



Pursuant to this Court's request, the United States Department of Homeland Security, Immigration and Customs Enforcement ("Department"), hereby files its Pre-Trial Statement of Law Regarding the Burden of Proof in the above-styled cause of action.

On April 6, 2009, after acquittal in the United States District Court for the Middle District of Florida on criminal charges narrowly focused on the interstate transportation of explosives,<sup>1</sup> the Department served the respondent with a Notice to Appear. He is charged as removable under section 237(a)(4)(B) of the Immigration and Nationality Act ("the Act" or "INA"), as an alien described in section 212(a)(3)(B)(i)(II) of the Act as one who "a consular officer, the Attorney General, or the Secretary of the Department of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity." As is documented below, the applicable statutory language and case law establish that the Department's burden is not to prove that the respondent is in fact more likely than not to engage in terrorism. Rather, the Department must demonstrate only that grounds exist for reasonably believing that the respondent is engaged, or is likely to engage, in terrorist activity as broadly defined by the INA.

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<sup>1</sup> On August 28, 2007, the U.S. Attorney's Office for the Middle District of Florida ("USAO") charged the respondent with violating 18 U.S.C. § 842(a)(3)(A), knowingly transporting, shipping, causing to be transported, or receiving any explosive materials, as well as 18 U.S.C. § 2, aiding and abetting. On April 15, 2008, the USAO issued a superseding indictment against the respondent under 26 U.S.C. § 5861, illegal possession of a destructive device, 18 U.S.C. § 842(a)(3)(A) and 18 U.S.C. § 2. *See* Department's Second Notice of Filing of Exs. in Support of the Charge of Removal, April 30, 2009 ("Department's Second Notice"), at Tab S(b).

A. The Department's Burden of Proof Only Requires Showing that it is Reasonable to Believe the Respondent is Likely to Engage in Terrorist Activity

Although the Department must prove the respondent removable as charged, this burden is not a high one. As an initial matter, because the respondent was previously admitted to the United States as a lawful permanent resident, the Department must prove by clear and convincing evidence that he is removable from the United States. *See, e.g.*, INA § 240(c)(3)(A). Establishing removability under section 237(a)(4)(B) of the INA requires showing that the respondent is described in section 212(a)(3)(B)(i)(II) as an alien who “a consular officer, the Attorney General, or the Secretary of Homeland Security knows or has reasonable ground to believe is engaged in, or is likely to engage after entry in any terrorist activity (described in clause [212(a)(3)(B)](iv)).” *See* INA §§ 237(a)(4)(B); 212(a)(3)(B)(i)(II). Thus, the Department’s burden – in light of this removal charge’s specific language – requires showing only the clear and convincing existence of reasonable grounds to believe that the respondent is likely to engage in terrorist activity.

This “reasonable ground to believe” standard is in turn very low; indeed, courts have found it comparable to meeting the standard for establishing probable cause. *Matter of U-H-*, 23 I&N Dec. 355, 356 (BIA 2002) (citing *Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990)). The burden is satisfied wherever there is sufficient information to justify a reasonable person in believing that the respondent falls within the proscribed category – here, the category of aliens who are engaged, or are likely to engage, in any form of terrorist activity. *See Matter of A-H-*, 23 I&N Dec. 774, 789 (A.G. 2005); *Matter of U-H-*, 23 I&N Dec. at 356. As the United States Supreme Court held in the context of

defining probable cause to search an individual, “[t]he substance of all the definitions of probable cause is a reasonable ground for belief” that is “particularized with respect to the person to be searched or seized.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citing *Illinois v. Gates*, 462 U.S. 213, 232 (1983)); *see also Wong Sun v. United States*, 371 U.S. 471, 478, n.6 (1963) (stating that “probable cause” and “reasonable grounds” are substantially the same). Accordingly, evidence satisfying the “reasonable ground to believe” standard need not prove that the respondent will actually engage in terrorism; rather, the evidence must only support a reasonable person’s belief that such activity is likely. *See* INA § 212(a)(3)(B)(i)(I); *cf. Adams*, 909 F.2d at 649 (noting that only a reasonable belief that an alien had engaged in terrorist activity – rather than proof of his involvement beyond a reasonable doubt – was required under a statute excluding from entry those aliens whom the government reasonably believed had engaged in terrorism).

