U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Rosas, Xavier, Esq.
Law Offices of Elsa Martinez, APC
523 W. 6th Street, Suite 633
Los Angeles, CA 90014

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: ALCARAZ-DE VASQUEZ, ESPE... **A 076-626-660**

Date of this notice: 2/18/2014

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Pauley, Roger
Donovan, Teresa L.

yungc
Userteam: Docket

File: A076 626 660 - Los Angeles, CA Date: FEB 18 2014

In re: ESPERANZA ALCARAZ-DE VASQUEZ a.k.a. Alicia Ortiz-Herrera

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Xavier Rosas, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact (withdrawn)

Sec. 212(a)(6)(C)(ii), I&N Act [8 U.S.C. § 1182(a)(6)(C)(ii)] - False claim of United Stated citizenship (withdrawn)

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document (sustained)

Lodged Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact (not sustained)

Sec. 212(a)(9)(C)(i)(II), I&N Act [8 U.S.C. § 1182(a)(9)(C)(i)(II)] - Reentry without admission after being ordered removed (sustained)

APPLICATION: Motion to Terminate

The respondent, a native and citizen of Mexico, appeals the May 13, 2010, and October 15, 2010, decisions of the Immigration Judge finding her removable as charged and denying her motion to terminate proceedings.

ISSUE

The question before us on appeal is whether, when the respondent sought reentry to the United States on July 9, 2006, she was properly charged as an "arriving alien." We answer that question in the affirmative.

FACTS AND PROCEDURAL HISTORY

On August 29, 1998, following expedited removal proceedings, the respondent was removed from the United States under the name "Alicia Ortiz-Herrera" (A077 224 015) pursuant to section 235(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1) (Exh. 5). The

respondent then reentered the United States at an unknown time and was granted lawful permanent resident (LPR) status on February 25, 1999, through a family-based petition (Exh. 4).

On July 9, 2006, the respondent sought reentry to the United States and advised the Department of Homeland Security (DHS) that she had lost her LPR card.[1] The respondent was paroled, and in July 2007, the DHS served her with a Notice to Appear (I-862); charging her as an arriving alien and alleging that she was granted LPR status on February 25, 1999; she applied for admission into the United States on July 9, 2006, and orally declared that she was a United States citizen. The DHS further alleged that she had made another oral claim to being a United States citizen to an inspecting officer at a port of entry on August 29, 1998, as "Alicia Ortiz-Herrera" and on that date was ordered removed from the United States pursuant to section 235(b)(1) of the Act. The DHS further alleged that she sought to procure by fraud or willful misrepresentation of material fact to gain admission into the United States or an immigration benefit, and did not possess or present a valid immigration visa, a reentry permit, a valid border crossing identification card, or any other valid entry document upon her application for admission into the United States. Accordingly, the DHS charged the respondent with removability under sections 212(a)(6)(C)(i), 212(a)(6)(C)(ii), and 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. §§ 1182(a)(6)(C)(i), (a)(6)(C)(ii), (a)(7)(A)(i)(I) (Exh. 1).

On October 30, 2007, the respondent, through counsel, admitted that she is a native and citizen of Mexico who had adjusted her status to that of LPR on February 25, 1999. She denied the remaining allegations and denied the charges of removability contained in the Notice to Appear. The DHS requested a continuance in order to gather documents with which to prove the allegations.

On November 14, 2007, the DHS served respondent's counsel with Additional Charges for Inadmissibility/Deportability (I-261), in which it asserted additional factual allegations in lieu of those contained in the Notice to Appear and withdrew the section 212(a)(6)(C)(i) charge (Exh. 2).

On March 4, 2008, the DHS issued the respondent another I-261, withdrawing the charge under section 212(a)(6)(C)(ii) and charging the respondent under section 212(a)(9)(C)(i)(II) and again under section 212(a)(6)(C)(i), based on the respondent's failure to disclose to the interviewing officer at her adjustment of status interview on February 25, 1999, that she had been removed from the United States on August 29, 1998 (Tr. at 16-18; Exhs. 2a, 4, and 5).[2]

In November 2008, the respondent moved to terminate proceedings, arguing that DHS improperly charged her as an arriving alien and that she should properly be charged as a returning LPR. In support, the respondent argued that because she had presented evidence of her status as an LPR after proceedings commenced, she could no longer be charged as an arriving

[1] The respondent reported that LPR card had been stolen while she was outside the United States on July 8, 2006 (*see* police report, May 20, 2009, Respondent's Motion to Terminate, Tab A).

[2] As part of her application for adjustment of status, the respondent checked the "No" block in answer to question 9 on the I-495, "Have you ever been deported from the U.S., or removed from the U.S. at government expense, excluded within the past year, or are you now in exclusion or deportation proceedings?" *See* Exh. 4 at 4.

alien. In the alternative, the respondent contended that her 1998 order of removal was not valid. She also argued that in 1999 the government was aware of her prior expedited removal order, granted her adjustment of status despite the prior order, and was authorized to do so.

