No. 24- ____

IN THE

Supreme Court of the United States

SINTIA DINES NIVAR SANTANA,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A noncitizen previously admitted to the United States may obtain relief from removal by having her status adjusted to that of a lawful permanent resident. The question presented is what standard of proof applies where such an individual seeks to prove eligibility for such relief.

RELATED PROCEEDINGS

Nivar Santana v. Garland, No. 22-1147, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on February 2, 2024. Order denying rehearing entered on April 9, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Sintia Dines Nivar Santana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 92 F.4th 491 and reprinted in the Appendix to the Petition ("Pet. App.") 1a–14a. The decision of the Board of Immigration of Appeals is unreported but reprinted at Pet. App. 16a–23a. The decision of the immigration judge is unreported but reprinted at Pet. App. 24a–31a.

JURISDICTION

The court of appeals entered its judgment on February 2, 2024, Pet. App. 1a, and denied a timely petition for rehearing on April 9, 2024, Pet. App. 15a. On June 12, 2024, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to and including August 7, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case concerns several interrelated statutory provisions, most notably 8 U.S.C. §§ 1101(a)(13), 1229a, and 1255(a). These provisions are reprinted at Pet. App. 32a–47a.

INTRODUCTION

The Immigration and Nationality Act (INA) distinguishes between noncitizens who were previously admitted to this country and those who were not, imposing more exacting burdens on the latter group. The INA requires noncitizens seeking admission to demonstrate that they are "clearly and beyond doubt" admissible—a standard that is arguably even more exacting than "beyond a reasonable doubt" in criminal prosecutions. *See* 8 U.S.C. § 1229a(c)(2)(A); 8 C.F.R. § 1240.8(b)–(c). But those who were previously admitted and seek "relief from removal" need not clear that bar. Instead, they must prove their eligibility for such relief only by a preponderance of the evidence. *See* 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d).

The INA also defines who is an applicant for "admission." The statutory definition of admission refers to "lawful entry" into the country. *See* 8 U.S.C. § 1101(a)(13)(A). A noncitizen who seeks to physically enter the country for the first time is therefore an applicant for admission. In addition, certain noncitizens, though already physically present within the country—because they entered unlawfully, for example—are "treated as" applying for admission. *Id.* § 1225(a)(1); *see also, e.g.*, *id.* § 1101(a)(13)(B).

The question presented is how the Board of Immigration Appeals (BIA) treats *another* group of individuals—namely, those who were already admitted and who now seek relief from removal based on an adjustment to lawful permanent resident status. Notwithstanding the restrictive statutory definition of "admission," the BIA treats those noncitizens as "applicants for admission" and thus subject to the "clearly

and beyond doubt" standard. *Matter of Bett*, 26 I. & N. Dec. 437, 440 (BIA 2014); Pet. App. 9a–10a.

Relying on the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Fourth Circuit accepted this "legal fiction" and therefore adopted the clearly and beyond doubt standard. Pet. App. 10a–11a. As the court of appeals acknowledged, its decision deepened a circuit split on this standard-of-proof question. *Id.* 11a–12a. The Ninth Circuit holds that the INA unambiguously imposes the preponderance standard in these circumstances. The Second, Sixth, Eighth, and Tenth Circuits—and now the Fourth, too—disagree.

This Court should at the very least grant, vacate, and remand in light of *Loper Bright Enters. V. Raimondo*, 603 U.S. ___ (June 28, 2024), which overruled the *Chevron* doctrine. Alternatively, the Court should grant plenary review to resolve the split among the courts of appeals. Because some courts have read the INA as the Fourth Circuit did here without invoking *Chevron*, the split may well persist even after *Loper Bright*. The question presented also affects thousands of noncitizens every year and is deeply important. In this case, the BIA's demanding standard of proof resulted in an order of removal against a noncitizen who has "resided in the United States without any apparent problem for more than two decades," raising a "distinguished son who has served honorably in the United States Army." Pet. App. 14a n.3. And the BIA's theory defies Congress's express line drawing in the INA. The decision below should not be allowed to stand.

STATEMENT OF THE CASE

A. Legal background

Noncitizens who arrive at ports of entry but are inadmissible can be removed from this country. 8 U.S.C. § 1229a(a)(2); *see also id.* § 1182. The same is true (as more directly relevant here) of those who were admitted in the past but overstay their visas, commit certain crimes, or fall into other specified categories. *Id.* § 1227(a).

Section 1229a of the INA governs proceedings for deciding "whether an alien is removable from the United States." 8 U.S.C. § 1229a(c)(1)(A). Such proceedings occur in two stages. At the first stage, the question is whether the noncitizen is removable, and the procedure for answering that question depends on whether the noncitizen has been previously admitted to the country. Noncitizens who were not previously admitted must prove "clearly and beyond doubt" that they are entitled "to be admitted." 8 U.S.C. § 1229a(c)(2)(A). By contrast, for noncitizens who *were* previously admitted, the Government bears the burden of proving removability by clear and convincing evidence. *Id.* § 1229a(c)(3). If the noncitizen is found to be removable, the question at the second stage becomes whether the noncitizen is eligible for "relief from removal" under Section 1229a(c)(4). Such relief can take many forms, including asylum, cancellation of removal, voluntary departure, or—most relevant here—adjustment of status to lawful permanent resident. 8 U.S.C. §§ 1158, 1229b, 1229c, 1255.

Adjustment of status is a discretionary form of relief that permits noncitizens residing in the United

States to obtain permanent resident status. 8 U.S.C. § 1255(a). Most often, adjustment of status occurs after a family member who is a U.S. citizen petitions the government to adjust the noncitizen's status. Frequently, too, the noncitizen is a trained professional or skilled worker whose employer wants her to become a permanent resident. An applicant for adjustment of status must meet the eligibility criteria set forth in Section 1255(a), which include, among other things, that the noncitizen was previously "admitted or paroled" into the country (that is, she entered the United States lawfully); is "eligible to receive an immigrant visa"; and is "admissible to the United States for permanent residence." *Id.*

When a noncitizen in removal proceedings seeks relief under Section 1229a(c)(4)—based on an adjustment of status or some other ground—she bears the "burden of proof" to show her eligibility for relief. 8 U.S.C. § 1229a(c)(4). And the default standard of proof in immigration proceedings is preponderance of the evidence. *See, e.g.*, USCIS Policy Manual Chapter 4 – Burden and Standards of Proof (last updated June 28, 2024); Charles Gordon *et al.*, 6 Immigration Law and Procedure § 72.04 (2024); *see also Woodby v. INS*, 385 U.S. 276, 285 (1966) (observing that preponderance standard "generally" prevails). Accordingly, the Department of Justice recognizes that a noncitizen seeking "[r]elief from removal" must establish eligibility for such relief—*i.e.*, that "the grounds for mandatory denial of the application" are inapplicable—by "a preponderance of the evidence." 8 C.F.R. § 1240.8(d).

The BIA, however, has taken the position that a different standard of proof—"clearly and beyond

doubt"—governs where a noncitizen seeks relief from removal based on an adjustment of status. *Matter of Bett*, 26 I. & N. Dec. 437, 440 (BIA 2014). The BIA reasons as follows: One criterion for obtaining an adjustment of status, as noted above, is that the noncitizen "is *admissible* to the United States for permanent residence." 8 U.S.C. § 1255(a)(2) (emphasis added). Therefore, according to the BIA, someone seeking relief from removal based on an adjustment of status should be "assimilated to the position of an applicant" for "admission" to this country. Pet. App. 10a; *see also id.* 9a-10a (collecting BIA cases). And the standard of proof for obtaining *admission* to this country is "clearly and beyond doubt." 8 U.S.C. § 1229a(c)(2)(A).

The question presented here is whether the BIA is right that the heightened standard of proof in Section 1229a(c)(2)(A), rather than the preponderance standard under Section 1229a(c)(4)(A), governs in this situation.

B. Factual and procedural history

1. Petitioner Sintia Dines Nivar Santana is a citizen of the Dominican Republic who was admitted to the United States in 2000. Pet. App. 2a. She and her son entered the United States pursuant to visitor visas, joining immediate family members who already resided in the country. Her mother, brother, sister, and stepdaughter are all U.S. citizens.

Petitioner and her son built lives in North Carolina. As an elder-care service provider, petitioner "performed important work in an understaffed and overworked profession." Pet. App. 14a n.3. Her supervisors at her former employer, Golden Horizons,

described her as one of the "most outstanding caregivers, skilled and caring, always going above and beyond." *Id.* (quoting CA4 J.A. 190). Petitioner's son served in the U.S. Army and "was naturalized through honorable service." *Id.* 2a.

After his naturalization, petitioner's son submitted a "Petition for Alien Relative" to the U.S. Citizenship and Immigration Services (USCIS), seeking to have petitioner's status adjusted to that of a lawful permanent resident. Pet. App. 2a–3a. USCIS denied petitioner's application in 2016, finding "that she was inadmissible for falsely claiming to be a United States citizen when she executed the employment eligibility form" for her elder-care job. *Id.* 3a; *see* 8 U.S.C. § 1182(a)(6)(C)(ii).

2. Shortly thereafter, the Department of Homeland Security (DHS) charged petitioner as deportable under 8 U.S.C. § 1227(a) and initiated removal proceedings against her. Pet. App. 3a, 25a. Petitioner conceded that she was removable because she had overstayed her visitor visa. Pet. App. 3a. But she renewed her request for adjustment of status as a ground for obtaining relief from removal. *Id.*

As in the earlier proceeding, DHS maintained petitioner was ineligible for adjustment because she had allegedly lied about her citizenship to obtain employment. To support this contention, DHS produced a single document: an unauthenticated copy of a Form I-9, allegedly signed by petitioner. Pet. App. 5a, 25a. The form contained a checked box attesting that she was "[a] citizen or national of the United States." *Id.* 3a. Even though DHS had failed to submit this

document before the required deadline, the immigration judge (IJ) accepted it into evidence. *Id.* 4a–5a.

Petitioner testified in response that "she did not check the box claiming citizenship on the Form I-9." Pet. App. 29a–30a. Two supervisors from Golden Horizons also testified that they did not believe petitioner checked the box. *Id.* 5a–6a, 27a. Instead, each supervisor attested that the other was responsible. *Id.* Indeed, one of them had seen the other "do [that to] other documents." *Id.* 5a. Both stated that petitioner "had never claimed to be a citizen," and one noted that petitioner had in fact "disclosed" that "she was *not*" a U.S. citizen. *Id.* 5a–6a (emphasis added).

Petitioner argued the proper standard of proof to resolve this factual issue was "preponderance of the evidence"—the standard that even the Department of Justice recognizes governs applications for relief from removal. Pet. App. 4a. The IJ disagreed and applied the "clearly and beyond doubt" standard, which governs applications for admission. *Id.* Under this heightened standard, the IJ found petitioner's evidence "insufficient . . . to meet her burden of proof" that she did not falsely claim on the I-9 form that she was a U.S. citizen. *Id.* 29a–30a. And relying solely on this finding, he held that petitioner was ineligible for adjustment of status as a form of relief from removal. *Id.* 30a.

