CHAPTER 1

INTRODUCTION TO REMOVAL PROCEEDINGS

This chapter includes:

§ 1.1 Introduction

To be an effective immigration advocate, it is essential to have a thorough understanding of the laws affecting your clients and understand 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 ICE learns that they are here in violation of immigration laws; they might file a case before 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.

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 points in substantive law, such as the grounds of inadmissibility and deportability, as well as guidance on removal procedure.

§ 1.2 What's Inside

Our goal in writing this manual has been 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. **Chapter 1** provides a framework for immigration court proceedings and fundamentals for how an immigrant should be charged. 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 will discuss what is meant by inadmissibility and deportability. 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 LPRs, and the burden of proof when an immigrant is seeking relief from removal.

Chapter 2: Case Assessment and Discovery. Chapter 2 discusses important aspects of working with your client, and assessing your client's case. This chapter will discuss the attorney-client relationship as well as important discovery steps one can take to fully prepare for court, such as FOIA requests and obtaining criminal documents.

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. The subject of Chapter 5 is 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 v. state definitions of crimes, etc.

Chapter 6: Representing Detained Clients and Bond Hearings. This chapter includes practice tips for dealing with detained clients and a look at bond hearings. Chapter 6 discusses mandatory detention and special bond hearings that might occur after a prolonged detention.

Chapter 7: The Master Calendar Hearing and Contesting Removal. Now that you know what charges your client might be facing, and the burden of proof that might apply, this chapter will discuss the master calendar hearing and contesting removal charges. This chapter includes practical information to assist the practitioner at the master calendar hearing, including a discussion of the notice to appear, taking pleadings, and contesting removal.

Chapter 8: Trial Preparation and Motions. This chapter covers preparation for the merits hearing, or individual hearing. In addition, we will cover 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.

In the last four chapters, we will briefly 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 will discuss procedures and practical tips on filing, as well as a discussion of prosecutorial discretion and voluntary departure. The remaining chapters will highlight forms of relief that arise frequently in complex removal proceedings.

Chapter 9: Filing for Relief. Chapter 9 includes practical information to assist the practitioner considering options and filing for relief from removal. We will discuss prosecutorial discretion, and threshold issues, such as who has jurisdiction over the relief you wish to seek. In addition, this chapter will discuss voluntary departure as an option.

Chapter 10: Non-LPR Cancellation of Removal and Related Relief. In this chapter, we will discuss non-lawful permanent resident cancellation of removal, a form of relief that one may only apply for in proceedings. In addition, we will briefly discuss related forms of relief, including cancellation and suspension under NACARA, and the former suspension of deportation.

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).

Chapter 12: Asylum. This chapter will provide 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.

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

§ 1.3 Immigration Proceedings: A Quick Overview

A. Removal Proceedings under INA § 240

Immigration proceedings begin with DHS creating a Notice to Appear, which is an official charging document stating the factual basis for the charges against the non-citizen, 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 a notice to appear, and the notice to appear is filed with the immigration court, the person is in removal proceedings.

Removal proceedings are administrative in nature. The immigration courts are part of the Executive Office for Immigration Review, which falls under the Department of Justice. Immigration judges are administrative judges. Although proceedings are administrative proceedings, they are adversarial in nature (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. The opposing party

against the alien in removal proceedings is the DHS, which is represented by the Office of Chief Counsel for ICE.

The immigrant charged with removal is considered the *respondent* in proceedings. The respondent must respond or answer to the charges brought against her 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:

