No. 24-46

In the Supreme Court of the United States

SINTIA DINES NIVAR SANTANA, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
JOHN W. BLAKELEY
MELISSA NEIMAN-KELTING
ELIZABETH K. FITZGERALD-SAMBOU
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a noncitizen in removal proceedings seeking relief from removal in the form of adjustment of status to lawful permanent residence must demonstrate her admissibility "clearly and beyond doubt," 8 U.S.C. 1229a(c)(2)(A), or instead by a preponderance of the evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 92 F.4th 491. The decisions of the Board of Immigration Appeals (Pet. App. 16a-23a) and the immigration judge (*id.* at 24a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2024. A petition for rehearing was denied on April 9, 2024 (Pet. App. 15a). On June 12, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 7, 2024. The petition for a writ of certiorari was filed on July 12, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163, as amended (8 U.S.C. 1101 *et seq.*), sets forth various standards of proof applicable in removal proceedings. If a noncitizen in removal proceedings is an "applicant for admission," she "has the burden of establishing" that she "is clearly and beyond doubt entitled to be admitted and is not inadmissible." 8 U.S.C. 1229a(c)(2)(A).[1] If the noncitizen "has been admitted to the United States," the government "has the burden of establishing by clear and convincing evidence that" she "is deportable." 8 U.S.C. 1229a(c)(3)(A). And if the noncitizen is found deportable (and hence removable) and applies for "relief or protection from removal," she "has the burden of proof to establish that," among other things, she "satisfies the applicable eligibility requirements" for the particular form of relief or protection sought. 8 U.S.C. 1229a(c)(4)(A).

One way to obtain relief or protection from removal is for the noncitizen to successfully apply for adjustment of status to that of a lawful permanent resident. See 8 U.S.C. 1255(a); 8 C.F.R. 1245.1, 1245.2; cf. 8 U.S.C. 1229b(b)(1). Only a noncitizen who, among other requirements, is eligible for an immigrant visa and "is admissible" for permanent residence is eligible for adjustment of status. 8 U.S.C. 1255(a)(2).

2. Petitioner is a native and citizen of the Dominican Republic who was admitted to the United States in 2000 on a nonimmigrant visa. Pet. App. 2a. She was authorized to remain in the United States for six months but "remained well beyond that limit." *Ibid.* In 2014, petitioner applied for adjustment of status with U.S. Citi-

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 590 U.S. 222, 226 n.2 (2020).

zenship and Immigration Services (USCIS). *Id.* at 3a. USCIS denied her application in 2016, concluding that petitioner was "inadmissible"—and thus ineligible for adjustment of status—because she had "falsely claimed that [she] w[as] a U.S. citizen" on a Form I-9 (for verification of employment eligibility) in order to obtain employment at an eldercare facility. Certified Administrative Record (A.R.) 179; see 8 U.S.C. 1182(a)(6)(C)(ii)(I) (providing that a noncitizen "who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit * * * is inadmissible"). USCIS dismissed petitioner's motion to reopen. A.R. 181-182.

In 2017, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner, eventually charging that she was removable under 8 U.S.C. 1227(a)(1)(B) for having overstayed the authorized period in her visa. See Pet. App. 3a; A.R. 204; see also 8 U.S.C. 1227(a)(1)(B) (providing that a noncitizen "who is present in the United States in violation of" the INA "is deportable"). Petitioner conceded that she was removable under Section 1227(a)(1)(B) and requested adjustment of status as relief from removal or, in the alternative, permission for voluntary departure in lieu of removal. See Pet. App. 25a; A.R. 71-72; see also 8 U.S.C. 1229c(b)(1).

3. The immigration judge (IJ) denied petitioner's application for adjustment of status but granted her application for voluntary departure. Pet. App. 24a-31a.

As relevant here, the IJ found that petitioner was inadmissible on a non-waivable ground, and thus ineligible for adjustment of status, for the same reason that USCIS had found in 2016: She had falsely represented herself to be a United States citizen on the I-9 form.