Furthermore, by ruling on effectively-identical statutory language in the context of a related national-security provision in the Act, the Attorney General has found that the probable cause/reasonable grounds for believing standard is “substantially less stringent than the preponderance of the evidence” standard. *See Matter of A-H-*, 23 I&N Dec. at 778-89 (defining the “reasonable grounds for regarding” standard in the context of INA national security provisions and the former withholding of deportation statute). As noted by the Attorney General in *A-H-*, this standard is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to national security. *Id.* at 788-789. More specifically, the Attorney General held that a reasonable belief that the alien poses a danger to the national security can be based on “any nontrivial degree of risk.” *Id.* at 788 (emphasis added). Federal courts have since

affirmed the proposition that “the Attorney General’s adoption [in *A-H-*] of a standard akin to probable cause in criminal cases is . . . reasonable, and thus ‘a permissible construction of the statute.’” *Yusupov v. Attorney General*, 518 F.3d 185, 200 (3d Cir. 2008) (citing *Chevron U.S.A., Inc. v. National Def. Res. Council, Inc.*, 467 U.S. 837, 843-44, n.11 (1984)); *see also Malkandi v. Mukasey*, 544 F.3d 1029, 1037 (9th Cir. 2008) (adopting the U.S. Court of Appeals for the Third Circuit’s determination in *Yusupov* that “‘reasonable’ grounds should be evaluated against a reasonable person, probable cause standard”).

In sum, due to the minimal threshold of the “reasonable ground” charge at issue, the Department must only provide the Court with sufficient evidence to establish a reasonable belief in the respondent’s present or likely future involvement in terrorist activity. Once again, this burden is akin to supporting a finding of probable cause and is significantly lower than meeting a preponderance of the evidence standard. *Matter of A-H-*, 23 I&N Dec. at 789.

**B. Congress Constructed the INA Definition of “Engage in Terrorist Activity” Broadly, to Encompass a Wide Variety of Activities**

The Department, in meeting the above burden, must show that it is reasonable to believe the respondent is likely to “engage in terrorist activity” as defined in INA § 212(a)(3)(B)(iv). The Department first notes, however, that the range of such terrorist activities is wide: in drafting the national security grounds of removability, Congress created a broad definition of “engage in terrorist activity” meant to cover a substantial variety of conduct. *See Hussain v. Mukasey*, 518 F.3d 534, 537 (7th Cir. 2008) (noting that the definitions contained in section 212(a)(3)(B) of the INA are broad); *cf. Matter of*

*S-K-*, 23 I&N Dec. 936, 941 (BIA 2006) (finding that Congress intentionally drafted the terrorist bars to relief very broadly).

The Act defines “terrorist activity” itself as unlawful activity that includes – but is not limited to – the use of any explosive, firearm, or other weapon or dangerous device with the intent to (1) endanger, directly or indirectly, the safety of one or more individuals, (2) cause substantial damage to property; or (3) a threat, attempt or conspiracy to do so. INA § 212(a)(3)(B)(iii). The broader term “engage in terrorist activity” encompasses, in an individual capacity or as a member of an organization, an even wider variety of activities that include the following: (1) committing or inciting to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (2) preparing or planning a terrorist activity; (3) gathering information on potential targets for terrorist activity; (4) soliciting funds or other things of value for a terrorist activity or terrorist organization; (5) soliciting any individual to engage in terrorist activity or join a terrorist organization; and (6) committing an act that the actor knows, or reasonably should know, affords material support to terrorists or a terrorist organization. INA § 212(a)(3)(B)(iv)(VI).

In determining the reasonableness of believing the respondent is likely to engage in the above-listed activities, all relevant, non-“intrinsically suspect” evidence may be considered, as the “information relied on to support the ‘reasonable grounds’ determination need not meet standards for admissibility of evidence in court proceedings.” *Matter of A-H-*, 23 I&N Dec. at 789-90. For instance, an alien’s past ties to terrorists and terrorist activities alone can suffice to demonstrate a reasonable likelihood of future terrorist acts. *See Matter of U-H-*, 23 I&N Dec. at 356. This is

consistent with analogous case law in which consideration of past conduct bears on concerns over prospective acts. See *Matter of Valentin Valdez-Valdez*, 21 I&N Dec. 703, 710 (BIA 1997) (noting that an alien's past actions are relevant in the bond context for consideration of prospective actions); accord *United States v. Tortora*, 922 F.2d 880, 885 (1st Cir. 1990) (considering past criminal conduct and associational ties as relevant considerations for determining prospective danger to the community in the context of criminal pretrial detention). Moreover, Congress certainly intended that those formulating the requisite "reasonable ground to believe" consider an alien's past activity when evaluating his or her admissibility or removability. This intent is perhaps most relevantly exhibited in the INA's definition of the bars to withholding of removal in section 241(b)(3) of the Act: "an alien who is described in 237(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security to the United States."

C. The Department's Burden in the Instant Civil Administrative Removal Proceedings is Distinct from the Burden in the Respondent's Prior Criminal Prosecution for Non-Terrorism Related Charges

Lastly, the respondent's acquittal in criminal court neither precludes the Department from filing the instant removal charge nor affects the Department's burden of proof. This, in short, is because the respondent's case before this Court solely concerns whether he is eligible for the significant privilege of remaining in the United States. In other words, the Department is not seeking to retry the respondent for his earlier – or any other – criminal charges. Several additional reasons make the respondent's acquittal presently irrelevant: (1) the respondent's criminal charges and immigration charges are distinct; (2) the burden of proof in civil removal proceedings differs from criminal

proceedings; and (3) additional probative evidence is available for the instant hearings that was excluded from the respondent's criminal trial.

