No. 19-438

In the Supreme Court of the United States

CLEMENTE AVELINO PEREIDA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, an alien who has been convicted of certain offenses, including a "crime involving moral turpitude," is statutorily ineligible for discretionary cancellation of removal. 8 U.S.C. 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I); see 8 U.S.C. 1229b(b)(1)(C). In determining an alien's eligibility for cancellation of removal or any other "relief or protection from removal," the alien bears the burden of proof to establish that he "satisfies the applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i); see 8 C.F.R. 1240.8(d). The question presented is:

Whether an alien carries his burden of proving his eligibility for cancellation of removal where the alien has been convicted under a statute defining multiple crimes, at least some of which would constitute disqualifying offenses, but the record is inconclusive as to which crime formed the basis of the alien's conviction.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 916 F.3d 1128. The decisions of the Board of Immigration Appeals (Pet. App. 11a-19a) and the immigration judge (Pet. App. 20a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2019. A petition for rehearing was denied on July 2, 2019 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on September 30, 2019, and was granted on December 18, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, "set[s] out the process for removing aliens from the country," *Mata* v. *Lynch*, 135 S. Ct. 2150, 2153 (2015), and the grounds for doing so. The INA provides for a "removal proceeding" before an immigration judge (IJ) to determine whether a particular alien should be removed. *Judulang* v. *Holder*, 565 U.S. 42, 46 (2011) (citing 8 U.S.C. 1229, 1229a). "[T]he statutory bases" for removal "have always varied" depending on whether the alien has been admitted to the United States or is seeking admission. *Ibid.* If the alien has not been admitted, he may be removed based on "any applicable ground of inadmissibility under [8 U.S.C.] 1182(a)." 8 U.S.C. 1229a(a)(2). If the alien has been admitted, he may be removed based on "any applicable ground of deportability under [8 U.S.C.] 1227(a)." *Ibid.*; see 8 U.S.C. 1229a(e)(2). The grounds of inadmissibility in Section 1182(a) and of deportability in Section 1227(a) are similar in many ways but differ in various respects.

Whether the alien has previously been admitted also affects the burden of proof regarding the alien's removability and which party bears it. If the alien has not been admitted, then "the alien has the burden of establishing * * * that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible." 8 U.S.C. 1229a(c)(2)(A). In contrast, if the alien has been admitted, then the government "has the burden of establishing by clear and convincing evidence that * * * the alien is deportable." 8 U.S.C. 1229a(c)(3)(A).

b. The INA also has long granted the Attorney General discretion to grant relief from removal in certain circumstances. As relevant here, prior to 1996, the INA

provided that "the Attorney General m[ight], in his discretion, suspend deportation" of an alien if (1) the alien showed he "ha[d] been physically present in the United States for a continuous period of not less than seven years" before seeking suspension of deportation; (2) he "prove[d] that during all of such period he was and [remained] a person of good moral character"; and (3) he "[was] a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who [was] a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1254(a)(1) (1994); see *INS* v. *Chadha*, 462 U.S. 919, 923-924 (1983). Previously admitted aliens who were deportable based on certain criminal convictions could still apply for suspension of deportation, but they were subject to heightened eligibility criteria governing continuous physical presence, good moral character, and hardship. See 8 U.S.C. 1254(a)(2) (1994); see also 8 U.S.C. 1254(a)(3) (1994) (special rules for certain victims of domestic violence).

Although those prerequisites were necessary to obtain suspension of deportation, they were never alone sufficient. Suspension was "in all cases a matter of grace" and "not a matter of right under any circumstances." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). It lay within the "unfettered discretion of the Attorney General," akin to "'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.'" *Id.* at 354 & n.16 (citation omitted).

Congress became concerned that suspension of deportation and other forms of discretionary relief were being exploited inappropriately and impeding the expeditious removal of aliens unlawfully present—including aliens who had committed crimes in the United States.

H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 114-115, 118-125 (1996) (House Report). For example, "[t]he 'extreme hardship' standard" for suspension of deportation "ha[d] been weakened by recent administrative decisions" that deemed routine consequences of removal sufficient. H.R. Rep. No. 828, 104th Cong., 2d Sess. 213 (1996) (Conf. Report).

In 1996, to address these concerns, Congress "replace[d]" suspension of deportation with a new form of relief: cancellation of removal (and adjustment of status). Conf. Report 213; see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, Subtit. A, sec. 304(a)(3), § 240A, 110 Stat. 3009-587, 3009-594 to 3009-596 (8 U.S.C. 1229b). The new cancellation-of-removal provision "limit[ed] the categories of illegal aliens eligible for such relief and the circumstances under which it may be granted" to reach only "truly exceptional cases." Conf. Report 213-214; see House Report 108 ("[r]elief from deportation will be more strictly limited"). Among other changes, Congress raised the threshold showing of hardship for nonpermanent-resident aliens—requiring them to show "exceptional and extremely unusual hardship"—and extended the required "continuous period" of physical presence from seven years to ten. 8 U.S.C. 1229b(b)(1)(A) and (D); see Conf. Report 213-214. Congress also prohibited cancellation of removal for (among others) aliens who have been convicted of certain criminal offenses. 8 U.S.C. 1229b(b)(1)(C) and (c)(4).

To be eligible for cancellation of removal today, a nonpermanent-resident alien must (1) have been "physically present in the United States for a continuous period" of at least ten years; (2) have been "a person of good moral

character" during that period; (3) have "not been convicted of an offense under" Sections 1182(a)(2) or 1227(a)(2) or (3); and (4) show that removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or" a lawful permanent resident. 8 U.S.C. 1229b(b)(1)(A)-(D). A prior conviction for a "crime involving moral turpitude" disqualifies an alien from satisfying the third criterion (and, in some instances, also the second). 8 U.S.C. 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I); see 8 U.S.C. 1101(f)(3), 1229b(b)(1)(B) and (C). If the applicant establishes his eligibility under those threshold criteria, whether a favorable exercise of discretion is warranted depends on a balancing of "the favorable and adverse factors" of his particular case. *In re A-M-*, 25 I. & N. Dec. 66, 76 (B.I.A. 2009). IIRIRA also sets an annual cap that limits the Attorney General to cancelling the removal of no more than 4000 aliens per year. 8 U.S.C. 1229b(e)(1).

c. In contrast to the issue of removability—which the government sometimes bears the burden of proving, 8 U.S.C. 1229a(c)(3)(A)—the alien always bears the burden of proving that he is eligible for cancellation of removal (or other relief) and that an exercise of discretion is warranted. Before 1997, it already was "well-settled that an alien bears the burden of establishing eligibility for relief or a benefit." 62 Fed. Reg. 10,312, 10,322 (March 6, 1997). Regulations promulgated in 1997 codified that "well-settled rule." *Ibid.* As promulgated then and still today, the regulation provides that "[t]he respondent [*i.e.*, the alien] 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." *Id.* at 10,368 (8 C.F.R. 240.8(d) (1998)); 8 C.F.R 1240.8(d).

The regulation further provides that, "[i]f 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." *Ibid.*

In 2005, Congress incorporated that settled rule into the INA itself. Section 1229a(c)(4), added by the REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, Tit. I § 101(d), 119 Stat. 304, provides that "[a]n alien applying for relief or protection from removal has the burden of proof to establish that the alien" both "satisfies the applicable eligibility requirements" and, "with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion." 8 U.S.C. 1229a(c)(4)(A). It also specifies that "[t]he 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." 8 U.S.C. 1229a(c)(4)(B).

The application form for requesting cancellation of removal—at the time of petitioner's application and today—informs the alien that certain past offenses may render the alien ineligible for relief and directs the alien to describe any prior criminal history. Executive Office for Immigration Review (EOIR), U.S. Dep't of Justice, Form EOIR-42B, *Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents* i, 5 (Rev. July 2016) (2016 Form EOIR-42B), https://go.usa.gov/xd5eP. The form instructs the alien to state whether he has ever "been arrested, summoned into court as a defendant, convicted, fined, imprisoned, placed on probation, or forfeited collateral"—either

"in the United States or in any foreign country"—"for an act involving a felony, misdemeanor, or breach of any public law or ordinance (including, but not limited to, traffic violations or driving incidents involving alcohol)." *Id.* at 5. If the alien's "answer is in the affirmative," he must "give a brief description of each offense including the name and location of the offense, date of conviction, any penalty imposed, any sentence imposed, and the time actually served." *Ibid.* (emphasis omitted); see Administrative Record (A.R.) 128 (petitioner's Form EOIR-42B).