3. Petitioner appealed to the BIA, arguing that the IJ should have applied the preponderance standard under Section 1229a(c)(4)(A). Pet. App. 18a. Because petitioner was admitted to the United States years ago, she maintained, "she is not an applicant for admission" under Section 1229a(c)(2)(A). *Id.*

The BIA disagreed and dismissed petitioner's appeal. Pet. App. 23a. It reiterated its previous position that an "applicant for adjustment of status is in a similar position to a non-citizen applying for admission." *Id.* 18a–19a. Accordingly, the BIA "assimilated" petitioner from the position of someone seeking relief from removal into the position of an applicant for admission at a port of entry. *Id.* 9a–10a, 18a–19a. The BIA then reaffirmed its view that Section 1229a(c)(2)(A)'s "clearly and beyond doubt" standard governs in this situation. *Id.* 19a. Applying that standard, the BIA upheld the IJ's determination that petitioner "cannot meet her burden of proof" because the record did not establish "'clearly and beyond a doubt' that she did not make a false claim to U.S. citizenship on the Form I-9 that she submitted for employment with Golden Horizons." *Id.* 23a.

4. Petitioner sought judicial review in the Fourth Circuit. Pet. App. 2a. In the court of appeals, she renewed her contention that the BIA erred by requiring her "to establish her admissibility 'clearly and beyond doubt,' rather than by a preponderance of the evidence." *Id.*

The Fourth Circuit rejected this argument. The court of appeals recognized that the BIA's "assimilation" approach rests on a "legal fiction," because a noncitizen who was previously admitted to the country and seeks relief from removal is not actually an applicant for "admission" to the country. Pet. App. 10a. After all, such a person entered the country lawfully and continues to be "physically located in the United States." *See id.* But the Fourth Circuit accepted that fiction because it believed that the BIA's

interpretation was "entitled to deference by the courts." *Id.* 10a–11a. In the Fourth Circuit's view, the BIA could reasonably adopt its assimilation theory to "effectuate" the requirement in Section 1255(a)(2) that applicants for adjustment of status prove they are "admissible." *Id.* 9a, 11a. And "[b]eing assimilated to the position of an applicant for admission," it held, "requires a noncitizen to satisfy the statutory mandate set forth in [Section] 1229a(c)(2)(A)"—*i.e.*, the clearly and beyond doubt standard. *Id.* 10a.

In so holding, the Fourth Circuit acknowledged that the Ninth Circuit reads the INA differently and applies the "preponderance of the evidence" standard. Pet. App. 11a-12a. But the Fourth Circuit adopted the position of the Second, Sixth, Eighth, and Tenth Circuits, deepening a circuit split over the proper standard of proof in this situation. *Id.*

5. The Fourth Circuit subsequently denied rehearing en banc. Pet. App. 15a.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are split four-to-one as to the proper standard of proof where a noncitizen, who was previously admitted to the United States, seeks relief from removal based on an adjustment of status. Had petitioner's immigration proceedings arisen in the Ninth Circuit—as more than half of immigration cases do—she could have established her eligibility for relief by a preponderance of the evidence. But because her case arose in the Fourth Circuit, she was required to demonstrate her eligibility clearly and beyond doubt.

At a minimum, the Court should grant the petition, vacate the decision below, and remand for further consideration in light of *Loper Bright Enters. v. Raimondo*, 603 U.S. ___ (2024). Alternatively, this Court should use this case to resolve the split over this important question of immigration law.

I. At a minimum, the Court should grant, vacate, and remand in light of *Loper Bright*.

Citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court below posited that "[t]he BIA's interpretation [of the INA] 'must be given controlling weight,'" unless arbitrary, capricious, or manifestly contrary to law. Pet. App. 10a-11a (citation omitted). Accordingly, the panel concluded merely that petitioner "ha[d] not shown" that the BIA's decision to apply the clearly and beyond doubt standard "was arbitrary, capricious, or contrary to law." *Id.* 11a. The panel did not ask whether the BIA's interpretation of the INA was correct.

By assigning "controlling weight" to the BIA's interpretation of the INA, the Fourth Circuit contravened this Court's intervening decision in *Loper Bright Enters. V. Raimondo*, 603 U.S. ___ (2024), which overruled *Chevron*.

1. In *Loper Bright*, this Court instructed judges to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id.* at ___ (slip op. 35). In so holding, the Court rejected the "fiction" at the core of *Chevron*, *i.e.* "that statutory ambiguities are implicit delegations to agencies." *Id.* at *15. That presumption, the Court

explained, "is misguided because agencies have no special competence in resolving ambiguities. Courts do." *Id.*

Since issuing *Loper Bright*, this Court has vacated and remanded numerous decisions in which courts of appeals invoked *Chevron* deference, directing the courts to reconsider those decisions in light of *Loper Bright*.[1] And the Court has done so in immigration cases even when the Government argued that the BIA's construction of the INA was correct without *Chevron* deference.[2]

2. This Court should follow the same course here and vacate the decision below. The Fourth Circuit's decision reflects exactly the mistaken understanding of the judicial role that *Loper Bright* aimed to correct. Even under *Chevron*, courts were required to "employ[] traditional tools of statutory construction" to "try to resolve any ambiguity in the statute" before affording deference. *Chevron*, 467 U.S. at 843 n.9; Brett M. Kavanaugh, *Keynote Address: Remarks at Notre Dame Law School*, 98 Notre Dame L. Rev. 1849, 1850–52 (2023). All the more so where, as here, the question presents "a pure question of statutory

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[1] *See, e.g.*, *Diaz-Rodriguez v. Garland*, No. 22-863; *Bastias v. Garland*, No. 22-868; *Edison Elec. Inst. v. FERC*, No. 22-1246; *Foster v. Dep't of Agric.*, No. 23-133; *Lissack v. Commissioner*, No. 23-413*; Cruz Cruz v. Garland*, No. 23-538; *United Nat. Foods, Inc. v. NLRB*, No. 23-558; *KC Transport, Inc. v. Su*, No. 23-876, *Solis-Flores v. Garland*, No. 23-913.

[2] *Compare* Resp. Br. at 9, *Cruz Cruz v. Garland* (filed Feb. 14, 2024); Resp. Br. at 7–10, *Bastias v. Garland*, No. 22-868 (filed May 23, 2023); Resp. Br. at 11–13 & n.3, *Diaz-Rodriguez v. Garland*, No. 22-863 (filed May 23, 2023).

construction for the courts to decide," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)—one that has not been expressly delegated to any agency. But the Fourth Circuit never asked whether the statute was ambiguous; its first and only question was whether the interpretation was arbitrary or capricious. Pet. App. 10a–11a.[3] Had the Fourth Circuit engaged thoroughly with the text, it would have concluded that the preponderance standard applies. *See infra* at 21–31.

II. Alternatively, the Court should grant plenary review to establish the proper standard of proof in this setting.

As the Fourth Circuit acknowledged, its decision here deepened a square split over what standard of proof applies where a noncitizen previously admitted to the United States seeks relief from removal based on adjustment of status. Pet. App. 12a. If the Court does not GVR here, it should grant plenary review to resolve that conflict.

A. There is a square split over the issue.

1. The Ninth Circuit holds that the "preponderance of the evidence" standard governs where a noncitizen previously admitted to the United States

[3] The Fourth Circuit also looked to its previous decision in *Dakura v. Holder*, 772 F.3d 994 (4th Cir. 2014), which had stated that the "clearly and beyond doubt" standard applies to noncitizens seeking adjustment of status as relief from removal. Pet. App. 11a n.2. But the panel below was careful to note that *Dakura* was also "spawned by the BIA." *Id.* As the panel explained, *Dakura* relied on a "chain of authority" that traces back to "the 'assimilation' history of the BIA." *Id.* 11a. The Fourth Circuit thus left no doubt the BIA's interpretation of the INA was "significant here." *Id.* 10a.

seeks relief from removal based on adjustment of status. In *Romero v. Garland*, 7 F.4th 838 (9th Cir. 2021), the Ninth Circuit reasoned that because the Section 1229a(c)(4)(A) requires noncitizens seeking "relief from removal" to prove their eligibility only by a preponderance of the evidence, that standard controls in this situation. *Id.* at 841.

In so holding, the Ninth Circuit expressly rejected the BIA's position that the "clearly and beyond doubt standard" under Section 1229a(c)(2)(A) should apply instead. *Romero*, 7 F.4th at 841. As that court explained, Section 1229a(c)(2)(A) "unambiguously applies only to applicants for admission." *Id.* And a noncitizen who was previously admitted does not become an "applicant for admission" simply because she must show that she satisfies the criteria for admissibility. *Id.*

2. In direct contrast, the Fourth Circuit has now expressly rejected the "preponderance" standard and held that the "clearly and beyond doubt" standard indeed governs in this context. Pet. App. 10a. Following the BIA's lead, the Fourth Circuit holds that noncitizens who were previously admitted and now seek an adjustment of status should be "assimilated" to the position of applicants for admission to "effectuate" the requirement in Section 1255(a)(2) that such applicants prove they are "admissible." *Id.* 9a, 11a.

The Second, Sixth, Eighth, and Tenth Circuits likewise apply the clearly and beyond doubt standard where noncitizens who were previously admitted later seek relief from removal based on an adjustment of status. *See Crocock v. Holder*, 670 F.3d 400, 403 (2d Cir. 2012); *Matovski v. Gonzales*, 492 F.3d 722, 738

(6th Cir. 2007); *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008); *Kechkar v. Gonzales*, 500 F.3d 1080, 1085 (10th Cir. 2007). Take the Eighth Circuit's decision in *Kirong*. As here, the petitioner in that case argued that the preponderance standard applied because he was "not an applicant for admission." *See* 529 F.3d at 804. The Eighth Circuit disagreed. It asserted that the petitioner was "in a similar position as an alien seeking entry into the United States." *Id.* (citing *Ruiz-Almanzar v. Ridge*, 485 F.3d 193, 197–98 (2d Cir. 2007)). The Eighth Circuit thus held that the BIA had "correctly determined that [the petitioner] was required to prove clearly and beyond doubt that he was admissible and, therefore, eligible for adjustment of status." *Id.*

These courts of appeals have reiterated their position many times since. *E.g.*, *Ronga v. Holder*, 593 F. App'x 57, 58 (2d Cir. 2014); *Mwamlenga v. Sessions*, 731 F. App'x 473, 476 (6th Cir. 2018); *Bazzi v. Holder*, 746 F.3d 640, 643 (6th Cir. 2013); *Ferrans v. Holder*, 612 F.3d 528, 531 (6th Cir. 2010); *Godfrey v. Lynch*, 811 F.3d 1013, 1017–18 (8th Cir. 2016); *Hashmi v. Mukasey*, 533 F.3d 700, 702–03 (8th Cir. 2008); *Mwagile v. Holder*, 374 F. App'x 809 (10th Cir. 2010).