Pet. App. 28a-30a. The IJ explained that petitioner was "applying for adjustment of status, which places her in the position of an alien applying for admission," and therefore she had "the burden of proving 'clearly and beyond a doubt'" that she was not inadmissible, *i.e.*, that she had not falsely represented her citizenship. *Id.* at 28a (quoting 8 U.S.C. 1229a(c)(2)(A)).

The IJ observed that petitioner had signed the portion of the I-9 form containing the checkbox next to the statement asserting citizenship. Pet. App. 29a. The IJ acknowledged petitioner's "claim that she did not check the box claiming citizenship on the Form I-9"—and that instead someone at the eldercare facility must have checked the box—but the IJ observed that the employee who gave petitioner the form "testified that she [meaning, the employee] did *not* check the box and she does not recall if [petitioner] checked the box herself." *Id.* at 29a-30a. Given that "inconclusive" evidence about who checked the box, the IJ determined that petitioner had not satisfied her "burden of proof that she 'clearly and beyond a doubt' was not inadmissible for making a false[] claim of United States citizenship." *Id.* at 30a (citation omitted).

4. The Board of Immigration Appeals (BIA or Board) dismissed petitioner's appeal. Pet. App. 16a-23a.

As relevant here, the Board rejected petitioner's argument that "because she was previously legally admitted" as a nonimmigrant, "she is not an applicant for admission, and therefore she need only meet the preponderance of evidence standard to demonstrate her eligibility for" adjustment of status, including the requirement of admissibility. Pet. App. 18a. The Board observed that binding Fourth Circuit and Board prece-

dent foreclosed petitioner's position. *Ibid.* (citing *Dakura* v. *Holder*, 772 F.3d 994, 998 (4th Cir. 2014), and *In re Bett*, 26 I. & N. Dec. 437, 440 (B.I.A. 2014)). The Board explained that "an applicant for adjustment of status is in a similar position to a non-citizen applying for admission," and therefore must satisfy the same "'clearly and beyond doubt'" standard for proving admissibility in removal proceedings. *Id.* at 18a-19a (quoting 8 U.S.C. 1229a(c)(2)(A)).

Undertaking a "de novo review," the Board agreed with the IJ that petitioner had not satisfied that standard. Pet. App. 20a. The Board explained that "the record is inconclusive" and "equivocal at best" about who checked the box next to the statement about citizenship. *Id.* at 22a. The Board acknowledged petitioner's claim that someone at the eldercare facility must have checked the box, but observed that the employee who testified in the removal proceedings, as well as a manager who had submitted a letter to USCIS in support of petitioner's 2016 motion to reopen, each denied having checked the box herself or knowing who did. *Id.* at 23a; see A.R. 163-165 (employee testimony); A.R. 188-189 (letter from manager). The Board further observed that petitioner admitted that the I-9 form "contains her handwriting and bears a signature that resembles hers." Pet. App. 23a.

5. The court of appeals denied the petition for review. Pet. App. 1a-14a.

As relevant here, the court of appeals rejected petitioner's contention that "the IJ and the BIA should have permitted her to establish admissibility by a preponderance of the evidence, rather than requiring proof 'clearly and beyond doubt.'" Pet. App. 9a. The court observed that 8 U.S.C. 1255(a)(2) requires an applicant

for adjustment of status to demonstrate her admissibility, and that "to effectuate § 1255(a)(2), the BIA has maintained a longstanding and consistent practice of 'assimilating' noncitizens applying for adjustment of status to the position of an applicant for admission." Pet. App. 9a-10a (citing, *inter alia*, *In re Bett*, *supra*, and *In re Campos*, 13 I. & N. Dec. 148, 149 (B.I.A. 1969)). The court explained that "[t]o be 'assimilated' means, in this context, that a noncitizen residing in the United States, and who applies for an adjustment of status, is to be evaluated like an applicant for admission, despite the noncitizen being then physically located in the United States." *Id.* at 10a (citation omitted). Accordingly, petitioner was required "to satisfy the statutory mandate set forth in [Section] 1229a(c)(2)(A)," that is, the "'clearly and beyond doubt'" standard applicable to noncitizens applying for admission in removal proceedings. *Ibid.* (citation and emphasis omitted). The court explained that the Board's "longstanding interpretation of the § 1255(a)(2) statutory provision to require 'assimilation'" was "entitled to deference" under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 10a-11a.