2. a. Petitioner, a native and citizen of Mexico, entered the United States unlawfully on an unknown date. Pet. App. 2a, 21a. According to petitioner, he entered the country in approximately 1995. *Id.* at 3a; A.R. 125; see Pet. Br. 6. In 2009, the Department of Homeland Security (DHS) served petitioner with a Notice to Appear charging him with removability as an alien present in the United States without having been admitted or paroled. Pet. App. 3a; A.R. 487-488; see 8 U.S.C. 1182(a)(6)(A)(i).

Petitioner conceded that he was removable and indicated his intention to seek cancellation of removal. Pet. App. 3a, 12a, 21a; see A.R. 104. At a hearing before the IJ, petitioner's counsel explained that a criminal case against petitioner was then pending in Nebraska state court, which could "affect his eligibility for cancellation of removal." A.R. 104. At counsel's request, in light of petitioner's pending criminal case, the IJ continued the removal proceedings. A.R. 104-105.

In 2010, petitioner was convicted in the state-court proceedings of attempted criminal impersonation, in violation of Neb. Rev. Stat. §§ 28-201 and 28-608 (2008). Pet. App. 2a & n.1; Pet. Br. App. 3a-4a, 7a-9a (A.R. 163,

165) (journal entry and complaint). At that time, Section 28-608(1) provided that a "person commits the crime of criminal impersonation if he":

> (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another;
>
> (b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another and to deceive or harm another;
>
> (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or
>
> (d) Without the authorization or permission of another and with the intent to deceive or harm another:
>
> > (i) Obtains or records personal identification documents or personal identifying information; and
> >
> > (ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

Neb. Rev. Stat. § 28-608(1) (2008). Section 28-201 prohibited attempting (*inter alia*) any of those offenses. Neb. Rev. Stat. § 28-201 (2008).

The complaint alleged that petitioner had attempted to violate Section 28-608 from 2007 to 2009. Pet. Br. App. 7a (A.R. 165). Neither the complaint nor the journal entry specified which subsection of Section 28-608(1) he had

attempted to violate. *Id.* at 3a-4a, 7a-9a (A.R. 163, 165). The complaint alleged, however, that petitioner had "use[d] a fraudulent Social Security card to obtain employment" at a particular company. *Id.* at 8a (A.R. 165); see Pet. App. 27a. Petitioner, represented by counsel, pleaded no contest to the charge and was found guilty. Pet. Br. App. 3a (A.R. 163); Pet. App. 2a, 24a.

b. Petitioner subsequently filed an application for cancellation of removal. In his application, petitioner responded affirmatively to the question asking about prior criminal arrests or prosecutions. A.R. 128. He did not provide any description of his offense, instead stating that he "w[ould] supplement the necessary information prior to the hearing." *Ibid.* Petitioner subsequently submitted what appears to be a printout of the online docket of his criminal case. A.R. 208-213.

DHS contended that petitioner's Nebraska conviction for criminal impersonation is a crime involving moral turpitude, rendering him ineligible for cancellation of removal under 8 U.S.C. 1229b(b)(1)(C). A.R. 152-159. In support of that contention, DHS submitted certified copies of the journal entry and complaint from his case and copies of the relevant statutes. See A.R. 161-167. Petitioner disputed that his conviction was a crime involving moral turpitude, see A.R. 147-148, but he submitted no other relevant documents from the criminal proceeding to establish the specific subsection under which he had been convicted, such as a plea agreement or colloquy.

The IJ agreed with DHS that petitioner is ineligible for cancellation of removal. Pet. App. 20a-30a. "To determine whether [petitioner's] offense qualifie[d] as a" crime involving moral turpitude, the IJ "appl[ied] the categorical approach" articulated by this Court's decisions. *Id.* at 23a; see *id.* at 24a-29a. Under that approach,

an adjudicator must "compare the elements of the statute forming the basis of the [alien's] conviction with the elements of the 'generic' crime" to determine whether "the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps* v. *United States*, 570 U.S. 254, 257 (2013). But if the underlying statute "sets out one or more elements of the offense in the alternative" and thus "effectively creates 'several different . . . crimes'"—and "[i]f at least one, but not all, of those crimes matches the generic version"—the adjudicator may apply the "modified categorical approach." *Id.* at 257, 264 (citation omitted). Under that "variant" of the categorical approach, the adjudicator may "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Id.* at 257. If the adjudicator is able to ascertain which of the alternative crimes the alien was convicted of committing, the adjudicator may then apply the ordinary categorical analysis to that crime by comparing its elements with the generic crime. *Ibid.*

Applying that approach here, the IJ determined that the statute petitioner was convicted of attempting to violate, Neb. Rev. Stat. § 28-608(1) (2008), did not categorically qualify as a crime involving moral turpitude. Pet. App. 25a-27a. The IJ reasoned that a conviction under subsection (a), (b), or (d) of that statute would qualify as a crime involving moral turpitude, because each of those subsections "contain[ed] as a necessary element the intent to defraud, deceive, or harm" and "reflect[ed] a sufficiently depraved state of mind to render a conviction * * * morally turpitudinous." *Id.* at 26a-27a. But the IJ concluded that a violation of subsection (c)—which applies to

the carrying on of a profession, business, or other occupation without a license—would not so qualify, because that subsection "contain[ed] no *mens rea* requirement" and did "not require a vicious motive or corrupt mind." *Id.* at 27a.

Turning to the modified categorical approach, the IJ observed that the complaint had charged petitioner with the "fraudulent [use of a] Social Security card to obtain employment." Pet. App. 27a. On that basis, the IJ found that "[t]he Complaint demonstrates that [petitioner] was not convicted of attempting to carry on a business without a license under subsection (c)"—to which use of a fraudulent Social Security card would be irrelevant—"and he was therefore necessarily convicted under subsection (a), (b), or (d), any of which involves moral turpitude." *Ibid.* Petitioner thus "ha[d] not demonstrated by a preponderance of the evidence that his conviction" was not disqualifying. *Id.* at 30a.

c. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 11a-19a. Following its precedent, the Board applied a categorical approach, *id.* at 12a, and agreed with the IJ that Section 28-608(1) did not categorically qualify as a crime involving moral turpitude because "only convictions under [subsections] (a), (b), or (d) * * * contain as a necessary element the intent to defraud or deceive," *id.* at 14a-15a. The Board also agreed that "section 28-608 is divisible," with each subsection "describing separate crimes with different punishments." *Id.* at 15a.

The Board accordingly "appl[ied] the modified categorical approach." Pet. App. 16a. Unlike the IJ, however, the Board concluded that, in the circumstances of this particular case, the record of conviction was inconclusive as

to the subsection of the statute that petitioner was convicted of violating. *Id.* at 17a. Although the "complaint charge[d]" petitioner with "using a fraudulent social security card to obtain employment, which would seem to support a finding that the crime underlying [his] attempt offense involved fraud or deceit," the Board noted that the journal entry reflecting his conviction "d[id] not specify the particular subsection of the substantive statute [petitioner] was ultimately convicted of." *Ibid.*

The Board nevertheless agreed with the IJ that petitioner was statutorily ineligible for cancellation of removal. Pet. App. 17a. It explained that, "[i]n the context of relief [from] removal, the [alien] bears the burden of proving that his particular conviction does not bar relief." *Ibid.* The Board found that petitioner "ha[d] not carried his burden" under the INA and the governing regulations of "proving that his conviction [wa]s not" for a crime involving moral turpitude. *Ibid.*

3. The court of appeals denied a petition for review. Pet. App. 1a-10a.

Like the IJ and the Board, the court of appeals concluded that Section 28-608(1) was not categorically a crime involving moral turpitude, because one provision (subsection (c)) did not contain intent to deceive as a necessary element. Pet. App. 7a. But the court also agreed that the statute was divisible, and it applied the modified categorical approach to try to ascertain which subsection petitioner had been convicted of violating. *Id.* at 7a-8a. Like the Board, the court found the record inconclusive on that question. *Id.* at 8a. The court explained that it could consider "only a 'limited class of documents * * * to determine what crime, with what elements, [petitioner] was convicted of,'" and the documents presented did not indicate "the subsection of the statute under

which [petitioner] was convicted." *Ibid.* (quoting *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016)).

The court of appeals also agreed with the Board that petitioner's failure to demonstrate the "particular crime for which [he] was convicted" was dispositive. Pet. App. 9a. The court explained that, "under the INA, the alien bears 'the burden of proof to establish that [he] satisfies the applicable eligibility requirements' for cancellation of removal, including that he was not 'convicted of an offense' that would disqualify him from cancellation of removal." *Id.* at 8a (citations omitted; brackets in original). It thus was petitioner's "burden to establish that his conviction for attempted criminal impersonation is *not* a [crime involving moral turpitude]." *Ibid.* (emphasis added). "On this record, without more," the court was "unable to make the requisite determination" of which alternative crime petitioner was convicted of committing. *Ibid.* The court agreed with other circuits that have held that such "ambiguity surrounding [the alien's] criminal conviction" meant that petitioner had not carried his burden to prove his eligibility for cancellation. *Ibid.*; see *id.* at 8a-9a. It observed that "the fact that [petitioner] [wa]s not to blame for the ambiguity surrounding his criminal conviction d[id] not relieve him of his" burden. *Id.* at 8a.

