



Removal Defense

Online Course

American Immigration Lawyers Association

Module 2: Analyzing the NTA

Exercise: Shifting Burdens During Pleadings and Demonstrating Eligibility for Discretionary Relief

Faculty Response

At a consultation, your detained client's partner presents you with some photocopied documents, including a 2017 Notice to Appear (scheduling no hearing, other than "to be determined") and a 2019 Notice of Hearing (scheduling hearing for next Friday). According to the client's partner, the client does not possess any conviction records, and believes that DHS never served her with copies. She wants you to go with the detainee to court.

The details of Notice to Appear are:

Factual Allegations:

1. You are not a citizen of the United States.
2. You are a citizen of Canada.
3. You were admitted to the United States on or about January 1, 2010, as a B1/B2 temporary visitor, for a stay not to exceed July 1, 2010.
4. On May 1, 2015, you were convicted in Miami, Florida, for the offense of cannabis possession, in violation of Fla. Stat. 893.13(6)(a) (cannabis over 20 grams)

Legal Charges.

Based on the foregoing, the DHS alleges that you are:

1. Removable pursuant to INA § 237(a)(1)(C) (Violation of condition of entry)
2. Removable pursuant to INA § 237(a)(2)(B)(i) (Any controlled substance violation)



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Questions:

From the moment the client enters your office, what steps might you take to be thoroughly prepared to argue her case next week, and beyond, in order to fully utilize every aspect of the law to help your client?

What relief might the client have available to her?

What extra facts are needed to better establish relief?

What procedural arguments might you make?

How do the facts intersect with the statutory burden(s) of proof?

Faculty Response:

- Prepare for court by immediately filing a FOIA request of DHS and EOIR
- Immediately request to review the Record of Proceedings
- At hearing, if you have not reviewed documents, you may request *again* to review DHS or EOIR copies of any documents
- Object to jurisdiction vesting, based on the non-statutory NTA
- Hold the DHS to its burden of proof, re: the existence of the conviction.
- NOTE: Termination is not possible, based on the overstay charge, even if DHS withdraws the controlled substance ground of deportability
- Find out if “partner” might mean “spouse” and if not, if marriage is possible
- Request bond
- Burden is on the government to show that the offense triggers mandatory detention



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If the respondent marries the partner:

- Burden is on the client to overcome the presumption that the marriage was entered for purpose of the immigration benefit, since it was entered during proceedings
- Burden is on the client to show that the I-130 was filed diligently
- Burden is on the client to prove that she is admissible, since “adjustment of status” is relief and requires being admissible
- Burden is on the client to prove conviction may be waived with INA 212(h) (i.e. that it relates to under 30 grams of cannabis)
- Burden is on the client to establish extreme hardship to a qualifying relative
- Burden is on the client to establish that she is worthy of favorable exercise of discretion