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The Shifting Burdens of Immigration Law

This outline was compiled by Immigration Judge Hank Ipema and has recently been revised and updated. The outline is an effort to highlight burdens of proof, including common presumptions, faced by immigration adjudicators but does not address standards of proof.

I. Alienage

The Department of Homeland Security ("DHS") bears the burden of proving alienage. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) ("It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. It is true that the burden of proving alienage rests upon the Government."), *overruled on other grounds by INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); Gordon, Mailman, & Yale-Loehr, Immigration Law and Procedure § 64.03 (rev. ed. 2009) ("INA § 240(a)(1) provides that IJs shall determine whether 'an alien' is inadmissible or deportable. It therefore remains the government's burden to first establish the court's jurisdiction by proving that the person in court is, in fact, 'an alien.'").

Evidence of alienage must be established by clear and convincing evidence. *See Matter of Amaya*, 21 I&N Dec. 583, 588 (BIA 1996) (pre-IIRIRA case) ("[T]he respondent's admission that he was born in Honduras is clear, unequivocal, and convincing evidence that shifts to him the burden of showing the time, place, and manner of his entry under section 291 of the Act."); *Matter of Cervantes*, 21 I&N Dec. 351, 354 (BIA 1996) (pre-IIRIRA case) ("The burden of proof in deportation proceedings does not shift to the alien to show time, place, and manner of entry under section 291 of the Act, until after the respondent's alienage has been established by clear, unequivocal, and convincing evidence." (citing *Woodby v. INS*, 385 U.S. 276 (1966), and *Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995))).

"In removal proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to come forward with evidence to substantiate his citizenship claim." *Matter of Hines*, 24 I&N Dec. 544, 546 (BIA 2008); *Matter of Leyva*,

16 I&N Dec. 118, 119 (BIA 1977) (same for deportation proceedings). A person presumed to be an alien bears the burden of proving a claim to United States citizenship by a preponderance of credible evidence. *See De Brown v. Department of Justice*, 18 F.3d 774, 777-78 (9th Cir. 1994); *De Vargas v. Brownell*, 251 F.2d 869, 870 (5th Cir. 1958); *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 332 (BIA 1969) (finding a preponderance of credible evidence is necessary to overcome the presumption of alienage which attaches by reason of foreign birth).

Once alienage is established, the burden is on the respondent to show the time, place, and manner of entry. Section 291 of the Act. If this burden of proof is not sustained, the respondent is presumed to be in the United States in violation of the law. *Id.* This burden and presumption is applicable to any charge of deportability which brings into question the time, place, and manner of entry. *See Matter of Benitez*, 19 I&N Dec. 173 (BIA 1984). *Contra Iran v. INS*, 656 F.2d 469 (9th Cir. 1981) (holding that the presumption only applies in cases involving illegal entry). In presenting this proof, the respondent is entitled to the production of his visa or other entry document, if any, and of any other documents and records pertaining to his entry which are in the custody of the DHS and not considered confidential by the Attorney General. Section 291 of the Act.

II. Removal Proceedings

A. Deportable Aliens

A respondent charged with deportability shall be found to be removable if the DHS proves by clear and convincing evidence that the respondent is deportable as charged. Section 240(c)(3)(A) of the Act; 8 C.F.R. §§ 1003.26(c) (same burden for in absentia removal hearing), 1240.8(a). No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. Section 240(c)(3)(A) of the Act; *see also Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (holding that the "clear and convincing evidence" standard requires an "abiding conviction" on the part of the fact-finder that the truth of a fact is "highly probable"); *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1989) (holding that when something has to be proved by clear and convincing evidence, the proof must demonstrate that it is highly probably true); *Black's Law Dictionary* 172 (6th ed. 1991) (stating that evidence is "clear and convincing" if it indicates that the truth of the fact to be proved is highly probable or reasonably certain).

When the respondent is charged with removability based upon a criminal conviction, the DHS must prove that the conviction is a removable offense when considering both the statutory elements of the crime and other factors that are not elements but affect the classification of the criminal conviction.[1] *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). "[W]hen a court vacates an alien's conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes." *Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006) (citing *Matter of Pickering,* 23 I&N Dec. 621, 624 (BIA 2003)). If the respondent provides evidence to demonstrate that the conviction that might render him or her removable has been vacated by a court of competent jurisdiction, the DHS must show by clear and convincing evidence that the conviction was vacated solely for reasons that do not invalidate the conviction for removal purposes. *Id.* at 269; *see also Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006).

B. Arriving Aliens

In proceedings commenced upon a respondent's arrival in the United States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. Section 240(c)(2) of the Act; 8 C.F.R. § 1240.8(b).

A returning lawful permanent resident who seeks to enter the United States is not ordinarily considered an applicant for admission. Section 101(a)(13) of the Act. However, to establish that a returning lawful permanent resident alien is to be treated as an applicant for admission (and thus that the grounds of inadmissibility apply), the burden of proof is on the DHS. The Board has held that the DHS must prove by clear and convincing evidence that one of the six exceptions to the general rule for lawful permanent residents in section 101(a)(13)(C) of the Act applies. Section 101(a)(13)(C) of the Act; *Matter of Guzman Martinez*, 25 I&N Dec. 845 (BIA 2012); *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011); *Matter of Huang*, 19 I&N Dec. 749 (BIA 1988) (stating that the DHS bears the ultimate burden of showing a respondent abandoned his or her lawful permanent resident status); *Matter of Kane*, 15 I&N Dec. 258 (BIA 1975) (same). However, the Sixth Circuit has stated that the DHS actually has the burden of proving by clear, *unequivocal*,

and convincing evidence that the returning lawful permanent resident is inadmissible, a higher standard than clear and convincing. *Ward v. Holder*, 733 F.3d 601 (6th Cir. 2013) (citing *Addington v. Texas*, 441 U.S. 418 (1966)). The Sixth Circuit noted that the First, Fifth, and Ninth Circuits have also come to the same conclusion. *Id.*

When the DHS paroles a returning lawful permanent resident for prosecution, it need not have all the evidence to sustain its burden of proving that the alien is an applicant for admission at that time but may ordinarily rely on the results of a subsequent prosecution to meet that burden in later removal proceedings. *Matter of Valenzuela-Felix*, 26 I&N Dec. 53 (BIA 2012).

C. Aliens Present in the United States Without Being Admitted or Paroled

In the case of a respondent charged as being present in the United States without being admitted or paroled, the DHS must first establish the alienage of the respondent. If the DHS establishes foreign birth, a presumption of alienage arises. *See Matter of Hines*, 24 I&N Dec. 544, 546 (BIA 2008). Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. Section 240(c)(2) of the Act; 8 C.F.R. § 1240.8(c).

D. In Absentia Removal Hearing

In any removal proceeding before an Immigration Judge in which the alien fails to appear, the Immigration Judge shall order the alien removed in absentia if: (1) the DHS establishes by clear, unequivocal, and convincing evidence that the alien is removable; and (2) the DHS establishes by clear, unequivocal, and convincing evidence that written notice of the time and place of proceedings and written notice of the consequences of failure to appear were provided to the alien or the alien's counsel of record. Section 240(b)(5) of the Act; 8 C.F.R. §1003.26(c).

The DHS bears the burden of establishing jurisdiction for removal proceedings by proper issuance of a notice to appear under section 239(a)(1) of the Act and the filing of that notice to appear with the Immigration Court. *Kohli v. Gonzalez*, 473 F.3d 1061 (9th Cir. 2007); *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001); 8 C.F.R. §§ 1003.14, 1239.1(a); *see also Matter of E-S-I-*, 26 I&N Dec. 136 (BIA 2013) (regarding service on those who lack mental competency); *Matter of Amaya*, 21 I&N Dec. 583, 585 (BIA 1996) (finding that notice of hearing is adequate for a minor where there is clear, unequivocal, and convincing evidence that notice is served on "the person or persons who are most likely to be responsible for ensuring that [the minor] alien appears before the Immigration Court at the scheduled time"); 8 C.F.R. § 103.8(c)(2).

