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PRACTICE ADVISORY[1]
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THE BURDEN OF PROOF TO OVERCOME THE AGGRAVATED FELONY BAR TO CANCELLATION OF REMOVAL

This practice advisory provides strategies to overcome the aggravated felony bar to cancellation of removal. This issue is relevant for clients who were not subject to removal for an aggravated felony conviction, but may be ineligible for relief based on the aggravated felony bar. The advisory also provides guidance for noncitizens applying for discretionary relief, who may be subject to mandatory grounds of denial.

The information in this advisory is not legal advice and does not substitute for individual advice supplied by a lawyer familiar with a client's case. Readers are advised to check for new cases and legal developments.

I. Introduction: Burden of Proof

The Supreme Court in *Lopez v. Gonzales* held that a state felony conviction for possession of a controlled substance is not an aggravated felony unless considered a felony under federal law. 127 S.Ct. 625 (2006). An aggravated felony conviction is a mandatory ground of denial for cancellation of removal relief. INA § 240A(a)(3). As a result, certain noncitizens previously barred from cancellation of removal are now eligible to apply for cancellation relief.

However, the government may argue that the noncitizen still bears the burden to show that s/he has not "been convicted of any aggravated felony" to qualify for relief. INA § 240A(a)(3). Therefore, it is important for practitioners, advocates, and noncitizens to understand the allocation of the burden of proof in this context. This practice advisory will explain the respective burdens of proof, discuss how much evidence is needed to meet the government's burden, and provide suggested replies to rebut the government's evidence.

A. When does this issue arise?

The burden of proof is especially important when the government argues that the respondent is subject to the aggravated felony bar to

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cancellation. Often, the government is unable to prove the noncitizen is deportable, because the record of conviction lacks evidence to establish that the respondent was convicted of an aggravated felony, which is an essential element of the government's case. Yet, when the respondent applies for cancellation, the government argues that the respondent cannot meet his/her burden to establish that s/he is eligible for cancellation, because the aggravated felony conviction is a bar to relief. Common circumstances include:

Example

The respondent was convicted of cocaine possession, and the immigration judge found him/her removable based on a controlled substance conviction.[2] The government was unable to prove that the conviction was an aggravated felony to establish deportability, because the record of conviction did not state whether the crime involved more than five grams of crack cocaine (thus amounting to an aggravated felony).[3] The respondent applied for cancellation, and the government, using the same record of conviction, argued that the respondent was barred from relief based on an aggravated felony conviction. In this context, allocation of the burden of proof is determinative of whether the respondent is barred from relief.

B. Who has the burden of proof in cases involving discretionary relief?

In applying for relief from removal, the respondent has the statutory burden to "establish that the alien satisfies the applicable eligibility requirements," and to demonstrate that s/he "satisfies the applicable eligibility requirements" and "merits a favorable exercise of discretion." INA § 240(c)(4)(A). To meet this burden, the respondent must comply with "applicable requirements…as provided by law or by regulation." INA § 240(c)(4)(B). The burden of proof in 8 C.F.R. § 1240.8(d) provides that:

> "The respondent 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."

This regulation creates two distinct standards: one for eligibility and the favorable exercise of discretion, and one for mandatory grounds of denial. Whereas the respondent "shall have the burden" to establish affirmative grounds of eligibility, s/he has the burden

[2] INA § 237(a)(2).

[3] INA § 101(a)(43) provides that "[t]he term 'aggravated felony' means…illicit trafficking in controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." A conviction for possession of more than five grams of crack cocaine is punishable pursuant to 18 U.S.C. § 924(c), and therefore amounts to an aggravated felony. *Id.*

to overcome a mandatory bar only "if the evidence indicates" that the bar applies. In effect, this creates a rebuttable presumption: the respondent is presumed not subject to a mandatory bar unless the "evidence indicates" that it applies.[4]

A presumption is a procedural rule of law, which affects the allocation of the burden of proof.[5] The burden of proof consists of two parts: the burden of persuasion and the burden of production.[6] The burden of persuasion is the burden to convince the fact finder that evidence supports a given proposition.[7] This burden remains on the same party without shifting.[8] In contrast, the burden of production is "the obligation to come forward with the evidence at different points in the proceeding."[9] *Schaffer v. Weast*, 126 S.Ct. 528, 533 (2005). This burden may shift between parties depending upon the evidence produced.