3. The split over the proper standard of proof may well persist notwithstanding this Court's abolition of the *Chevron* doctrine.

The Ninth Circuit has held that the INA "unambiguously" forecloses the BIA's "assimilation" theory and requires courts to apply the preponderance standard here. *Romero*, 7 F.4th at 841. Since *Romero*, the Ninth Circuit has confirmed that "8 U.S.C. § 1229a(c)(2)'s 'clearly and beyond doubt' standard is

never applicable to aliens . . . who are seeking adjustment of status as a form of relief from removal after a prior lawful admission." *Gonzalez-Mejia v. Garland*, 2021 WL 3465704, at *1 n.1 (9th Cir. Aug. 6, 2021). *Loper Bright* obviously gives the Ninth Circuit no cause to reconsider its position.

By contrast, while the Fourth Circuit invoked *Chevron* below, *see* Pet. App. 10-11a, decisions from other courts of appeals applying the "clearly and beyond doubt" standard in this situation do not rely on *Chevron*. And those courts of appeals have sometimes applied that standard without even noting that the BIA takes that position. *See, e.g.*, *Kechkar*, 500 F.3d at 1085; *Hashmi*, 533 F.3d at 702.

The conflict here is particularly troublesome because it implicates a dispute between the Ninth Circuit and other courts of appeals. The Ninth Circuit is responsible for more than half the immigration cases nationwide—"by far the highest percentage" of any circuit. U.S. Court of Appeals for the Ninth Circuit, *A Short History of the Ninth Circuit Court of Appeals*, https://www.ca9.uscourts.gov/information/ninth-circuit-history (last visited July 9, 2024). If the Government continues even after *Loper Bright* to contend before other circuits that the Ninth Circuit is misreading the INA, this Court's intervention is all the more warranted.

B. The question presented is important and recurring.

1. This Court has often granted certiorari to determine what standard of proof applies to a finding required under the INA and other federal statutes. *See,*

e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–31 (1987) (INA); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 97, 107 (2016) (Patent Act); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 557 (2014) (same); *United States v. O'Brien*, 560 U.S. 218, 221 (2010) (criminal sentencing); *Grogan v. Garner*, 498 U.S. 279, 281–82 (1991) (Bankruptcy Code); *Steadman v. SEC*, 450 U.S. 91, 92 (1981) (Administrative Procedure Act). That is because the standard of proof is often crucial to the outcome of litigation.

That is especially so where, as here, the dueling standards at issue differ drastically. The preponderance standard "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (citation omitted). So long as a fact is more likely than not true (even if barely so), the standard is satisfied. The clearly and beyond doubt standard, by contrast, requires much more. The only standard of proof that is "comparable" in Anglo American law is the "beyond a reasonable doubt" standard that applies in criminal cases, *Romero*, 7 F.4th at 840—a standard that demands "utmost certainty," *In re Winship*, 397 U.S. 358, 364 (1970). Indeed, given the absence of the word "reasonable" in the clearly-and-beyond-doubt standard, it arguably requires even *greater* certainty than beyond a reasonable doubt. *See* Fatma Marouf, *Immigration Law's Missing Presumption*, 111 Geo. L.J. 983, 1024 (2023).

2. The question presented is also particularly important in light of the profound consequences of removal. Time and again, this Court has recognized the

"severity" of removal. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Equivalent to "banishment or exile," *id.* (citation omitted), removal forces someone to "forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification," *Woodby v. INS*, 385 U.S. 276, 285 (1966). The consequences of removal extend far into the future, in many cases—including this one—leaving a noncitizen permanently inadmissible to the country with virtually no exceptions. *See* 8 U.S.C. § 1182(a)(6)(C)(ii). In still more cases, the noncitizen can be rendered inadmissible for five years—and sometimes up to twenty years—just for having been "ordered removed." *Id.* § 1182(a)(9)(A).

Removal is especially consequential for those seeking an adjustment of status. Such persons have often lived here for years, even decades. And the basis for seeking an adjustment to the status of lawful permanent resident tends to be that the noncitizen has a family member residing in the United States or an employer who wants them to remain here indefinitely. In fact, more than half of people who receive adjustment of status are immediate relatives of U.S. citizens or permanent residents. U.S. Dep't Homeland Security, *Legal Immigration and Adjustment of Status Report* (2023), https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration (across all persons obtaining adjustment of status). Nearly a quarter have employers who want them to remain in this country to perform vital jobs. *See id.*

The record here reflects these realities. Petitioner was admitted to this country in 2000. Pet. App. 2a. Removal would expel her from the place she has

called home for nearly twenty-five years. *Id.* It would separate her from her son, a naturalized citizen who served in the U.S. military, as well as other immediate family members who are also U.S. citizens. *Id.* And it would cost her community an "outstanding" elder-care worker—someone who is "skilled and caring, always going above and beyond." *Id.* 14a n.3.

3. The question presented also arises in thousands of cases annually. More than 4,500 individuals every year seek relief from removal based on an adjustment of status. Transaction Records Access Clearinghouse, *Beyond Asylum: Deportation Relief During the Trump Administration* (2020), https://trac.syr.edu/immigration/reports/631/ (more than 18,000 applicants between 2017 and 2020). Indeed, adjustment of status is one of the most "frequently requested forms of relief" from removal. U.S. Dep't of Justice, *Fact Sheet: Forms of Relief from Removal* (2004), https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/05/ReliefFromRemoval.pdf.[4]

Accordingly, if the BIA is wrong that the clearly and beyond doubt standard governs in this situation, it follows that many who are eligible to obtain relief from removal based on adjustments of status are nevertheless being deported—at least from states within the Second, Fourth, Sixth, Eighth, and Tenth

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[4] The question presented could also affect the many noncitizens who seek adjustment of status outside removal proceedings. USCIS applies the "clearly and beyond doubt" standard in that situation, citing cases from removal proceedings to justify doing so. USCIS Policy Manual, Chapter 10(A) (citing *Matter of Bett*, 26 I. & N. Dec. 437, 440 (BIA 2014)).

Circuits. By contrast, if the BIA is right, then many people on the West Coast who would otherwise be deported are instead being granted relief from removal.

C. This case is an excellent vehicle to address the issue.

For three reasons, this petition presents an excellent vehicle to address this important question.

First, the question presented was directly raised and addressed below. Petitioner argued at every stage of her proceedings that the preponderance standard should apply. Pet. App. 3a, 10a, 18a. The Fourth Circuit considered the question presented at length, ultimately holding that "the BIA and IJ did not err in applying the 'clearly and beyond doubt' standard in these proceedings." *Id.* 12a; *see also id.* 9a.

Second, a decision in petitioner's favor would warrant reversal. A court may affirm an agency's decision only on the grounds the agency relied upon. *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 94–95 (1943). Consequently, where the BIA decided the case under the wrong standard of proof, remand is required. *See, e.g.*, *Romero*, 7 F.4th at 841 (remand required where the BIA applied "an improperly high [standard] of proof"); *Mikhail v. INS*, 115 F.3d 299, 306 (5th Cir. 1997) (holding it was "constrained to remand" where BIA did not apply "proper standard of proof"). That is the case here, as the IJ and BIA found only that the evidence was "insufficient to sustain [petitioner's] burden of proof that she 'clearly and beyond a doubt' was not inadmissible." Pet. App. 30a; *see also id.* 17a–20a, 23a, 28a. Neither the IJ nor the BIA evaluated petitioner's evidence under the preponderance standard.

Third, petitioner would prevail in further proceedings under a preponderance standard. Any fair assessment of the record reveals that it is more likely than not that someone other than petitioner checked the box on the I-9 indicating that she was a U.S. citizen. Petitioner testified that she did not check the box. Pet. App. 5a. Petitioner's supervisors did not believe she checked the box either. *Id.* 5a–6a. Instead, each supervisor testified the other was responsible; one of them had even seen the other "do [that to] other documents." *Id.* 5a. Both supervisors reported that petitioner never claimed to be a U.S. citizen. *Id.* 5a–6a. In fact, petitioner disclosed to one of them that she was *not* a citizen. *Id.*

The only evidence against petitioner is the single, unauthenticated I-9 form itself. Pet. App. 4a–5a. This document alone may have sufficed to establish, in the IJ's view, a trace of doubt about petitioner's admissibility. But it is not enough to show, contrary to the credible testimony otherwise, that petitioner more likely than not falsely claimed citizenship.

D. The Fourth Circuit's decision is incorrect.

The Fourth Circuit decision flouts the plain text of the INA. Section 1229a(c)(4) establishes procedures that govern "relief from removal." There is no dispute that adjustment of status is a form of relief from removal—just like asylum, cancellation of removal, and voluntary departure. *See* 8 U.S.C. § 1229a(b)(7). Nor is there any dispute that Section 1229a(c)(4)(A) imposes a preponderance standard for establishing "eligibility" for relief from removal. That is the default standard applicable to immigration cases, *see supra* at 5, and the Department of Justice has codified the

preponderance standard by regulation, 8 C.F.R. § 1240.8(d). Put it together, and the answer to the question presented is straightforward: An individual who seeks relief from removal in the form of adjustment of status need demonstrate only by a preponderance of the evidence that she satisfies each of the "applicable eligibility requirements," including the requirement that she be admissible. *See* 8 U.S.C. § 1229a(c)(4)(A).

The Fourth Circuit had no basis to accept the BIA's position to the contrary. The BIA treats noncitizens in petitioner's position as applicants for admission subject to the "clearly and beyond doubt" standard under a separate provision of the statute, Section 1229a(c)(2)(A). But the text, structure, and design of the statute precludes that reading.

1. Begin with the text of Section 1229a(c), which distinguishes between admission to the country and deportation from it, imposing distinct "burden[s] of proof" depending on the stage of the proceeding. 8 U.S.C. § 1229a(c). Section 1229a(c)(2)(A) applies only "if the [noncitizen] is an applicant for admission," and it provides that the noncitizen must establish "clearly and beyond doubt" that he is "entitled to be admitted." *Id.* § 1229a(c)(2)(A). Section 1229a(c)(4) establishes procedures that govern when a noncitizen who *has* been admitted "appl[ies] for relief or protection from removal." *Id.* § 1229a(c)(4). In that circumstance, as explained above, the noncitizen need establish only by a preponderance of the evidence that she "satisfies the applicable eligibility requirements." *Id.* § 1229a(c)(4)(A); *see also supra* at 5, 21–22.

