilty in 1995, then took a two week trip in 2013 to visit her mother, under *Vartelas*, she would argue that her trip

²⁴ *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

²⁵ See INA § 101(a)(13)(C).

²⁶ IIRIRA § 301(a), 8 USC § 1101(a)(13) (amending INA § 101(a)(13)).

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.

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

C. False admission as a U.S. citizen compared to admission on a fraudulent visa

A noncitizen who gains admission to the United States by pretending to be a U.S. citizen has not yet been “admitted,” because the person was not admitted and inspected as a noncitizen.²⁷ In most jurisdictions a noncitizen who has used a fraudulent visa (e.g., a fake or borrowed border-crossing card or foreign passport) will be considered “admitted,” at least for evaluating adjustment of status eligibility. In this context, the courts have found that a procedurally regular inspection which resulted in permission to enter meets the criteria for admission, even though the admission was not lawful. In *Matter of Quilantan*,²⁸ 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 another’s visa or other false document is considered admitted for purposes of adjusting status to lawful permanent residence under INA § 245(a).²⁹ It is unclear in what other contexts procedural regularity might be sufficient.

D. Special considerations for undocumented individuals in removal proceedings

Individuals that are present in the United States and undocumented could have either been admitted at the border or entered without inspection, and therefore not previously admitted. For instance, a person who entered with a tourist visa was initially admitted to the United States with a proper visa, but if they overstayed the authorized period of stay, they are now here undocumented. This person will be charged under the grounds of deportability in removal proceedings. A person who entered the United States in some way other than through a check point has entered without inspection and will be charged under the grounds of inadmissibility in removal proceedings.

In both these cases, once this person faces removal proceedings, the main concern becomes eligibility for relief because the fact they have no status means the government will likely prevail on a charge of removability based on having no status. There are various forms of immigration relief—applications a person can file to gain status or the right to stay in the United States—and each application has its own eligibility criteria. If the immigration judge finds the person inadmissible or deportable, the focus will shift to the eligibility criteria for relief.

²⁷ See *Matter of Pinzon* (PDF), 26 I&N Dec. 189 (BIA 2013) (a noncitizen who enters the United States by falsely claiming U.S. citizenship is not deemed to have been inspected by an immigration officer, so the entry is not an “admission” under INA § 101(a)(13)(A)).

²⁸ *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

²⁹ USCIS asserts that if a noncitizen falsely claims lawful permanent resident status at the border, they cannot benefit from a claim to a procedurally regular admission. See 7 USCIS-PM B.2(A)(2). *But see, Sum v. Holder*, 602 F. 3d 1092 (9th Cir. 2010).

§ 1.6 Deportation and Exclusion Proceedings before IIRIRA

Court cases started before April 1, 1997 remain under the prior structure which had two types of proceedings—deportation and exclusion proceedings—instead of removal proceedings. Understanding the system that was in place before IIRIRA went into effect is helpful in understanding pre-IIRIRA case law. In many instances, this case law is still the guide for establishing who is deportable and admissible. Also, because cases that were begun before April 1, 1997 will continue under the old system, in **deportation or exclusion proceedings**, it is useful to understand the prior framework.

Removal proceedings under IIRIRA began on April 1, 1997, which combined the prior deportation or exclusion proceedings into one single proceeding, though within that proceeding the noncitizen is either charged with being “inadmissible” or being “deportable.” The crucial difference between the old and the current system is the difference between **entry** and **admission**. Before IIRIRA, whether the person faced the grounds of deportation or exclusion depended on whether the person made an **entry** into the United States—not whether the person was *admitted*. An entry is different from an admission. **Entry** includes a person coming into the United States legally or illegally, with or without inspection. It does not include a person who is formally stopped by immigration officials at the border or port of entry and refused admission. (Under pre-IIRIRA law, such people frequently were paroled into the United States, but that was still not considered an entry, because they had been stopped.) An **admission** is an entry after DHS inspection.

Under the old law, a person who completed an entry faced the grounds of deportation. Only people who were refused admission by INS faced grounds of exclusion.