The court of appeals additionally explained that "[i]n any event," binding circuit precedent already established "that a noncitizen applying for adjustment of status is in a similar position to a noncitizen seeking entry into the United States," and that "being in such a similar situation requires the noncitizen to prove that she had not falsely represented herself to be a United States citizen, by evidence that is 'clear and beyond doubt.'" Pet. App. 11a-12a (quoting *Dakura*, 772 F.3d at 998) (brackets omitted).

ARGUMENT

Petitioner renews her contention (Pet. 21-31) that the Board should have required her to demonstrate her admissibility by a preponderance of the evidence rather than under the "clearly and beyond doubt" standard in 8 U.S.C. 1229a(c)(2)(A). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court. Although a Ninth Circuit panel has held that a preponderance standard applies in similar circumstances, that outlier decision is inconsistent with other Ninth Circuit decisions, and this Court generally does not intervene to resolve that sort of intracircuit conflict.

In the alternative, petitioner asks this Court (Pet. 11-13) to grant the petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings (GVR) in light of *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024), which overruled *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But that course is inappropriate because the court of appeals did not rely solely on *Chevron* deference to the Board's interpretation of the INA, but instead also relied on binding circuit precedent foreclosing petitioner's argument about the applicable standard of proof. See *Loper Bright*, 144 S. Ct. at 2273. The petition for a writ of certiorari should therefore be denied.

1. a. The court of appeals correctly held that petitioner was required to demonstrate her admissibility "clearly and beyond doubt." 8 U.S.C. 1229a(c)(2)(A). The INA does not explicitly address the standard of proof for a noncitizen (1) previously admitted to the United States (2) who is currently in the country (3) and in removal proceedings (4) to establish her admissibility

(5) in order to demonstrate eligibility for adjustment of status (6) as a form of relief from removal. But the best reading of the statute as a whole is that the "clearly and beyond doubt" standard applies in that particular confluence of circumstances.

Section 1229a(c)(2)(A) provides that an "applicant for admission" in removal proceedings has the burden to establish admissibility "clearly and beyond doubt." 8 U.S.C. 1229a(c)(2)(A). Petitioner acknowledges (Pet. 4) that a noncitizen in her position who was not previously admitted to the United States—that is, one who meets circumstances 2 through 6 above—would be an "applicant for admission" and thus subject to the "clearly and beyond doubt" standard. Petitioner contends, however, that she is not an "applicant for admission" because she was previously lawfully admitted on a nonimmigrant visa. That contention lacks merit, especially given that she seeks to establish her admissibility for purposes of demonstrating that she is eligible for adjustment of status (circumstance 5).

Adjustment of status is governed by 8 U.S.C. 1255. Under Section 1255(a), even a noncitizen "who was inspected and admitted" in the past must nevertheless demonstrate that she is *currently* admissible for permanent residence to be eligible for adjustment of status. 8 U.S.C. 1255(a)(2) (noncitizen is eligible for adjustment only if, among other things, she "*is* admissible to the United States for permanent residence") (emphasis added). As both a theoretical and practical matter, therefore, such a noncitizen is in precisely the same position as any other noncitizen who must demonstrate that she is currently admissible under the INA. For that reason, the Board has long treated (or "assimilated," in immigration-law parlance) such a noncitizen

as an "applicant for admission" for purposes of Section 1255(a). See, *e.g.*, *In re Jimenez-Lopez*, 20 I. & N. Dec. 738, 741 (B.I.A. 1993) ("[W]ith respect to adjustment of status under [Section 1255], it is well established that an applicant for relief under that provision is 'assimilated' to the position of an alien seeking entry into this country because a grant of such relief is contingent upon a favorable adjudication of the applicant's admissibility.").