Under the statute, then, the key question is whether the noncitizen is seeking admission—such that Section 1229a(c)(2)(A) governs—or is seeking relief from removal, so that Section 1229a(c)(4) does. And Congress has demarcated clearly what constitutes "admission." The INA defines "admission" to mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). That definition, all agree, "contemplate[s] a physical crossing" of the border, into the United States. *Bracamontes v. Holder*, 675 F.3d 380, 385 (4th Cir. 2012).

What's more, Congress has expressly provided when the Act sets aside that definition—that is, when noncitizens, while not actually applicants for admission at a port of entry, should nevertheless be treated as seeking admission. For instance, Section 1101(a)(13), which sets forth the definition of "admission," also sets forth exceptions. Under Section 1101(a)(13)(B), a noncitizen "who is paroled" into the country or "permitted to land temporarily as an alien crewman shall not be considered to have been admitted," even though she is physically within the country. Section 1225(a)(1), in turn, states that a noncitizen "present in the United States who has *not* been admitted" is "deemed" to be "an applicant for admission" for certain purposes. *Id.* § 1225(a)(1) (emphasis added). By "deem[ing]" some individuals applicants for admission, Congress expressly "create[d] a special legal fiction," so that it could treat some individuals—*i.e.*, those who entered the country without admission—as if they were applying to enter the country even though they are already physically present

within the United States. *See Sturgeon v. Frost*, 587 U.S. 28, 47 (2019) (explaining that Congress uses the word "deemed" when "it is necessary to establish a legal fiction") (citation omitted).

In the decision below, however, the Fourth Circuit held that the BIA could properly "assimilate[]" *another* group of individuals into the position of seeking admission to the country—noncitizens who, like petitioner, were in fact admitted and who now seek to adjust their status during removal proceedings. Pet. App. 9a–10a. Plainly, these individuals do not meet the statutory definition of those seeking "admission," 8 U.S.C. § 1101(a)(13)(A): Someone who applies for adjustment of status is necessarily already present in the country. *Id.*; *see also* 8 C.F.R. § 1245.1(a)(1). Nor do they fit within either of the statutory provisions discussed above, where Congress has expressly "deemed" a noncitizen an applicant for admission. 8 U.S.C. §1225(a)(1); *see also id.* § 1101(a)(13)(B). Yet the BIA nevertheless crafted its own "legal fiction" for these noncitizens anyway, Pet. App. 10a, deeming these individuals, "abracadabra-style," applicants for admission, too, *Sturgeon*, 587 U.S. at 47.

This Court should reject that atextual approach. Rarely should a court adopt a "legal fiction" despite "find[ing] nothing in the text . . . to support" it. *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1097 (11th Cir. 2018), *aff'd* 587 U.S. 262 (2019). But where, as here, Congress has *expressly* adopted a legal fiction for some noncitizens, the negative inference as to others is particularly strong. If Congress had wanted to "assimilate" applicants for adjustment to the status of applicants for admission,

it knew well how to do so. *See Pereida v. Wilkinson*, 592 U.S. 224, 232 (2021) (applying this canon to Section 1229a(c)).

Contrary to the Fourth Circuit's suggestion, it does not matter that one of the criteria for eligibility to adjustment of status is that the noncitizen be "admissible" into the country. Pet. App. 11a. There is a fundamental difference between being an actual applicant for admission and merely needing to meet the eligibility criterion of admissibility. Section 1229a(c)(2)(A) applies in the former circumstance, *i.e.*, noncitizens actually "appl[ying] for admission." 8 U.S.C. § 1229a(c)(2)(A). But Section 1229a(c)(4) applies to the latter, *i.e.*, the "applicable eligibility requirements" for relief from removal. *Id.* § 1229a(c)(4). Because this case involves "eligibility requirements," *id.*, the Fourth Circuit erred in refusing to apply Section 1229a(c)(4).

2. The structure of the INA reinforces that Section 1229a(c)(4)'s preponderance standard—not subsection (c)(2)'s "clearly and beyond doubt" standard—governs requests for relief from removal based on an adjustment of status.

First, the Fourth Circuit's reading collapses two distinct concepts: "the exclusion of aliens from admission to this country and the deportation of aliens previously admitted." *Judulang v. Holder*, 565 U.S. 42, 45 (2011); *see also* 8 U.S.C. § 1229a(e)(2). The INA distinguishes between noncitizens charged with exclusion, or "*inadmissibility*," under Section 1182(a) and those charged with "*deportability* under [S]ection 1227(a)," 8 U.S.C. § 1229a(a)(2) (emphases added), imposing more exacting burdens on noncitizens who

seek admission to the United States than those who have previously been admitted and seek only to stay here. Section 1229a(c)(2)(A), which governs "applicant[s] for admission," goes to exclusion and sets forth a high bar: the clearly and beyond doubt standard. *Id.* § 1229a(c)(2)(A). But noncitizens like petitioner, who have already been admitted, face deportation—an entirely distinct ground for removal, governed by a separate subsection, with a separate burden of proof. *See id.* § 1229a(c)(3). The Fourth Circuit's approach would erase Congress's careful distinction between those two grounds for removability, extending yet again the "burden[s]" of establishing admissibility to noncitizens who have already satisfied them. *Id.* § 1229a(c).

Second, the Fourth Circuit's approach not only conflates the distinct grounds of removability, but also looks to the wrong *phase* of removal proceedings. Removal proceedings are divided into two phases: "(1) determination of the alien's removability, and (2) consideration of applications for discretionary relief." *Matovski*, 492 F.3d at 727; *see also* Richard D. Steel, *Steel on Immigration Law* § 14.22 (2023 ed.). Even when noncitizens are charged with inadmissibility—rather than deportability—Section 1229a(c)(2)(A)'s "clearly and beyond doubt" standard applies at the first phase, when noncitizens contest whether they are removable. By contrast, requests for relief (on any ground) occur in the second phase of the proceedings—after removability has been settled—and are governed by Section 1229a(c)(4). There is no basis to import the standard of proof from the first phase of the proceeding into the second.

Third, the Fourth Circuit's decision creates an unjustified schism between adjustment of status and other forms of relief from removal. For instance, a noncitizen who seeks withholding of removal—which allows a noncitizen to remain if she shows her life or freedom would otherwise be threatened—must prove eligibility only by a preponderance. *See Cardoza-Fonseca*, 480 U.S. at 431; *see also Sanchez Jimenez v. U.S. Att'y Gen.*, 492 F.3d 1223, 1238 (11th Cir. 2007). For a noncitizen seeking relief based on waiver of removal, which is available to avoid the consequences of certain grounds of removability, a preponderance standard also governs. *See, e.g.*, *Maric v. Sessions*, 854 F.3d 520 (8th Cir. 2017). And the same is true for a noncitizen who seeks cancellation of removal. *See, e.g.*, *Salem v. Holder*, 647 F.3d 111, 115 (4th Cir. 2011). That is so even though cancellation can result in legal permanent resident status—the same outcome as adjustment of status. There is no good reason to treat these forms of relief from removal differently.

3. The Fourth Circuit also subverted the INA's design by applying subsection (c)(2)'s "clearly and beyond doubt" standard to noncitizens seeking relief based on adjustment of status.

The standard of proof applied to a particular adjudication reflects "a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). It is usually most sensible to impose "a roughly equal allocation of the risk of error between litigants." *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Accordingly, the default standard in civil actions is preponderance of the evidence. *Id.*; *see also California ex rel.*

Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 (1981) (per curiam). The same is true in immigration proceedings. *See supra* at 5.

"[C]learly and beyond doubt," by contrast, is "comparable to 'beyond a reasonable doubt' in criminal prosecutions." *Romero*, 7 F.4th at 840. Such a heightened standard "imposes almost the entire risk of error" on the noncitizen. *See Addington v. Texas*, 441 U.S. 418, 424 (1979). Indeed, the Court has urged that courts "should hesitate to apply such an exacting standard too broadly or casually in noncriminal cases." *Id.* at 428. That is presumably why Congress has prescribed expressly when the "clearly and beyond doubt" standard should apply in immigration proceedings—*i.e.*, to applicants for admission—and been careful to delineate precisely which noncitizens should be treated as applicants. *See supra* at 23–24.

That being so, the "clearly and beyond doubt" standard has no place in the context of applicants for adjustment of status who have already been admitted to the country. Such individuals are not seeking to enter the United States in the first instance, so their application does not implicate this Nation's sovereign interest in controlling who is allowed admission inside its borders. 8 U.S.C. § 1101(a)(13)(A). On the contrary, noncitizens in petitioner's position have previously been found admissible under 8 U.S.C. § 1182. There is less need to guard against the "risk of error" for noncitizens who were previously vetted. *See Addington*, 441 U.S. at 424.

That is especially true because adjustment of status is a form of discretionary relief, which means that even once the eligibility criteria are met, the Attorney

General has discretion to grant or deny the relief. This Court has recognized that a less stringent standard of eligibility is appropriate under the INA for discretionary—rather than mandatory—relief. *See Cardoza-Fonseca*, 480 U.S. at 444. The same theory holds good as between standards of proof: While Congress might reasonably impose a heightened standard of proof for a mandatory form of relief from removal, there is no justification for holding that Congress meant to impose an extra burden for noncitizens who seek discretionary adjustment of status.

4. The BIA's previous adoption of the "assimilation" theory the Fourth Circuit applied below cannot rescue the Fourth Circuit's interpretation of the INA. This Court has now squarely overruled *Chevron*. *Loper Bright Enters. v. Raimondo*, 603 U.S. at ___ (2024) (slip op. at 35). The BIA's interpretation of the INA is valid only to the extent it has the "power to persuade," *id.* at 10 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), and it does not.

To begin, the BIA's position cannot be squared with the text, history, or design of the statute. *See supra* at 21–29. That alone is reason to reject it. "Respect" for Executive Branch interpretations does not allow courts to set aside "the best reading of the statute." *Loper Bright*, 603 U.S. at ___, ___ (slip op. at 9, 23).

Nor has the BIA demonstrated any "thoroughness" in considering the question, so as to warrant affording any "weight" to its interpretation of the INA. *Loper Bright*, 603 U.S. at ___, ___ (slip op. at 10, 17) (quoting *Skidmore*, 323 U.S. at 140). The BIA reasons that an applicant for relief from removal based on an

adjustment of status must meet the "clearly and beyond doubt" standard because a person in that position is "assimilated" to the position of an applicant for admission. Pet. App. 10a–11a. But the BIA has never considered critical legal developments that undercut this reasoning. To begin, the BIA developed the assimilation theory it applied here in the 1960s, *see, e.g.*, *Matter of Campos*, 13 I. & N. Dec. 148, 149 (BIA 1969)—decades before two statutory amendments to the INA made clear that applicants for relief are not applicants for admission. In particular, the BIA's assimilation theory predates the 1996 enactment of the statutory definition of "admission," which excludes people who are already present in the country. *See supra* at 23; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 301, 110 Stat. 3009–575. The BIA's theory also predates Congress's enactment of Section 1229a(c)(4) in the REAL ID Act of 2005, Pub. L. No. 109–13, Div. B., § 101, 119 Stat. 304. That provision now expressly distinguishes individuals seeking "relief from removal" from applicants for admission. Petitioner is not aware of any BIA decision that grapples with those intervening statutory developments.