III. Deportation and Exclusion Proceedings

A. Deportation Proceedings

i. In General

The DHS has the burden of proving that the alien is deportable by evidence which is clear, unequivocal, and convincing. 8 C.F.R. § 1240.46(a); *see also Woodby v. INS*, 385 U.S. 276, 286 (1966).

ii. In Absentia Deportation Hearing

a. Pre-Immigration Act of 1990 (OSCs Served Prior to June 13, 1992)

"If any alien has been given a reasonable opportunity to be present at a proceeding under [section 242 of the Act], and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present." Section 242(b) of the Act (1988). "No decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." Section 242(b)(4) of the Act (1988).

b. Post-Immigration Act of 1990

In any deportation proceeding before an Immigration Judge in which the respondent fails to appear, the Immigration Judge shall order the respondent deported in absentia if: (1) the DHS establishes by clear, unequivocal and convincing evidence that the respondent is deportable; and (2) the Immigration Judge is satisfied that the written notice of the time and place of the

proceedings and written notice of the consequences of failure to appear as set forth in section 242(b)(c) of the Act were provided to the respondent in person or were provided to the respondent or the respondent's counsel of record, if any, by certified mail. 8 C.F.R. § 1003.26(b).

B. Exclusion Proceedings

i. In General

The burden of proof in exclusion proceedings is on the applicant to show to the satisfaction of the Attorney General that he or she is not subject to exclusion under any provision of the Act. Section 291 of the Act. Once an alien has presented a prima facie case of admissibility, the DHS has the burden of presenting some evidence that would support a contrary finding. *See Matter of Walsh and Pollard*, 20 I&N Dec. 60 (BIA 1988). The applicant for admission, however, still retains the ultimate burden of proof. *Id.*; *see also Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994).

However, an exception to the alien bearing the burden of proof occurs when the applicant has a "colorable" claim to status as a returning lawful permanent resident. In that case, the burden of proof to establish excludability is on the DHS. *Matter of Kane*, 15 I&N Dec. 258. The DHS's burden in such a case is to show by "clear, unequivocal, and convincing evidence" that the applicant should be deprived of lawful permanent resident status. *See Matter of Huang*, 19 I&N Dec. 749.

If the lawful permanent resident contends that exclusion proceedings are not proper under *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (*Fleuti*), he bears the burden to prove that he comes within the *Fleuti* exception to the entry definition. *See Molina v. Sewell*, 983 F.2d 676 (5th Cir. 1993).

In exclusion proceedings where the applicant has no "colorable claim" to lawful permanent resident status and alleges that exclusion proceedings are improper because he made an entry and should therefore be in deportation proceedings, the burden is on the applicant to show that he has affected an entry. *See Matter of Z-*, 20 I&N Dec. 707 (BIA 1993); *Matter of Matelot*, 18 I&N Dec. 334 (BIA 1982); *Matter of Phelisna*, 18 I&N Dec. 272 (BIA 1982).

In cases in which the applicant bears the burden of proof, the burden of proof never shifts and is always on the applicant. *Matter of Rivero-Diaz*, 12 I&N Dec. 475, 476 (BIA 1967) (citing *Matter of M-*, 3 I&N Dec. 777 (BIA 1949)). Where the evidence is of equal probative weight, the party having the burden of proof cannot prevail. *Id.*

An applicant for admission to the United States as a citizen of the United States has the burden of proving citizenship. *Matter of G-R-*, 3 I&N Dec. 141 (BIA 1948). Once the applicant establishes that he was once a citizen and the DHS asserts that he lost that status, the DHS bears the burden of proving expatriation. *Id.* The standard of proof to establish expatriation is less than the "clear, unequivocal, and convincing" evidence test as applied in denaturalization cases but more than a mere preponderance of evidence. The proof must be strict and exact. *Id.*

ii. In Absentia Exclusion Hearing

In any exclusion proceeding before an Immigration Judge in which the applicant fails to appear, the Immigration Judge shall conduct an in absentia hearing if the Immigration Judge is satisfied that notice of the time and place of the proceedings was provided to the applicant on the record at a prior hearing or by written notice to the applicant or to the applicant's counsel of record on the charging document or at the most recent address in the record of proceeding. 8 C.F.R. § 1003.26(a).

IV. Relief from Removal

A. In General

The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that, if discretionary, 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. 8 C.F.R. § 1240.8(d).

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought. The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is

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CIRCUIT COURT DECISIONS FOR SEPTEMBER 2014

by John Guendelsberger

The United States courts of appeals issued 109 decisions in September 2014 in cases appealed from the Board. The courts affirmed the Board in 94 cases and reversed or remanded in 15, for an overall reversal rate of 13.8%, compared to last month's 20.7%. There were no reversals from the First, Fifth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for September 2014 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	4	0	0.0
Second	22	18	4	18.2
Third	9	5	4	44.4
Fourth	7	6	1	14.3
Fifth	15	15	0	0.0
Sixth	7	6	1	14.3
Seventh	4	3	1	25.0
Eighth	1	1	0	0.0
Ninth	26	23	3	11.5
Tenth	4	4	0	0.0
Eleventh	10	9	1	10.0
All	109	94	15	13.8

The 109 decisions included 50 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 29 direct appeals from denials of other forms of relief from removal or from findings of removal; and 30 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	50	43	7	14.0
Other Relief	29	23	6	20.7
Motions	30	28	2	6.7

The seven reversals or remands in asylum cases involved credibility (two cases), particular social group, nexus, level of harm for past persecution, material support bar, and protection under the Convention Against Torture.

The six reversals or remands in the "other relief" category addressed crimes involving moral turpitude (two cases), categorical approach, respresentation by counsel, the section 212(c) waiver, and retroactive application of the stop-time rule for cancellation of removal. The two motions cases involved changed country conditions, and an in absentia order of removal.

The chart below shows the combined numbers for January through September 2014 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	40	31	9	22.5
Ninth	705	553	152	21.6
Third	97	82	15	15.5
First	41	35	6	14.6
Second	286	250	36	12.6
Fourth	78	70	8	10.3
Sixth	75	69	6	8.0
Tenth	44	41	3	6.8
Eleventh	86	81	5	5.8
Fifth	147	139	7	4.8
Eighth	50	49	1	2.0
All	1648	1400	248	15.0

Last year's reversal rate at this point (January through September 2013) was 12.3%, with 1730 total decisions and 213 reversals.