Under the INA, an "applicant for admission" must demonstrate admissibility "clearly and beyond a doubt" when inspected. 8 U.S.C. 1225(b)(2)(A). Under the "assimilation" principle, therefore, that is the standard that an applicant for adjustment of status under Section 1255 must meet to demonstrate admissibility. See *Jimenez-Lopez*, 20 I. & N. Dec. at 743. Section 1229a sets forth the same standard for an applicant for admission to demonstrate admissibility in removal proceedings. 8 U.S.C. 1229a(c)(2)(A). There is no sound basis to treat an applicant for adjustment of status as an applicant for admission for purposes of Section 1255, but not as an applicant for admission for purposes of Section 1229a. Indeed, doing so (as petitioner urges) would produce a significant anomaly: An applicant for adjustment of status who is not in removal proceedings would perversely bear a higher burden to establish admissibility than one who has already been found removable.

The statutory structure reinforces the conclusion that a noncitizen in petitioner's circumstance bears the higher burden. Section 1229a(c)(2) provides that in a removal proceeding, the noncitizen "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 * * * ; or
>
> (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

8 U.S.C. 1229a(c)(2). The disjunctive "or" and the partition into two labeled subparagraphs indicates that the two choices are exclusive and comprehensive: A noncitizen must prove either that she is "lawfully present" *or* that she is "entitled to be admitted and is not inadmissible." *Ibid.* The provision is thus best read to mean that any noncitizen who chooses to prove admissibility rather than lawful presence is ipso facto "an applicant for admission" who must therefore demonstrate admissibility "clearly and beyond doubt." *Ibid.* Because petitioner chose to attempt to prove admissibility (in the course of demonstrating eligibility for adjustment of status), she was therefore obligated to demonstrate her admissibility "clearly and beyond doubt."

Petitioner relies (Pet. 23-24) on a negative inference from Section 1225(a)(1), which states that a noncitizen "present in the United States who has not been admitted * * * shall be deemed for purposes of [the INA] an applicant for admission." 8 U.S.C. 1225(a)(1). According to petitioner, that provision implies that a noncitizen present in the United States who *has* previously been admitted should *not* be deemed to be an applicant for admission. But the provision obviously does not say that; petitioner's proposition does not logically follow from the text ("dogs have tails" does not imply that non-dogs lack tails); and, as discussed above, the text and structure of the INA preclude drawing that negative inference, at least with respect to applicants for adjust-

ment of status. Moreover, a faithful application of petitioner's negative-inference principle would mean that a noncitizen who is *not* "present in the United States" (*ibid.*) should not be deemed to be an applicant for admission. But even petitioner would not go that far.

Petitioner heavily relies (Pet. 22-26) on Section 1229a(c)(4), which states that a noncitizen "applying for relief or protection from removal has the burden of proof to establish" that she "satisfies the applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i). Petitioner would read that provision to require her to establish her eligibility for adjustment of status, including the admissibility element, by a preponderance of the evidence. But Section 1229a(c)(4)(A) does not specify a standard of proof. To the contrary, it uses the word "applicable," indicating that the noncitizen seeking relief from removal must satisfy whatever standard of proof is associated with the particular "eligibility requirement" in question. *Ibid.*

For example, because no particular standard of proof is specified, a default preponderance standard would apply to establishing that a noncitizen was "forced to abort a pregnancy or to undergo involuntary sterilization" for purposes of refugee status and asylum eligibility. 8 U.S.C. 1101(a)(42); see 8 U.S.C. 1158(b)(1)(B)(i). But the more demanding "clear and convincing evidence" standard would continue to apply to establishing eligibility for the bona-fide-marriage exception (allowing noncitizens to seek adjustment of status based on a marriage that occurs during removal proceedings). 8 U.S.C. 1255(e)(3). By the same token, the *less* demanding "well-founded fear" standard would continue to apply to establishing the likelihood of persecution for purposes of asylum eligibility. 8 U.S.C. 1101(a)(42); cf.