Regarding the first reason, the criminal indictment against the respondent was limited to charges concerning the interstate transportation of the contents of a car in which he was a passenger; the instant immigration charges concern the respondent's removability from the United States based on his possible engagement in a broad range of terrorist activities. *See* Department's Second Notice, at Tab (S)b. The criminal indictment thus limited the scope of evidence the jury was permitted to consider, and that jury did not evaluate whether reasonable grounds exist to believe that the respondent is likely to engage in terrorist activity. The instant matter instead requires legal analysis and fact finding distinct from that which was germane to the respondent's criminal trial.

Second, while in the criminal proceedings before the District Court, the U.S. government bore the burden of proof to establish each element beyond a reasonable doubt. In the instant civil removal proceedings, however, the Department carries the burden of establishing removability by the much lower standard of clear and convincing evidence. *Woodby v. INS*, 385 U.S. 276, 284-5 (1966). Criminal proceedings consequently place a substantially greater burden on the government than civil removal proceedings. *See Santosky v. Kramer*, 455 U.S. 745, 755-757 (1982) (finding that the "clear and convincing" burden is less than "proof beyond a reasonable doubt" burden required in criminal cases). A not-guilty verdict in a criminal proceeding therefore does not equate to an affirmative finding of innocence, but is merely a determination that the government provided insufficient proof to establish the respondent's guilt beyond all reasonable doubt. *Matter of I-*, 4 I&N Dec. 159, 162 (BIA 1950); *see also Helvering, v.*

*Mitchell*, 303 U.S. 391, 397 (1938) (“That acquittal [on a criminal charge] was ‘merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.’”) (citation omitted). Given that the government’s burden of proof in the respondent’s criminal proceedings differs significantly from the burden in the instant immigration proceedings, the respondent’s criminal acquittal indicates only that the government there failed to meet its higher burden – and nothing more.


Furthermore, courts have long held that because different standards of proof are involved, acquittal in a criminal action does not bar a civil suit based on the same facts. *Dowling v. United States*, 493 U.S. 342, 349 (1990); *Matter of Perez-Valle*, 17 I&N Dec. 581, 583 (BIA 1980); *see also Helvering*, 303 U.S. at 404 (holding that in civil proceedings following criminal proceedings, “double jeopardy” is inapplicable); *Lewis v. Frick*, 233 U.S. 291, 302 (1914) (stating that distinctions between criminal and administrative proceedings, and the inapplicability of *res judicata* for a criminal acquittal, is well-established law). Issues of *res judicata* – or “double jeopardy” – thus do not in any sense affect the instant case.

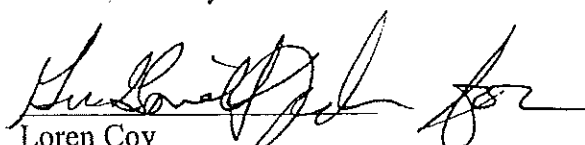
Finally, the District Court excluded much of the government’s evidence after finding that it was either not relevant to the criminal charges or was untimely filed. *See* Department’s Fourth Notice of Filing of Exs. in Support of the Charge of Removal, July 6, 2009, at Tab OO. That evidence is now available for, and highly relevant to, the Department’s case in the instant proceedings; the Department intends to use it to establish the respondent’s removability as charged.

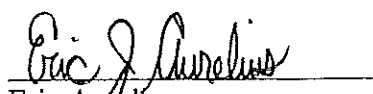
CONCLUSION

Based on the foregoing, the Department bears the burden to prove that clear and convincing evidence supporting a reasonable belief that the respondent is engaged in, or is likely to engage in, terrorist activity is extant. The respondent's acquittal in the discrete criminal proceedings on non-terrorism related charges is irrelevant and does not preclude the government from placing the respondent in removal proceedings for violations of immigration law. In this case, the Department must establish only that the respondent is removable because there are reasonable grounds, akin to the standard required for probable cause, to believe that the respondent is engaged in or is likely to engage in terrorist activities – a broadly-defined phrase encompassing an extensive array of conduct.

Respectfully submitted,

  
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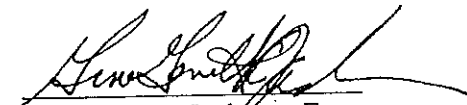
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Department of Homeland Security's Pre-Trial Statement of Law Regarding the Burden of Proof was served on Respondent's attorney, Charles H. Kuck Esq., via personal service / regular U.S. Mail, postage prepaid, on this 7<sup>th</sup> day of July 2009 to the address of

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