SUMMARY OF ARGUMENT

A removable nonpermanent-resident alien is eligible for cancellation of removal only if he proves (*inter alia*) that he has not been convicted of a crime involving moral turpitude. Petitioner, a removable nonpermanent-resident alien, has a prior conviction under a divisible statute that defined multiple offenses, some of which are crimes involving moral turpitude. The court of appeals correctly determined, in accordance with the majority of courts to consider the question, that given petitioner's failure to prove

that he was convicted of a non-disqualifying version, he did not carry his burden of establishing eligibility for relief.

A. 1. The INA authorizes the Attorney General to cancel the removal of a nonpermanent-resident alien who has been found removable only if the alien satisfies certain statutory eligibility criteria. 8 U.S.C. 1229b(b)(1). Among other things, the alien must prove that he has not been convicted of a "crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I); see 8 U.S.C. 1229b(b)(1)(C). The INA places the burden on the alien to establish that he satisfies the statutory eligibility criteria. 8 U.S.C. 1229a(c)(4)(A)(i). The statute requires the alien to sustain that burden in accordance with applicable regulations and instructions that accompany the application form. 8 U.S.C. 1229a(c)(4)(B). The regulations make clear that, if the evidence indicates that a ground of ineligibility "may" apply, the alien must prove "by a preponderance of the evidence" that the ground of ineligibility "do[es] not apply" to him. 8 C.F.R. 1240.8(d). The application form for cancellation of removal instructs the alien to disclose and provide certain information regarding any prior convictions he has.

2. An alien who has a conviction under a divisible statute that covers multiple offenses—at least some of which are disqualifying—must prove that his conviction was for a version of the offense that is not disqualifying.

Determining whether a prior conviction is disqualifying typically calls for a "categorical approach," in which an adjudicator considers only the elements of the prior offense and compares them to the disqualifying offense identified in the INA. *E.g.*, *Kawashima* v. *Holder*, 565 U.S. 478, 483 (2012). Applying that approach is straightforward where the specific offense the alien was

convicted of committing is known and the elements of that offense have been identified. If the elements of the crime of conviction substantially correspond to (or are narrower than) those of the disqualifying offense as set forth in the INA, then the alien's offense is disqualifying.

But where the alien was convicted under a divisible statute that encompasses multiple distinct offenses—and some but not all of those crimes are disqualifying—an additional, antecedent step is necessary. The adjudicator must first attempt "to determine what crime, with what elements, a defendant was convicted of." *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016). This Court has approved a method—the modified categorical approach—that enables an adjudicator to try to "discover 'which statutory phrase,' contained within a statute listing 'several different' crimes, 'covered a prior conviction,'" by considering "a limited class of documents" from the record of conviction. *Descamps* v. *United States*, 570 U.S. 254, 257, 263 (2013) (citation omitted).

The modified categorical approach provides a method for an alien who has been convicted under a divisible statute, some portions of which define disqualifying offenses, to carry his burden of proving that the offense does not render him ineligible. But that approach does not remove the alien's burden. And if the alien cannot demonstrate based on the types of documents this Court has approved that he was convicted of a particular crime under the divisible statute that is not disqualifying, the alien has not carried his burden of proving eligibility.

3. That is the case here. Petitioner was convicted under a divisible statute, which covers some offenses that constitute crimes involving moral turpitude but at least one that does not. The Board and the court of ap-

peals determined that the record of petitioner's conviction was inconclusive as to which crime under that provision he was convicted of committing. Petitioner therefore failed to carry his burden of proving eligibility for cancellation.

B. Petitioner's contrary arguments lack merit.

1. Petitioner observes that an adjudicator applying the categorical approach must presume that a prior conviction rested upon the least acts criminalized by the elements of that offense. He contends, based on that least-acts presumption, that if the record of conviction is insufficiently clear as to which offense an alien was convicted of committing, the adjudicator must assume the conviction is not disqualifying. That argument conflates two different inquiries. The least-acts presumption is a principle for determining, under the categorical approach, how to classify an already-identified crime. The issue here, however, is identifying which crime under a divisible statute an alien was convicted of committing. The presumption has no bearing on that distinct, antecedent question.

2. Petitioner also contends that the statutory and regulatory provisions placing the burden of proof on the alien to establish eligibility for relief do not apply to the issue of whether he has been convicted of a disqualifying offense. He asserts that the burden of proof applies only to factual questions and that whether an offense is disqualifying entails a legal inquiry. But which offense an alien was convicted of committing in a particular case is a question of fact. The inquiry this Court has articulated—which calls for examining particular documents in the record of conviction—is addressed to the factual question of which version of the crime was the basis of the conviction.

Petitioner additionally contends that the INA's text and context indicate that the burden of proof does not

apply to whether an alien has a disqualifying conviction. But the text makes no exceptions exempting the alien from carrying that burden with respect to prior convictions or any other particular issue. Nothing in the context or history contradicts the clear statutory text.

3. Finally, petitioner asserts that requiring an alien to prove that his prior conviction under a divisible statute is not disqualifying presents practical difficulties and would be unfair. But in adopting and adhering to the modified categorical approach, this Court found it more workable than the alternatives. In any event, adopting petitioner's position would not eliminate the difficulties he identifies; it would simply shift the burden of proof, and accompanying difficulties, from the alien to the government. That would contravene Congress's considered judgment that, in the context of aliens found removable who seek discretionary relief, the alien should bear the burden of proof. If the alien cannot demonstrate his eligibility for relief, such relief is unavailable to him.

ARGUMENT

AN ALIEN FAILS TO ESTABLISH HIS ELIGIBILITY FOR DISCRETIONARY RELIEF FROM REMOVAL IF HE HAS A CONVICTION UNDER A DIVISIBLE STATUTE AND THE RECORD IS INCONCLUSIVE AS TO WHETHER THE ALIEN WAS CONVICTED OF A DISQUALIFYING OFFENSE

An alien seeking cancellation of removal bears the burden of proving his eligibility for such relief. 8 U.S.C. 1229a(c)(4)(A); 8 C.F.R. 1240.8(d). A nonpermanent-resident alien must establish (*inter alia*) that he has not been convicted of certain offenses, including a "crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I); see 8 U.S.C. 1229b(b)(1)(C). A "categorical approach" is generally used to determine whether a particular prior conviction is disqualifying by

comparing the elements of that offense to the federal definition of the disqualifying crime. *Kawashima* v. *Holder*, 565 U.S. 478, 483 (2012).

This case concerns the scenario where the elements of an alien's prior conviction are insufficiently clear—because the statute of conviction defines multiple alternative crimes, some but not all of which are disqualifying, and the record the alien supplied does not adequately specify which alternative he was convicted of committing. In that scenario, under the modified categorical approach, the alien is not eligible for cancellation of removal. That conclusion follows from Congress's allocation in the INA of the burden of proving eligibility for relief and this Court's precedent. Petitioner's contrary arguments rest on fundamental misapprehensions of the INA and this Court's case law. And the rule he urges would eviscerate Congress's judgment that the alien, not the government, bears the burden of proof regarding eligibility.

A. An Alien With A Criminal Conviction Under A Divisible Statute Bears The Burden Of Proving That He Was Not Convicted Of A Disqualifying Crime Under The Statute

The INA authorizes the Attorney General to cancel the removal of a nonpermanent-resident alien who is unlawfully present in the United States, but only if the alien satisfies certain eligibility criteria and the Attorney General determines in his discretion to grant such relief. See 8 U.S.C. 1229b(b). The INA expressly assigns to the alien the burden of establishing both that he is eligible for cancellation and that an exercise of discretion is warranted in his case. 8 U.S.C. 1229a(c)(4)(A). Because only aliens who have not been convicted of certain offenses are eligible, an alien who has a prior conviction bears the burden of proving that it was *not* for a disqualifying offense. An alien who was convicted under a divisible statute covering multiple

crimes—one or more of which is disqualifying—can carry that burden only by demonstrating that he was convicted of a crime that does not render him ineligible for relief.