The numbers by type of case on appeal for the first 9 months of 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	875	723	152	17.4
Other Relief	365	299	66	18.1
Motions	408	378	30	7.4

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Second Circuit:

Oppedisano v. Holder, No. 13-4351-ag, 2014 WL 4999986 (2d Cir. Oct. 8, 2014): The Second Circuit denied the petition for review of the Board's precedent decision in *Matter of Oppedisano*, 26 I&N Dec. 202 (BIA 2013), which held that the crime of unlawful possession of ammunition by a convicted felon under 18 U.S.C. § 922(g) is an offense "relating to firearms" and thus an aggravated felony under section 101(a)(43)(E)(ii) of the Act. The Board interpreted the term "relating to" as being "purely descriptive," as opposed to restrictive (classifying only a subset of crimes contained in § 922(g), which includes offenses involving both firearms and ammunition, as aggravated felonies). The Second Circuit found the Board's reasoning worthy of deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Holding that the term is ambiguous, the court found "numerous persuasive reasons" in the Board's opinion to support the descriptive interpretation. The court agreed with the Board's view that the "relating to" parenthetical language served the common sense function of describing the nature of the enumerated statute and explained that descriptive parentheticals, which make complex statutes more readable, are common in many statutes. The court further noted that the context of the parenthetical provides additional support for a descriptive interpretation because section 101(a)(43)(E)(iii) describes 26 U.S.C. § 5861 with the same parenthetical section 101(a)(43)(E)(ii) uses to describe 18 U.S.C. § 922(g). Since 26 U.S.C. § 5861 only encompasses crimes involving firearms but § 922(g) covers offenses involving both firearms and ammunition, the parenthetical can only be meant as descriptive in that context. Viewing the parenthetical as restrictive would result in different meanings being ascribed to the same term in two consecutive provisions of section 101(a)(43)(E) of the Act. The court was unpersuaded by the petitioner's additional arguments and concluded that the Board reasonably interpreted the parenthetical as descriptive.

Sutherland v. Holder, No. 12-4510, 2014 WL 4999963 (2d Cir. Oct. 8, 2014): The Second Circuit dismissed the petition for review of a decision of the Board affirming an Immigration Judge's order of removal. The Immigration Judge found the petitioner removable as one convicted of an aggravated felony relating to a controlled substance based on her 1997 Arizona conviction for attempted possession of four or more pounds of marijuana. In 2011, during the pendency of removal proceedings, the Arizona Superior Court vacated the petitioner's conviction, but the Immigration Judge rejected her contention that it was no longer valid for immigration purposes. The circuit court agreed, finding that, contrary to the petitioner's assertion, the record established that the basis for vacating the conviction was rehabilitation and avoiding adverse immigration consequences. The court concurred with the Ninth Circuit's holding in *Poblete Mendoza v. Holder*, 606 F.3d 1137, 1141−42 (9th Cir. 2010), that any conviction vacated under section 13-907 of the Arizona Revised Statutes, on which the petitioner had relied, was vacated for rehabilitative reasons and consequently remains valid for immigration purposes. The court thus found that its holding in *Saleh v. Gonzales*, 495 F.3d 17 (2d Cir. 2007), was controlling and the conviction was valid for immigration purposes. The court dismissed the petition for lack of jurisdiction.

Urgen v. Holder, 768 F.3d 269 (2d Cir. 2014): The Second Circuit vacated a decision of the Board denying asylum to the petitioner, who claimed to be a stateless Tibetan born in Nepal. The Immigration Judge made an adverse credibility determination based on implausibilities in the petitioner's testimony and found that the petitioner's documents were insufficient to overcome the problems in the testimony. The Immigration Judge noted that the petitioner's Tibetan "green book" was neither authenticated nor issued by a government authority and that a letter from the petitioner's parents was in English and unaccompanied by identity documents. Furthermore, because the petitioner had entered the U.S. with a Nepali passport, the Immigration Judge concluded that, depending on the passport's validity, the petitioner was either Nepali or his identity was unknown. The Board held that the petitioner had not met his burden of establishing his identity or nationality, which the Board noted were threshold issues. The Board also agreed with the diminished weight that the Immigration Judge afforded the documentation. However, the Board did not review the Immigration Judge's adverse credibility determination, the petitioner's testimony, or the merits of the claim. The circuit court first determined that it could not meaningfully review the decision in the absence of the Board's review of the Immigration Judge's credibility finding. Acknowledging that nationality is a threshold issue, the court added that it need not be determined through documentation only, because an asylum applicant

can meet his or her burden of proof through credible testimony alone. The court further noted that where an asylum applicant is unable to establish nationality, the fact-finder must still make a determination of nationality and citizenship since claims for asylum, withholding, and protection under the Convention Against Torture are all country-specific. The court found the agency's failure to do so "particularly troubling" because the petitioner alleged a fear of persecution and torture in both Nepal and China. Additionally, the court noted that a determination of nationality is necessary in order to designate a country for removal. Accordingly, the court remanded the record to the Board for further proceedings.

Fourth Circuit:

Mohamed v. Holder, No. 13-2027, 2014 WL 5304878 (4th Cir. Oct. 17, 2014): The Fourth Circuit granted the petition challenging an order of removal pursuant to section 237(a)(2)(A)(ii) of the Act, based on the petitioner's convictions for two crimes involving moral turpitude. Relying on its decision in *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), the Board held that the petitioner's conviction for failure to register as a sex offender in violation of section 18.2-472.1 of the Virginia Annotated Code was a crime involving moral turpitude. The circuit court observed that if Congress had intended section 237(a)(2)(A)(ii) of the Act to be satisfied by "simply the wrong inherent in violating the statute," then the language "involving moral turpitude" would be rendered superfluous. Thus, the court found that a crime involving moral turpitude must involve not only conduct that violates the statute, but also a moral norm. The court acknowledged the Government's argument that the stated purpose of the sex offender registration statute is to reduce the risk to society of repeated sex offenses. However, the court found that the statute itself did not prohibit repeated sex offenses but rather was a "regulatory or administrative provision requiring only registration—the presentation of information—by a specific class of persons." The court found "no moral norm requiring sex offenders to register or to provide information to the community." Thus, while agreeing that the purpose of the State statute is to prevent future immoral conduct, the court held that the violation of the registration requirement is not a crime involving moral turpitude. Following the same line of reasoning in its *Chevron* analysis, the court did not accord deference to the Board's decision in *Matter of Tobar-Lobo*. Accordingly, the Board's decision was reversed, and the record was remanded with instructions to vacate the order of removal.

Regis v. Holder, No. 13-1988, 2014 WL 5285651 (4th Cir. Oct. 16, 2014): The Fourth Circuit denied the petition for review of a decision of the Board upholding the denial of the petitioner's application for adjustment of status. The petitioner had been issued a K-2 nonimmigrant visa as the minor child of the fiancée of a U.S. citizen. The visa was issued 5 days prior to the petitioner's 21st birthday, and he did not actually enter the U.S. until after he had turned 21. An Immigration Judge denied the petitioner's adjustment application, relying on the Board's precedent decision in *Matter of Le*, 25 I&N Dec. 541 (BIA 2011), which was decided during the pendency of the petitioner's case. In *Le*, the Board held that a K-2 derivative child of a K-1 fiancée satisfies the definition of a "minor child" and is thus eligible to adjust status if he or she was under the age of 21 at the time of entry. The petitioner relied on *Carpio v. Holder*, 592 F.3d 1091 (10th Cir. 2010), for the proposition that the threshold date is the time when the K-2 applicant "seeks to enter." The *Carpio* court further explained that such date "may be plausibly read" as the date the K-1 visa petition is filed with either the Department of Homeland Security or the applicable U.S. consulate. The Fourth Circuit agreed with both the Tenth Circuit and the Board as to the ambiguity of the statute, noting that both *Carpio* and *Le* offer plausible interpretations of the statute. The court noted that it was bound under *Chevron* to defer to the Board's interpretation, if reasonable. According to the court, under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), the Tenth Circuit's construction would only trump the Board's subsequent interpretation (which is otherwise entitled to *Chevron* deference) if the court's prior construction derives from the unambiguous language of the statute and thus leaves no room for agency interpretation. The Fourth Circuit further found the Board's interpretation in *Le* to be well reasoned and consistent with the existing statutory and regulatory framework.