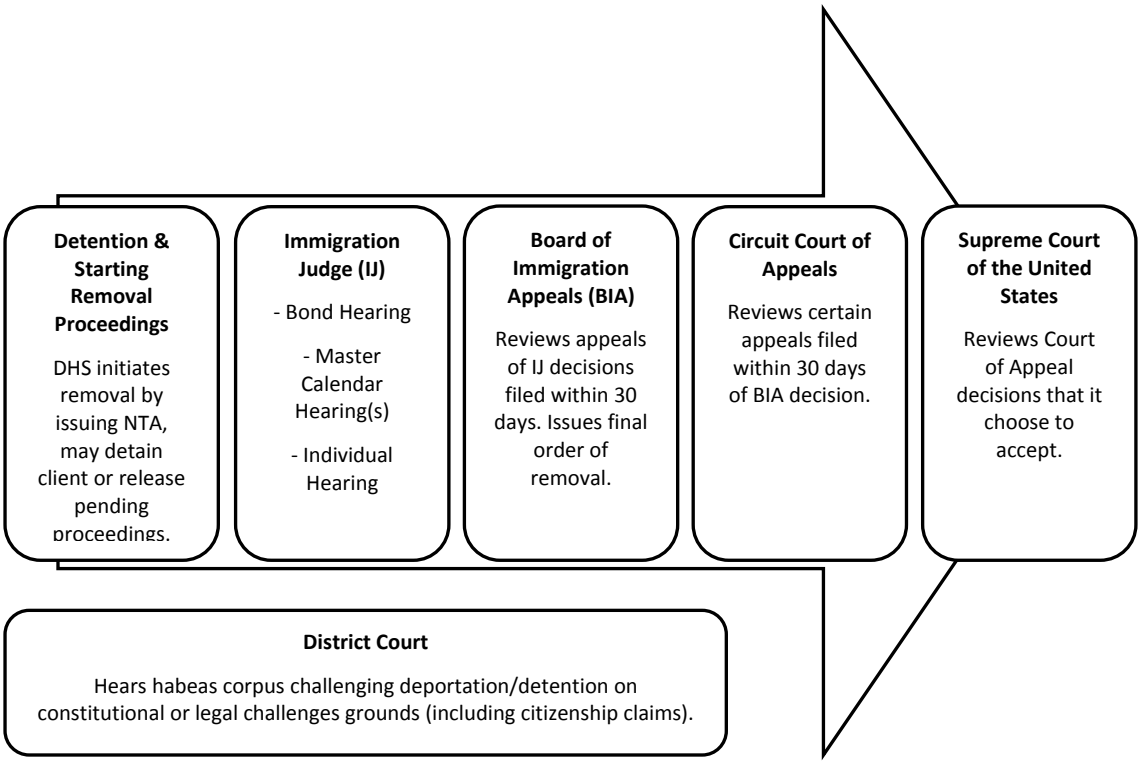
- Right to representation at no expense to the Government. INA 240(a)(4)(A). However, mentally ill noncitizens may be able to secure an attorney through a recent case.[1]
- Right to be provided a list of available legal services. 8 CFR 1003.61
- Right to contact her consulate. 8 CFR 1236.1(e).
- Right to an interpreter. 8 CFR 1240.5
- Right to examine and present evidence, call witnesses, etc. INA 240(a)(4)(B).
- 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 themselves before an immigration judge in immigration court.[2] 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, status conferences, and individual or merits hearings (trial). Detained clients might have an opportunity to request a bond be set by an immigration judge. This would take place in a bond hearing. See **Chapter 6** for more information on bond and detention. Otherwise, all proceedings begin with a master calendar hearing in which the respondent must appear and answer the charges. See **Chapter 7** for more information about the master calendar hearing. 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). The BIA is an administrative appellate body. 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 30 days from the 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

[1] *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).
[2] Some immigrants do not have the right to removal proceedings before an immigration judge. Those facing expedited removal (see Part B of this section); 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.

be appealed.[3] However, if the respondent appeals a removal decision to a Circuit Court of Appeals, the noncitizen must also file a stay of removal or he 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 or certain citizenship claims.



Most "arriving aliens" generally do not have a chance to present their case in removal proceedings, with important exceptions including lawful permanent residents or asylum seekers who successfully demonstrate a "credible fear." Removal proceedings as just described are, for the most part, for those already within the U.S. 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.

B. Expedited Removal

Expedited removal allows DHS to remove arriving aliens without full removal proceedings.[4] 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

[3] 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).
[4] Expedited removal provisions can be found at INA § 235(b).

airport) who either does not have proper documentation or has committed fraud or falsely claimed U.S. citizenship.[5] In other words, a person who attempts to enter, who is inadmissible under INA § 212(a)(6) or INA § 212(a)(7). Under the statute, 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 2 years. In 2004, DHS used this provision to announce that expedited removal will be applied to those detected by immigration enforcement officers within 100 miles of the border within 14 days of entry. To date, DHS has not designated a larger use of this provision. In the future, they could expand the geographic area or extend the amount of time after entry to which expedited removal would apply.

People subject to expedited removal are issued an order by an officer with DHS, usually an officer with U.S. Customs and Border Protection ("CBP"). 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 by an asylum officer and, if found to have a "credible fear," must be referred to an immigration judge. 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 juveniles are not to be removed through this process. Instead, they should be served an NTA and released into family care where possible. 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).

§ 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)[6] 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. Prior to the passage of IRIIRA, 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.

[5] Cuban citizens who arrive at U.S. ports-of-entry by aircraft are exempted from this first category of aliens subject to expedited removal under § 235(b)(1)(F) of the Act.
[6] Pub. L. 104-128, enacted 9/30/96; effective 4/1/97.

§ 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 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. 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 broken up and its functions are 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 represented by attorneys in the Office of Chief Counsel, under Immigration and Customs Enforcement (ICE), which is an agency of DHS.

A. Definition of Admission

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 removed from the United States.