1. An alien seeking cancellation of removal must prove that he was not convicted of a disqualifying offense

To be eligible for cancellation of removal, a nonpermanent-resident alien must show that he has not been convicted of a crime involving moral turpitude. Among other eligibility requirements, the INA permits cancellation for such an alien only if he "has not been convicted of an offense under section 1182(a)(2) [or] 1227(a)(2)," with an irrelevant exception. 8 U.S.C. 1229b(b)(1)(C). The cross-referenced provisions cover various criminal offenses, including "crime[s] involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I). Such a conviction may also prevent the alien from satisfying another eligibility requirement: that he "has been a person of good moral character" during the requisite 10-year period of continuous physical presence in the United States. 8 U.S.C. 1229b(b)(1)(B); see 8 U.S.C. 1101(f)(3), 1182(a)(2)(A).

Like all other aspects of eligibility, the INA places the burden of proving that the alien has not been convicted of such a disqualifying offense squarely on the alien. Unlike the issue of whether an alien is removable—for which the allocation of the burden of proof depends on whether the alien has been admitted—the INA always places the burden on an alien seeking cancellation of removal (or other relief) to show that such relief is warranted. 8 U.S.C. 1229a(c)(4). Section 1229a(c)(4) provides that "[a]n alien applying for relief or protection from removal has the burden of proof to establish that the alien" both "satisfies the applicable eligibility requirements" and, "with respect to any form of relief

that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion." 8 U.S.C. 1229a(c)(4)(A); see, *e.g.*, *Syblis* v. *Attorney Gen. of the U.S.*, 763 F.3d 348, 357 (3d Cir. 2014); *Garcia* v. *Holder*, 584 F.3d 1288, 1289 (10th Cir. 2009). The statutory text makes no exceptions for particular grounds of ineligibility, such as disqualifying criminal convictions, or any specific subsidiary issues.

For an alien who has a prior conviction for any crime, the alien bears the burden of proving by a preponderance of the evidence that his crime is not disqualifying. Section 1229a(c)(4)(B) states that an alien seeking cancellation of removal or other relief "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." 8 U.S.C. 1229a(c)(4)(B). The governing regulations specify that, "[i]f 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) (emphases added). Thus, if an alien has a prior conviction that "may" render him ineligible for cancellation, it is his burden to "prov[e] by a preponderance of the evidence" that the conviction is not disqualifying. *Ibid.* To "show[]" a fact "by a 'preponderance of the evidence'" simply means demonstrating that "'the existence of [that] fact is more probable than its nonexistence.'" *Concrete Pipe & Prods. of Cal., Inc* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (citation omitted).

The application form's instructions, at the time of petitioner's application and today, implement those requirements by directing the alien to disclose and describe (*inter alia*) past convictions. The application directs the applicant to state whether, "either in the United States or in any foreign country," he has ever "been arrested, summoned into court as a defendant, convicted, fined, imprisoned, placed on probation, or forfeited collateral for an act involving a felony, misdemeanor, or breach of any public law or ordinance (including, but not limited to, traffic violations or driving incidents involving alcohol)." 2016 Form EOIR-42B, at 5. If the applicant answers "in the affirmative," then he must "give a brief description of each offense including the name and location of the offense, date of conviction, any penalty imposed, any sentence imposed, and the time actually served." *Ibid.* (emphasis omitted); A.R. 128; see *Marinelarena* v. *Barr*, 930 F.3d 1039, 1056 (9th Cir. 2019) (en banc) (Ikuta, J., dissenting), petition for cert. pending, No. 19-632 (filed Nov. 15, 2019).

2. An alien with a conviction under a divisible statute must prove that he was not convicted of an offense under that statute that renders him ineligible

a. Determining whether a conviction constitutes a crime involving moral turpitude (or another disqualifying offense under the INA) typically calls for application of a categorical approach. See, *e.g.*, *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986-1987 (2015); *Kawashima*, 565 U.S. at 483; but cf. *Nijhawan* v. *Holder*, 557 U.S. 29, 36-40 (2009) (holding that a particular INA provision called for a "'circumstance-specific,' not a 'categorical,' interpretation"). Under that approach, the adjudicator "look[s] to the statute defining the crime of conviction, rather than to the specific facts underlying the crime,"

to determine whether "the elements of the offense[]" satisfy the definition of a disqualifying offense. *Kawashima*, 565 U.S. at 483; see, *e.g.*, *Shular* v. *United States*, No. 18-6662 (Feb. 26, 2020), slip op. 2-3.

The nature of the categorical inquiry depends in part on how federal law defines a particular disqualifying offense. Some INA provisions refer broadly to offenses that "involve" particular conduct. *Kawashima*, 565 U.S. at 483 (quoting 8 U.S.C. 1101(a)(43)(M)(i), which covers certain crimes that "involve[] fraud or deceit") (brackets omitted). For such provisions, an adjudicator asks whether the "elements" of the alien's prior offense "necessarily entail" the conduct described in the INA provision. *Id.* at 484; see *Shular*, slip op. 6-11 (addressing similar "involving" language in the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(A)(ii)).

In contrast, certain other INA provisions refer to "generic" crimes as disqualifying offenses. *Moncrieffe* v. *Holder*, 569 U.S. 184, 192 (2013) (construing 8 U.S.C. 1101(a)(43)(B) to encompass "offenses that 'proscribe conduct punishable as a felony under'" specified federal controlled-substance laws (brackets and citation omitted)). Where the INA refers to a generic offense, the adjudicator asks "whether 'the * * * statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding" offense. *Id.* at 190 (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186 (2007)).

However the INA defines a particular type of disqualifying offense, the categorical approach looks only to the elements of the alien's crime, "not to the facts of [his] particular prior case." *Moncrieffe*, 569 U.S. at 190 (citation omitted); see also, *e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243, 2248-2249 (2016) (same under

18 U.S.C. 924(e)). Under the categorical approach, it is only the facts that "a jury 'necessarily found' to convict a defendant (or what he necessarily admitted)" that count. *Mathis*, 136 S. Ct. at 2255 (citation omitted).

b. "The comparison of elements that the categorical approach requires is straightforward when a statute sets out a single (or 'indivisible') set of elements to define a single crime." *Mathis*, 136 S. Ct. at 2248. After ascertaining the elements of the crime from the statute, the adjudicator determines whether those elements "'substantially correspond[]' to or [are] narrower than the" federal definition of the disqualifying offense. *Quarles* v. *United States*, 139 S. Ct. 1872, 1877 (2019) (quoting *Taylor* v. *United States*, 495 U.S. 575, 599 (1990)); see *Descamps* v. *United States*, 570 U.S. 254, 257 (2013). If an alien has a prior conviction under an indivisible statute, the adjudicator simply examines the elements set forth in that statute to determine whether they necessarily establish the type of disqualifying crime at issue—here, a crime involving moral turpitude.

But an adjudicator cannot always tell from the face of a criminal judgment and the statute which crime (and thus which elements) an alien seeking cancellation of removal was convicted of committing. "Some statutes * * * have a more complicated (sometimes called 'divisible') structure" that "list[s] elements in the alternative, and thereby define[s] multiple crimes." *Mathis*, 136 S. Ct. at 2249. Such a "statute alone" thus "does not disclose" *which* version of the offense an alien was convicted of committing in a particular case. *Descamps*, 570 U.S. at 262. To be sure, the alien must have been convicted of one of the particular crimes covered by a divisible statute. "A prosecutor charging a violation of a

divisible statute must generally select the relevant element from its list of alternatives," and "the jury, as instructions in the case will make clear, must [have] f[ou]nd that element, unanimously and beyond a reasonable doubt." *Id.* at 272. But a judgment of conviction may not indicate which alternative crime was the basis for the conviction—for example, if the judgment cites only the entire statute.

If all (or none) of the crimes the statute covers are disqualifying, then any question as to which crime an alien was convicted of committing is immaterial. But "[i]f at least one, but not all, of th[e] crimes" encompassed by a divisible statute would be disqualifying, an adjudicator "needs a way to find out which the [alien] was convicted of." *Descamps*, 570 U.S. at 264. Otherwise, the adjudicator cannot make the comparison that the categorical approach requires and cannot determine whether the alien is ineligible—any more than if the judgment did not cite any statute at all. The ordinary categorical approach itself cannot answer that antecedent question. The categorical approach assumes that a crime has been identified and prescribes a methodology for comparing that crime (based on its elements) to the disqualifying crime.

To fill that need, this Court has approved a "modified" version of the categorical approach as "a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque." *Mathis*, 136 S. Ct. at 2253. Under the modified version the Court has approved in the context of criminal sentencing, an adjudicator may consult "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant

was convicted of." *Id.* at 2249. If those documents reveal "'which statutory phrase,' contained within a statute listing 'several different' crimes, 'covered [the] prior conviction,'" the adjudicator "can then do what the categorical approach demands" by comparing the elements of that particular version of the crime with those of the disqualifying offense. *Descamps*, 570 U.S. at 257, 263 (quoting *Nijhawan*, 557 U.S. at 41).