INS v. *Cardoza-Fonseca*, 480 U.S. 421, 448-450 (1987). As those examples illustrate, Section 1229a(c)(4)(A) is best read as simply incorporating the preexisting applicable standards of proof that Congress has specified elsewhere in the INA; the provision should not be read to silently override those other specifications with a blanket preponderance standard. It follows that the "clearly and beyond doubt" standard would continue to apply to establishing admissibility in order to demonstrate eligibility for adjustment of status as relief from removal.

b. The statutory history confirms that straightforward conclusion. Before the INA's enactment in 1952, the only way for a noncitizen to obtain lawful-permanent-resident status was to apply for an immigrant visa from abroad, where the application is adjudicated by the Department of State through consular processing. See *Department of State* v. *Muñoz*, 602 U.S. 899, 903-904 (2024); *Jain* v. *INS*, 612 F.2d 683, 686 (2d Cir. 1979), cert. denied, 446 U.S. 937 (1980). Accordingly, "nonimmigrant aliens who sought to adjust their status to that of immigrants were required to leave the country and seek reentry as immigrants." *Jain*, 612 F.2d at 686. Congress enacted the adjustment-of-status provision in the INA to streamline that process by permitting certain nonimmigrants to obtain lawful-permanent-resident status without having to depart and reenter the country. *Ibid.*

But nothing in the INA lowers the standard of proof that the noncitizen must satisfy; to the contrary, "the criteria for securing adjustment of status and obtaining an immigrant visa are materially identical." *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 46 n.1 (2014) (plurality opinion); see 8 U.S.C. 1255(a) (noncitizen seeking ad-

justment of status must be "eligible to receive an immigrant visa"). Similarly, although adjustment of status was initially available only to those previously admitted as nonimmigrants, see INA § 245(a), 66 Stat. 217, Congress later expanded it to other noncitizens who had not previously been admitted to the United States, see, *e.g.*, Act of July 14, 1960, Pub. L. No. 86-648, § 10, 74 Stat. 505 (expanding adjustment of status to certain noncitizens "paroled into the United States"). Yet the INA does not distinguish between those various types of applicants with respect to the showing they must make to have their status adjusted. See 8 U.S.C. 1255(a). Accordingly, the standard of proof for obtaining status as a lawful permanent resident should be the same whether the noncitizen is within or without the United States, or whether the noncitizen was or was not previously admitted. Cf. 8 U.S.C. 1201(g) and (h), 1361. And petitioner does not dispute that noncitizens outside the United States and noncitizens who were not previously admitted must satisfy the "clearly and beyond doubt" standard to establish admissibility for purposes of obtaining lawful-permanent-resident status. It follows that petitioner must as well.

The Board's "assimilation" principle reflects that parity of treatment. The Board adopted that principle many decades ago and has consistently adhered to it. See, *e.g.*, *In re Campos*, 13 I. & N. Dec. 148, 149 (B.I.A. 1969); *In re Connelly*, 19 I. & N. Dec. 156, 159 (B.I.A. 1984); *In re Rainford*, 20 I. & N. Dec. 598, 601 (B.I.A. 1992); *Jimenez-Lopez*, 20 I. & N. Dec. at 741; *In re Bett*, 26 I. & N. Dec. 437, 440, 443-444 (B.I.A. 2014). Courts, too, have uniformly accepted the "assimilation" principle in general, see, *e.g.*, *Jankowski-Burczyk* v. *INS*, 291 F.3d 172, 175 n.2 (2d Cir. 2002); *Cabral* v. *Holder*, 632

F.3d 886, 891 (5th Cir. 2011); *Klementanovsky* v. *Gonzales*, 501 F.3d 788, 794 (7th Cir. 2007); *Campos* v. *INS*, 402 F.2d 758, 760 (9th Cir. 1968), and—with one outlier exception, discussed below—its application in removal proceedings in particular, see, *e.g.*, *Crocock* v. *Holder*, 670 F.3d 400, 403 & n.3 (2d Cir. 2012) (per curiam); *Dakura* v. *Holder*, 772 F.3d 994, 998 (4th Cir. 2014); *Ferrans* v. *Holder*, 612 F.3d 528, 531 (6th Cir. 2010); *Kirong* v. *Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008); *Valadez-Munoz* v. *Holder*, 623 F.3d 1304, 1308 (9th Cir. 2010), cert. denied, 565 U.S. 821 (2011). At the same time, Congress has amended the adjustment-of-status provision many times in the intervening decades without ever calling into question that settled interpretation.[2] That "uniform body of administrative and judicial precedent" thus counsels strongly in favor of interpreting the INA to reflect that longstanding administrative practice. *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998); see *George* v. *McDonough*, 596 U.S. 740, 746 (2022).