Ninth Circuit:

Medina-Lara v. Holder, No. 13-70491, 2014 WL 5072684 (9th Cir. Oct. 10, 2014) (reissued decision): The Ninth Circuit granted the petition for review of the Board's order affirming the Immigration Judge decision that the petitioner is removable based on his conviction, which was for an aggravated felony, a controlled substance violation, and a firearms offense. The court acknowledged that the Immigration Judge and Board

employed the modified categorical approach in analyzing the petitioner's State controlled substance conviction, to which an enhancement for carrying a firearm during that offense was applied. Noting that the parties conceded that the applicable statute was both broader than the generic predicate offense and divisible, the court focused on whether the documents on which the Immigration Judge relied (an amended complaint and an abstract of judgment) clearly established that the petitioner pled guilty to the element of the predicate offense alleged in the complaint. The court found both documents to be of the type approved in *Shepard v. United States*, 544 U.S. 13 (2005). However, the court held that the information relied on in those documents fell short of clearly and convincingly establishing the elements to which the petitioner pled because of ambiguities in the numbering of the two documents. The court observed that the Government's attempts to interpret the ambiguities were "*plausible* explanations of what the abstract *might* mean" but found that this was not enough to meet the "clear and convincing" standard. Regarding the firearms offense, the Board concluded that the State conviction categorically satisfied the removal ground under step one of the *Taylor/Descamps* analysis. In reaching that determination, the Board relied on the Ninth Circuit's decision in *Gil v. Holder*, 651 F.3d 1000 (9th Cir. 2011). However, the court agreed with the petitioner's claim that *Gil* can no longer be relied on in light of the court's recent decision in *United States v. Aguilera-Rios*, 2014 WL 4800292 (9th Cir. Sept. 29, 2014), which held that *Gil* was overruled by *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). The order of removal was vacated and the record was remanded with instructions to terminate the proceedings.

Aragon-Salazar v. Holder, No. 10-71763, 2014 WL 4922254 (9th Cir. Oct. 2, 2014): In a split panel decision, the Ninth Circuit granted a petition for review of the Board's decision affirming an Immigration Judge's denial of special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act ("NACARA"). The Immigration Judge determined that the petitioner's false testimony in support of the application prevented him from establishing 7 years of good moral character "immediately preceding the date of such application," which the statute requires. The question before the circuit court was whether the application for relief is a continuing one, in which case the false testimony, which occurred after the physical filing of the cancellation application, would fall within the relevant 7-year period. Applying the first step of its *Chevron* analysis, the court found that the statutory language clearly indicated that the period of time for which an applicant must show good moral character is the 7-year period immediately preceding the filing of the NACARA application, which ends on the date that application is filed. Accordingly, the court found that under the plain terms of the statute, an application for special rule cancellation of removal is not a continuing application. In reaching this conclusion, the court compared the statute's use of the words "has been a person of good moral character," to the language employed in the repealed suspension of deportation provisions, under which the applicant was required to show that he or she "was and is a person of good moral character." The court found that in replacing the "expansive" language "was and is" with the past tense phrase "has been," Congress established that the special rule cancellation application was not a continuing one. Accordingly, the Board's decision was vacated and the record was remanded.

BIA PRECEDENT DECISIONS

In *Matter of Munroe*, 26 I&N Dec. 428 (BIA 2014), the Board held that for purposes of establishing an alien's eligibility for a waiver under section 216(c)(4)(A) of the Act, 8 U.S.C. § 1186a(c)(4)(A), the relevant period for determining whether an alien's removal would result in extreme hardship is the 2-year period for which the alien was admitted as a conditional permanent resident.

The respondent was admitted on July 3, 1997, as a conditional permanent resident for a 2-year period based on her marriage to a United States citizen. She and her husband divorced in March 1999, so the respondent could not jointly file a petition to remove conditions on her residence under section 216(c)(1) of the Act. The respondent filed an application for a waiver of the joint filing requirements, which the U.S. Citizenship and Immigration Service ("USCIS") denied in August 2004. The USCIS subsequently denied a second waiver application.

In May 2007, the respondent married her current husband, with whom she has three United States citizen children, born in 2001, 2004, and 2007. In January 2008, she filed a third waiver application under section 216(c)(4)(A), claiming that her removal would result in extreme hardship. The USCIS denied the application, finding that the period for establishing hardship began in July 1997, when the respondent's conditional permanent

resident status commenced, and ended 2 years later in July 1999 when the status automatically terminated.

The respondent then renewed her waiver application before the Immigration Judge, who concluded that the relevant period for determining hardship began in July 1997 and extended at least until August 2004, when the USCIS denied the first waiver application. The Immigration Judge found that the respondent had demonstrated extreme hardship related to her first child and granted the waiver. The Department of Homeland Security ("DHS") appealed.

Examining section 216(c)(4) of the Act, which provides that the DHS should determine extreme hardship by considering "circumstances occurring only during the period that the alien was admitted for permanent residence on a conditional basis," the Board concluded that the language is unambiguous and clearly refers to the 2-year period for which an alien was admitted as a conditional permanent resident. The Board further held that even if the language is ambiguous, its interpretation is the most reasonable construction of section 216(c)(4). In addition to the extreme hardship waiver, section 216(c)(4) provides other waivers that are available to an alien whose marriage was terminated through no fault of his or her own or who was subjected to abuse by the spouse or intended spouse. Reasoning that those provisions are clearly related to the marriage generating the conditional permanent resident status, the Board explained that limiting the hardship period to the 2-year conditional residence period ensures that the extreme hardship waiver only addresses hardships related to that marriage, rather than creating an entirely new avenue for relief.

The Board pointed out that the Second Circuit affirmed the holding in *Matter of Singh*, 24 I&N Dec. 331 (BIA 2007), that no conflict exists between section 216(c)(4)(A) and its implementing regulations, which state that "only those factors that arose subsequent to the alien's entry as a conditional permanent resident" can be considered. Since no end point of the hardship period had been specified, however, the Board clarified that it ends on the last day of the 2-year period of an alien's admission as a conditional permanent resident. Concluding that the Immigration Judge erred in finding the respondent eligible for the hardship waiver based on circumstances related to her second marriage, which occurred after the 2-year period, the Board sustained the DHS's appeal and remanded the record.

In *Matter of Bett*, 26 I&N Dec. 437 (BIA 2014), the Board held that a Form I-9 (Employment Eligibility Verification) is admissible in immigration proceedings to support charges of removability and to determine an alien's eligibility for relief from removal.

The respondent was charged with removability under section 237(a)(1)(C)(i) of the Act and he sought adjustment of status as the beneficiary of an approved visa petition filed on his behalf by his United States citizen wife. In October 2009, he filed I-9 forms with two employers indicating that he was a United States citizen. Although he had a social security card with the caveat, "VALID FOR WORK ONLY WITH DHS AUTHORIZATION," his employers had received copies of a social security card without that restriction. The respondent stated that he did not remember filling out the I-9 forms and checking the citizenship box, and he professed not to know how his employers obtained copies of a social security card with no employment restriction.

The Immigration Judge found that the respondent lacked credibility. Concluding that the respondent had not established that he was not inadmissible under section 212(a)(6)(C)(ii)(I) of the Act as an alien who made a false claim to citizenship, the Immigration Judge determined that he had not satisfied his burden of proving eligibility for adjustment of status.

On appeal the respondent argued that a Form I-9 is inadmissible as evidence in an immigration proceeding pursuant to section 274A(b)(5) of the Act, which is entitled "Limitation on Use of Attestation Form." The Board rejected the respondent's interpretation and agreed with the Eighth Circuit's decision in *Downs v. Holder*, 758 F.3d 994, 997 (8th Cir. 2014), that by its plain meaning, section 274A(b)(5) unambiguously permits the use of a Form I-9 as evidence. The Board therefore held that I-9 forms are admissible in removal proceedings, both to support charges of removability and to determine an alien's eligibility for relief from removal. The Board was similarly unpersuaded by the respondent's argument that recent case law undermines a determination that I-9 forms are admissible in immigration proceedings. Like the Eighth Circuit in *Downs*, the Board found the cases cited by the respondent inapposite and therefore not binding precedent.

