BURDENS OF PROOF IN REMOVAL PROCEEDINGS

JUDGE JACK H. WEIL

Burdens of Proof in Removal Proceedings

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There are three classes of aliens in removal proceedings. These are: 1) arriving aliens, 2) aliens present without admission or parole (sometimes referred to as EWIs, PWIs, or PWAs), and 3) admitted aliens.

DHS notes the class to which an alien belongs at the top of the Notice to Appear. It is important, however, to review their determination as they are often incorrect.

The determination as to which class an alien belongs is important because it affects the burden of proof in removal proceedings and also because it affects whether the immigration judge has jurisdiction to redetermine bond. An IJ has no jurisdiction to redetermine bond in the case of an arriving alien.

The decision as to which of the above classes an alien belongs is a conclusion of law. Therefore, I do not ask the alien to plead to that determination when pleading to the NTA. Instead, I draw the conclusion myself based upon the pleadings, evidence, and the charge of removal.

As mentioned, the determination as to which class an alien belongs affects the burden of proof in removal proceedings. See, INA 240(c)(2)&(3). Below is a description of the burden or standard of proof required and who bears the burden of proof in each of the three listed classes of cases:

Admitted Aliens

The Department of Homeland Security has the burden of establishing by clear and convincing evidence that the alien who has been admitted to the United States is removable. INA240(c)(3)(A). This means that DHS must prove by clear and convincing evidence both that the respondent is an alien and that the removal charge is true.

Admitted aliens are charged with removability under INA section 237.

Aliens Present Without Admission or Parole (or who arrive at a time or place in violation of law)

The Department of Homeland Security always has the burden to prove by clear and convincing evidence that the respondent is an "alien."

Admission of birth abroad gives rise to a rebuttable presumption that the respondent is an alien. Accordingly, if, in pleading to the NTA, the respondent

admits the factual allegation that he is a native (i.e., born in) a country that is not the United States or a territory or possession of the United States, it is presumed that the respondent is an alien. Respondent must be afforded an opportunity to rebut this presumption. If respondent fails to rebut the presumption, then alienage is established and DHS has met their burden of proving by clear and convincing evidence that the respondent is an alien.

For aliens present without admission or parole, once DHS proves that the respondent is an alien, the burden is on the respondent to prove by clear and convincing evidence that he/she is lawfully present in the United States pursuant to a prior admission. INA 240(c)(2)(B).

A simple way to state the burden of proof for aliens present without admission or parole is that the Department of Homeland Security must prove by clear and convincing evidence that the respondent is an alien and then the burden is on the respondent to prove by clear and convincing evidence that he/she is lawfully present in the United States pursuant to a prior admission.

The present without admission or parole class of aliens is charged with removability under INA section 212 and most frequently under INA section 212(a)(6)(A)(i).

Arriving Aliens

An arriving alien or applicant for admission bears the burden of proving that he/she is clearly and beyond doubt entitled to be admitted and is not inadmissible under INA section 212. INA 240(c)(2)(A).

It is clear that the arriving alien bears the burden of proving that he/she is clearly and beyond a doubt entitled to admission. It is undisputed that undocumented aliens and non-immigrant aliens seeking admission are arriving aliens and therefore must prove clearly and beyond a doubt that they are entitled to admission.

The issue becomes more complicated, however, when the respondent is an alien lawfully admitted for permanent residence. This is because INA 101(a)(13)(C) states that an alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking admission into the United States for the purposes of the immigration laws..." Accordingly, a lawful permanent resident who is coming to a port of entry and requesting admission is generally not regarded as seeking admission and therefore, subject to the caveat below, is not subject to the grounds of inadmissibility contained in INA section 212.

However, the law states that certain lawful permanent residents listed in INA 101(a)(13)(C)(i)-(vi) are regarded as seeking admission and therefore are subject to the grounds of inadmissibility under INA 212. Examples of lawful permanent

residents who are regarded as seeking admission and therefore regarded as "arriving aliens" subject to the grounds of inadmissibility under INA 212 include aliens who have abandoned or relinquished their lawful permanent resident status, aliens absent from the United States for a continuous period in excess of 180 days, aliens who have engaged in illegal activity after having departed the United States, certain aliens who have committed an offense identified in INA 212(a)(2) unless they have been granted relief under 212(h) or 240A(a), or aliens attempting to enter at a time or place in violation of law or who have not been admitted to the United States after inspection. This is a summary of INA 101(a)(13)(C)(i)-(vi) for illustrative purposes. A more careful reading of INA 101(a)(13) is in order.

Accordingly, at the risk of over-simplification, the general rule is that a lawful permanent resident is not regarded as seeking admission to the United States nor is he/she subject to the grounds of inadmissibility in INA 212 unless he/she falls into one of the classes of aliens described in INA 101(a)(13)(C)(i)-(vi). If the lawful permanent resident is described in INA 101(a)(13)(C)(i)-(vi), then he/she is an arriving alien and subject to the same grounds of inadmissibility under INA 212(a) as all other aliens such as non-immigrants and undocumented applicants for admission.

This returns us to the question of who bears the burden of proving that an alien lawfully admitted for permanent residence is an "arriving alien" and therefore subject to the grounds of inadmissibility under INA 212?

I take the position that if the evidence clearly demonstrates that the respondent is a lawful permanent resident, the burden is on DHS to show clearly and convincingly that the respondent falls within one of the categories of aliens listed in 101(a)(13)(C)(i)-(vi). For example, I require DHS to come forward with proof that the alien "has engaged in illegal activity" or has "committed an offense identified in section 212(a)(2)" and then allow the respondent to respond to it. I do not believe that an alien should be required to prove a negative (e.g., that he/she has not engaged in unlawful activity after having departed the United States) without DHS providing some evidence as to what unlawful act the alien is believed to have committed following his/her departure. I believe that the "an alien lawfully admitted for permanent residence shall not be regarded as seeking an admission" language of the statute and due process supports this position.

To summarize the burden of proof for arriving aliens, if: 1) the respondent is not lawfully admitted for permanent residence or 2) the respondent is lawfully admitted for permanent residence but DHS establishes by clear and convincing evidence that the respondent falls within one of the categories listed in 101(a)(13)(C)(i)-(vi), then the respondent is an arriving alien and must prove clearly and beyond a doubt that he/she is entitled to admission. If the respondent is a lawful permanent resident and DHS fails to prove by clear and convincing evidence that the respondent falls within one of the categories listed in

101(a)(13)(i)-(vi), then I would conclude that the respondent is not an arriving alien, not sustain the INA 212 charge and terminate the proceeding.

Please be advised the above summary represents my legal conclusions and is subject to interpretation.