Petitioner suggests (Pet. 23, 30) that Congress implicitly overruled that longstanding administrative practice when it amended the definition of "admission" in 1996 and added Section 1229a(c)(4) in 2005. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 301(a), 110 Stat. 3009-575 (amending 8 U.S.C. 1101(a)(13)); REAL ID Act of 2005, Pub. L. No. 103-13,

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[2] See, *e.g.*, Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 6, 90 Stat. 2705-2706; Department of State and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, Tit. V, § 506(b), 108 Stat. 1765-1766; Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, Tit. I, § 111(a), 111 Stat. 2458; LIFE Act Amendments of 2000, Pub. L. No. 106-554, Div. B, Tit. XV, § 1502, 114 Stat. 2763A-324.

Div. B, § 101(d), 119 Stat. 304 (adding 8 U.S.C. 1229a(c)(4)). Neither provision, however, contains any language that would upend the previously settled administrative practice.

The amended definition of "admission" simply states that the term means "the lawful entry of the alien * * * after inspection and authorization," while making clear that all others (such as those "paroled" into the country) are not "admitted." IIRIRA § 301(a), 110 Stat. 3009-575; 8 U.S.C. 1101(a)(13). That definitional provision does not address whether a noncitizen who concededly must establish admissibility should be deemed (or assimilated to the position of) an "applicant for admission." As for Section 1229a(c)(4), as explained above, that provision does not itself specify a standard of proof, and therefore is best read as simply incorporating the preexisting standards that Congress has elsewhere specified for the particular eligibility requirements at issue.

c. Petitioner's remaining arguments lack merit.

Petitioner suggests (Pet. 2, 30) that a "clearly and beyond doubt" standard is inconsistent with a regulation providing that when a noncitizen seeks relief from removal and "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). But if a noncitizen in removal proceedings is an "applicant for admission," then the INA itself requires that she establish her admissibility "clearly and beyond doubt." 8 U.S.C. 1229a(c)(2)(A). And the regulation—which could not in any event override that statutory command, see Pet. App. 9a—does not even address the question

whether a noncitizen in petitioner's position should be deemed to be an "applicant for admission."

Petitioner errs in contending that the court of appeals' decision confuses "inadmissibility" and "exclusion" with "deportability" and "deportation." Pet. 25 (citations and emphases omitted). Although the difference between those concepts is meaningful in some contexts, cf. *Vartelas* v. *Holder*, 566 U.S. 257, 262 (2012); *Judulang* v. *Holder*, 565 U.S. 42, 45-46 (2011), it has no relevance with respect to Section 1229a(c)(2), which sets forth a standard of proof for admissibility that an "applicant for admission" must satisfy without drawing any textual distinction between an applicant who has previously been admitted and one who has not. 8 U.S.C. 1229a(c)(2)(A). The only interpretive question is whether a noncitizen like petitioner, who was previously admitted as a nonimmigrant but now seeks an adjustment of status to lawful permanent resident, should be treated as an "applicant for admission." As explained above, the answer is yes. She therefore must satisfy the "clearly and beyond doubt" standard in Section 1229a(c)(2). That conclusion does not conflate inadmissibility and deportability; it simply gives effect to the plain text of the statute.

Finally, to the extent petitioner relies (Pet. 23-25) on the principle, adopted by some lower courts, that an adjustment of status is not an "admission," see, *e.g.*, *Bracamontes* v. *Holder*, 675 F.3d 380, 387 (4th Cir. 2012) (citing cases), that reliance is misplaced. Even if an adjustment of status generally does not itself constitute an "admission" into the country, that does not address whether an applicant for adjustment of status should be deemed to be an "applicant for admission" *for purposes*

of establishing admissibility as an eligibility requirement for adjustment of status under Section 1255(a)(2).