In practical terms, IIRIRA changed what happens to people who entered without inspection. Before IIRIRA, those people had an advantage: because they had made an entry, the former INS had to prove that they were deportable. Under current removal proceedings, people who enter without inspection have a disadvantage: since they have not been inspected, they are considered to still be seeking admission—even if they have lived in the United States for years. Under the current framework, this means they must prove they do not come within a ground of inadmissibility or seek relief.

Example: Mel and Sam entered the United States without inspection in 1990. The INS arrested Mel in April 1996. Because he had made an entry, he was placed in deportation proceedings and the INS had to prove that he came within a ground of deportation.

The INS arrested Sam in 2000, when removal proceedings were in effect. In 2000, in determining whether Sam would be subject to the grounds of inadmissibility or the grounds of deportability, the test is whether Sam was admitted, not whether he made an entry. Because he had not been admitted, Sam was placed in removal proceedings in which he had the burden of proving that he did not come within a ground of inadmissibility.

Under pre-IIRIRA law, the grounds of inadmissibility were referred to as “grounds of exclusion.” There is no real difference between the terms “grounds of inadmissibility” and “grounds of exclusion.” If you read court opinions about cases that started before 1997, they will refer to whether the person came within the grounds of exclusion or deportation, instead of grounds of

inadmissibility or deportability. Within this framework, there were two types of hearings: deportation hearings, in which the INS had to prove the person was deportable, and exclusion hearings, in which the person had to prove that they were admissible. Generally, the INS had the burden of proving someone was deportable while the noncitizen had to prove they were not excludable in exclusion proceedings. A person in deportation proceedings will have received an Order to Show Cause (OSC) instead of a Notice to Appear. A sample OSC is included at **Appendix A**. In exclusion proceedings, the person received Form I-122, “Notice to Applicant for Admission Detained for Hearing.” If an old case is reopened, or a prior deportation case is remanded after an appeal, that person is still in deportation proceedings. For this reason, you might still come across deportation cases and OSCs in current practice.

§ 1.7 The Grounds of Inadmissibility and Grounds of Deportability

The **grounds of deportability** are contained in § 237(a) of the Immigration and Nationality Act (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 comes within a ground of deportability is **deportable**. Grounds of deportability include certain crimes, including aggravated felonies, terrorism, and violating immigration laws, such as overstaying a visa. The grounds of deportability will apply to those who have been admitted and are within the United States.

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 comes within a ground of inadmissibility is **inadmissible**. These grounds include health-related concerns, criminal grounds, lying to government officials to gain a benefit, risk they will become dependent on government welfare programs, unlawful presence in the United States, terrorism, and miscellaneous grounds.

The grounds of inadmissibility apply both at the border and in removal proceedings for persons seeking admission. They are also relevant requirements to establish eligibility for many immigration applications, including adjustment of status, registry, the old amnesty programs, Temporary Protected States (TPS), and nonimmigrant visas.

Chapters 3, 4 and 5 discuss grounds of inadmissibility and deportability in detail.

ADVOCACY TIP: Read the INA (the “Act”) as well as this manual. 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). The grounds of deportability are at INA § 237(a). Although they are not something one would memorize, it is important to become familiar with where to find various provisions in the statute and to consult the wording of those provisions regularly.

It is important to form your own understanding about what the statute says. You might find arguments by thinking about the wording of the actual statute. Interpretation of the statute is also informed by case law and agency regulations.

§ 1.8 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 brief synopsis of the differing burdens of proof, which are dealt with in more detail in subsequent chapters in the context of specific grounds of removability and specific forms of relief from removal.