The Court has indicated that the same modified approach applies under the INA in determining whether an alien was convicted of a version of an offense that is disqualifying and permits the adjudicator to consult the same limited class of documents. See, *e.g.*, *Moncrieffe*, 569 U.S. at 191 (adjudicator "may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or '"some comparable judicial record" of the factual basis for the plea'" (citations omitted)); accord *Esquivel-Quintana* v. *Holder*, 137 S. Ct. 1562, 1568 n.1 (2017); *Mellouli*, 135 S. Ct. at 1986 n.4; cf. 8 U.S.C. 1229a(c)(3)(B) (listing records that "constitute proof of a criminal conviction"). Petitioner does not appear to dispute that understanding. Pet. Br. 35 & nn.7-8, 45.

Understood in this fashion, "the modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Descamps*, 570 U.S. at 260; see *id.* at 263-264. The modified categorical approach thus is not an "exception" to the ordinary categorical approach. *Id.* at 263. It merely "adds * * * a mechanism for making

th[e] comparison" the categorical approach requires by enabling the adjudicator to answer the threshold question of which of multiple crimes covered by a statute was actually the basis of a particular prior conviction. *Ibid.*

c. The modified categorical approach thus provides an alien who is seeking cancellation of removal, but who has a prior conviction under a divisible statute, with a method for proving that his conviction is not disqualifying. If he shows, using the "limited class of documents" this Court has approved, "'which statutory phrase * * * covered [his] prior conviction'"—and if the offense defined by that portion of the statute is not disqualifying—then he has carried his burden of proving that that conviction does not render him ineligible. *Descamps*, 570 U.S. at 257, 263 (citation omitted).

The modified categorical approach does not relieve the alien of his burden of proof. If an alien is convicted under a divisible statute that covers some disqualifying crimes, then a "ground[] for mandatory denial of the application for relief may apply," and accordingly "the alien shall have the burden of proving by a preponderance of the evidence that such ground[] do[es] not apply." 8 C.F.R. 1240.8(d). The alien thus must show it is "more likely than not," *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007) (emphasis omitted), that he was convicted of a non-disqualifying version. As multiple courts of appeals have recognized, if the alien fails to demonstrate based on permissible documents which version of the offense he was convicted of committing, he has not carried that burden. See *Syblis*, 763 F.3d at 357 (Alien "ha[d] only demonstrated that the record is inconclusive—that his conviction * * * *may or may not* be related to a federally controlled substance," which "fail[ed] to show 'that the existence of a

fact is more probable than its nonexistence.'"); *Salem* v. *Holder*, 647 F.3d 111, 116 (4th Cir. 2011) ("Presentation of an inconclusive record of conviction is insufficient to meet a noncitizen's burden of demonstrating eligibility [for cancellation of removal], because it fails to establish that it is more likely than not that he was not convicted of" a disqualifying offense.), cert. denied, 565 U.S. 1110 (2012); *Garcia*, 584 F.3d at 1290 ("Because it is unclear from his record of conviction whether he committed a [crime involving moral turpitude], we conclude he has not proven eligibility for cancellation of removal."); see also *Gutierrez* v. *Sessions*, 887 F.3d 770, 779 (6th Cir. 2018) (inconclusive record of conviction fails to "demonstrate[] by a preponderance of the evidence that" the applicant is eligible for relief), cert. denied, 139 S. Ct. 863 (2019).

Put differently, if the statute of conviction is divisible, some but not all of the crimes it covers are disqualifying, and the record of conviction submitted by the alien is insufficient to establish the specific crime of conviction, neither the ordinary categorical approach nor the modified variant can resolve whether the conviction renders the alien ineligible. The adjudicator is no more able to discern whether the offense is disqualifying than if the judgment had specified no particular statute of conviction at all. But while the categorical-approach framework cannot provide an answer in that scenario, the INA's allocation of the burden of proof can and does. Congress's judgment that the alien shall bear the burden of proving his eligibility for cancellation of removal means that a lack of sufficient certainty about the alien's prior conviction renders him ineligible. See *Marinelarena*, 930 F.3d at 1061 (Ikuta, J., dissenting); *Lucio-Rayos* v. *Sessions*, 875 F.3d 573, 581 (10th Cir.

2017), cert. denied, 139 S. Ct. 865 (2019). Where the categorical approach's analysis is indeterminate, the burden of proof imposed by the statute and regulations is dispositive.

3. Petitioner failed to carry his burden of proving his eligibility for cancellation of removal in this case

The foregoing principles resolve this case. The IJ, the Board, and the court of appeals all determined that petitioner has a 2010 Nebraska state-court conviction for attempted criminal impersonation, in violation of Neb. Rev. Stat. §§ 28-201 and 28-608 (2008). Pet. App. 2a & n.1, 12a & n.1, 24a; see Pet. Br. App. 3a-4a, 7a-9a (A.R. 163, 165) (journal entry and complaint). All three concluded, and the parties agreed below, that a conviction under the criminal-impersonation statute, Section 28-608, does not categorically constitute a crime involving moral turpitude, because at least one crime it covers does not require intent to deceive. Pet. App. 7a, 14a-15a, 25a-27a. All three further determined that the offense is divisible. *Id.* at 7a, 15a-16a; see *id.* at 26a-27a. As the Board explained, "Section 28-608 is divided into several subsections, each describing separate crimes with different punishments." *Id.* at 15a; see *Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, * * * they must be elements"); *Descamps*, 570 U.S. at 264 (statute is divisible if it "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes'" (citation omitted)). Petitioner does not appear to dispute any of those determinations.

Under the INA and regulations, petitioner therefore bore the burden of proving that the particular version of the offense he was convicted of committing was one that did not constitute a crime involving moral turpitude. 8 U.S.C. 1229a(c)(4)(A); 8 C.F.R. 1240.8(d); see pp. 19-28,

supra. The fact that petitioner had been convicted under a divisible statute, at least some portions of which constitute disqualifying crimes, meant that a "ground[] for mandatory denial of the application for relief m[ight] apply" to him. 8 C.F.R. 1240.8(d). He thus "ha[d] the burden of proving by a preponderance of the evidence that such ground[] d[id] not apply." *Ibid.*[1]

Each of the adjudicators below determined that petitioner did not carry that burden. The IJ found based on the complaint that petitioner had been convicted for attempting a version of the criminal-impersonation offense that *was* a crime involving moral turpitude. Pet. App. 27a. The Board and the court of appeals disagreed with that finding, determining that, in the circumstances of this particular case, the record of conviction did not sufficiently establish that point. *Id.* at 7a-10a, 17a. But irrespective of their different views on that issue, all three adjudicators agreed that petitioner had not proven affirmatively by a preponderance of the evidence that his prior conviction was not disqualifying. *Ibid.*; see *id.* at 30a (IJ's finding that petitioner had not carried his burden).

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[1] The state-court journal entry cites only the Nebraska attempt statute, Section 28-201, and does not specify the particular substantive statute petitioner had attempted to violate. Pet. Br. App. 3a (A.R. 163). The complaint alleges that he attempted to violate Nebraska's criminal-impersonation statute, Section 28-608. *Id.* at 7a (A.R. 165). Petitioner does not appear to dispute that he was convicted of attempting to violate Section 28-608 on the ground that only the complaint identifies that provision. Even if the complaint were insufficient to establish that petitioner was convicted of attempting to violate that provision, he still would bear the burden of demonstrating that his offense of conviction (whether under Section 28-608 or another Nebraska law) is not a disqualifying offense.

That consensus is correct. The court's journal entry does not indicate which subsection of the statute petitioner was convicted of attempting to violate. See Pet. Br. App. 3a-4a (journal entry and order). It indicates that a "factual basis" for petitioner's plea was "found," but not which version of criminal impersonation he admitted to having attempted. *Id.* at 3a. Although an online-docket printout that petitioner submitted states that "[t]he parties ha[d] agreed to a plea bargain," A.R. 210, petitioner did not submit a plea agreement or colloquy in his removal proceedings before the IJ. And although the criminal complaint makes clear that petitioner was charged with attempting to violate Section 28-608, it recites the entire substantive portion of that statute with no indication that petitioner was charged with a non-disqualifying version of the offense, and petitioner has not shown how the charged conduct ("us[ing] a fraudulent Social Security card to obtain employment") corresponds to a non-disqualifying offense. Pet. Br. App. 8a (A.R. 165); see *id.* at 7a-8a (A.R. 165). Petitioner thus did not carry his burden of proving his eligibility for cancellation of removal. He was required, but failed, to refute a potentially applicable ground of ineligibility.

