CHAPTER 1

INTRODUCTION

This chapter includes:

§ 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 conceptually the concept of an "admission" in immigration law. Those seeking an admission to the United States or adjusting status to lawful permanent resident are generally subject to the grounds of inadmissibility, while those that 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 concise guide will introduce the various grounds of inadmissibility and deportability, provide an introduction to analyzing crimes in the immigration context, and describe the various waivers for these grounds of removal. This manual is divided into six chapters, which are described below:

Chapter 1. This chapter 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 includes a short history lesson on what immigration law was like before our current system was established.

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

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.

§ 1.2 Admission and the Grounds of Inadmissibility and Deportability

Our current immigration law divides people into two groups: those who are seeking admission and those who have already been admitted. Those who are seeking admission must show that they are admissible to the United States. For those who have already been admitted, the government must show that they are deportable. Generally, persons already within the United States whom the government believes are here illegally are placed in removal proceedings before an immigration judge where they can either show that they are admissible or defend themselves against charges of deportability.

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 that are seeking admission must show that they are admissible to the United States and have a basis for relief. For those that have already been admitted, the government must show that they are deportable.

NOTE: In this chapter, 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 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 has now been restructured, and its functions are divided among the new agencies under DHS.

A. Definition of admission

A key question in understanding which immigration laws 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 [an] alien 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.

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 "aliens" 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 legally be refused admission to or be 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;[1]
- 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). See below.

NOTE: On 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 are 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).[2] 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. *See* 8 C.F.R. § 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 C.F.R. § 212.5. DHS's 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, they will be subject to the grounds of inadmissibility.

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;[3]

[1] 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 C.F.R. §§ 42.72-42.74(b).
[2] This parole power has also given rise to a policy of "parole in place," the term USCIS uses to grant parole to someone already within the United States without having been admitted. Currently, parole in place is granted only to certain family members of military or former military. *See* http://www.uscis.gov/.
[3] *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.

- Lawful permanent residents, including conditional residents, except those who fall within INA § 101(a)(13)(C).

B. Lawful permanent residents who travel

Generally, a lawful permanent resident 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 a lawful permanent resident will be considered an applicant for admission upon return from a trip abroad. These circumstances are described in INA § 101(a)(13)(C).

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), a permanent resident 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 § 212(h) relief or § 240A(a) cancellation of removal to forgive the offense; OR
6. are attempting to enter or have entered without inspection.

Lawful permanent residents 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 a lawful permanent resident (LPR). 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, 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) that would make him an "applicant for admission." Marc should lawfully re-enter the United States without triggering removal proceedings.
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> 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.
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> **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 lawful permanent residency. 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 lawful permanent residents who were convicted of an offense described in INA § 101(a)(13)(C)(v) *before* April 1, 1997.[4] The law before April 1, 1997 under deportation proceedings allowed lawful permanent residents to make "brief, casual and innocent" departures without seeking a new admission to the United States. 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 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 their departure was brief, casual and innocent.

Before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) went 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.

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*,[5] 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 come within one of the six exceptions.[6] These exceptions do not look exclusively at the character of the absence, but also look to bad behavior on the part of the permanent resident.)

The 1997 statutory definition of admission replaced the statutory language defining entry in the INA.[7] The old *Fleuti* definition applies to a lawful permanent resident 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.

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[4] *See Vartelas v. Holder*, 132 S.Ct. 1479 (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."
[5] *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).
[6] *See* INA § 101(a)(13(C).
[7] IIRIRA § 301(a), amending INA § 101(a)(13), 8 U.S.C. § 1101(a)(13).

> **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 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 and held that Mr. Camins relied on the old law at the time he pleaded guilty, in 1996.
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> **Example:** Susie was admitted as a permanent resident in 1989. In 2002, Susie committed one crime involving moral turpitude that would make her inadmissible. (A theft offense with a 7-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 a permanent resident in the United States.
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> 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, and subject to grounds of inadmissibility.
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> **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 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 abroad of more than 180 days, or LPRs who are subject to non-crime grounds of inadmissibility. *See* INA § 101(a)(13)(C)(ii). 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 an alien. On the other hand, in most jurisdictions, a noncitizen who has used a fraudulent visa (e.g., a fake or borrowed border crossing card or foreign passport) has been admitted, even though the admission was not lawful. After the new definition of admission was enacted with the passage of IIRIRA, there was concern that INA § 101(a)(13)(A) would result in a finding that such an entry would not be an admission. Indeed, in *Orozco v. Mukasey*, the Ninth Circuit found that someone who had entered the United States using someone else's permanent resident card had *not* been admitted as defined

in INA § 101(a)(13)(A).[8] The Ninth Circuit later granted the parties' joint motion to dismiss the case, thus vacating its published decision following the BIA's grant to reopen the case.[9] Subsequently, in *Matter of Quilantan*,[10] 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 permanent resident card or other false document is considered admitted for purposes of adjusting status to lawful permanent resident under INA § 245(a). It is unclear in what other contexts procedural regularity might be sufficient.