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

For noncitizens found within the United States without being admitted or paroled, the government bears the burden of proving alienage.³⁰ The evidence required to prove alienage is not specified by regulation. 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.³¹

Once alienage has been established, the noncitizen must prove by clear and convincing evidence that they are lawfully in the United States pursuant to a prior admission or are clearly and beyond a doubt entitled to be admitted to the United States and are not inadmissible as charged.³² For noncitizens in removal proceedings, once alienage has been established, the burden of proof shifts to the noncitizen to show the time, place, and manner of entry.³³

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

1. General rules for noncitizens

Under INA § 240(c)(2), noncitizens who are subject to the grounds of inadmissibility, which includes 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 § 212” or,
2. by clear and convincing evidence, that they are lawfully present in the United States pursuant to a prior admission.

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

Despite the general rule governing the burden of proof for those deemed “applicants for admission” under IIRIRA, permanent residents who are subject to the grounds of inadmissibility

³⁰ 8 CFR § 1240.8(c); *see also* *Murphy v. INS*, 54 F.3d 605, 608 (9th Cir. 1995) (holding that the burden of proving alienage always remains on the government because it is a jurisdictional matter). While ILRC condones the derogatory term, this section refers to “alienage” to ensure legal specificity.

³¹ 8 CFR § 1240.11(e). There is an exception for asylum and withholding applications filed before USCIS (affirmative applications) on or after January 4, 1995. *Id.* Defensive applications (first filed before EOIR) cannot be used to establish that the person is foreign-born.

³² 8 CFR § 1240.8(c); *Murphy v. INS*, 54 F.3d at 608; *see also* *Lopez-Chavez v. INS*, 259 F.3d 1176 (9th Cir. 2001).

³³ INA § 291; *see also* *Matter of Benitez*, 19 I&N Dec. 173 (BIA 1984).

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. And the *government* bears the burden of proof in removal proceedings where a lawful permanent resident is charged with a ground of inadmissibility *as an arriving alien*.³⁴

Furthermore, in *Kwong Hai Chew v. Colding*,³⁵ and *Landon v. Plasencia*,³⁶ 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 a returning lawful permanent resident is to be deprived of his status, the government may only do so in a proceeding in which the government is both the moving party *and* bears the burden of proof.³⁷ 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, *the government* bears the burden of proving, *by clear and convincing evidence*, that the noncitizen is deportable.³⁸ “No decision on deportability shall be valid unless it is based upon reasonable, substantial and probative evidence.”³⁹ 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. These rules, and case law governing the establishment of deportability based on a criminal conviction, are covered extensively in **Chapter 5**.

Under the Supreme Court case, *Woodby v. INS*,⁴⁰ the standard for proving deportability was deemed to be clear, *unequivocal*, and convincing evidence. It is not clear whether there is a difference between “clear and convincing” and “clear, unequivocal and convincing,” but since the *Woodby* decision is constitutionally based and was decided by the Supreme Court, it should be the required standard of proof.

In *Matter of Vivas*,⁴¹ 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 a lawful permanent resident who supposedly obtained his residence through a U.S. citizen spouse. 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. Under these circumstances, the BIA affirmed the

³⁴ *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

³⁵ *Kwong*, 344 U.S.

³⁶ *Landon v. Plasencia*, 459 U.S. 21 (1982).

³⁷ *Kwong*, 344 U.S., at 596-598.

³⁸ INA § 240(c)(3)(A); 8 CFR § 1240.8(a).

³⁹ INA § 240(c)(3)(A).

⁴⁰ 385 U.S. 276 (1966).

⁴¹ 16 I&N Dec. 68 (BIA 1977).

immigration court's decision finding the respondent deportable. Similarly, in *Matter of Guevara*,⁴² 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.

Matter of Guevara also held, however, that the government cannot meet its burden of proof *solely* based on the respondent's assertion of his Fifth Amendment right to remain silent. In other words, where a noncitizen is subject to the deportability grounds, the government has to have submitted 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 him.⁴³

Circuit court cases. There is a conflict in the Circuit Courts over how the clear and convincing, or clear, unequivocal, and convincing standard for establishing deportability should be interpreted. In the Eleventh Circuit, the court affirmed the use of a document that contained several ambiguities to establish deportability for a firearms offense by clear and convincing evidence, reasoning that under the "substantial evidence" test the court had to affirm the BIA's decision unless there is no reasonable basis for that decision.⁴⁴ The Second Circuit, in *Francis v. Gonzales*⁴⁵ expressly disagreed with the Eleventh Circuit's decision in *Adefemi v. Ashcroft*. 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."⁴⁶ 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.