Indeed, petitioner did not even satisfy his burden of *production* under the INA to submit evidence showing that he was convicted of a non-disqualifying version of the crime. The INA expressly requires that an applicant must "comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief," including those imposed by the agency. 8 U.S.C. 1229a(c)(4)(B). And the Board has long made clear that "it is incumbent upon [an applicant for relief] to supply such information

that is within his knowledge and is relevant and material to a determination of whether he merits the relief." *In re Marques*, 16 I. & N. Dec. 314, 316 (B.I.A. 1977); see *In re Almanza-Arenas*, 24 I. & N. Dec. 771, 774-775 (B.I.A. 2009). A contrary rule, placing burdens of both persuasion *and* production on the government, would give aliens a powerful incentive not to disclose potentially disqualifying information in their possession. See *Marinelarena*, 930 F.3d at 1065 (Ikuta, J., dissenting).

In this case, if documents such as a plea agreement existed that showed petitioner was convicted of a version of the offense that did not involve moral turpitude, petitioner was in the best position to present them. Petitioner's criminal case, in which he was represented by counsel, Pet. Br. App. 3a (A.R. 163), was occurring in parallel with his removal proceedings, A.R. 104-105; see pp. 7-9, *supra*. And, given his counsel's acknowledgment of the relevance of the then-pending criminal case's outcome for petitioner's eligibility for relief, see A.R. 104—and petitioner's awareness when he pleaded guilty that his conviction could have immigration consequences, see Pet. Br. App. 4a (A.R. 163)—petitioner had every reason to ensure that relevant records were created and retained to clarify which specific crime he was convicted of committing. Yet even after DHS submitted the journal entry and complaint, petitioner did not furnish any such documents to the IJ. Thus, although the court of appeals determined that the categorical approach does not supply a conclusive answer, it correctly determined that the INA's burden of proof does: petitioner's failure to carry his burden forecloses his assertion of eligibility for cancellation of removal.

B. Petitioner's Contrary Arguments Lack Merit

Petitioner nevertheless contends that any inconclusiveness of the record of his conviction as to which version of criminal impersonation he was convicted of committing renders that conviction irrelevant to his eligibility for cancellation of removal. He advances two main arguments. First, he asserts that this Court's precedent requires "'presum[ing] that [his] conviction rested upon nothing more than the least of the acts criminalized,'" and an ambiguous record of conviction does not "rebut[] the default presumption." Pet. Br. 16-17 (citation and internal quotation marks omitted); see *id.* at 15-19. Second, petitioner argues (Br. 19-50) that the statutory and regulatory provisions placing the burden on the alien to prove that he is eligible for cancellation of removal do not apply to the issue of whether a prior conviction renders the alien ineligible. Both contentions lack merit and rest on fundamental misunderstandings of the INA and this Court's case law.

1. The least-acts presumption bears on what the elements of an offense establish, not on which offense under a divisible statute an alien was convicted of committing

This Court has explained that, because the categorical approach directs adjudicators to "examine what the state conviction necessarily involved, not the facts underlying the case, [they] must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe*, 569 U.S. at 190-191 (quoting *Johnson* v. *United States*, 559 U.S. 133, 137 (2010)) (brackets omitted); see *Mellouli*, 135 S. Ct. at 1986. The adjudicator then must "determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 569 U.S. at 191; see *Esquivel-Quintana*, 137 S. Ct. at 1568. From that principle, petitioner

extrapolates (Br. 17) a general rule that, whenever a "statute of conviction sweeps in more conduct than the relevant federal offense," the conviction must be presumed "*not* disqualifying." And he asserts (*ibid.*) that, if the record of conviction is ambiguous as to the "particular prong of a divisible statute" under which the alien was convicted, then the record cannot "rebut[] the default presumption." That argument lacks merit.

Petitioner's argument conflates two different inquiries under this Court's decisions addressing the categorical approach and its modified-categorical variant. As discussed above, when a statute defines multiple crimes, some of which are disqualifying and some of which are not, two separate steps are required. The first is to identify, if possible, the specific crime for which the defendant was convicted. The second is to determine whether that specific crime of conviction is a disqualifying offense. See pp. 21-28, *supra*.[2]

The least-acts presumption applies only at the second step. It is a principle for determining how to classify an already-identified crime under the categorical approach. An adjudicator examines what conduct must necessarily have been found (or the defendant must have admitted) for each of the elements to be established, and compares that conduct to the federal definition of the crime.

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[2] If the defendant was convicted under a divisible statute but the least acts criminalized by the elements of every crime the statute covers would (or would not) be disqualifying, the adjudicator need not conduct a threshold inquiry into which specific version of the offense the defendant was convicted of committing. Cf. *Descamps*, 570 U.S. at 264 (modified approach is needed "[i]f at least one, but not all, of those crimes matches the generic version").

The least-acts presumption is a corollary of the central tenet of the categorical approach: that courts examine only the elements of a prior crime of conviction —which reflect the facts that a jury had to find or the defendant had to admit—and not the specific circumstances of a particular past offense. See *Mathis*, 136 S. Ct at 2251-2256; *Descamps*, 570 U.S. at 257, 263-264. That is how the Court has consistently described the least-acts presumption—contrasting an examination into the minimum conduct that an offense's elements would require a jury to find or a defendant to admit (which the categorical approach requires) with an inquiry into the actual facts of a defendant's particular prior case (which the categorical approach prohibits). See *Esquivel-Quintana*, 137 S. Ct. at 1568; *Mellouli*, 135 S. Ct. at 1986; *Moncrieffe*, 569 U.S. at 190-191. Critically, that analysis can be conducted—and the least-acts presumption can be applied—only *after* the crime and its elements have been identified.

This case does not concern how to classify an already-identified crime under the categorical approach. Instead, the dispute concerns the antecedent determination of *which* crime an alien was convicted of committing in the first place. The least-acts presumption does not and cannot answer that question. Instead, "[t]hat is the job * * * of the modified approach: to identify, from among several alternatives, the crime of conviction so that the [adjudicator] can compare it to the generic offense." *Descamps*, 570 U.S. at 264; see *Moncrieffe*, 569 U.S. at 191 (describing modified categorical approach as a "qualification" to the least-acts presumption). Just as "[t]he modified approach * * * has no role to play" where a statute is not divisible, *Descamps*, 570 U.S. at 264, the least-acts presumption is irrelevant to the

antecedent inquiry of which crime under a divisible statute the defendant was convicted of committing.

The Court's cases applying the least-acts presumption confirm as much. The Court has invoked that presumption to determine the legal scope and significance under the categorical approach of past convictions for crimes that had already been identified. In *Moncrieffe*, although the Georgia statute at issue was divisible, the Court "kn[ew] from [the alien's] plea agreement" which of those offenses he had been convicted of committing. 569 U.S. at 192. Having discerned the specific offense of conviction, the Court then conducted the categorical comparison of the least conduct covered by the elements of that offense with the generic offense. *Id.* at 192-195. In *Mellouli*, the "[g]overnment [did] not argue[] that th[at] case f[ell] within the compass of the modified-categorical approach." 135 S. Ct. at 1986 n.4. And in *Esquivel-Quintana*, the California statutory-rape law at issue was not divisible, and the question was accordingly whether the least of the acts criminalized by that statute constituted "sexual abuse of a minor" under the INA. 137 S. Ct. at 1568 & n.1. In each case, no serious question existed as to "the actual crime of which the alien was convicted." *Id.* at 1568 n.1.

By conflating these separate inquiries and the principles that govern them, petitioner confuses (A) a conviction under an indivisible statute that is overbroad relative to the relevant generic offense, and (B) a conviction under a divisible statute that covers multiple crimes, some but not all of which are disqualifying, where the record does not indicate which crime formed the basis of the conviction. Those two types of conviction are meaningfully different. If an alien has a conviction under an indivisible statute, the adjudicator knows

which offense—that is, what set of elements—the alien was convicted of committing. The only remaining question is whether that offense disqualifies the alien for cancellation of removal. And because the adjudicator must assume that the alien was found guilty of (or admitted) committing only the least acts covered by the offense's elements, an overbroad indivisible crime is not disqualifying. The fact of a conviction proves only that the elements were established, and the government may not attempt to show that the alien in fact engaged in conduct above the minimum.

