FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUAN GABRIEL ROMERO, AKA Jonattan A. Concepcion, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent.*	No. 17-70534 Agency No. A087-958-853 OPINION

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

Argued and Submitted May 14, 2021
Pasadena, California

Filed August 2, 2021

Before: Ryan D. Nelson and Kenneth K. Lee, Circuit Judges, and Sidney H. Stein,[*] District Judge.

Per Curiam Opinion

[*] The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

SUMMARY[**]

Immigration

Granting Juan Gabriel Romero's petition for review of a decision of the Board of Immigration Appeals, and remanding, the panel: (1) held that, because Romero was not an applicant for admission, the BIA impermissibly applied the "clearly and beyond doubt" burden of proof in finding him inadmissible and therefore ineligible for adjustment of status; and (2) remanded for the BIA to apply the "preponderance of the evidence" burden.

An immigration judge denied Romero's application for adjustment of status on the ground that he was inadmissible, concluding that he had not shown that he was "clearly and beyond doubt" not inadmissible. The BIA affirmed, believing itself bound by *Lopez-Vasquez v. Holder*, 706 F.3d 1072 (9th Cir. 2013), to apply the "clearly and beyond doubt" burden of proof.

The panel observed that two burdens of proof were disputed. First, if the alien is "an applicant for admission," 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). Alternatively, an applicant for relief from removal has the burden of establishing eligibility, § 1229a(c)(4)(A), and if the evidence indicates that one or more of the grounds for mandatory denial of relief may apply, the "alien shall have

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the burden of proving by a preponderance of the evidence that such grounds do not apply," 8 C.F.R. § 1240.8(d). The panel observed that the "preponderance of the evidence" burden is comparatively much easier to meet than the "clearly and beyond doubt" burden.

The panel concluded that the BIA erred in applying an improperly high burden of proof, explaining that the "clearly and beyond doubt" burden unambiguously applies only to applicants for admission, and Romero was not an applicant for admission because he had been admitted into the United States before he applied for adjustment. Observing that the petitioner in *Lopez-Vasquez* had entered the country illegally, the panel explained that the BIA erroneously relied on that case here. The panel remanded for the BIA to reconsider whether Romero met his burden to show by a "preponderance of the evidence" that he was not inadmissible.

COUNSEL

Luther Snavely (argued) and Reza Athari, Reza Athari & Associates, Las Vegas, Nevada, for Petitioner.

Joanna L. Watson (argued), Trial Attorney; Anthony P. Nicastro, Assistant Director; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

PER CURIAM:

Juan Gabriel Romero petitions for review of the Board of Immigration Appeals ("BIA") decision that he was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) for making a false representation of U.S. citizenship for a purpose or benefit under Nevada law. We hold the BIA applied the wrong burden of proof to Romero's application. We therefore grant the petition and remand for reconsideration under the correct burden. *See Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006).

I

Romero, a Guatemalan citizen, was admitted into the United States in 2005 as a visitor. Romero unlawfully remained in the United States after his authorization expired in 2006. He married a U.S. citizen in 2007. In 2010, Romero's wife filed an I-130 Petition for Noncitizen Relative with U.S. Citizenship and Immigration Services ("USCIS"). Romero then filed a Form I-485 application for adjustment of status.

In 2013, USCIS interviewed Romero, who admitted he had obtained a driver's license from the Nevada Department of Motor Vehicles ("DMV") under a false name. USCIS denied Romero's I-485 application, finding him inadmissible for falsely claiming to be a U.S. citizen when applying at the DMV. The Department of Homeland Security then charged Romero with removability under 8 U.S.C. § 1227(a)(1)(B) for unlawfully remaining in the United States. Romero admitted the factual allegations and removal charge at immigration court. In removal

proceedings, Romero pursued only his application for adjustment of status.

The immigration judge ("IJ") concluded Romero was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) for falsely claiming U.S. citizenship for the benefit of a Nevada identification card ("ID"). In his 2005 application for a Nevada ID under the false name Jonattan Concepcion, Romero listed his birthplace as Rio Piedras, Puerto Rico. The IJ also found Romero had presented a Social Security card and a Consular Report of Birth Abroad of a U.S. Citizen ("CRBA"). The IJ decided that Romero's misrepresentation of birth in Puerto Rico was a false claim to U.S. citizenship, as was Romero's submission of a CRBA. The IJ concluded that Romero did not show he was "clearly and beyond doubt" not inadmissible, applying the burden of proof from 8 U.S.C. § 1229a(c)(2)(A). The IJ denied Romero's application for adjustment of status and ordered him removed to Guatemala.