The Board found no clear error in the Immigration Judge's adverse credibility determination and concluded that the Immigration Judge properly relied on the I-9 forms to find that the respondent made false claims to United States citizenship. Concurring with the Immigration Judge that the respondent had not demonstrated admissibility and thus could not establish eligibility for adjustment of status, the Board dismissed the appeal.

REGULATORY UPDATE

79 Fed. Reg. 64,299 (Oct. 29, 2014)

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 103

[CIS No. 2517-11; Docket No. USCIS-2012-0006]

RIN 1615-AC01

Notices of Decisions and Documents Evidencing Lawful Status

AGENCY: U.S. Citizenship and Immigration Services, DHS.
ACTION: Final rule; request for comments.
SUMMARY: The Department of Homeland Security (DHS) is amending its regulations governing when U.S. Citizenship and Immigration Services (USCIS) will issue correspondence, notices of decisions, and documents evidencing lawful status in the United States to an applicant, petitioner, attorney, or accredited representative. Specifically, this final rule explains how USCIS will issue requests, notices, cards, and original documents to applicants, petitioners, and their attorneys or accredited representatives of record. This final rule also amends the regulations to allow represented applicants to specifically consent to and request that any notices, decisions, and secure identity documents be sent solely to the official business address of the applicants' attorney or accredited representative, as reflected on a properly executed Notice of Entry of Appearance as Attorney or Accredited Representative. Further, through this final rule, DHS clarifies USCIS notification practices relating to represented parties. These changes will conform USCIS notice procedures to account for the full range of stakeholder norms, including industry preferences, in response to stakeholder comments.
DATES: *Effective Date:* This final rule is effective on January 27, 2015.

79 Fed. Reg. 62,176 (Oct. 16, 2014)

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services
[CIS No. 2544–14; DHS Docket No. USCIS–2014–0006]

RIN 1615–ZB29

Extension of the Designation of Nicaragua for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.
ACTION: Notice.
SUMMARY: Through this Notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of Nicaragua for Temporary Protected Status (TPS) for 18 months from January 6, 2015 through July 5, 2016.

The extension allows currently eligible TPS beneficiaries to retain TPS through July 5, 2016 so long as they otherwise continue to meet the eligibility requirements for TPS. The Secretary has determined that an extension is warranted because the conditions in Nicaragua that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in Nicaragua resulting from Hurricane Mitch, and Nicaragua remains unable, temporarily, to handle adequately the return of its nationals.

Through this Notice, DHS also sets forth procedures necessary for nationals of Nicaragua (or aliens having no nationality who last habitually resided in Nicaragua) to re-register for TPS and to apply for renewal of their Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who have previously registered for TPS under the designation of Nicaragua and whose applications have been granted. Certain nationals of Nicaragua (or aliens having no nationality who last habitually resided in Nicaragua) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions, if they meet: (1) At

least one of the late initial filing criteria; and, (2) all TPS eligibility criteria (including continuous residence in the United States since December 30, 1998, and continuous physical presence in the United States since January 5, 1999).

For individuals who have already been granted TPS under the Nicaraguan designation, the 60-day re-registration period runs from October 16, 2014 through December 15, 2014. USCIS will issue new EADs with a July 5, 2016 expiration date to eligible Nicaragua TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the timeframes involved with processing TPS re-registration applications, DHS recognizes that not all re-registrants will receive new EADs before their current EADs expire on January 5, 2015. Accordingly, through this Notice, DHS automatically extends the validity of EADs issued under the TPS designation of Nicaragua for 6 months, through July 5, 2015, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on Employment Eligibility Verification (Form I–9) and the E-Verify processes.

DATES: The 18-month extension of the TPS designation of Nicaragua is effective January 6, 2015, and will remain in effect through July 5, 2016. The 60-day re-registration period runs from October 16, 2014 through December 15, 2014. (**Note:** It is important for re-registrants to timely re-register during this 60-day re-registration period, and not to wait until their EADs expire.)

79 Fed. Reg. 62,170 (Oct. 16, 2014)

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2543–14; DHS Docket No. USCIS–2014–0007]

RIN 1615–ZB28

Extension of the Designation of Honduras for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Through this Notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of Honduras for Temporary Protected Status (TPS) for 18 months from January 6, 2015 through July 5, 2016.

The extension allows currently eligible TPS beneficiaries to retain TPS through July 5, 2016, so long as they otherwise continue to meet the eligibility requirements for TPS. The Secretary has determined that an extension is warranted because the conditions in Honduras that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in Honduras resulting from Hurricane Mitch, and Honduras remains unable, temporarily, to handle adequately the return of its nationals.

Through this Notice, DHS also sets forth procedures necessary for nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) to re-register for TPS and to apply for renewal of their Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Reregistration is limited to persons who have previously registered for TPS under the designation of Honduras and whose applications have been granted. Certain nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions, if they meet: (1) At least one of the late initial filing criteria; and, (2) all TPS eligibility criteria (including continuous residence in the United States since December 30, 1998, and continuous physical presence in the United States since January 5, 1999).

For individuals who have already been granted TPS under the Honduras designation, the 60-day re-registration period runs from October 16, 2014 through December 15, 2014. USCIS will issue new EADs with a July 5, 2016 expiration date to eligible Honduras TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the timeframes involved with processing TPS re-registration applications, DHS recognizes that not all re-registrants will receive new EADs before their current EADs expire on January 5, 2015. Accordingly, through this Notice, DHS automatically extends the validity of EADs issued under the TPS designation of Honduras for 6 months, through July 5, 2015, and explains how TPS beneficiaries and their employers may determine which EADs are automatically

extended and their impact on Employment Eligibility Verification (Form I–9) and the E-Verify processes. **DATES:** The 18-month extension of the TPS designation of Honduras is effective January 6, 2015, and will remain in effect through July 5, 2016. The 60-day re-registration period runs from October 16, 2014 through December 15, 2014. **(Note:** It is important for re-registrants to timely re-register during this 60-day re-registration period, and not to wait until their EADs expire.)

The Shifting Burdens *continued*

"probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

There is no catch-all definition of the term "preponderance of the evidence." Generally, however, when something is to be established by a preponderance of evidence it is sufficient that the proof only establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1989).

The REAL ID Act of 2005 applies to applications for relief filed on or after May 11, 2005. Pursuant to the REAL ID Act, an alien applying for relief or protection from removal has the burden of proof to establish that the alien (1) satisfies the applicable eligibility requirements; and (2) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion. Section 240(c)(4)(A) of the Act. Under the REAL ID Act, to sustain his or her burden:

> The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

Section 240(c)(4)(B) of the Act; *see also Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009).

B. Special Relief Provisions

i. Asylum

The alien has the burden of establishing that he or she is a refugee as defined in section 101(a)(42) of the Act. Section 208(b)(1)(B)(i) of the Act; 8 C.F.R. §§ 1208.13(a), 1240.11(c)(3)(iii), 1240.49(c)(4)(iii).

The REAL ID Act of 2005, which applies to applications filed on or after May 11, 2005, provides:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

Section 208(b)(1)(B)(ii) of the Act.

The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution does not relieve the alien of the additional burden of establishing eligibility for asylum. 8 C.F.R. § 1208.13(a).