Section 1240.8(d) of title 8 of the Code of Federal Regulations establishes a rebuttable presumption in the context of a mandatory bar, and, thus, places the initial burden of production on the government to submit sufficient evidence to "indicate" that the mandatory bar applies.[10] If the government does not meet this burden, the respondent is not subject to the bar. However, if the government provides sufficient evidence, the presumption disappears, and the burden of production shifts to the respondent to establish by a preponderance of the evidence that the mandatory bar does not apply. Throughout this process, the burden of persuasion remains on the respondent.[11]

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[4] A rebuttable presumption is "a presumption which the law requires the trier of fact to make where the prerequisite base facts have been established and where no contrary evidence has been produced." 1-301 G. WEISSENBERGER & J. DUANE, FEDERAL EVIDENCE (hereinafter "FEDERAL EVIDENCE"), § 301.2 (2004). It differs from a conclusive presumption, which cannot be rebutted by evidence from the opposing party. *Id.*

[5] The Federal Rules of Evidence define a presumption as "a procedural device that operates to shift the evidentiary burden of producing evidence (i.e., the burden of going forward) to the party against whom the presumption is directed." 1-301 FEDERAL EVIDENCE, *supra* note 4, § 301.1.

[6] *Schaffer v. Weast*, 126 S.Ct. 528, 533 (2005).

[7] The Supreme Court defined the burden of persuasion as "which party loses if the evidence is closely balanced." *Schaffer*, 126 S.Ct. at 533-34.

[8] *See e.g.*, 1-301 FEDERAL EVIDENCE, *supra* note 4, § 301.1; 2 AMERICAN JURISPRUDENCE ADMINISTRATIVE LAW, § 355 (2d ed. 2006).

[9] *See* 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2487, at 292-94 (J. Chadbourn rev. 1981)(stating that the rule originated from a conflict between judge and jury and required the party to first satisfy judge through burden of production before the matter goes to jury).

[10] The allocation of the burden of proof is similar to the regulatory burden in the context of the firm resettlement bar to asylum, wherein the respondent's burden is triggered "if the evidence indicates" that the bar applies. 8 C.F.R. § 208.13(c)(2)(ii)(2000). The Third Circuit in *Abdille v. Ashcroft* interpreted the regulatory burden, stating that: "the INS bears the initial burden of producing evidence that indicates that the firm resettlement bar applies, and, should the INS satisfy this threshold burden of production, both the burden of production and the risk of non-persuasion then shift to the applicant to demonstrate, by a preponderance of the evidence, that he or she had not firmly resettled in another country." 242 F.3d 477, 491 (3d Cir. 2001).

[11] This is consistent with section 240(c)(4)(A) of the INA, which places the burden on the non-citizen to establish eligibility for relief, and the opinion of the Department of Homeland Security as stated in the Federal Register: "It is well-settled that an alien bears the burden of establishing eligibility for relief or a benefit. This provision [8 C.F.R. § 1240.8(d)] merely reflects the well-settled rule." Comments Relating to Removal Hearings Under Section 240 of the Act, 62 Fed. Reg. 10312, 10322 (March 6, 1997).

C. Who bears the burden of proof in Cancellation of Removal?

Given that cancellation of removal is discretionary relief, 8 C.F.R. § 1240.8(d) provides authoritative guidance on the allocation of the burden of proof.[12] Accordingly, the respondent "shall have the burden" to establish affirmative grounds of eligibility, including: lawful admission as a permanent resident for five years and continuous residence for seven years after having been admitted in any status.[13] However, the regulation creates a rebuttable presumption, regarding mandatory grounds of denial. Thus, the government bears the initial burden of production to prove that the mandatory bar applies, and, absent such evidence, the respondent is not barred from relief.