§ 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 an alien 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 and in removal proceedings for persons seeking admission. But they are also relevant 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.

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. 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 won't need welfare, or are considered to be a communist, 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.

Certain grounds of inadmissibility and deportability, in specific situations, can be **waived** (forgiven) by DHS or an immigration judge. If DHS or a judge grants the person's application for

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[8] 521 F.3d 1068 (9th Cir. 2008).
[9] *Orozco v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008); http://www.legalactioncenter.org/litigation/adjustment-status-when-admission-involved-fraud-or-misrepresentation#cases.
[10] *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

a waiver, the person will not be refused admission or removed. Waivers are discussed in **Chapter 6**.

NOTE: Guide to ever-changing citations, and the INS and DHS. Citations to the INA are tricky. In 1990, Congress changed the grounds of exclusion and deportation and created new cites for them. Cases from before 1990 will use different citations than cases from 1990-1997. The IIRIRA changed citations 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, turn to **Appendix B**.

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 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 wording of the actual statute. Interpretation of the statute is also informed by case law and agency regulations.

§ 1.4 A Short History Lesson: Exclusion and Deportation Proceedings Before IIRIRA, Compared to Removal Proceedings Under IIRIRA

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)[11] amended the Immigration & Nationality Act (INA) to provide for a whole new structure to address entry, exclusion, deportation, and admission. (See **§ 1.3** for a discussion of how deportation and exclusion worked in proceedings that began before this legislation took effect.)

Removal proceedings under IIRIRA began on April 1, 1997. (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 several changes created by 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 began before April 1, 1997 will continue under the old system, in **deportation or exclusion proceedings**, it is useful to understand the prior framework.

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

[11] Pub. L. 104-128, enacted 9/30/96; effective 4/1/97.

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 Immigration and Naturalization Service (INS) had to prove the person was deportable, and exclusion hearings, in which the person had to prove that he or she was admissible. Generally, the INS had the burden of proving someone was deportable while the non-citizen had to prove they were not excludable in exclusion proceedings.

The crucial difference between the old and new system is the difference between **entry** and **admission**. In pre-IIRIRA laws, 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 DHS inspectors at the border or port of entry and refused admission. (Under pre-IIRIRA law, such people who were stopped by DHS inspectors were frequently paroled into the United States, but that still was not considered an entry, because they had been stopped). An **admission** is an entry after DHS inspection.

Under the old law, a person who made 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 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 that they must prove that they do not fall within a ground of inadmissibility.

> **Example:** Both 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.
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> In 2005, ICE arrested Sam. Under the removal proceedings framework in 2005, 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 fall within a ground of inadmissibility.

§ 1.5 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 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. 8 C.F.R. § 1240.8(c); *see also Murphy v. INS*.[12] 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 under 8 C.F.R. § 1240.11(e).[13] Although the rules of evidence do not apply directly to removal proceedings, practitioners have succeeded in having the courts recognize constitutional rights. If the information of alienage was obtained by the government in gross violation of a person's Fourth or Fifth Amendment rights, they can argue to suppress the evidence. *See Motions to Suppress: Protecting the Constitutional Rights of Immigrants in Removal Proceedings*; https://www.ilrc.org/motions-to-suppress.

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. 8 C.F.R. § 1240.8(c).[14] 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.[15]

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 section 212" or,
2. by clear and convincing evidence, that they are lawfully present in the U.S. 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 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

[12] 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).
[13] Except 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.
[14] *Murphy v. INS*, above; *see also Lopez-Chavez v. INS*, 259 F.3d 1176 (9th Cir. 2001).
[15] INA § 291; *see also Matter of Benitez*, 19 I&N Dec. 173 (BIA 1984).

§ 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*.[16]

Furthermore, in *Kwong Hai Chew v. Colding*,[17] and *Landon v. Plasencia*,[18] 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 their 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.[19] 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. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). "No decision on deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."[20] 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*, 385 U.S. 276 (1966), 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," and some courts have held that there are differences in specific contexts. For example, in *Ward v. Holder*, the Sixth Circuit held that the *Woodby* standard is applicable to returning lawful permanent residents, and the clear, unequivocal and convincing standard is a higher standard than clear and convicting. 733 F.3d 601 (6th Cir. 2013). In *Matter of Patel*, the BIA stated that the clear and convincing standard "imposes a lower burden than the clear, unequivocal, and convincing standard applied in deportation and denaturalization proceedings." 19 I&N Dec. 774, 783 (BIA 1988). However, because the *Woodby* decision is constitutionally based and is law of the Supreme Court, it should be the required standard of proof.