In addition, the BIA appears never to have considered the tension between its position and its own governing regulations, which the Department of Justice promulgated in the immediate wake of the 1996 amendments to the statute. *See* 62 Fed. Reg. 10312-01 (Mar. 6, 1997). As noted above, those regulations specify that the "preponderance of the evidence" standard governs requests for relief from removal. *See* 8 C.F.R. § 1240.8(d). Likewise, the regulations

expressly apply the "clearly and beyond doubt" standard only to "[a]rriving aliens" and noncitizens who entered the country without being admitted or paroled. *Id.* § 1240.8(b)–(c). To petitioner's knowledge, the BIA has never expressly reconciled its assimilation theory with those more recent—and contradictory—regulations. Thus, whatever persuasive force the BIA's interpretation might have carried in the 1960s, this Court need not and should not credit it today. *See Loper Bright*, 603 U.S. at ___ (slip op. at 35).

CONCLUSION

For the foregoing reasons, the petition should be granted, the decision below should be vacated, and the case should be remanded in light of *Loper Bright*. Alternatively, the Court should grant certiorari and set the case for plenary review.

Respectfully submitted,

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July 12, 2024

APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

22-2114

SINTIA DINES NIVAR SANTANA,

Petitioner,

v.

MERRICK B. GARLAND, Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals.

Argued: December 5, 2023 Decided: February 2, 2024

Before WILKINSON, KING, and THACKER, Circuit Judges.

Petition for review denied by published opinion. Judge King wrote the opinion, in which Judge Wilkinson and Judge Thacker joined.

ARGUED: Hans Christian Linnartz, LINNARTZ LAW OFFICE, P.A., Raleigh, North Carolina, for Petitioner. Gregory Michael Kelch, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for

Respondent. **ON BRIEF:** Brian M. Boynton, Principal Deputy Assistant Attorney General, Walter Bocchini, Senior Litigation Counsel, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

KING, Circuit Judge:

Petitioner Sintia Dines Nivar Santana seeks our review of a final order of the Board of Immigration Appeals (the "BIA") that affirmed the decision of an immigration judge (an "IJ") declaring her ineligible for adjustment of status. Nivar, who was deemed inadmissible for falsely claiming to be a citizen of the United States, presents two contentions of error. First, she asserts that the IJ and BIA erroneously ruled that she was required to establish her admissibility "clearly and beyond doubt," rather than by a preponderance of the evidence. Second, she argues that her evidentiary hearing before the IJ was fundamentally unfair because of the IJ's erroneous admission of a Form I-9 (the "employment eligibility form"). As explained herein, we reject Nivar's contentions of error and deny her petition for review.

I.

A.

Nivar is a native and citizen of the Dominican Republic who was admitted into the United States in May 2000 as a nonimmigrant visitor. Her visa authorized her to remain here for only six months, but she remained well beyond that limit. Her noncitizen son, however, eventually was naturalized through honorable service in the United States Army. The young man was thereby able to submit a "Petition for Alien Relative" form to the Citizenship

and Immigration Services (the "CIS") and establish his maternal relationship with Nivar. She then completed a follow-up step and filed a Form I-485 with the CIS, dated July 8, 2014, seeking to adjust her immigration status (the "status adjustment request").

In March 2016, the CIS denied Nivar's status adjustment request, ruling that she was inadmissible for falsely claiming to be a United States citizen when she executed the employment eligibility form in applying for a job in 2013 at Golden Horizons, an elder-care provider in Connecticut. That is, on the form bearing Nivar's signature, there was a checked box that provided an affirmative response that said: "I attest, under penalty of perjury, that I am . . . [a] citizen of the United States." *See* J.A. 184.[1] Nearly a year after her status adjustment request was denied, in January 2017, the Department of Homeland Security (the "DHS") served Nivar with a notice to appear before an IJ, charging her with removability under the applicable statutory provision, 8 U.S.C. § 1227(a)(1)(B), for overstaying her visa.

B.

1.

At a preliminary hearing before the IJ in July 2018, Nivar conceded removability on the ground that she had overstayed her visa, but renewed her status adjustment request based on the then-approved petition of her soldier son. At a subsequent IJ hearing in August 2018, Nivar's lawyer advised the IJ that Nivar was eager to testify that she did not

[1] Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties in this matter.

falsely claim to be a United States citizen on the employment eligibility form, and that someone else had inappropriately made that assertion therein. The IJ calendared an evidentiary hearing concerning the issue of a false citizenship claim for October 29, 2018, and advised the parties that any evidence to be considered had to be filed with the immigration court at least 15 days before the hearing.

During the fixed 15-day window, the DHS did not submit any documentary evidence. Nivar, however, filed evidence with the immigration court, including her affidavit of September 28, 2018. By her affidavit, Nivar acknowledged that her status adjustment request had been denied on grounds that she had falsely claimed to be a citizen. She also swore that she had examined a copy of the employment eligibility form, that she did not recognize it as "something that [she had] ever read or signed," and that she had never "knowingly checked the box that says I am a citizen of the United States." *See* J.A. 194. Neither party submitted the employment eligibility form to the court.

On October 29, 2018, the IJ conducted an evidentiary hearing on the merits of Nivar's status adjustment request. During the hearing, the IJ advised Nivar that she was required to demonstrate "clearly and beyond doubt" that she was admissible. *See* J.A. 85. Nivar's lawyer interposed a different legal position, asserting that the applicable standard was proof by a preponderance of the evidence.

When Nivar was on the witness stand, her lawyer sought to show her the employment eligibility form and ask if she recognized it. The IJ, however, advised that he had not been provided with the employment eligibility form by either party. The DHS lawyer

believed that the employment eligibility form was already in the record, and when the IJ was unable to find it, the DHS lawyer provided it to the IJ and Nivar's lawyer. When Nivar's lawyer objected on authenticity, the DHS lawyer replied that the employment eligibility form had "been litigated" and was "kept in the regular course." *See* J.A. 100. The IJ then accepted the employment eligibility form into evidence, over the objection of Nivar's lawyer.

Immediately after the employment eligibility form was accepted into evidence, Nivar's lawyer asked Nivar if she recognized it, and she responded, "Yes, I think I fill[ed] it out." *See* J.A. 103-04. She then clarified that she had filled out only "the top part" and recognized her handwriting thereon. *Id.* at 104-05. Nivar also testified, however, that she did not remember checking the box indicating that she was "[a] citizen of the United States." *Id.* at 105, 184.

A woman named Kathy DeVeau — an administrator for Golden Horizons elder care when Nivar applied for work — also testified. DeVeau agreed that the employment eligibility form related to Nivar's hiring. She recognized her own handwriting on the portion of the employment eligibility form for driver's license information and recognized the handwriting of a coworker — Jan Hamilton, an Assistant President of Golden Horizons — on the social security portion thereof. When asked if Nivar had checked the box indicating that she was a United States citizen, DeVeau did not know. She went on to testify that Nivar could have checked the box, but believed that Hamilton "probably" placed the checkmark on the employment eligibility form. *See* J.A. 161. DeVeau believed this because she had seen Hamilton "do [that to] other documents." *Id.* at 166.

According to DeVeau, Nivar never claimed to be an American citizen and had disclosed to DeVeau that she was not.

Another exhibit submitted to the IJ was a letter from Hamilton, who said that she did not place the checkmark on the employment eligibility form and instead asserted that it might have been DeVeau that checked the box. Hamilton said that she "would be surprised if Ms. Nivar knowingly checked the box claiming to be a [United States] citizen." *See* J.A. 189. Hamilton did not believe Nivar would have knowingly checked the box because (1) Nivar had never claimed to be a citizen, (2) they had talked about Nivar's family in the Dominican Republic, and (3) Nivar was a "completely honest individual." *Id.*

2.

By written decision of November 2018, the IJ denied Nivar's status adjustment request and ordered her removed. In denying Nivar's request, the IJ ruled that Nivar was "in the position of an alien applying for admission to the United States." *See* J.A. 58. As such, Nivar bore the burden of establishing "clearly and beyond doubt [she was] entitled to be admitted and is not inadmissible." *Id.* From there, the IJ reasoned that Nivar was inadmissible for falsely claiming to be a citizen on the employment eligibility form because the record evidence was "inconclusive." *Id.* at 59. With no one confirming who had checked the box on the employment eligibility form, the IJ ruled that Nivar had not proved "clearly and beyond doubt" that she had not checked the box claiming citizenship. *Id.* at 58.

C.

In December 2018, Nivar filed a timely notice of appeal with the BIA. On appeal, Nivar maintained that she only needed to demonstrate her admissibility by a preponderance of the evidence, and not by evidence that was clear and beyond doubt. She also challenged the IJ's admission of the employment eligibility form, along with the IJ's weighing of the evidence.

After an unexplained delay of nearly four years, in October 2022, the BIA affirmed the IJ's decision and dismissed Nivar's appeal. The BIA reasoned that precedents of the BIA and relevant court of appeals make clear that Nivar's burden is to satisfy the "clearly and beyond doubt" standard. *See* J.A. 5. The BIA reiterated that an applicant for adjustment of status must satisfy the higher burden because that type of applicant is in a similar position to a noncitizen seeking entry. The BIA also ruled that the IJ had not erred in admitting the employment eligibility form into evidence because Nivar had not shown that its admission was fundamentally unfair. The BIA emphasized that Nivar conceded that her handwriting was on the employment eligibility form and she had recognized it as a document that she had "fill[ed] out." *See* J.A. 6.

Finally, the BIA upheld the IJ's weighing of the evidence and was satisfied that the IJ had not erred. The BIA ruled that, although Nivar acknowledged that she did not check the box on the employment eligibility form claiming citizenship, "the record was inconclusive as to who did." *See* J.A. 7. The BIA emphasized that neither DeVeau nor Hamilton had definitively identified who checked the box, leaving

the evidence as equivocal at best, and falling short of being proof that was "clear[] and beyond doubt." *Id.*

After being denied relief by the BIA, Nivar petitioned this Court for review. We possess jurisdiction to review "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D).

II.