II. The Government's Burden of Production

A. How much evidence is necessary to "indicate" that the aggravated felony bar applies?

The Ninth Circuit has held that the government's burden of production is equivalent to the burden to prove deportability, placing a high burden on the government to establish that the respondent has been convicted of an aggravated felony.[14] While the Board has not adopted this approach, it has required the government to produce some evidence to satisfy its burden.[15] However, the Board has not defined how much evidence is sufficient to meet the government's burden. In the absence of guidance from the Board, practitioners should consider the meaning of "evidence indicates" in other contexts.[16] Courts have interpreted "evidence indicates" in other regulations to require the government to produce sufficient evidence to "reasonably infer" that the mandatory bar applies. These cases indicate that a conviction record lacking important information does not meet the government's burden.[17] This section further explains these standards.

1. Ninth Circuit Decisions

The Ninth Circuit has equated the government's burden of production to the burden to establish deportability. *Cisneros-Perez v. Gonzales*, 451 F.3d 1053, 1059-60 (9th Cir. 2006). The court, in *Cisneros-Perez*, found that a record of conviction did not meet the government's burden of production if it was not

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[12] Section 240(a) of the INA states that "[t]he Attorney General may cancel removal," and 8 C.F.R. § 1240.20(a) provides that "[a]n application for the exercise of discretion under section 240A of the Act shall be submitted."

[13] Grounds of eligibility are grounds that must be established affirmatively in order to merit relief. INA § 240A. Such grounds are governed by the burden of proof in section 240(c)(4)(A) of the INA, which states that "[a]n alien applying for relief or protection from removal has the burden of proof to establish that the alien to establish that the alien satisfies the applicable eligibility requirements."

[14] *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1067-68 (9th Cir. 2006); *Cisneros-Perez v. Gonzales*, 451 F.3d 1053, 1059-60 (9th Cir. 2006);

[15] *In re S-K-*, 23 I&N Dec. 936, 941 (BIA 2006); *In re R-S-H-*, 23 I&N Dec. 629, 640 (BIA 2003).

[16] 8 C.F.R. § 208.13(c)(2)(ii)(July 27, 1990)(asylum); 8 C.F.R. § 208.16(d)(2) (July 27, 1990)(withholding of removal). *See e.g., Diallo v. Ashcroft*, 381 F.3d 687, 693-94 (7th Cir. 2004); *Rife v. Ashcroft*, 374 F.3d 606, 610-11 (8th Cir. 2004); *Abdille v. Ashcroft*, 242 F.3d 477,490 (3d Cir. 2001).

[17] *See* section II(A)(3) of this practice advisory at page 6.

sufficient to establish deportability.[18] 451 F.3d at 1059-60. The record of conviction lacked important facts needed to establish the mandatory bar applied, and the court reasoned that inferences from the record alone were not sufficient to shift the government's burden.[19] *Id.* at 1059. This approach was also adopted in *Salviejo-Fernandez v. Gonzales*, wherein the court considered whether the respondent was barred from Cancellation based on an aggravated felony conviction. 455 F.3d 1063, 1067-68 (9th Cir. 2006). In deciding whether the conviction amounted to an aggravated felony, the court applied the two-step categorical analysis from *Taylor v. United States*, which the Board uses as a framework to establish deportability.[20] The Ninth Circuit, thus, placed a high burden on the government, and practitioners in the Ninth Circuit should argue that a conviction record lacking facts necessary to determine whether the crime was an aggravated felony does not meet the government's burden, because it is not sufficient to find the respondent deportable.

2. Board of Immigration Appeals Decisions

The Board has no measurable standard about how much evidence the government needs to satisfy its burden of production. However, the Board addressed the issue in two cases and required that the government provide some evidence that a mandatory bar applies to shift the burden to the respondent.[21] In *In re R-S-H-*, the Board held that a "plethora" of evidence was sufficient to "trigger concerns" about the respondent and shift the burden of production.[22] 23 I&N Dec. 629, 640 (BIA 2003). Similarly, in *In re S-K-*, the Board found the government's burden was met by "sufficient evidence" in the record.[23] 23 I&N Dec. 936, 941 (BIA 2006). These two cases involved bars related to national security matters,[24] which traditionally require greater deference to the executive

[18] *Cisneros-Perez* involved the question of whether a conviction amounted to a "crime of domestic violence," therefore barring the respondent from Cancellation of Removal. *Cisneros-Perez*, 451 F.3d at 1053-54. Although the case did not address the aggravated felony bar, the decision is authoritative on the issue of the burden of proof, because a conviction for a "crime of domestic violence" – like the aggravated felony bar - is a mandatory ground of denial and thus governed by 8 C.F.R. § 1240.8(d). INA § 240A(b)(1)(C); INA § 237(a)(2).