The BIA upheld the IJ. The BIA believed it was bound by *Lopez-Vasquez v. Holder*, 706 F.3d 1072 (9th Cir. 2013), to apply the "clearly and beyond doubt" burden of proof. The BIA agreed with the IJ that Romero's misrepresentation of birth in Puerto Rico rendered him inadmissible, as did his false CRBA. The BIA also concluded Romero waived his argument that a false statement of U.S. citizenship must be material to any state benefit. The BIA also held that even absent waiver, Romero's misrepresentation of U.S. citizenship was necessary to obtain an ID because Nevada requires proof of lawful status or authorization to work in the United States.

II

We have jurisdiction to "review [] constitutional claims and questions of law presented in petitions for review of final removal orders." *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc). We review legal questions de novo, *Zumel v. Lynch*, 803 F.3d 463, 471 (9th Cir. 2015), including the question of what burden of proof applies, *Malkandi v. Holder*, 576 F.3d 906, 913 (9th Cir. 2009). "We review only the BIA's opinion, except to the extent that it expressly adopted portions of the IJ's decision." *Villegas Sanchez v. Garland*, 990 F.3d 1173, 1178 (9th Cir. 2021) (quotation omitted). "Our review is limited to those grounds explicitly relied upon by the BIA." *Id.* (cleaned up).

III

Romero applied for adjustment of status. Our review hinges on whether Romero met his burden to show he is not inadmissible. The Attorney General has discretion to adjust the status of an admitted alien, like Romero, to lawful permanent resident ("LPR") if "the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and . . . an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a). But "[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under . . . Federal or State law is inadmissible." *Id.* § 1182(a)(6)(C)(ii).

Two burdens of proof are disputed. First, "if the alien is an applicant for admission," then "the alien has the burden of establishing . . . that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section

1182 of this title." *Id.* § 1229a(c)(2)(A); *see also* 8 C.F.R. § 1240.8(b)–(c) (applying "clearly and beyond doubt" burden to "proceedings commenced upon a respondent's arrival" or "[a]liens present in the United States without being admitted"). This burden is stringent, comparable to "beyond a reasonable doubt" in criminal prosecutions. *Cf. Valadez-Munoz v. Holder*, 623 F.3d 1304, 1309 (9th Cir. 2010) (analogizing the "clearly and beyond doubt" and "beyond a reasonable doubt" burdens, but with the burden on the alien rather than the prosecutor).

Alternatively, "[a]n alien applying for relief or protection from removal has the burden of proof to establish that the alien . . . satisfies the applicable eligibility requirements." 8 U.S.C. § 1229a(c)(4)(A). "If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. § 1240.8(d). The "preponderance of the evidence" burden is comparatively much easier to meet than the "clearly and beyond doubt" burden. *Cf. Addington v. Texas*, 441 U.S. 418, 423 (1979).

Fundamentally, Romero argues the BIA imposed an improperly high burden of proof and for remand for reconsideration under the lower burden. The "clearly and beyond doubt" burden under 8 U.S.C. § 1229a(c)(2)(A) unambiguously applies only to applicants for admission. And the statutory definition of admission "unambiguously demonstrates" an alien's "post-entry adjustment of status to an LPR after h[is] admission to the United States as a visitor does not constitute an admission." *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1054 (9th Cir. 2014); *see also* 8 U.S.C. § 1101(a)(13)(A) (defining "admitted" and "admission" as "the lawful entry of the alien into the United

States after inspection and authorization by an immigration officer"). Romero had been admitted before he applied for adjustment of status. Thus, he is not now an "applicant for admission," and therefore the "clearly and beyond doubt" burden does not apply. Rather, the "preponderance of the evidence" burden from 8 C.F.R. § 1240.8(d) applies.

The BIA erroneously relied on our decision in *Lopez-Vasquez*, 706 F.3d at 1074 n.1. In *Lopez-Vasquez*, the petitioner had "entered the United States illegally." *Id.* at 1076. Therefore, he was treated as an applicant for admission and bore the burden of proving "clearly and beyond doubt" he was not inadmissible. *See id.* at 1074 n.1; *see also Valadez-Munoz*, 623 F.3d at 1308; *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). But "[a]liens who have been lawfully admitted to the country generally receive more protection under immigration law than aliens who are seeking admission to the United States." *Vazquez Romero v. Garland*, 999 F.3d 656, 659 (9th Cir. 2021) (footnote omitted). Romero was lawfully admitted and is not now an applicant for admission, so our decision in *Lopez-Vasquez* does not govern the burden of proof here.

Because the BIA fundamentally erred in applying an improperly high burden of proof, we need not reach the other issues raised by Romero. "[W]here the BIA applies the wrong legal standard to an applicant's claim, the appropriate relief from this court is remand for reconsideration under the correct standard." *Ornelas-Chavez*, 458 F.3d at 1058. Therefore, we remand for the BIA to reconsider whether Romero met his burden to show by a "preponderance of the evidence" under 8 C.F.R. § 1240.8(d) that he was not inadmissible.

PETITION FOR REVIEW GRANTED.