The Following People Are Subject to the Grounds of Inadmissibility:

- People that 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;[7]
- 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.

A Note on Parole: The 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 her situation is the same as if she were waiting at the border, applying for admission. The 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 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 the DHS grants parole. See 8 CFR § 212.5. 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.

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[8]
- Lawful permanent residents, including conditional residents, except those who fall within INA § 101(a)(13)(C).

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[7] A person with an immigrant visa from a U.S. Consulate abroad does not become a lawful permanent resident until and unless he or she is admitted at a U.S. border while the immigrant visa is valid, and within six months of the date the visa was granted. See 22 CFR §§ 42.72-42.64(b).

[8] 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.

B. Lawful Permanent Residents Who Travel

Generally, a lawful permanent resident travels freely, and is not making a new admission upon re-entry into the United States. Usually, LPRs 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), a permanent resident returning from a trip outside the United States is seeking admission if he or she:

1. has abandoned or relinquished permanent resident status;
2. has been absent from the United States for a continuous period of more than 180 days;
3. has engaged in illegal activity after departing the United States;
4. has left the United States while under removal or extradition proceedings;
5. has 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. is 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 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 the 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.
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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.

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). The DHS can place him in removal proceedings with a Notice to Appear and charge him with being inadmissible for his TB 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.[9] 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. In a recent Supreme Court case, the Court held that those that pled guilty to an offense prior to the change in law should be able to rely on the law as it was. 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 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.

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*,[10] 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.[11] 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.[12] 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

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[9] See *Vartelas v. Holder*, 132 S.Ct. 1479 (March 28, 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."
[10] *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).
[11] See INA § 101(a)(13(C).
[12] IIRIRA § 301(a), amending INA § 101(a)(13), 8 USC § 1101(a)(13).

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 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 LPRs' 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 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 U.S., 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 U.S.
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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 travelling, 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.

> **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 over 180 days, or 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. 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).[13] 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.[14] Subsequently, in *Matter of Quilantan*,[15] 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.

§ 1.6 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 (DHS) inspectors at the border or port of entry and refused admission. (Under pre-IIRIRA law, such people frequently were paroled in to 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 made an entry faced the grounds of deportation. Only people who were refused admission by INS faced grounds of exclusion.

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[13] 521 F.3d 1068 (9th Cir. 2008).
[14] *Orozco v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008); www.legalactioncenter.org/litigation/adjustment-status-when-admission-involved-fraud-or-misrepresentation#cases.
[15] *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

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 have to prove that they don't come within a ground of inadmissibility.

> **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.
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> 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 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. 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 an alien, 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 an alien 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 you will become dependent on government welfare programs, unlawful presence in the United States, terrorism and certain crimes.

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 non-immigrant visas.

This manual will describe and give examples of some of the most common and important grounds of inadmissibility and deportability, as well as describe some of the common forms of relief from removal.

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.

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§ 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 she finds herself. 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. 8 CFR § 1240.8(c); see also *Murphy v. INS*.[16]

[16] 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).

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, 8 CFR § 1240.11(e).[17]

Once alienage has been established, the noncitizen must prove by clear and convincing evidence that he or she is lawfully in the U.S. pursuant to a prior admission, or is clearly and beyond a doubt entitled to be admitted to the U.S. and is not inadmissible as charged. 8 CFR § 1240.8(c).[18] 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. INA § 291; see also *Matter of Benitez*.[19]

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 § 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*. *Matter of Rivens*.[20]

Furthermore, in *Kwong Hai Chew v. Colding*,[21] and *Landon v. Plasencia*,[22] 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

[17] Except for asylum and withholding applications filed before USCIS (affirmative applications) on or after January 4, 1995. *Defensive* applications (first filed before EOIR) cannot be used to establish alienage.
[18] *Murphy v. INS*, above; see also *Lopez-Chavez v. INS*, 259 F.3d 1176 (9th Cir. 2001).
[19] 19 I&N Dec. 173 (BIA 1984).
[20] 25 I&N Dec. 623 (BIA 2011). See also *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).
[21] *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).
[22] *Landon v. Plasencia*, 459 U.S. 21 (1982).

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.[23] 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 CFR § 1240.8(a). "No decision on deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."[24] 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** and **Chapter 7**.

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's 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 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*,[25] 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.*

In *Matter of Vivas*,[26] 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*,[27] 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.

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[23] *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).
[24] *Kwong Hai Chew*, *supra*; INA § 240(c)(3)(A).
[25] 21 I&N Dec. 330 (BIA 1996).
[26] 16 I&N Dec. 68 (BIA 1977).
[27] 20 I&N Dec. 238 (BIA 1991).