In contrast, if an alien has a conviction under a divisible statute that covers multiple distinct crimes—only some of which render an alien ineligible for cancellation of removal—the adjudicator first needs to determine which crime the alien was convicted of committing. The alien must have been convicted of one of those distinct crimes under the divisible statute. See *Descamps*, 570 U.S. at 272. A defendant cannot be convicted of a divisible statute in its entirety, any more than a federal defendant could be convicted of violating Title 18 of the United States Code. But unless all (or none) of the crimes the statute covers would be disqualifying, the adjudicator cannot classify the conviction under the categorical approach without first identifying *which* crime an alien was convicted of committing.

Here, petitioner could not have been convicted of attempting to violate Section 28-608 as a whole, because that divisible statute encompasses at least four different crimes, with different elements. And some but not all of those crimes would be disqualifying. An adjudicator cannot sufficiently determine which of those crimes underlay the conviction, and thus whether the convic-

tion renders petitioner ineligible for relief, absent clarifying record materials. If no such materials have been produced, then the party who has the burden of proof—here, the alien—cannot prevail. That is not because of any presumption for construing the scope of a criminal offense. It is for the more basic reason that the adjudicator cannot adequately assess whether the alien was convicted of a disqualifying or a non-disqualifying version of the offense, and thus cannot find that the party who has the burden of proving whether the conviction is disqualifying has carried it.

2. The burden of proving eligibility imposed by the INA and regulations applies to the issue of whether an alien was convicted of a crime that renders him ineligible

Petitioner devotes the bulk of his argument (Br. 19-50) to contending that the burden of proving eligibility for cancellation of removal—which the INA and governing regulations explicitly place on the alien—is irrelevant to the issue of whether an alien has been convicted of a disqualifying crime. That contention also lacks merit and, like his similar argument based on the least-acts presumption, rests on a misconception of the categorical-approach framework.

a. Petitioner primarily contends that burdens of proof pertain only to "factual questions," and whether an alien's prior conviction is one that renders him ineligible for relief under the INA is a question of law. Pet. Br. 20 (emphasis omitted); see *id.* at 19-36. That is incorrect. His argument again conflates two distinct steps in the analysis this Court has prescribed.

Once the crime of which an alien has been convicted has been ascertained and its elements identified, the adjudicator applies the categorical approach to determine whether that offense renders an alien ineligible for

relief. To do so, the adjudicator asks whether the elements of that offense match the generic federal definition of the crime. See, *e.g.*, *Mathis*, 136 S. Ct. at 2248. That analysis does involve a "purely legal inquiry." *Marinelarena*, 930 F.3d at 1060 (Ikuta, J., dissenting) (citing *Mathis*, 136 S. Ct. at 2249).

But this case concerns the antecedent step of determining *which* crime an alien was convicted of committing. And identifying "the offense of conviction itself 'is a factual determination, not a legal one.'" *Le* v. *Lynch*, 819 F.3d 98, 105 (5th Cir. 2016) (citation and internal quotation marks omitted). An adjudicator determining the fact of a prior conviction resolves whether a particular prior prosecution resulted in a judgment of conviction against the alien, and under what statute, by examining the record of conviction in that specific prior case. That same record-based inquiry can include determining whether the alien was convicted in the prior case under one particular portion of a divisible statute as opposed to another portion—*i.e.*, which version of the crime the alien was charged with and found guilty of (or pleaded guilty to) committing. Whether the elements of that version of the crime constitute a disqualifying offense under the INA is a legal question. But which version of the crime was the basis for the particular conviction is a factual question that can be resolved only by examining the record of conviction in that case.

This Court's decisions confirm that understanding. The Court's seminal case adopting the categorical approach in the criminal-sentencing context, *Taylor*, *supra*, explained that a "sentencing court [may] look only to the fact that the defendant had been convicted of crimes falling within certain categories, [but] not to the facts underlying the prior convictions." 495 U.S. at

600. And the methodology the Court has approved for determining which portion of a divisible statute an alien was convicted of committing is record-based. Under the modified categorical approach, the adjudicator "looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249; see *Descamps*, 570 U.S. at 257, 262-264. The approach "relies on documentary evidence to determine of which of the several offenses set forth in a divisible statute the alien was convicted." *Lucio-Rayos*, 875 F.3d at 582 n.14.

This case illustrates the inherently record-specific character of the inquiry. All of the adjudicators below determined, and petitioner does not dispute, that he was convicted of attempting a felony offense, in violation of Neb. Rev. Stat. 28-201 (2008). Pet. Br. App. 3a; see pp. 9-13, *supra*. The record of conviction shows that he was charged with and convicted of attempting to violate Nebraska's criminal-impersonation statute, Neb. Rev. Stat. 28-608 (2008). Pet. App. 2a & n.1, 12a & n.1, 24a; see Pet. Br. App. 7a-8a. And because (as all further agree) that statute is divisible and covers at least four distinct crimes with different elements, it necessarily follows that petitioner was convicted of one of those specific offenses. See *Descamps*, 570 U.S. at 272. If documents—such as a plea agreement or colloquy transcript—had been presented that revealed which specific offense under Section 28-608 petitioner pleaded no contest to attempting and of which he was convicted, then the record might have affirmatively shown that petitioner was ineligible (or eligible) for relief. Pet. Br. 17. Conversely, the absence of such record materials left the court of

appeals "[u]nab[le] to discern the particular crime for which [petitioner] was convicted." Pet. App. 9a. That lack of sufficient certainty "foreclose[d]" consideration of the various legal arguments petitioner raised as to the classification of his prior conviction. *Ibid.*

Petitioner cites two cases—*Moncrieffe* and *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010)—for his view that "burdens of proof have not played a role" even "in cases where the noncitizen bore the burden of proof." Pet. Br. 22, 24 (emphasis omitted); see *id.* at 24-25. But both are inapposite because there was no question in either case as to which crime the alien had been convicted of committing. As noted above, in *Moncrieffe*, although the statute under which the alien had been convicted was divisible, it was clear from the plea agreement which specific version of the offense the alien had pleaded guilty of committing. See 569 U.S. at 192. Similarly, in *Carachuri-Rosendo*, although an enhanced version of the alien's offense existed, "the State did not elect to seek [that] enhancement." 560 U.S. at 571; see *id.* at 573. Neither *Moncrieffe* nor *Carachuri-Rosendo* addressed a threshold inquiry into which crime was the basis of the prior conviction. In contrast, this case does present that question, and petitioner's failure to carry his burden of proof answers it.

b. Petitioner also contends (Br. 37-42) that the INA's text and context indicate that Congress intended to exclude from the alien's burden of proving his eligibility for relief the issue whether a particular prior conviction renders the alien ineligible. That is incorrect.

The INA's text unambiguously imposes on "[a]n alien applying for relief or protection from removal * * * the burden of proof to establish that the alien * * * satisfies the applicable eligibility requirements."

8 U.S.C. 1229a(c)(4)(A)(i). The plain language makes no exception for any subsidiary question that bears on eligibility. As with the other prerequisites for a nonpermanent-resident alien to establish eligibility for cancellation of removal—such as a 10-year period of continuous physical presence, 8 U.S.C. 1229b(b)(1)(A), and being "a person of good moral character during [that] period," 8 U.S.C. 1229b(b)(1)(B)—the INA's text thus places the burden of proving that the alien "has not been convicted of an offense under [8 U.S.C.] 1182(a)(2) [or] 1227(a)(2)," 8 U.S.C. 1229b(b)(1)(C), on the alien.

Petitioner points to nothing in the text that supports reading in an unstated exception for that eligibility requirement. He contends instead (Br. 37) that the text does not expressly "alter the categorical approach's legal nature." See Pet. Br. 37-38. Petitioner's textual argument thus is premised on his assertion that determining which offense under a divisible statute an alien was convicted of committing is a question of law, which is incorrect as explained above, see pp. 37-40, *supra*.

Petitioner also asserts (Br. 39-41) that the neighboring provisions of Section 1229a(c) show that the alien's burden of proof does not extend to showing he lacks disqualifying prior convictions. He points (Br. 39-40) to Section 1229a(c)(4)(B), which is captioned "Sustaining burden," 8 U.S.C. 1229a(c)(4)(B) (emphasis omitted), but it undermines his position. The first sentence of that subparagraph, discussed above, states that "[t]he 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." *Ibid.* And regulations already in force when that provision was

enacted, and still today, require an alien who "may" be ineligible for relief on a particular "ground[]" to "prov[e] by a preponderance of the evidence that such ground[] do[es] not apply." 8 C.F.R. 1240.8(d). Petitioner has not challenged the validity of that regulation or explained why the agency's reading of it as applying to disqualifying convictions no less than other criteria is unreasonable.

Petitioner notes (Br. 39-40) that other language in Section 1229a(c)(4)(B) relates to matters such as witnesses' credibility that generally have no bearing on whether a prior conviction is disqualifying. But those matters often will be relevant to other eligibility issues. The fact that Congress also addressed those matters in the global statutory provision specifying what an alien must do to discharge his burden of proof regarding discretionary relief is unremarkable.