D. The burden of proof in applications for discretionary relief

Burden of proof also comes up in the context of applications for relief from removal. If the government successfully establishes deportability or inadmissibility for a lawful permanent resident, 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

⁴² 20 I&N Dec. 238 (BIA 1991).

⁴³ *Id.*; see also *Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979).

⁴⁴ *Adefemi v. Ashcroft*, 386 F.3d 1022, 1029 (11th Cir. 2004).

⁴⁵ 442 F.3d 131, 138–39 (2nd Cir. 2006).

⁴⁶ *Id.*; see also *Hana v. Gonzales*, 400 F.3d 472, 475-76 (6th Cir. 2005); *Nakamoto v. Ashcroft*, 363 F.3d 874, 882 (9th Cir. 2004).

- 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.⁴⁷ 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.⁴⁸

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

... [S]hall 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 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, and case law is still developing on this issue. For a complete discussion of criminal grounds of inadmissibility and deportability, see **Chapter 5**.

This becomes an issue for applicants for relief who have been convicted under a “divisible” statute, but the record relating to that conviction does not specify which piece of the divisible statute they violated. One example of divisible statutes are California drug statutes. They are divisible between the different substances—some of which are substances that also are on federal drug schedules (e.g., like ecstasy or methamphetamine), 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”? Everyone agrees that if it is vague and ICE has the burden to prove the person deportable, the person wins because ICE can’t prove that “a controlled substance” refers to methamphetamine and not a drug that is not on the federal controlled substances schedule, like chorionic gonadotropin. What happens in such cases where the person is trying to meet their burden to show eligibility for relief?

Prior to 2021, courts differed on this issue. However, in *Pereida v. Wilkinson* the Supreme Court held that the immigrant must produce evidence to prove that their conviction under a divisible statute is not a bar to relief from removal.⁴⁹

Example: Mr. Pereida was eligible to apply for non-LPR cancellation, but for the fact that he had been convicted of a misdemeanor. The conviction was under a divisible statute that included some offenses that were crimes involving moral turpitude (CIMTs) and some that were not. In Mr. Pereida’s case, this CIMT conviction would be a bar to

⁴⁷ INA § 240(c)(4)(B).

⁴⁸ *Id.*

⁴⁹ *Pereida v. Wilkinson*, 141 S.Ct. 754, 758 (2021).

cancellation. He did not produce a qualifying record of conviction that proved that he was not convicted of the CIMT.

The Supreme Court held that because an applicant for relief from removal has the burden to prove they are eligible for the relief, Mr. Pereida had the burden to prove that his conviction was not for one of the CIMTs under the statute. Because he did not present evidence proving that, the Court found that the conviction barred him from applying for cancellation.

Advocates have strongly criticized the *Pereida* decision on a number of points, one of which is that it will be difficult to impossible for an unrepresented person, especially one who is detained, to obtain the required court documents or other evidence to meet their burden.⁵⁰ While *Pereida* specifically concerned eligibility for an application for relief from removal, ICE will assert that the rule applies to any application for admission, lawful status, or relief.⁵¹

Issues around burdens of proof, both in proving removability and establishing eligibility for relief will arise in various chapters of this manual. See **Chapter 7** for contesting removability and **Chapter 9-12** for a discussion of relief. The categorical approach and issues of establishing deportability due to a conviction is discussed in **Chapter 5**.

⁵⁰ See also discussion in the *Pereida* dissent, 141 S.Ct. at 765-777.

⁵¹ Advocates may be able to push back on the expansion of *Pereida* to affirmative applications for benefits outside of the relief context by noting that *Pereida* relied heavily on language in INA § 240(c)(4), “Applications for Relief from Removal.” But while making this argument, at the same time advocates should investigate the possibility of obtaining post-conviction relief.