Matter of Guevara also held, however, that the government cannot meet its burden of proof *solely* based on the respondent's assertion of his 5th 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.[28]

Circuit Court Cases. There is a conflict in the Circuits 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). Contrast this decision with the BIA's decision in *Matter of Pichardo*, above. The Second Circuit, in *Francis v. Gonzales*[29] 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."[30] 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.

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.

[28] *Matter of Guevara*; see also *Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979).
[29] *Francis v. Gonzales*, 442 F.3d 131, 138-39 (2d Cir. 2006).
[30] *Id*.

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. § 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 he or she does not have it and cannot reasonably obtain it. § 240(c)(4)(B).

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

> … shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for 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 the Ninth Circuit. To summarize, in 2012, the Ninth Circuit decided that 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.[31] 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.[32]

However, the U.S. Supreme Court has subsequently rendered decisions in two cases that are incompatible with *Young*: *Moncrieffe v. Holder*, 569 U.S. ___, 133 S.Ct. 1678, (2013) and *Descamps v. Holder*, ___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.[33] 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.

> **Example:** Jessie first obtained legal status in the U.S., as an LPR, in 2005. In 2010, Jessie was convicted of "unlawful possession of a weapon" and in 2013, Jessie was convicted of "possession of methamphetamine." Jessie is placed in removal proceedings and he is charged with being deportable for a drug offense. When Jessie applies for LPR cancellation of removal, the government cites *Young v. Holder*, and claims that Jessie must not only produce all the records of his convictions, but also has the burden of proving that the 2010 weapons conviction is *not* a "firearms" conviction and does not therefore trigger the "stop-time" bar for LPR cancellation as a deportable offense. If

[31] *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012); see also *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).
[32] *Young v. Holder*, 697 F.3d 976, 989-990 (9th Cir. 2012).
[33] *Moncrieffe v. Holder*, 569 U.S. ___, 133 S.Ct. 1678, (2013).

Jessie is not able to prove the weapons conviction did not involve a firearm, through the "reviewable" records of his conviction, and the record is inconclusive, then under *Young*, Jessie loses and does not qualify for LPR cancellation. However, after *Moncreiffe* was decided, Jessie now has a great argument that *Young* was implicitly overruled, and that (1) Jessie does not have the burden of producing conviction records and (2) whether Jessie's weapons conviction is a deportable offense is solely a legal question. Under the categorical approach and the "minimum conduct necessary to convict" standard outlined by the Supreme Court in these two recent decisions, Jessie's conviction should not render him deportable or ineligible for relief from removal—since the minimum conduct necessary to convict Jessie of this offense includes weapons that are not firearms. *It does not matter* whether Jessie actually used a firearm or not—what matters is that the statute broadly covered both firearms and other types of weapons, in one element, "weapons," and as a result a conviction under that statute is categorically *not* a deportable "firearms" conviction.

The BIA in *Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014), withdrew from its earlier *Matter of Lanferman* decision in part, as inconsistent with *Descamps* and *Moncreiffe*. The BIA held in *Chairez* that the government has the burden of proving a conviction exists and whether or not it is "divisible" as to deportability, but did not address the issue in Young, with regard to the burden of proof to establish eligibility for relief where the record of conviction is inconclusive. This means, that the BIA will at minimum require the government to prove whether a conviction exists, and whether it is a categorical match or not for a ground of deportability or inadmissibility, and also whether or not the statute is divisible.

Subsequent to the *Moncreiffe* decision, the Ninth Circuit in a panel decision held that *Young* in *Almanza-Arenas v. Holder*, had been abrogated in part by *Moncreiffe*, specifically with regard to the burden of proof placed on a respondent to prove a divisible conviction did *not* result in ineligibility for relief from removal.[34] The *Almanza-Arenas* panel held that "[o]ur circuit precedent in *Young v. Holder* is clearly irreconcilable with *Moncrieffe"* and pointed out that "the Supreme Court stressed that courts applying the modified categorical approach must "err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the [Immigration and Nationality Act] must be construed in the noncitizen's favor."[35] However, on January 15, 2015, the Ninth Circuit requested briefing regarding whether it should decide to reconsider the *Almanza-Arenas* panel decision *en banc*, so as of this writing, there is not yet have a definitive rule regarding burden of proof related to convictions and eligibility for relief in the Ninth Circuit. Regardless, *Moncrieffe* should still be utilized to argue that *Young* was implicitly overruled by the Supreme Court.

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** for a discussion of relief.

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[34] *Almanza-Arenas v. Holder*, __F.3d.__ (9th Cir. Nov. 10, 2014).
[35] *Almanza-Arenas v. Holder*, __F.3d.__ (9th Cir. Nov. 10, 2014), citing *Moncrieffe v. Holder*, 569 U.S. ___, 133 S.Ct. 1678, 1693 (2013).

Chapter 1