[19] The court held that while an "inference can perhaps be made" that the crime involved domestic violence, and thus barred the respondent from Cancellation, an unclear conviction record was not sufficient to shift the burden to the respondent. *Cisneros-Perez*, 451 F.3d at 1059.

[20] The Supreme Court in *Taylor v. United States* articulated a two-part test to determine whether a conviction is an "aggravated felony" for the purposes of the Armed Career Criminal Act. 495 U.S. at 575-56. In *Gonzales v. Duenas-Alvarez*, the Supreme Court applied this test for the first time to removal proceedings. 27 S. Ct. 815, __ (2007).

[21] *See In re S-K-*, 23 I&N Dec. at 936; *In re R-S-H-*, 23 I&N Dec. at 629.

[22] The Board in *In re R- S- H-* held that "DHS produced significant evidence to support its position that the respondent is a danger to our national security" and "this protected information is enough to trigger concerns about the respondent." 23 I&N Dec. at 640.

[23] The Board in *In re S- K-* found that the government met its burden on each element of the material support bar through "sufficient evidence in the record to conclude that the CNF uses firearms and/or explosives to engage in combat with the Burmese military." 23 I&N Dec. at 941-42.

[24] *In re S-K-* involved the terrorism and material support bars to asylum. 23 I&N Dec. at 936. *In re R-S-H-* involved the bar to asylum based on a danger to national security. 23 I&N Dec. at 629-30.

branch.[25] Thus, practitioners should argue that the government's burden in the aggravated bar context is greater, because it does not involve issues of national security.

3. Meaning of "evidence indicates" in the other contexts

Several Circuits have interpreted the language, "evidence indicates," in other regulations, and these cases provide guidance in understanding the government's burden in the aggravated felony context.[26] For example, a noncitizen is barred from asylum if s/he has participated in the persecution of others. INA § 101(a)(42)(B). The statute requires evidence of two elements for the statutory bar to apply, including: (1) the respondent "ordered, incited, assisted, or otherwise participated in" persecution, and (2) the persecution was on account of a protected ground. The burden of proof is governed by 8 C.F.R. § 208.13(c)(2)(ii), and provides that: "If the evidence indicates that one of the above grounds apply [including the persecution of others bar] to the applicant, he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act."[27] In interpreting this regulation, the Ninth Circuit held in *Alvarado v. Gonzales* that the government must produce evidence "sufficient to raise an inference" that the mandatory bar applied to meet its burden.[28] The court required proof on both elements of the mandatory bar before the burden shifted to the respondent. 449 F.3d 915, 930 (9th Cir. 2006).

Applying this principle to the aggravated felony bar, a conviction record lacking essential facts is not sufficient to meet the government's burden, because it lacks evidence of each element necessary to establish that the respondent has been convicted of an aggravated felony. For example, the government argues that the respondent's cocaine conviction amounts to an aggravated felony, barring him/her from cancellation, but the conviction record does not state whether the

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[25] The Court in *Zadvydas v. Davis* acknowledged that "special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. 678, 696 (U.S. 2001).

[26] The Department of Homeland Security has issued two regulations about mandatory bars to asylum and withholding of removal, which contain almost identical language to the regulation governing the aggravated felony bar. 8 C.F.R. § 208.13(c)(2)(ii)(asylum); 8 C.F.R. § 208.16(d)(2)(withholding of removal).

[27] The burden scheme only applies to asylum applications filed before April 1, 1997. 8 C.F.R. § 208.13(c)(2)(ii).