2. Petitioner does not contend that the court of appeals' decision conflicts with any decision of this Court. Petitioner also acknowledges that most courts of appeals have agreed that a noncitizen in her position must establish admissibility clearly and beyond doubt, and she identifies only a single recent published decision from a Ninth Circuit panel that has applied a preponderance standard in similar circumstances. See Pet. 3, 10, 13-16. That narrow conflict does not warrant this Court's review.

The published Ninth Circuit panel decision cited by petitioner, *Romero* v. *Garland*, 7 F.4th 838 (2021) (per curiam), reasoned that because the noncitizen there "had been admitted before he applied for adjustment of status," "he is not now an 'applicant for admission.'" *Id.* at 841 (citation omitted). The court also reasoned that the preponderance standard in the regulation (8 C.F.R. 1240.8(d)) must therefore apply. *Romero*, 7 F.4th at 841. As explained above, that reasoning is incorrect on both fronts: Whether someone was once admitted in the past does not logically preclude her from being treated as an "applicant for admission" for certain purposes; and the regulation does not address the circumstances under which the statute itself would require treating such a noncitizen as an "applicant for admission."

More important, the outlier panel decision in *Romero* conflicts with other Ninth Circuit decisions. For example, the Ninth Circuit has recognized both that a noncitizen who seeks to adjust her status "to that of a permanent resident is assimilated to the position of an alien seeking to enter the United States," *Campos*, 402 F.2d at 760, and that a noncitizen who seeks adjust-

ment of status in removal proceedings as relief from removal "has the 'burden of establishing clearly and beyond doubt' that he is 'entitled to be admitted and is not inadmissible,'" *Valadez-Munoz*, 623 F.3d at 1308 (citation and ellipsis omitted); see *Blanco* v. *Mukasey*, 518 F.3d 714, 720 (2008) (same). Indeed, in *Lopez-Vasquez* v. *Holder*, 706 F.3d 1072 (2013), the Ninth Circuit expressly rejected the position now advanced by petitioner—that a preponderance standard applies when the noncitizen seeks relief from removal under 8 U.S.C. 1229a(c)(4)(A)—on the ground that it was foreclosed by *Valadez-Munoz* and *Blanco*. 706 F.3d at 1074 n.1.

Romero attempted to distinguish that precedent on the ground that the noncitizen in *Romero* had previously been admitted, 7 F.4th at 841, but that reasoning is flatly inconsistent with the assimilation principle adopted by *Campos*, which holds that applicants for adjustment of status (who, like petitioner, might well have been previously admitted as nonimmigrants) are subject to the same standards as applicants for immigrant visas (who need not have been previously admitted), 402 F.2d at 760. Nor is *Romero*'s distinction of *Lopez-Vasquez* and the other precedents convincing, given that those cases also relied on the assimilation principle and did not suggest that the standard of proof would have been different had the noncitizen previously been admitted.

This Court generally does not intervene to resolve intracircuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). And because *Romero* is the only published decision that petitioner identifies on the other side of

the asserted circuit conflict, this Court's review would be premature, given that the Ninth Circuit might well resolve its intracircuit conflict by returning to the well-settled position shared by all of the other courts of appeals and the Board itself.

3. a. In any event, this case would be an inappropriate vehicle in which to address the question presented because petitioner would not be entitled to relief even if that question were resolved in her favor. Both the IJ and the Board found the evidence supporting petitioner's claim (that she did not falsely assert U.S. citizenship) to be at best "inconclusive." Pet. App. 22a, 30a. "[I]nconclusive" evidence cannot satisfy a preponderance standard "because it fails to establish that a fact is more likely than not." *Ullah* v. *Garland*, 72 F.4th 597, 603 (4th Cir. 2023) (brackets and citation omitted); cf. *Pereida* v. *Wilkinson*, 592 U.S. 224, 240 (2021) ("And just as evidentiary gaps work against the government in criminal cases, they work against the alien seeking relief from a lawful removal order. When it comes to civil immigration proceedings, Congress can, and has, allocated the burden differently.").