Petitioner next observes (Br. 40) that Section 1229a(c)(3)(B) prescribes the types of documents that suffice to prove a conviction. Petitioner infers (*ibid.*) that the absence of similar language in Section 1229a(c)(4) shows that Congress did not intend the latter provision to address criminal convictions. But there was no need or reason for Congress to repeat that language in Section 1229a(c)(4) because the text petitioner cites in Section 1229a(c)(3)(B) already applies to Section 1229a(c)(4) as well. Although another portion of Section 1229a(c)(3) places on the government the burden of proving that an alien who was previously admitted is deportable, 8 U.S.C. 1229a(c)(3)(A), the provision petitioner cites addressing how convictions may be proved applies to "any" INA proceeding without limitation, 8 U.S.C. 1229a(c)(3)(B). Section 1229a(c)(3)(B) states that, "[i]n 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," and proceeds to list various types of documents. 8 U.S.C. 1229a(c)(3)(B); 8 U.S.C. 1229a(c)(3)(C) (same for electronic records). That language was already in the statute when Congress added subsection (c)(4) to Section 1229a as part of the REAL ID Act in 2005. See 8 U.S.C. 1229a(c)(3)(B) (2000). Congress had no need to reiterate those parameters on the documents that may be used to prove the fact of a prior conviction.

Petitioner additionally asserts (Br. 40-42) that the historical background shows that Section 1229a(c)(4)(A) exempts an alien from having to prove that his prior conviction is not disqualifying. Petitioner notes (Br. 41) that the "categorical approach" was well settled in the INA at the time of that provision's enactment. And he observes (Br. 42) that in the REAL ID Act Congress abrogated two presumptions "unrelated to convictions" that predated that statute but "said nothing to supersede" the least-acts presumption. Petitioner's arguments again assume his erroneous conclusion that the categorical approach requires treating an ambiguous record of conviction under a divisible statute as not disqualifying.

The statutory history reinforces the correct reading of the text as requiring the alien who has a prior conviction to prove that it is not disqualifying. Before IIRIRA's enactment in 1996, an alien with a criminal conviction for an offense that would render the alien removable was not disqualified from seeking discretionary relief. Cf. 8 U.S.C. 1254(a)(2) (1994) (imposing somewhat more onerous requirements on such aliens). In IIRIRA, Congress eliminated that eligibility. It replaced suspension of

deportation with cancellation of removal, and it prohibited cancellation of removal for aliens with criminal offenses for crimes enumerated in the INA's inadmissibility and deportability provisions. See 8 U.S.C. 1229b(b)(1)(C) (rendering ineligible for relief aliens "convicted of an offense under section 1182(a)(2), 1227(a)(2)"). Because it was already "well-settled that an alien bears the burden of establishing eligibility for relief or a benefit," 62 Fed. Reg. at 10,322, Congress would have understood that the new regime would require aliens seeking cancellation to prove that they did not have a disqualifying conviction.

When Congress enacted Section 1229a(c)(4), it codified that well-settled rule and required aliens seeking relief to comply with agency regulations and instructions. Congress "affirmed the vitality" of the existing framework, which requires an alien who "'may'" be ineligible under a particular ground to refute that ground, and "sought to underscore that the noncitizen bears the burden at the relief stage." *Salem*, 647 F.3d at 115 (quoting 8 C.F.R 1240.8(d)). The history leaves no doubt of which party Congress intended to bear the burden. The detail and care with which the INA addresses which party in removal proceedings bears the burden of proof on particular issues in specific postures, 8 U.S.C. 1229a(c)(2)-(4), show that Congress's determination was deliberate. When the government seeks to remove an alien who was previously admitted and alleges that the alien is removable based on a prior conviction, the government bears the burden of proving that the conviction is disqualifying. 8 U.S.C. 1229a(c)(3). When an alien found removable seeks relief from removal, in contrast, Congress placed the burden on the alien. 8 U.S.C. 1229a(c)(4)(A)(i).

Petitioner's position would contravene Congress's judgment and "effectively nullif[y] the statutorily prescribed burden of proof." *Syblis*, 763 F.3d at 357 (quoting *Garcia*, 584 F.3d at 1290) (brackets in original).

c. Finally, petitioner contends that excusing an alien who is seeking cancellation of removal from proving that his past conviction does not render him ineligible is needed to avoid "practical difficulties" and "unfairness." Pet. Br. 43, 45 (emphasis omitted); see *id.* at 43-50. Even if they were well founded, such concerns could not "justify * * * disregard[ing] the clear meaning of the statutory language," *United States* v. *Rodriquez*, 553 U.S. 377, 389 (2008), which unequivocally places the "burden of proof" on the alien to "establish that" he "satisfies the applicable eligibility requirements," 8 U.S.C. 1229a(c)(4)(A)(i). In any event, petitioner's policy arguments are unavailing.

Petitioner's principal argument (Br. 43-47) is that carrying the burden of proof imposed by statute and regulation often will be too difficult for aliens seeking cancellation relief. He asserts (Br. 45) that requiring an alien with a conviction under a divisible statute to show that he was convicted of a non-disqualifying version of that crime asks the alien "to prove the unprovable." Petitioner points (*ibid.*) to the "strict limitations" this Court's precedents impose on the types of documents that may be considered to identify the offense of conviction, and asserts that records in that "narrow range of conviction documents" may be lost or may not exist. See Pet. Br. 43-46. But this Court limited the records that may be used to identify a crime of conviction in part to avoid similar "practical difficulties." *Taylor*, 495 U.S. at 601. And the Court has adhered to the modified categorical approach embodying those limitations based on

a conclusion that it is workable, and simpler and fairer than the alternative. See *Mathis*, 136 S. Ct. at 2253; *Descamps*, 570 U.S. at 267, 270-271.

In any event, adopting petitioner's position would not eliminate the practical difficulties presented by the limits the Court has recognized on the evidence an adjudicator may consider to resolve ambiguities about the offense of conviction. To the extent documents that clarify the basis of a conviction are lost or never generated in particular cases, those problems will persist irrespective of the Court's decision in this case. Where adequate clarifying records do not exist, one party or the other—whichever has the burden of proof—will not prevail. Where the government bears the burden—in establishing that an admitted alien is removable—the absence of records often means the government cannot carry it. See *Rodriquez*, 553 U.S. at 389. Here, Congress has placed the burden of proof on the alien. 8 U.S.C. 1229a(c)(4)(A)(i). Petitioner's approach would simply flip that burden to the government, giving the alien the benefit of any ambiguity. He identifies no valid basis for such overriding of Congress's considered judgment.

Moreover, although the wisdom of Congress's choice is not before the Court, sound reasons support the approach Congress adopted. An alien like petitioner who was convicted in a criminal prosecution will often be in a better position to present relevant documents that were provided to him or his counsel in the criminal case. Placing the burden on the alien to disprove a disqualifying offense creates a powerful incentive for the alien to furnish the IJ with relevant records. And in cases like this, where the alien pleads guilty to a criminal offense after being made aware that a conviction may have immigration consequences, the alien also has a strong incentive

to ensure that relevant records (such as a plea-colloquy transcript) are created and retained in the first place.

In contrast, petitioner's position that "the alien is entitled to relief whenever the record is ambiguous w[ould] encourage aliens to withhold and conceal evidence." *Marinelarena*, 930 F.3d at 1065 (Ikuta, J., dissenting). Petitioner's view that the alien need not even carry a burden of production would further magnify that incentive. And sound reasons support Congress's judgment even where clarifying records are unavailable through no fault of the alien. Congress was entitled to conclude that insufficient certainty concerning the eligibility for discretionary relief of an alien who has already been found removable—and who has a criminal conviction that has come to the adjudicator's attention—should not redound to the alien's benefit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

* * * * *

(f) For the purposes of this chapter—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was—

* * * * *

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section[8] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

* * * * *

[8] So in original. The phrase "of such section" probably should not appear.

2. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

3. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

* * * * *

4. 8 U.S.C. 1229a provides in pertinent part:

Removal proceedings

* * * * *

(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. 8 U.S.C. 1229b provides in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * * * *

6. 8 U.S.C. 1254(a) (1994) provides:

Suspension of deportation

(a) Adjustment of status for permanent residence; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

(2) is deportable under paragraph (2), (3), or (4) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person

whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(3) is deportable under any law of the United States except section 1251(a)(1)(G) of this title and the provisions specified in paragraph (2); has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and proves that during all of such time in the United States the alien was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

7. 8 C.F.R. 1240.8 provides:

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 Untied 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.