We review the BIA's legal conclusions de novo, but our review of its factual findings must be narrow and deferential. *Mulyani v. Holder*, 771 F.3d 190, 197 (4th Cir. 2014). Whether the BIA or the IJ applied the proper legal standard is a question of law subject to de novo review. *See Perez Vasquez v. Garland*, 4 F.4th 213, 221 (4th Cir. 2021). Evidentiary rulings in immigration proceedings, including issues concerning the admission of evidence, are not circumscribed by the Federal Rules of Evidence, but are limited only by due process considerations. *See Anim v. Mukasey*, 535 F.3d 243, 256 (4th Cir. 2008). An issue of whether an admission of evidence violates the applicable due process considerations is also conducted de novo. *See Tinoco Acevedo v. Garland*, 44 F.4th 241, 246 (4th Cir. 2022). Because the BIA adopted and supplemented the IJ's decision, we must review both rulings. *See Jian Tao Lin v. Holder*, 611 F.3d 229, 235 (4th Cir. 2010).

III.

Nivar maintains that two fatal errors were committed by the IJ and the BIA. First, she argues that they erroneously ruled that she must establish her admissibility "clearly and beyond doubt," rather than by a preponderance of the evidence. Second, she argues that her IJ hearing was fundamentally unfair because the IJ admitted her employment eligibility

form into evidence. We address those contentions in turn.

A.

Nivar agrees that she bore the burden of proving her admissibility into the United States. She argues, however, that the IJ and the BIA should have permitted her to establish admissibility by a preponderance of the evidence, rather than requiring proof "clearly and beyond doubt." Her textual and regulatory hook that a preponderance of the evidence standard applies is based on a regulation governing immigration court proceedings, codified at 8 C.F.R. § 1240.8(d) — titled "Relief from removal." The relief from removal regulation provides as follows:

> 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.

8 C.F.R. § 1240.8(d) (emphasis added).

The problem with Nivar's contention is that, for a noncitizen to qualify for adjustment of status, she must satisfy a statutory provision codified at 8 U.S.C. § 1255(a)(2). It provides, in relevant part, that an applicant for an adjustment of status must prove that she "is admissible to the United States for permanent residence." *See* 8 U.S.C. § 1255(a)(2). And to effectuate § 1255(a)(2), the BIA has maintained a longstanding and consistent practice of "assimilating"

noncitizens applying for adjustment of status to the position of an applicant for admission. *See In re Connelly*, 19 I. & N. Dec. 156, 159 (BIA 1984); *In re Jimenez-Lopez*, 20 I. & N. Dec. 738, 741 (BIA 1993); s*ee also In re Campos*, 13 I. & N. Dec. 148, 149 (BIA 1969); *In re Rainford*, 20 I. & N. Dec. 598, 601 (BIA 1992); *In re Bett*, 26 I. & N. Dec. 437, 440 (BIA 2014). To be "assimilated" means, in this context, that a noncitizen residing in the United States, and who applies for an adjustment of status, is to be evaluated like an applicant for admission, despite the noncitizen being then physically located in the United States. *See Jimenez-Lopez*, 20 I. & N. Dec. at 741. Otherwise stated, the so-called "assimilation" is a legal fiction that treats an applicant for adjustment of status as if she is actually attempting to make an entry at the border.

Being assimilated to the position of an applicant for admission requires a noncitizen to satisfy the statutory mandate set forth in 8 U.S.C. § 1229a(c)(2)(A), which is that, "if the alien is an applicant for admission," she bears the burden of establishing that she is "*clearly and beyond doubt* entitled to be admitted and is not inadmissible." *See* 8 U.S.C. § 1229a(c)(2)(A) (emphasis added); *see also Bett*, 26 I. & N. Dec. at 440; *In re Richmond*, 26 I. & N. Dec. 779, 790 n.4 (BIA 2016). In these circumstances, her "assimilation" to the position of a noncitizen seeking admission means that Nivar was required to prove — "clearly and beyond doubt" — that she did not falsely claim United States citizenship. *See Bett*, 26 I. & N. Dec. at 440.

The BIA's longstanding interpretation of the § 1255(a)(2) statutory provision to require "assimilation" is significant here, because the BIA's

interpretation is entitled to deference by the courts. *See Sijapati v. Boente*, 848 F.3d 210, 214 (4th Cir. 2017). The BIA's interpretation "must be given controlling weight unless th[at] interpretation[ ] [is] 'arbitrary, capricious, or manifestly contrary to the statute.'" *See Fernandez v. Keisler*, 502 F.3d 337, 344 (4th Cir. 2007) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). With respect to the BIA's practice of "assimilating" resident noncitizens who apply for adjustment of status to be like applicants for admission, Nivar has not shown that the assimilation practice is arbitrary, capricious, or contrary to law. She has relied solely on an immigration-related regulation that does not speak of the BIA's longstanding "assimilation" practice.

In any event, we have recognized that the § 1255(a)(2) statutory provision requires a noncitizen seeking adjustment of status to demonstrate that she is then and there admissible into the United States for permanent residence. *See Dakura v. Holder*, 772 F.3d 994, 998 (4th Cir. 2014). Based on § 1255(a)(2) and the "assimilation" history of the BIA, we explained in our *Dakura* decision that a noncitizen applying for adjustment of status is in a similar position to a noncitizen seeking entry into the United States. *Id.*[2] And being in such a similar situation requires the noncitizen to prove that she had not

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[2] Our panel in the *Dakura* case in 2014 did not explicitly rely on any authority from the BIA; rather, it relied on § 1255(a) of Title 8, plus a decision of the Eighth Circuit — *Hashmi v. Mukasey*, 533 F.3d 700, 702 (8th Cir. 2008). But the chain of authority relied upon in the *Hashmi* decision confirms that the "assimilation rule" was spawned by the BIA. *See In re Jimenez-Lopez*, 20 I. & N. Dec. 738, 741.

falsely represented herself to be a United States citizen, by evidence that is "clear[] and beyond doubt." *Id.* At least three of our sister circuits have likewise recognized the BIA's assimilation practice as requiring that the "clearly and beyond doubt" standard be applied when a noncitizen applicant is seeking to prove admissibility. *See Crocock v. Holder*, 670 F.3d 400, 403 (2d Cir. 2012); *Ferrans v. Holder*, 612 F.3d 528, 531 (6th Cir. 2010); *Godfrey v. Lynch*, 811 F.3d 1013, 1017-18 (8th Cir. 2016). *But see Romero v. Garland*, 7 F.4th 838, 840-41 (9th Cir. 2021) (declining to assimilate admitted noncitizen to position of one seeking admission). In these circumstances, the BIA and IJ did not err in applying the "clearly and beyond doubt" standard in these proceedings.

B.

Nivar's final contention is that the IJ denied her a fundamentally fair hearing by admitting the employment eligibility form into evidence. More specifically, Nivar argues that the DHS lawyer acted in a prejudicial manner, violating the applicable rules in his tardy submission of the employment eligibility form. She also maintains that the DHS lawyer failed to properly authenticate the employment eligibility form.

As Nivar acknowledges, the Federal Rules of Evidence "do not apply in immigration proceedings, and evidentiary determinations are limited only by due process considerations." *See Anim v. Mukasey*, 535 F.3d 243, 256 (4th Cir. 2008). To prevail on a due process claim in an immigration proceeding, a noncitizen must establish "(1) that a defect in the proceeding rendered it fundamentally unfair and (2) that the defect prejudiced the outcome of the case."

Id. In challenging the admission of evidence in such proceedings, the first of those elements — fairness — is "closely related to the reliability and trustworthiness of the evidence." *Id.* (internal quotation marks omitted). Ultimately, the requirements of due process vary from circumstance to circumstance. But due process requires — at minimum — "the opportunity to be heard at a meaningful time and in a meaningful manner." *See Rusu v. I.N.S.*, 296 F.3d 316, 321 (4th Cir. 2002).

1.

Nivar has correctly contended that the DHS's failure to timely submit the employment eligibility form undermined the appearance of fairness at the IJ hearing. Despite the untimely submission, however, Nivar was not deprived of "the opportunity to be heard at a meaningful time and in a meaningful manner." *See Rusu*, 296 F.3d at 321. In March of 2016 — two years prior to the IJ hearing — the CIS had denied Nivar's status adjustment request, based on the employment eligibility form. Additionally, in her affidavit Nivar admitted that she received the employment eligibility form and examined it. And it was Nivar's lawyer who first broached the employment eligibility form issue in the hearing. That sequence indicates that Nivar was not surprised by the employment eligibility form during the IJ hearing and that she had a fair opportunity to account for it. Thus, although the DHS lawyer was untimely and should have complied with his duties, his conduct did not render the IJ hearing fundamentally unfair.

2.

Finally, Nivar maintains that the IJ erred in ruling that the employment eligibility form was admissible evidence. At this point, however, we can only review whether the admission was "fundamentally unfair," which is "closely related to the reliability and trustworthiness of the evidence." *See Anim*, 535 F.3d at 256. After the form's admission, Nivar's lawyer questioned Nivar quite fully, and she confirmed that the handwriting at the top of the form was her own. And the witness DeVeau confirmed that the employment eligibility form had been used by Golden Horizons in Nivar's hiring process. In these circumstances, we are unable to find that the admission of the employment eligibility form was fundamentally unfair.

IV.

Pursuant to the foregoing, Nivar's petition for review must be denied.[3]

PETITION DENIED

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[3] Although we are denying Nivar's petition for review, we do not make light of the misfortune in her situation. Nivar has resided in the United States without any apparent problem for more than two decades, nurturing and raising an apparently able and distinguished son who has served honorably in the United States Army. As an elderly veteran, I have a soft spot for soldiers and their families, and I deeply appreciate his voluntary military service for our country. Furthermore, Nivar — as an elder care service provider — has apparently worked diligently and performed important work in an understaffed and overworked profession. And Nivar not only performed important work, she was considered one of Golden Horizons' "most outstanding caregivers, skilled and caring, always going above and beyond." *See* J.A. 190. Perhaps the situation deserves another look from the Department of Justice?

APPENDIX B

FILED: April 9, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2114

(A205-655-470)

SINTIA DINES NIVAR SANTANA,

Petitioner

v.

MERRICK B. GARLAND, Attorney General,

Respondent

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge King, and Judge Thacker.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX C

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF: Sintia Dines NIVAR-SANTANA, A205-655-470 Respondent	**FILED** Oct 19, 2022

ON BEHALF OF RESPONDENT: Hans C. Linnartz, Esquire

IN REMOVAL PROCEEDINGS
On Appeal from a Decision of the Immigration Court,
Charlotte, NC

Before: Hunsucker, Appellate Immigration Judge

HUNSUCKER, Appellate Immigration Judge

The respondent, a native and citizen of the Dominican Republic, appeals from the Immigration Judge's November 26, 2018, decision denying her application to adjust status. Section 245(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255(a). We will dismiss the appeal

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law,

discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Under our de novo review, we hold that the Immigration Judge properly denied the respondent's application because she did not meet her burden of proving "clearly and beyond a doubt" that she was entitled to be admitted to the United States, and that she is not inadmissible under section 212(a) of the INA (IJ at 3-4). Section 245(a) of the INA; *see Matter of Bett,* 26 I&N Dec. 437, 440 (BIA 2014) (holding that "[t]o be eligible for adjustment of status, an applicant has the burden to show that he is clearly and beyond doubt entitled to be admitted to the United States and is not inadmissible under section 212(a) of the Act"); *see also Dakura v. Holder*, 772 F.3d 994, 998 (4th Cir. 2014) ("The INA requires that, in order for [a non-citizen] to adjust his status to that of a lawful permanent resident, he must be admissible. See 8 U.S.C. § 1255(a). The [non-citizen] bears the burden of proving that he 'clearly and beyond doubt ... is not inadmissible under [8 U.S.C. §] 1182.'") (citation omitted).

