Shifting Burdens of Proof

Removal Defense
Online Course

American Immigration Lawyers Association

DHS Burden Scenarios

Alienage
8 CFR § 1240.8

Removability as Charged
INA § 240(c)(3)(A); 8 CFR § 1240.8(a)

Standard: "clear and convincing evidence"
Convictions: official records

LPR Who Traveled, Charged as "Arriving Alien" Subject to INA 212 Criminal Grounds

DHS has burden to prove that LPR is within categories of "seeking admission"

Respondent Burden Scenarios

Eligibility for Relief
INA § 240(c)(4)(A)(i)

Immigrant bears burden to establish eligibility by clear and convincing evidence

See *Pereida v. Wilkinson,* 141 S.Ct. 754 (2021), Matter of Almanza, 24 I&N Dec. 771 (BIA 2009): If an ambiguous outcome after modified categorical approach – immigrant loses, as can't clearly meet burden of proof to show eligibility

Stop Time

Need to show clear and convincing eligibility: legal matters (i.e. "crimmigration" theory) and factual matters (documenting last entry, continuous residence)

See *Barton v. Barr*, 140 S.Ct. 1442 (2020): Clock is stopped on the date of the commission of any offense that would trigger inadmissibility, regardless of whether client is factually seeking an admission.

NOTE: Remember, clock is not stopped by 237 offenses that are not also grounds of inadmissibility

Worthiness of Discretion
INA § 240(c)(4)(A)(ii)

Production, to Sustain Burden, Corroboration
INA § 240(c)(4)(B)

Overcome Presumption That a Marriage Entered While in Proceedings Is for Purpose of Evading Immigration Laws
8 CFR § 235.1(c)(8)

NOTE: **Asylum** has complicated burden shifting arrangements depending on elements of the case (past persecution, etc.), covered elsewhere.