With respect to information provided in the application, the information provided in an asylum application filed on or after January 4, 1995, may be used as a basis for the initiation of removal proceedings, or to satisfy any burden of proof in exclusion, deportation, or removal proceedings. 8 C.F.R. § 1208.3(c)(1). The applicant's signature on the asylum application establishes a presumption that the applicant is aware of the contents of the application. 8 C.F.R. § 1208.3(c)(2).

With respect to the requirement in section 208(a)(2)(B) of the Act that the alien demonstrate by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States, the applicant has the burden of proving: (1) by clear and convincing evidence that the asylum application has been filed within 1 year of the date of the alien's arrival in the United States, or (2) to the satisfaction of the asylum officer, the Immigration Judge, or the Board that he or she qualifies for an exception to the 1-year deadline based on changed circumstances or extraordinary circumstances. 8 C.F.R. § 1208.4(a)(2); *Matter of F-P-R-*, 24 I&N Dec. 681 (BIA 2008).

A frivolousness finding, unlike a determination in regard to eligibility for a particular form of relief that is governed by 8 C.F.R. § 1240.8(d), is a preemptive determination which, once made, forever bars an alien from any benefit under the Act, except for withholding of removal. Section 208(d)(6) of the Act; 8 C.F.R. § 1208.20. Because of the severe consequences that flow from a frivolousness finding, the preponderance of the evidence must support an Immigration Judge's finding that the respondent knowingly and deliberately fabricated material elements of the claim. *Id.*; *Matter of Y-L-*, 24 I&N Dec. 151. Under the regulation, plausible explanations offered by the respondent must be considered in the ultimate determination whether the preponderance of the evidence supports a frivolousness finding. *Matter of Y-L-*, 24 I&N Dec. 151.

An applicant who is found to have established past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. The presumption can be rebutted if the DHS proves by a preponderance of the evidence a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution or that the applicant could avoid future persecution by relocating to another part of the alien's country and, under all the circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.13(b)(1). If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well founded. 8 C.F.R. § 1208.13(b)(1); *see also Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008); *Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998).

If the DHS rebuts the presumption, the asylum application will be denied unless the applicant demonstrates compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution, or the applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country. 8 C.F.R. § 1208.13(b)(1)(iii).

For the purposes of determining the reasonableness of internal relocation for 8 C.F.R. § 1208.13(b)(1)(i), (b)(1)(ii), and (b)(2), in cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government sponsored. 8 C.F.R. § 1208.13(b)(3)(i). In cases in which the persecutor is a government or is government sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.13(b)(3)(ii); *see also Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012).

If the evidence indicates that a mandatory denial ground may apply, the applicant shall have the burden of proving by a preponderance of the evidence that he or she did not so act. 8 C.F.R. § 1240.8(d); *see also* 8 C.F.R. § 1208.13(c)(2)(ii). With respect to the mandatory denial ground of firm resettlement, the framework for making firm resettlement determinations focuses exclusively on the existence of an offer of permanent resettlement and allows for the consideration of direct and indirect evidence.

The DHS has the initial burden to make a prima facie showing of an offer of firm resettlement by presenting direct evidence of an alien's ability to stay in a country indefinitely. When direct evidence is unavailable, indirect evidence may be used if it has a sufficient level of clarity and force to establish that the alien is able to permanently reside in the country. An asylum applicant can rebut evidence of an offer of firm resettlement by showing by a preponderance of the evidence that such an offer has not been made or that the applicant's circumstances would render him or her ineligible for such an offer of permanent residence. Evidence that permanent resident status is available to an alien under the law of the country of proposed resettlement may be sufficient to establish a prima facie showing of an offer of firm resettlement, and a determination of firm resettlement is not contingent on whether the alien applies for that status. *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011); *cf. Maharaj v. Gonzales*, 450 F.3d 961, 968-69 (9th Cir. 2006) (en banc) (recounting the history of the firm resettlement doctrine and stating that once the DHS presents evidence of an offer of some type of permanent resettlement, the burden shifts to the applicant to show that the nature of his stay and ties were too tenuous, or the conditions of his residence too restricted, for him to be firmly resettled). A finding of firm resettlement is a factual determination reviewed for substantial evidence. *Maharaj v. Gonzales*, 450 F.3d at 967.

ii. Withholding of Removal

The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of a protected ground. Section 241(b)(3) of the Act; 8 C.F.R. § 1208.16(b).

Section 241(b)(3)(C) of the Act incorporates the standard at section 208(b)(1)(B)(ii) of the Act (added by the REAL ID Act of 2005 and applicable to applications filed on or after May 11, 2005), which states:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

Section 208(b)(1)(B)(ii) of the Act.

If the applicant is determined to have suffered past persecution on account of a protected ground, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. The presumption may be rebutted if the DHS proves by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on a protected ground or that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.16(b)(1); *see also Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008). If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm. 8 C.F.R. § 1208.16(b)(1)(iii).

For the purposes of determining the reasonableness of internal relocation for 8 C.F.R. § 1208.16(b)(1) and (b)(2), in cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government sponsored. 8 C.F.R. § 1208.16(b)(3)(i). In cases in which the persecutor is a government or is government sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.16(b)(3)(ii).

If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply. 8 C.F.R. § 1208.16(d)(2).

iii. Termination of Asylum/Withholding of Removal

The DHS must establish, by a preponderance of evidence, one or more of the grounds set forth in 8 C.F.R. § 1208.24(a) or (b). 8 C.F.R. § 1208.24(f); *see also Matter of A-S-J-*, 25 I&N Dec. 893 (BIA 2012). Impeachment evidence alone is insufficient for the DHS to meet its burden. *Urooj v. Holder*, 734 F.3d 1075, 1078 (9th Cir. 2013).

To terminate a grant of asylum pursuant to 8 C.F.R. § 1208.24 (2013), the DHS must establish, by a preponderance of the evidence, that (1) there was fraud in the alien's asylum application and (2) the fraud was such that the alien was not eligible for asylum at the time it was granted; however, proof that the alien knew of the fraud in the application is not required in order to satisfy the first criterion. *Matter of P-S-H-*, 26 I&N Dec. 329 (BIA 2014).

iv. Withholding/Deferral of Removal under the Convention Against Torture

The burden of proof is on the applicant for withholding of removal under the Convention Against Torture to establish that it is more likely than not that he or she would be tortured, as defined in 8 C.F.R. § 1208.18(a), if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2).

If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply. 8 C.F.R. § 1208.16(d)(2).

With respect to deferral of removal under the Convention Against Torture, an alien who has been ordered removed; has been found under 8 C.F.R. § 1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under 8 C.F.R. § 1208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured. 8 C.F.R. § 1208.17(a).

In properly instituted proceedings at the request of the DHS to terminate deferral of removal status, the burden remains on the applicant to establish that it is more likely than not that he or she would be tortured in the country to which removal has been deferred. 8 C.F.R. § 1208.17(d)(3).

v. Section 203 of NACARA

The burden of proof is on the applicant to establish by a preponderance of the evidence that he or she is eligible for suspension of deportation or special rule cancellation of removal and that discretion should be exercised to grant relief. 8 C.F.R. § 1240.64(a).