Here, petitioner has attempted to pin the checking of the box on the I-9 form next to the attestation of citizenship on someone at the eldercare facility at which she worked. But the employee and manager who provided evidence in this case each denied having done so (and instead blamed the other), and neither claimed to have actual knowledge of whether petitioner checked the box herself. See A.R. 163-165, 188-189. At the same time, petitioner has acknowledged that the I-9 form "contains her handwriting and bears a signature that resembles hers." Pet. App. 23a. In those circumstances, no rea-

sonable factfinder could find it more likely than not that someone other than petitioner checked the box.

b. Furthermore, the question presented is not of sufficient importance to warrant this Court's review because petitioner provides no sound basis to believe that the admissibility determination will frequently depend on the difference between a preponderance standard and a clearly-and-beyond-doubt standard of proof for contested facts. The question presented, as framed by petitioner (Pet. i), addresses situations where a noncitizen who has previously been admitted seeks relief from removal under Section 1229a(c)(4). By hypothesis, a noncitizen would seek such relief only if the government already has shown by "clear and convincing evidence" that she is "deportable" in the first place. 8 U.S.C. 1229a(c)(3)(A).

But a showing of deportability may by itself establish inadmissibility as well. For example, the government can establish deportability by showing that the noncitizen was inadmissible at the time of entry, 8 U.S.C. 1227(a)(1)(A)—and if the government has established *in*admissibility at the time of entry by clear and convincing evidence, it may be quite unlikely that the noncitizen could turn around and establish admissibility by a preponderance of the evidence. Similarly, many grounds of deportability also would render the noncitizen inadmissible, so proof of those grounds by clear and convincing evidence would effectively foreclose showing admissibility under any standard of proof. Compare 8 U.S.C. 1182(a)(2) (crimes rendering a noncitizen inadmissible), with 8 U.S.C. 1227(a)(2) (crimes rendering a noncitizen deportable).

4. In the alternative, petitioner requests that the Court GVR in light of *Loper Bright*, given the lower

court's reliance on *Chevron* deference. Pet. 11-13; see Pet. App. 11a. But that course is inappropriate because the court of appeals relied not just on *Chevron* deference to the Board's longstanding assimilation principle, but also on circuit precedent squarely holding that a noncitizen in removal proceedings who wishes "to adjust his status to that of a lawful permanent resident * * * bears the burden of proving that he 'clearly and beyond doubt is not inadmissible,'" *Dakura*, 772 F.3d at 998 (citation and ellipsis omitted). See Pet. App. 11a-12a (citing *Dakura*).

This Court made clear that its decision in *Loper Bright* "d[id] not call into question prior cases that relied on the *Chevron* framework," which "are still subject to statutory *stare decisis* despite [the Court's] change in interpretive methodology." 144 S. Ct. at 2273. Because the court of appeals here relied on its prior decision in *Dakura*, and because petitioner never asked the Fourth Circuit to revisit that precedent (and has therefore forfeited any such request), a GVR would simply result in the court of appeals' entering the same decision on remand, since any panel would continue to be bound by *Dakura*.

Although this Court has vacated and remanded in other immigration cases in light of *Loper Bright* where the lower court relied *solely* on *Chevron* deference to a Board decision, see, *e.g.*, *Diaz-Rodriguez* v. *Garland*, 144 S. Ct. 2705, 2705 (2024) (No. 22-863); *Bastias* v. *Garland*, 144 S. Ct. 2704, 2705 (2024) (No. 22-868), it has denied certiorari in analogous cases where the lower court additionally relied on circuit precedent, even where that precedent itself relied on *Chevron* deference to the Board, see, *e.g.*, *Kerr* v. *Garland*, 144 S. Ct. 2715 (2024) (No. 22-867); *Debique* v. *Garland*, 144 S. Ct. 2715

(2024) (No. 23-189). Because the court of appeals here also relied on circuit precedent in rejecting petitioner's claims, denying the petition for a writ of certiorari would accord with the Court's practice since *Loper Bright*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
JOHN W. BLAKELEY
MELISSA NEIMAN-KELTING
ELIZABETH K. FITZGERALD-SAMBOU
Attorneys

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