[28] Courts also have interpreted "evidence indicates" in the context of the firm resettlement bar. 8 C.F.R. § 208.13(c)(2)(ii). The Ninth Circuit in *Maharaj v. Gonzales* required the government to provide either direct evidence of an offer of permanent resettlement or evidence of "sufficient force for the IJ reasonably to infer" that the mandatory bar applied. 450 F.3d 961, 976 (9th Cir. 2006). This approach has been adopted by several Circuits. *See e.g., Diallo v. Ashcroft*, 381 F.3d 687, 694 (7th Cir. 2004)(holding that circumstantial evidence cannot be a surrogate for direct evidence if fail to "rise to a sufficient level of clarity and force."); *Abdille v. Ashcroft*, 242 F.3d 477, 490 (3d Cir. 2001)(finding circumstantial evidence admissible only "if they rise to a sufficient level of clarity and force."); *Mussie v. I.N.S.*, 172 F.3d 329, 332 (4th Cir. 1999)(holding that evidence "sufficient to support an inference" that the mandatory bar applies shifts the burden in the absence of evidence to the contrary); *Adballa v. INS*, 43 F.3d 1397, 1399 (10th Cir. 1994)(holding evidence "sufficient to suggest" that mandatory bar applied was enough to meet the government's burden).

crime involved more than five grams of crack cocaine. Like persecution on account of political opinion, the amount of substance is a critical component of determining whether the conviction amounts to an aggravated felony, because the crime is only an aggravated felony if it involved more than five grams.[29] In the absence of such evidence, the record is not "sufficient to raise an inference" that the respondent has been convicted of an aggravated felony.

Further, evidence that merely raises the possibility that the noncitizen has committed an aggravated felony lacks "sufficient force" to meet the government's burden.[30] *Kungys v. U.S.*, 485 U.S. 759, 783-84 (1988)(Brennan, J., concurring). For example, a conviction record may indicate that the crime involved cocaine, but not specify which type of cocaine. While such a record raises the possibility that the conviction involved crack cocaine, amounting to an aggravated felony, it is equally likely that the conviction involved cocaine powder, which would not amount to an aggravated felony. Thus, evidence supporting two contrary assertions of fact is not sufficient for the IJ to "reasonably infer" that the respondent is ineligible.[31]

B. Can the Government use extra-record evidence to meet its burden?

The government may try to admit evidence outside the record of conviction to meet its burden of production. The most common type of evidence is a police report. An upcoming practice advisory will address this issue in more detail and provide arguments to challenge the government's use of extra-record evidence in this context.

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[29] INA § 101(a)(43) provides that "[t]he term 'aggravated felony' means…illicit trafficking in controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." A conviction for possession of more than five grams of crack cocaine is punishable pursuant to 18 U.S.C. § 924(c), and therefore amounts to an aggravated felony. *Id.*

[30] Justice Brennan stated in *Kungys* that: "I wish to emphasize, however, that in my view a presumption of ineligibility does not arise unless the Government produces evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed.... Evidence that simply raises the possibility that a disqualifying fact might have existed does not entitle the Government to the benefit of a presumption that the citizen was ineligibile [sic]." 485 U.S. at 783-84.

[31] Other evidentiary presumptions may also operate at the same time as illustrated by the Ninth Circuit in *Alvarado*, allowing the court to reasonably infer from evidence supporting two conflicting inferences if there is a legal principle permitting the court to do so. 449 F.3d at 930-931. In *Alvarado*, the court considered whether the respondent had persecuted others on account of political opinion and heard testimony that those persecuted were members of the "Shining Path," a Maoist guerilla organization. *Id.* at 930. Although this evidence supported two possible inferences: (1) his actions were motivated by political goals, or (2) his actions were motivated by intelligence gathering objectives, the court found that the government's burden was met, because the court has "repeatedly held that persecution in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion constitutes persecution on account of political opinion, event if the persecution served intelligence-gathering purposes." *Id.* at 930-31 (citations and quotations omitted). This legal principle allowed the court to "reasonably infer" from evidence supporting two opposite inferences. Given the absence of a similar legal principle in the aggravated felony bar context, practitioners should argue that the court cannot "reasonably infer" from evidence supporting contrary findings of fact, and thus, the government's burden is not met.