Qualified Salvadoran and Guatemalan applicants for special rule suspension or cancellation are presumed to have established the requisite extreme hardship, and the burden of proof shall be on the DHS to establish that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States. The presumption shall be rebutted if the evidence in the record establishes that it is more likely than not that neither the applicant nor a qualified relative would suffer the requisite hardship if the applicant were deported. 8 C.F.R. § 1240.64(d).

vi. Form I-130 Filed by Petitioner with Sexual Abuse of Minor Conviction

When filing a visa petition for an alien, the petitioner has the burden of proving eligibility to so petition. *Matter of Introcaso*, 26 I&N Dec. 304, 307 (BIA 2014). Pursuant to the Adam Walsh Act, an individual who has been convicted of a specified offense against a minor is not eligible to file an alien relative petition. *Id.* The petitioner has the burden to prove that he or she has not been convicted of a specified offense or that, if he or she has, he or she poses no risk to the beneficiary. *Id.*

vii. Post-Conclusion Voluntary Departure

In addition to the statutory elements, the alien must establish by clear and convincing evidence that

the alien has the means to depart the United States and intends to do so. Section 240B(b)(1)(D) of the Act; 8 C.F.R. § 1240.26(d)(1)(iv).

V. Evidentiary Presumptions

A. Presumption of Regularity

The Board has held that government documents are entitled to a presumption of regularity. *Matter of P-N-*, 8 I&N Dec. 456 (BIA 1959). It is the respondent or applicant's burden to overcome this presumption.

B. Similarity of Names

When documentary evidence bears a name identical to that of the respondent, an Immigration Judge may reasonably infer that such evidence relates to the respondent in the absence of evidence that it does not relate to him or her. *See Corona-Palomera v. INS*, 661 F.2d 814 (9th Cir. 1981); *United States v. Rebon-Delgado*, 467 F.2d 11 (9th Cir. 1972); *Matter of Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Leyva*, 16 I&N Dec. 118.

C. Refusal of Alien To Testify

Refusal to testify without legal justification concerning matters of alienage, time and place of entry, and lack of proper documents, justifies the drawing of unfavorable inferences. *Matter of Pang*, 11 I&N Dec. 489 (BIA 1966); *Matter of R-S-*, 7 I&N Dec. 271 (BIA 1956) (finding the respondent's refusal to testify "reliable, substantial and probative evidence supporting a finding that the respondent is deportable"); *Matter of P-*, 7 I&N Dec. 133 (BIA 1956); *Matter of B-*, 5 I&N Dec. 738 (BIA 1954). It is proper to draw an unfavorable inference from refusal to answer pertinent questions after a prima facie case of deportability has been established where such refusal is based upon a permissible claim of privilege, as well as where privilege is not a factor. *Matter of O-*, 6 I&N Dec. 246 (BIA 1954).

"Deportation proceedings are civil proceedings, and in such proceedings an immigration judge may draw an adverse inference from a defendant's silence in response to questioning." *United States v. Solano-Godines*, 120 F.3d 957, 962 (9th Cir. 1997) (citing *United States v. Alderete-Deras*, 743 F.2d 645,647 (9th Cir. 1984), and *United States ex rel. Bilokumsky v. Tod*, 263 U.S. at 154); *see also Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978) ("Petitioners' decision to remain mute during the deportability phase of the hearing was an appropriate exercise of their Fifth Amendment privilege, but by doing so they do not shield themselves from the drawing of adverse inferences that they are not legally in this country and their silence cannot be relied upon to carry forward their duty to rebut the Government's prima facie case.")

Although it is proper to draw an unfavorable inference from a respondent's refusal to answer pertinent questions, the inference may only be drawn after a prima facie case of deportability has been established. *Matter of J-*, 8 I&N Dec. 568 (BIA 1960); *Matter of O-*, 6 I&N Dec. 246 (BIA 1954). In deportation proceedings, the respondent's silence alone, in the absence of any other evidence of record, is insufficient to constitute prima facie evidence of the respondent's alienage and is therefore also insufficient to establish the respondent's deportability by clear, unequivocal, and convincing evidence. *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991). A record should clearly show that an alien was called upon to give testimony, that there was a refusal to testify, and the ground of the refusal. *Matter of J-*, 8 I&N Dec. 568.

With respect to relief, where an alien refused to answer the questions of a congressional committee on the grounds that the answers might incriminate him, the Board held that it might well be inferred that what would be revealed by the answers to such questions would not add to the alien's desirability as a resident. Therefore, he was found not to be a desirable resident of the United States and his application for suspension of deportation was denied as a matter of discretion. *Matter of M-*, 5 I&N Dec. 261 (BIA 1953).

With respect to applicants for discretionary relief, an applicant for the exercise of discretion has the duty of making a full disclosure of all pertinent information. If, under a claim of privilege against self-incrimination pursuant to the Fifth Amendment, an applicant refuses to testify concerning prior false claims to United States citizenship, denial of his application is justified on the ground that he has failed to meet the burden of proving his fitness for relief. *Matter of Y-*, 7 I&N Dec. 697 (BIA 1958). An alien seeking a favorable exercise of discretion cannot limit the inquiry to the favorable aspects of the case and reserve the right to be silent on the unfavorable aspects. *Matter of DeLucia*, 11 I&N Dec. 565 (BIA

1966); *Matter of Y-*, 7 I&N Dec. 697. In asserting his Fifth Amendment privilege against self-incrimination and refusing to disclose such information, the respondent prevents an Immigration Judge from reaching a conclusion as to the respondent's entitlement to adjustment of status, fails to sustain the burden of establishing that he is entitled to the privilege of adjustment of status, and his application is properly denied. *Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

Since the grant of voluntary departure is a matter of discretion and administrative grace, a respondent's refusal to answer questions directed to him bearing on his application for voluntary departure is a factor that an Immigration Judge may consider in the exercise of discretion. *Matter of Li*, 15 I&N Dec. 514 (BIA 1975); *Matter of Mariani*, 11 I&N Dec. 210 (BIA 1965) (same); *see also Matter of DeLucia*, 11 I&N Dec. 565 (same for registry under section 249 of the Act).

D. Oath Requirement as to Asylum Application

When applying for asylum and related relief, the applicant must be questioned under oath, at a minimum, as to the truth of the contents of the application for relief. *Matter of E-F-H-L-*, 26 I&N Dec. 319, 322 (BIA 2014); *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989).

E. Motion To Suppress

In a claim that evidence was allegedly obtained in violation of due process, the burden is on the respondent to establish a prima facie case of illegality before the DHS will be called upon to assume the burden of justifying the manner in which it obtained its evidence. *Matter of Burgos*, 15 I&N Dec. 278 (BIA 1975); *Matter of Wong*, 13 I&N Dec. 820 (BIA 1971); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971).

Where a party wishes to challenge the admissibility of a document allegedly obtained in violation of the due process clause of the Fifth Amendment, the offering of an affidavit which describes how the document or the information therein was obtained is not sufficient to sustain the burden of establishing a prima facie case. If an affidavit is offered which, if accepted as true, would not form a basis for excluding the evidence, the contested document may be admitted into the record. If the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence in question, then the claims must also be supported by testimony. *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); *see also Espinoza v. INS*, 45 F.3d 308 (9th Cir. 1995).

F. Motion To Reopen

In seeking to reopen removal proceedings, the burden is upon the moving party to establish that reopening is warranted. What must be proven and the standard of proof varies depending upon the basis for the motion. *Compare Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (stating that an alien who has already had a hearing on the merits of relief bears a "heavy burden" of showing that new evidence "would likely change the result in the case"), *with Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998) (stating that an alien who seeks reopening for previously unavailable relief must present sufficient evidence to show "a reasonable likelihood of success on the merits"), *and Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996) (same).

An alien seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes. Where the respondent presented no evidence to prove that his conviction was not vacated solely for immigration purposes, he failed to meet his burden of showing that his motion to reopen should be granted. *Matter of Chavez*, 24 I&N Dec. 272 (BIA 2007). *But see Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006).