In any event, there are some interesting examples of how the standard of proof for deportability has been applied in practice. For example, in *Matter of Pichardo*,[21] the BIA held that the government failed to meet its burden of proof when the criminal court document offered to prove a firearms conviction did not specify that the weapon was a firearm, *even where the respondent testified that he used a gun.*

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[16] *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). *See also Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).
[17] *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).
[18] *Landon v. Plasencia*, 459 U.S. 21 (1982).
[19] *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).
[20] *Kwong Hai Chew*, *supra*; INA § 240(c)(3)(A).
[21] 21 I&N Dec. 330 (BIA 1996).

In *Matter of Vivas*,[22] 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 permanent resident 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. Under these circumstances, the BIA affirmed the immigration court's decision finding the respondent deportable. Similarly, in *Matter of Guevara*,[23] 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 their 5th 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.[24]

Circuit court cases. There is a conflict among 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. *Adefemi v. Ashcroft*, 386 F.3d 1022, 1029 (11th Cir. 2004). The Eleventh Circuit's decision contrasts with the BIA's decision in *Matter of Pichardo*, discussed above. The Second Circuit, in *Francis v. Gonzales*[25] 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."[26] 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 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.

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[22] 16 I&N Dec. 68 (BIA 1977).
[23] 20 I&N Dec. 238 (BIA 1991).
[24] *Matter of Guevara*; see also *Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979).
[25] *Francis v. Gonzales*, 442 F.3d 131, 138-39 (2nd Cir. 2006).
[26] *Id*.

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):

> An alien applying for relief or protection from removal has the burden of proof to establish that the alien---
>
> (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 alien 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. INA § 240(c)(4)(B). 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. INA § 240(c)(4)(B).

Furthermore, 8 C.F.R. § 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 relief may apply, the alien 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. Particularly, in cases where a vague record of conviction is an issue in the case, courts on conflicted on whether an applicant for a benefit can meet their burden of proof. For a complete discussion of criminal grounds of inadmissibility and deportability, *see* **Chapter 5**.

For applicants for relief that are convicted of crimes, courts differ on whether an applicant has succeeded in meeting their burden of proof where the record of conviction is vague. This becomes an issue for those that have been convicted of 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?

Until July 2019, the Ninth Circuit operated under the holding in *Young v. Holder*.[27] The *Young* rule said that a vague record of conviction is not enough to establish eligibility for relief where the conviction raises a potential bar: Respondents bear the burden of proving that a *conviction* does *not* trigger deportability or inadmissibility which would disqualify the noncitizen from eligibility for relief from removal.[28] The Ninth Circuit held that this burden included a requirement that the respondent produce all "reviewable" conviction records, and that if the reviewable record is inconclusive, the respondent has not met her burden.[29]

On July 18, 2019, the Ninth Circuit overruled its prior decision in *Young v. Holder*. *Marinelarena v. Barr* holds that a vague record is sufficient for a person applying for relief to show that they have met their burden of proof.[30]

> **Example:** Undocumented Marge whose record shows only that she was convicted of possession of "a controlled substance" in California still is eligible to adjust status or apply for non-LPR cancellation. Deportable LPR Lucy who was convicted of possession for sale of "a controlled substance" in California still 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. As such, the conviction does not bar Lucy or Marge from applying for relief under *Marinelarena* because their convictions are not decisively convictions for a federally controlled substance.

This reasoning is supported by two important U.S. Supreme Court cases, *Young*: *Moncrieffe v. Holder*, 569 U.S. 184 (2013) and *Descamps v. Holder*, 570 U.S.___, 133 S.Ct. 2276 (2013). The Supreme Court stated that whether a conviction has immigration consequences is clearly a legal question, and therefore no "burden of proof" exists for this issue.[31] If the government *fails* to establish that a conviction results in deportability or inadmissibility, for example for an aggravated felony or a crime involving moral turpitude, then that conviction cannot subsequently be used as a basis for one of the bars to relief from removal on the same grounds. Other Circuit Courts have held that *Moncrieffe* is controlling on the issue of burden of proof, finding that under *Moncrieffe*, an inconclusive record of conviction does not establish a conviction of a disqualifying offense and thus does not bar a noncitizen from establishing eligibility for relief from removal.[32] Thus, practitioners should continue to utilize *Moncrieffe* when arguing issues of

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[27] *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012); *see also Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).
[28] *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012); *see also Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).
[29] *Young v. Holder*, 697 F.3d 976, 989-990 (9th Cir. 2012).
[30] *Marinelarena v. Barr*, --F.3d …, (9th Cir., July 18, 2019), 2019 WL 3227458.
[31] *Moncrieffe v. Holder*, 569 U.S. 184 (2013).
[32] *See Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016); *Martinez v. Mukasey*, 551 F.3d 113 (2nd Cir. 2008); *Syblis v. Att'y Gen*., 763 F.3d 348 (3rd Cir. 2014). *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).

burden of proof for determining eligibility for relief from removal in circuits that do not have rulings in line *Moncrieffe*.

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