

From: (b)(6)
To: OPLA HQ Personnel; OPLA Field Personnel
Subject: Broadcast Message: Implementing *Pereida v. Wilkinson*
Date: Thursday, March 11, 2021 10:04:27 AM

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Disseminated on behalf of Ken Padilla and Adam V. Loiacono. . .

On March 4, 2021, the Supreme Court issued *Pereida v. Wilkinson*, No. 19-438, 2021 WL 816351 (U.S. Mar. 4, 2021), holding, in a 5-3 decision, that because the Immigration and Nationality Act (INA) places the burden of proof on an applicant for discretionary relief from removal to establish eligibility for such relief, an applicant for cancellation of removal under section 240A(b)(1) of the INA bears the burden of showing that he or she has not been convicted of an offense disqualifying him or her from that form of relief. That burden is not carried when the evidentiary record is ambiguous as to whether the noncitizen has been convicted of a disqualifying offense. The Court's decision resolves a longstanding conflict among the circuit courts. *See Pereida*, 2021 WL 816351, at *4.

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(b)(5) The Court rejected the argument that, pursuant to *Moncrieffe v. Holder*, 569 U.S. 184 (2013), a conviction should be presumed to rest on the minimum conduct necessary to commit the offense, finding that *Moncrieffe* addressed the immigration consequences of a known offense, rather than the determination of which offense had been committed. *See Pereida*, 2021 WL 816351, at *8; *see also id.* at *6 (explaining that the presumption does not answer the question of which crime a person is convicted of). The Court emphasized that evidentiary issues regarding a conviction are bound to occur occasionally regardless of who bears the burden of proof, but Congress had explicitly spoken to the burden of proof in this instance, and it was not the Court's place to engage in judicial policymaking in the face of clear Congressional intent. *See id.* at *9.

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In light of this decision, OPLA attorneys should consider the following practice pointers:

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This message includes internal guidance provided for internal OPLA use only and is not intended for public disclosure. Please ensure that it is treated consistent with applicable guidance. If there are any questions about this guidance or *Pereida*, please do hesitate to reach out to ILPD (ILPD-E or ILPD-W), as appropriate.

Thank you,

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