In order to reopen proceedings to apply for asylum and withholding of removal based on changed country conditions, an alien must meet the requirements in section 240(c)(7)(C)(ii) of the Act and 8 C.F.R. § 1003.23(b)(4)(i). Specifically, the alien must show that the proffered evidence is material and was not available at the prior hearing, reflects changed country conditions arising in the country of nationality, and supports a prima facie case for the underlying relief sought. *Matter of J-G-*, 26 I&N Dec. 161, 169 (BIA 2013). Although the regulations would prohibit a motion to reopen that relies solely on a change in personal circumstances, the regulations do not prohibit a motion to reopen based on evidence of changed country conditions that are relevant in light of the petitioner's changed circumstances. *Chandra v. Holder,* 751 F.3d 1034 (9th Cir. 2014) (citing *Shu Han Liu v. Holder*, 718 F.3d 706, 707 (7th Cir. 2013)); *Yu Yun Zhang v. Holder*, 702 F.3d 878, 879–80 (6th Cir. 2012);

Jiang v. U.S. Att'y Gen., 568 F.3d 1252, 1258 (11th Cir. 2009)).

In order to rescind an order entered in absentia in removal, deportation, or exclusion proceedings, a motion to reopen must be filed within 180 days after the date of the order of removal, deportation, or exclusion if the alien demonstrates that the failure to appear was because of exceptional circumstances, or at any time if the alien demonstrates that he or she did not receive notice or was in Federal or State custody and the failure to appear was through no fault of the alien. 8 C.F.R. § 1003.23(b)(4)(ii)–(iii); *see also Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013).

G. Particular Charges

i. National Security-Related Provisions

As used in the national security-related provisions of the Act, "reasonable grounds" is substantially less stringent than preponderance of the evidence. *Matter of A-H-*, 23 I&N Dec. 774, 789 (A.G. 2005) (citing *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (noting that "probable cause" is a less demanding standard than "preponderance of the evidence"), and *Illinois v. Gates*, 462 U.S. 213, 235 (1983) ("Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable cause] decision.")). The "reasonable grounds for regarding" standard is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security. *Id.*

ii. Termination of Conditional Permanent Resident Status under Section 216 of the Act

Section 216(b)(2) of the Act states that the DHS bears the burden of demonstrating "by a preponderance of the evidence" that a condition for termination described in section 216(b)(1)(A) of the Act is met. *See Matter of Lemhammad*, 20 I&N Dec. 316, 320 (BIA 1991).

The Board notes that in order to be eligible for a waiver under section 216(c)(4)(B) of the Act, the respondent must demonstrate by a preponderance of the evidence that her marriage was entered into in good faith. The proper burden is that of demonstrating the claimed relationship by a preponderance of the evidence. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997) (citing *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988), and *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965)).

iii. Firearms Offenses

In removal proceedings, an alien charged under section 237(a)(2)(C) of the Act, as an alien who has been convicted of an offense involving a firearm, may argue that the DHS has not meet its burden of proof because the statute of conviction does not exclude antique firearms, which are an exception to the Federal definition of a "firearm" in 18 U.S.C. § 921(a) (2012). Where the DHS has presented evidence that an alien has been convicted of an offense involving a firearm, it has met its burden of presenting clear and convincing evidence of deportability, and the burden then shifts to the respondent to show that the weapon was, in fact, antique, or that the statute of conviction has been applied to antique firearms in other cases. *See Matter of Chairez*, 26 I&N Dec. 349, 355-58 (BIA 2014) (clarifying that a State firearms statute that contains no exception for "antique firearms" is categorically overbroad relative to section 237(a)(2)(C) of the Act only if the alien demonstrates that the State statute has, in fact, been successfully applied to prosecute offenses involving antique firearms); *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010). *But see Medina-Lara v. Holder*, No. 13-70491, 2014 WL 5072684, at *6-8 (9th Cir. Oct. 10, 2014).

VI. Special Proceedings

A. Rescission Proceedings

The burden of proof in rescission proceedings is on the DHS to establish rescission by evidence that is "clear, unequivocal, and convincing." *Waziri v. INS*, 392 F.2d 55 (9th Cir. 1968); *Rodriques v. INS*, 389 F.2d 129 (3d Cir. 1968); *Matter of Vilanova-Gonzalez*, 13 I&N Dec. 399 (BIA 1969).

B. Credible Fear Proceedings

Upon review of the asylum officer's negative credible fear determination, if the Immigration Judge concurs with the determination of the asylum officer, the case shall be returned to the Government for removal of the alien. 8 C.F.R. § 1208.30(g)(2)(iv). If the Immigration Judge finds that the alien, other than an alien stowaway, possesses a credible fear of persecution

or torture, the Immigration Judge shall vacate the order of the asylum officer issued on a Form I-860 and the DHS may commence removal proceedings under section 240 of the Act, in which the alien may file asylum and withholding applications. 8 C.F.R. § 1208.30(g)(2)(iv)(B); *see also Matter of X-K-*, 23 I&N Dec. 731, 733 (BIA 2005). If the Immigration Judge finds that a stowaway possesses a credible fear of persecution or torture, the alien shall be allowed to file an application for asylum and withholding before the Immigration Judge in accordance with 8 C.F.R. § 1208.4(b)(3)(iii). 8 C.F.R. § 1208.30(g)(2)(iv)(C).

C. Reasonable Fear Proceedings

Upon the Immigration Judge's review of the asylum officer's negative reasonable fear determination, if the Immigration Judge concurs, the Immigration Judge shall return the case to the Government for removal of the alien. 8 C.F.R. § 1208.31(g). No appeal shall lie from the Immigration Judge's determination. If the Immigration Judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit a Form I-589, and the Immigration Judge shall consider only the application for withholding of removal under 8 C.F.R. § 1208.16 and shall determine whether the removal must be withheld or deferred. 8 C.F.R. § 1208.31(g)(2)(i). The parties may appeal the withholding determination to the Board. 8 C.F.R. § 1208.31(g)(2)(ii).

D. Claimed Status Proceedings

When an alien who is claiming under oath or under penalty of perjury to be a lawful permanent resident, refugee, asylee, or U.S. citizen is ordered removed pursuant to section 235(b)(1) of the Act, the case will be referred to an Immigration Judge for review. 8 C.F.R. § 1235.3(b)(5)(iv). If the Immigration Judge determines that the alien has never been admitted as a lawful permanent resident or as a refugee, has never been granted asylum status, or is not a U.S. citizen, the order issued by the officer will be affirmed and the DHS will remove the alien. *Id.* There is no appeal from that decision. *Id.* If the Immigration Judge determines that the alien was once admitted as a lawful permanent resident or refugee, or was granted asylum status, or is a U.S. citizen, and such status has not been terminated by final administrative action, the Immigration Judge will terminate proceedings and vacate the expedited removal order. *Id.* The DHS may then initiate removal proceedings against an alien, but not against a person determined to be a U.S. citizen. *Id.*

E. Attorney Disciplinary Proceedings

Where disciplinary proceedings are based on a final order of suspension or disbarment, the order creates a rebuttable presumption that reciprocal disciplinary sanctions should follow, which can be rebutted only if the attorney demonstrates by clear and convincing evidence that the underlying disciplinary proceeding resulted in a deprivation of due process, that there was an infirmity of proof establishing the misconduct, or that discipline would result in a grave injustice. *Matter of Kronegold*, 25 I&N Dec. 157 (BIA 2010).

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1. This outline does not address the processes by which an Immigration Judge analyzes the effect of a criminal conviction upon a respondent's immigration status, removability, or eligibility for relief from removal. These complex processes, commonly known as the categorical and modified categorical approaches, are the subject of extensive published decision and learned secondary sources. *See Descamps v. United States*, 133 S. Ct. 2276 (2013); *Taylor v. United States*, 495 U.S. 575 (1990).