More specifically, the Immigration Judge properly held that the respondent did not prove, clearly and beyond a doubt, that she did not "falsely represent[s]" herself to be a United States citizen when she submitted a Form I-9 for private employment (IJ at 3 (citing section 212(a)(6)(C)(ii) of the INA, 8 U.S.C. § 1186(a)(6)(C)(ii))); *see also Matter of Bett*, 26 I&N Dec. at 440 ("It is well established that [a non-citizen] who represents himself as a citizen on a Form I-9 to secure employment with a

private employer has falsely represented himself for a purpose or benefit under the Act.").

The respondent argues on appeal that because she was previously legally admitted to the United States (as a B-2 visa holder), she is not an applicant for admission, and therefore she need only meet the preponderance of evidence standard to demonstrate her eligibility for relief (Respondent's Br. at 6-10 (citing 8 C.F.R. § 1240.8(d))). In support of her legal argument, the respondent cites an out-of-circuit opinion issued by the United States Court of Appeals for the Ninth Circuit (Respondent's Br. at 7-8 (citing *Romero v . Garland,* 7 F.4th 838 (9th Cir. 2021))).

The respondent's argument is undermined by precedent issued by the Board and the United States Court of Appeals for the Fourth Circuit, the controlling federal jurisdiction here. *See Matter of Bett*, 26 I&N Dec. at 440; *see also Dakura,* 772 F.3d at 998. Those cases are on all fours with this case, including the fact that the respondents in those cases also had been previously legally admitted to the United States (as non-immigrant student visa holders). *See Matter of Bett*, 26 I&N Dec. at 437; *see Dakura,* 772 F.3d at 995.

Those opinions further reason that an applicant for adjustment of status is in a similar position to a non-citizen applying for admission, and therefore he or she must establish "clearly and beyond doubt [that he or she is] entitled to be admitted and is not inadmissible under section 212 [of the INA]." Section 240(c)(2) of the INA, 8 U.S.C. § 1229a(c)(2); *see also Matter of Bett*, 26 I&N Dec. at 440 (citing *Hashmi v. Mukasey,* 533 F.3d 700, 702 (8th Cir. 2008) (noting that a noncitizen applying for adjustment of status

"is in a similar position to [a non-citizen] seeking entry into the United States," and therefore shoulders the burden of establishing admissibility pursuant to section 240(c)(2) of the INA, 8 U.S.C. § 1229a(c)(2))); *see also Dakura,* 772 F.3d at 998 (same). Thus, the Immigration Judge properly required the respondent to prove "clearly and beyond a doubt" that she was entitled to be admitted to the United States, and that she is not inadmissible under section 212(a) of the INA (IJ at 3).

The Immigration Judge also properly held that the respondent did not meet the "clearly and beyond a doubt" burden of proof on the record submitted (IJ at 3-4). The Immigration Judge found that the Form I-9 submitted for the record included a check in the box after the phrase "I attest, under penalty of perjury, that I am . . . [a] citizen of the United States" (IJ at 3; Exh. 3). The Immigration Judge also found that the respondent submitted the Form I-9 when she applied for a job at Golden Horizons Elder Care Services, Inc., and that there was no dispute that she completed Section I of the form – "Employee Information and Verification" (IJ at 3; Tr. at 38; Exh. 3).

The Immigration Judge further found that the respondent testified that she did not check the box on the Form I-9 attesting to U.S. citizenship, and that she was equivocal with respect to whether it was her signature that appeared on the Form I-9, testifying at one point that the signature "could be hers" (IJ at 3-4; Tr. at 38-46, 52, 58, 67). The Immigration Judge also found that the respondent testified that she never claimed to be a U.S. citizen to anyone, including anyone involved in the hiring process at

Golden Horizons (IJ at 3-4; Tr. at 39-40). The Immigration Judge further found that the respondent's testifying witness, Ms. DeVeau, testified that she herself did not check the box on the Form I-9, and that she did not know if the respondent checked the box because she (Ms. DeVeau) did not watch the respondent fill out the Form I-9 (IJ at 4; Tr. at 85-86, 90-91, 100, 104-05). These findings of fact are supported by the record, and are not clearly erroneous.

Under our de novo review, the Immigration Judge correctly held that, based on the record presented, the respondent's claim that she did not check the box on the Form I-9 attesting to U.S. citizenship is insufficient to meet the "clearly and beyond a doubt" standard of proof; particularly in light of her signature on the Form I-9 attesting to its accuracy (IJ at 4).

The respondent contends on appeal that the Immigration Judge erred by admitting the Form I- 9 into the record without requiring proper authentication by the Department of Homeland Security ("DHS") (Respondent's Br. at 10-14). The fact that a document is not formally authenticated under sections 287.6 or 1287.6 of Title 8 of the Code of Federal Regulations does not mandate that the evidence be rejected or suppressed.

Instead, the relevant question to ask is "whether the evidence is probative and its admission is fundamentally fair" so as not to deprive the respondent of due process of law. *See Matter of J.R. Velasquez*, 25 I&N Dec. 680, 683 (BIA 2012) (citation omitted). The respondent has not demonstrated that admission of the Form I-9 submitted by the DHS was

fundamentally unfair. The Immigration Judge questioned the respondent regarding the contents of the proffered Form I-9, and she conceded that her handwriting appears on the document, and that she recognized the document proffered by the DHS as a document that she had "fill[ed] out" (Tr. at 37-38).

Contrary to the respondent's argument on appeal, the Immigration Judge's questioning of the respondent regarding the contents of the Form I-9 proffered by the DHS was not "a transparent attempt to save the government's case" (Respondent's Br. at 13). Instead, the Immigration Judge's questioning of the respondent with regard to the Form I-9 was consistent with his adjudicatory role to ensure that admission of the document would be "fundamentally fair" to the respondent. *See* section 240(b)(1) of the INA, 8 U.S.C. § 1229a(b)(1); *see also Matter of J-F-F-*, 23 I&N Dec. 912, 922 (A.G. 2006) ("[i]t is appropriate for Immigration Judges to aid in the development of the record, and directly question witnesses, ..."). The respondent's suggestion that the Immigration Judge was improperly doing the job of the DHS is without merit (Respondent's Br. at 13).

The respondent's appellate arguments objecting to the Immigration Judge's admission of the Form I-9 do not identify any flaw or error in the admitted document that deprived her of her procedural rights in the proceedings (Exh. 3; Respondent's Br. at 10-14). Thus, on this record, the Immigration Judge properly admitted and relied on the Form I-9 proffered by the DHS at the October 29, 2018, hearing (Exh. 3). *See Matter of J.R. Velasquez*, 25 I&N Dec. at 683.

The respondent also contends on appeal that the Immigration Judge erred in relying on the Form I-9 to find the respondent had falsely represented herself to be a U.S. citizen, without considering the testimony of the respondent and her two supporting witnesses, which, in the absence of an explicit adverse credibility finding, are entitled to a rebuttable presumption of credibility (Respondent's Br. at 16-18). Section 240(c)(4)(C) of the INA, 8 U.S.C. 1229a(c)(4)(C).

We disagree because even assuming the credibility of the respondent and her two witnesses, the respondent has not met her burden of proving "clearly and beyond a doubt" that she did not make a false claim of U.S. citizenship on the Form I-9 (IJ at 3-4; Exh. 3). While the respondent testified that she did not check the box claiming U.S. citizenship, the record is inconclusive as to who did (IJ at 3-4). Further, the respondent's testimony as to whether it was her signature on the Form I-9 was equivocal at best, and such equivocation does not meet her burden of proving "clearly and beyond a doubt" that she did not falsely represent herself to be a United States citizen on the Form I-9, and that she is entitled to be admitted (IJ at 3-4; Tr. at 40-46, 52, 58, 67).

Likewise, the respondent's 2 supporting witnesses – Ms. DeVeau, who testified in person, and Ms. Hamilton, who provided a written letter – did not provide testimony sufficiently definitive that would allow the respondent to meet the "clearly and beyond a doubt" standard of proof (IJ at 4). Ms. DeVeau testified that she did not watch the respondent fill out the Form I-9, and she did not know who checked the box on the Form I-9 claiming U.S. citizenship (Tr.

at 90-93, 100, 104-05). Ms. DeVeau also testified that she herself did not check the box on the Form I-9, and that she believed Ms. Hamilton likely checked it (Tr. at 94-95, 99-100).

Ms. Hamilton, in turn, provided a written letter that stated that, in her opinion, "it is possible" that the person who hired the respondent concluded that the respondent was a U.S. citizen, checked the box attesting to U.S. citizenship, and "simply had [the respondent] sign the bottom of the form" (Respondent's Evidence, Tab A, April 6, 2016, Letter from Ms. Hamilton). Neither Ms. DeVeau nor Ms. Hamilton provided testimony definitively stating who checked the box on the Form I-9, and/or whether the signature on the Form I-9 was the respondent's signature.

The respondent cannot meet her burden of proof by stating that she does not know how the box on the Form I-9, which she admits contains her handwriting and bears a signature that resembles hers, came to be checked reflecting that she is a United States Citizen (IJ at 4; Exh. 2 – Respondent's Decl). The respondent has not established, on this record, "clearly and beyond a doubt" that she did not make a false claim to U.S. citizenship on the Form I-9 that she submitted for employment with Golden Horizons Eldercare (IJ at 3-4). Thus, the Immigration Judge properly denied her application for adjustment of status. *See* section 245(a) of the INA, 8 U.S.C. § 1255(a); *see also Matter of Bett*, 26 I&N Dec. at 440; *see also Dakura*, 772 F.3d at 998.

Accordingly, the following order will be issued.

ORDER: The respondent's appeal is dismissed.

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

IN THE MATTER OF NIVAR SANTANA, Sintia Dines Respondent.	IN REMOVAL PROCEEDINGS File No.: A205-655-470 November 26, 2018
CHARGES:	Sections 237(a)(3)(D) and 237(a)(1)(B) of the Act
APPLICATIONS:	Adjustment of Status and Post-Conclusion Voluntary Departure
ON BEHALF OF RESPONDENT: Hans Christian Linnartz, Esquire	ON BEHALF OF THE GOVERNMENT: Office of the Chief Counsel U.S. Department of Homeland Security

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent is a native and citizen of the Dominican Republic who entered the United States as a visitor at New York, New York, on or about May 26, 2000. Exhibit 1. In July 2014, Respondent filed a Form I-485, Application to Register Permanent Residence or Adjust Status, with the United States Citizenship and Immigration Services ("USCIS"). *See* Exhibit 6. On March 30, 2016, USCIS denied Respondent's Form I-485 application, finding that

she was inadmissible to the United States for falsely claiming to be a United States citizen on a Form I-9, Employment Eligibility Verification. Exhibit 4. On January 19, 2017, the Department of Homeland Security ("DHS") served Respondent with a Notice to Appear ("NTA") charging her with removability pursuant to section 237(a)(3)(D) of the Immigration and Nationality Act ("INA" or "Act").[1] *Id.*

At a master calendar hearing on July 19, 2018, Respondent, through counsel, admitted factual allegations one to three, denied factual allegation four, and denied the charge of removability under section 237(a)(3)(D) of the Act. *See* Exhibit 1. At a master calendar hearing on August 21, 2018, Respondent, through counsel, admitted new factual allegations five and six, and conceded the charge of removability under section 237(a)(1)(B) of the Act. *See* Exhibit 1B. Respondent designated the Dominican Republic as the country of removal. Respondent requested relief in the form of adjustment of status under section 245 of the Act and post-conclusion voluntary departure in the alternative. On October 29, 2018, the Court held an individual hearing concerning Respondent's statutory eligibility for adjustment of status. The Court, thereafter, reserved for a written decision.

II. Evidence Presented

The Court considered all documentary and testimonial evidence submitted by the parties contained in the record of proceedings, as articulated

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[1] On July 20, 2018, DHS filed a Form I-261, Additional Charges of Inadmissibility/Deportability, charging Respondent under section 237(a)(1)(B) of the Act. Exhibit 1B.

in the verbatim transcript of the hearing held on October 29, 2018. 8 C.F.R. § 1240.9. The evidentiary record contains documentary exhibits, marked and admitted as Exhibits 1 through 6. Respondent and Katherine DeVeau ("Ms. DeVeau") testified on Respondent's behalf.[2] The Court summarizes their testimony below, and in its analysis, *infra*.

1. Respondent's Testimony

Respondent is a fifty-six year old female, citizen and national of the Dominican Republic. She came to the United States with her son in 2000. In January 2013, Respondent applied for a job at Golden Horizons Elder Care Services, Inc. ("Golden Horizons"). Respondent interviewed with Ms. DeVeau. After the interview, Ms. DeVeau gave Respondent numerous documents to be completed and signed, including a Form I-9. Ms. DeVeau did not explain any of the documents to Respondent and did not watch Respondent fill out the paperwork. Ms. DeVeau did not ask Respondent if she was an American citizen. Respondent does not remember filling out a form that asked if she was an American citizen. Respondent gave Ms. DeVeau her driver's license and social security card for the Form I-9.

Respondent completed Section 1 of the Form I-9—Employee Information and Verification. *See* Exhibit 3. Respondent claims that the signature on the Form I-9 could be hers, but she does not remember filling out the form and does not remember checking the box which attests, under penalty of

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[2] Respondent's counsel proffered that Theresa "Mimi" P. Richardson would testify to Respondent's honesty and reliability.

perjury, that Respondent is a citizen of the United States. *Id.* Respondent was hired to work at Golden Horizons and maintained her employment for less than one year.

During cross-examination, Respondent explained that she submitted more evidence after she received an intent to deny letter from USCIS. Respondent admitted to remembering the other documents she signed during her adjustment of status process.

2. Katherine DeVeau's Testimony

Ms. DeVeau was the administrator at Golden Horizons when Respondent applied and interviewed for a position, Her job duties included hiring and firing the caregivers at Golden Horizons. In 2012, Ms. Deveau interviewed Respondent for a caregiver position. Ms. DeVeau recalls having a conversation with Respondent over the phone and Respondent telling her that she was not an American citizen.

When Respondent came in for an interview, Ms. DeVeau gave Respondent a packet with numerous documents that needed to be signed, including a Form I-9. Ms. DeVeau did not give Respondent any instructions to the Form I-9. While Respondent completed the paperwork, Ms. DeVeau made copies of other documents. On the Form I-9, Ms. DeVeau completed Section 2, List A, and wrote the words "social security card" under List C. *See* Exhibit 3. Ms. DeVeau did not check the box which attests, under penalty of perjury, that Respondent is a citizen of the United States. *Id.* Ms. DeVeau believes that the office administrator and the person who signed the Form I-9, Jan Hamilton, checked the box.

The remainder of Respondent and Ms. DeVeau's testimony are contained in the verbatim transcript of the proceedings.

III. Adjustment of Status

A. Burden of Proof

Respondent has the burden of demonstrating that she is eligible for relief from removal and demonstrating that relief is merited in the exercise of discretion. *See* INA§ 240(c)(4); 8 C.F.R. § 1240.8(d); *see also* INA § 237(a)(3)(D)(i) (same language, but rendering alien removable). Respondent is applying for adjustment of status, which places her in the position of an alien applying for admission to the United States. *See Crocock v. Holder,* 670 F.3d 400, 403 (2d Cir. 2012). An applicant for admission has the burden of establishing that she is "clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212" of the Act. INA § 240(c)(2)(A). Thus, Respondent bears the burden of proving "clearly and beyond a doubt" that none of the grounds of inadmissibility included in section 212 of the Act apply to her.

B. Analysis

An applicant is inadmissible under section 212(a)(6)(C)(ii) of the Act if she "falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law." INA § 212(a)(6)(C)(ii); *Matter of Barcenas-Barrera,* 25 I&N Dec, 40, 44 (BIA 2009) (citing INA § 212(a)(6)(C)(ii)). If an alien is found to be inadmissible under this section, she is not able to obtain a waiver. *Id.*; *see also Pichardo v. INS*, 216

F.3d 1198, 1201 (9th Cir. 2000) ("This section is a non-waivable ground of inadmissibility."). "It is well established that an alien who represents himself as a citizen on a Form I-9 to secure employment with a private employer has falsely represented himself for a purpose or benefit under the Act." *Matter of Bett,* 26 I&N Dec. 437, 440 (BIA 2014); *Dakura v. Holder,* 772 F.3d 994, 1000 (4th Cir. 2014). The Court notes that I-9 forms are admissible in immigration proceedings. *Matter of Bett,* 26 I&N at 442.

In support of the position that Respondent falsely represented herself to be a citizen of the United States, DHS submitted a Form I-9. *See* Exhibit 3. Respondent completed the Form I-9 when she applied for a job at Golden Horizons, which contained a check in the box after the phrase, "I attest, under penalty of perjury, that I am ... [a] citizen or national of the United States." *Id.* It is undisputed that the Form I-9 has a checked box claiming Respondent is a "citizen of the United States." *Id.* It is also undisputed that Respondent completed Section J—Employee Information and Verification—on the Form I-9. *Id.* At one point in her testimony, Respondent testified that the signature on the Form I-9 could be hers. Respondent claims in her testimony that someone other than herself checked the box and she never claimed to be a United States citizen to anyone at Golden Horizons or anywhere else. *Id.* Respondent's witness and only person present at the time Respondent completed the Form I-9, Ms. DeVeau, testified that she did *not* check the box and she does not recall if Respondent checked the box herself.

The Court finds that Respondent's claim that she did not check the box claiming citizenship on the

Form I-9 is insufficient evidence to meet her burden of proof, in light of her signature attesting to the accuracy of the document. The Court finds that this is insufficient to sustain Respondent's burden of proof that she "clearly and beyond a doubt" was not inadmissible for making a falser claim of United States citizenship. INA § 240(c)(2)(A). The Court finds that she is statutorily ineligible for adjustment of status under section 245(a) of the Act. To the extent the record is inconclusive, it cuts against Respondent, who has the burden of proof. *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011). The Court further concludes Respondent is ineligible for a waiver pursuant to section 212(i) of the Act because of her false claim to citizenship. The Court therefore, pretermits and denies her application for adjustment of status.

IV. Conclusion

For the reasons set forth *supra*, the Court finds that Respondent is not statutorily eligible for adjustment of status because she is inadmissible to the United States under section 212(a)(6)(C)(ii) of the Act. There are no further applications for relief pending before this Court. Accordingly, the Court enters the following orders:

ORDERS

IT IS HEREBY ORDERED that Respondent's application for Adjustment of Status is PRETERMITTED and DENIED.

IT IS FURTHER ORDERED that Respondent's application for Voluntary Departure is GRANTED, and in lieu of an order of removal, such departure is to take place on or before **01/25/2016**, at

Respondent's own expense and under such conditions as many be imposed by the Department of Homeland Security.

IT IS FURTHER ORDERED that, should Respondent fail to comply with any of the above orders, the voluntary departure order shall lapse without further notice or proceedings and this order shall become effective at once. Respondent shall be removed from the United States to the DOMINICAN REPUBLIC on the charge contained in the Notice to Appear.

IT IS FURTHER ORDERED that Respondent shall post a voluntary departure bond in the amount of $ 500 with the Department of Homeland Security within five business days from the date of this order to ensure that she departs voluntarily, when and as required. If said bond is not posted within five business days, the voluntary departure order shall lapse, and the order of removal shall take effect the following day.

IT IS FURTHER ORDERED that, should Respondent fail to depart voluntarily when and as required, Respondent shall then become subject to a civil penalty of up to $3,000.00, and will become ineligible for a period of ten years for any further relief, cancellation of removal, voluntary departure, adjustment of status, change of status and registry.

11.26.18 *Barry J. Pettinato*

BARRY J. PETTINATO
United States Immigration Judge
Charlotte, North Carolina

APPENDIX E

TITLE 8, UNITED STATES CODE
ALIENS AND NATIONALITY

* * *

8 U.S.C. § 1101. Definitions.

(a) As used in this chapter--

* * *

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

* * *

8 U.S.C. § 1229a. Removal proceedings.

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect

proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place--

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General--

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered

removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only--

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of

the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation--

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section

1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing--

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be

valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the

basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is--

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien--

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining 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.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were

made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply--

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title, section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title 3 pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the aliens representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means--

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

* * *

8 U.S.C. § 1255(a). Adjustment of status of nonimmigrant to that of person admitted for permanent residence.

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

* * *

APPENDIX F

TITLE 8 CODE OF FEDERAL REGULATIONS
ALIENS AND NATIONALITY

* * *

8 C.F.R. § 1240.8. Burdens of proof in removal proceedings.

(a) Deportable aliens. A respondent charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the respondent is deportable as charged.

(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.

(c) Aliens present in the United States without being admitted or paroled. In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent. 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.

(d) Relief from removal. 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.

* * *