On May 13, 2010, the Immigration Judge issued an interim order sustaining the charges under sections 212(a)(7)(A)(i)(I) and 212(a)(9)(C)(i)(II), finding that the respondent was properly charged as an "arriving alien," but not sustaining the charge under section 212(a)(6)(C)(i) of the Act, based on the allegation that her visa application was procured by fraud or willful misrepresentation of material fact (May 13, 2010, I.J. at 8).[3] The Immigration Judge determined that none of the section 101(a)(13)(C) exceptions applied to the respondent to charge her as an arriving alien, but that, nevertheless, she did not have a "substantively lawful admission" for permanent residence and was not entitled to be considered an LPR upon reentry (May 13, 2010, I.J. at 4). The Immigration Judge therefore denied the respondent's motion to terminate proceedings. On October 15, 2010, the Immigration Judge issued a final decision concluding that the respondent's arguments regarding the propriety of her 1998 removal did not alter the May 13, 2010, interim decision. The Immigration Judge ordered the respondent removed to Mexico.

DISCUSSION

On appeal, the respondent argues that as an LPR, she was improperly charged as an arriving alien under section 212(a) of the Act. We do not agree. The respondent was properly charged as an arriving alien because she could not demonstrate that she was entitled to be admitted to the United States. *See* 8 C.F.R. § 235.1(f)(1)(i) (requiring a person claiming LPR status to present the required documents and establish status to the satisfaction of the inspecting officer). On July 9, 2006, when the respondent sought reentry to the United States, she advised the inspecting officer that her LPR card had been stolen while she was outside of the United States. Consequently, she did not possess or present a valid immigrant visa, reentry permit, valid border crossing identification card, or any other valid entry document for admission into the United States. The respondent had no evidence of her LPR status, and, therefore, the DHS served her with a Notice to Appear (I-862) charging her, inter alia, under section 212(a)(7)(A)(i)(I) of the Act as an arriving alien (Exh. 1).

The respondent argues that she should have been admitted to the United States as an LPR because informing the inspecting officer that her "green card" had been stolen was sufficient to establish that she was not an arriving alien subject to a section 212(a)(7)(A)(i)(I) charge of admissibility (Respondent's Br. at 9). This argument is misplaced. She is correct that section 211(b) of the Act, 8 U.S.C. § 1181(b), allows the Attorney General, *in his discretion*, to readmit returning resident immigrants without requiring them to obtain a passport, immigrant visa, reentry permit or other documentation notwithstanding section 212(a)(7)(A)(i)(I) of the Act. *See* section 211(b) of the Act, 8 U.S.C. § 1181(b); 8 C.F.R. § 211.4. However, section 211(b) of the Act does not mandate that the Attorney General readmit otherwise admissible aliens who are in

[3] The DHS did not appeal the Immigration Judge's determination that the respondent was not ineligible for adjustment of status under section 212(a)(6)(C)(i) of the Act, fraud or willful misrepresentation of a material fact.

this posture, and the respondent here was not readmitted in the Attorney General's discretion.[4] Therefore, the DHS *properly* served her with a Notice to Appear (I-862) charging her, inter alia, under section 212(a)(7)(A)(i)(I) of the Act as an arriving alien (Exh. 1).

We agree with the Immigration Judge that the respondent is removable as an alien who is inadmissible. Section 245(a) adjustment of status can only be granted to an alien who demonstrates that she is "admissible to the United States for permanent residence." Section 245(a) of the Act. The respondent cannot presently satisfy that admissibility requirement. Although during proceedings the respondent presented documents establishing a colorable claim to returning resident status, the burden is upon the respondent to demonstrate that she is clearly and beyond doubt entitled to be admitted to the United States and is not inadmissible under section 212 or that she is, by clear and convincing evidence, lawfully present in the United States pursuant to a prior admission. *See Matter of Rivens*, 25 I&N Dec. 623, 625 (BIA 2011) (observing that section 240(c)(2) of the Act, 8 U.S.C. § 1229A(c)(2), expressly allocates the burden of proof to the alien where the alien is an applicant for admission). Here, the respondent was not able to meet her burden of proof, and the Immigration Judge properly sustained the charge against her under section 212(a)(9)(C)(i)(II) of the Act. Section 212(a)(9)(C)(i)(II) of the Act renders inadmissible an alien who is unlawfully present after having been ordered removed under section 235(b)(1). An exception to section 212(a)(9)(C)(i)(II) inadmissibility applies if the alien seeks admission after more than 10 years after the date of the alien's last departure from the United States. Section 212(a)(9)(C)(ii)(II) of the Act. Further, section 212(a)(9)(C)(iii) of the Act allows a waiver of section 212(a)(9)(C)(i)(II) inadmissibility in the case of an alien who is a Violence Against Women Act (VAWA) self-petitioner.

The DHS submitted a certified copy of the respondent's Notice to Alien Ordered Removed/Departure Verification (I-296) as evidence that the respondent was removed from the United States on August 29, 1998 (Exh. 5). The Form I-296 bears the respondent's photograph and fingerprint and warns, "you are prohibited from entering, attempting to enter, or being in the United States for a period of 5 years from the date of your departure from the United States as a consequence of your having been found inadmissible as an arriving alien in proceedings under section 235(b)(1) or 240 of the Act." *Id.* The respondent reentered the United States within the following 6 months, rather than after 10 years, because she was physically present at her February 25, 1999, adjustment of status interview (Exh. 4) in violation of section 212(a)(9)(C)(i)(II) of the Act. The respondent does not dispute that she was removed from the United States in 1998 and that she sought adjustment within 10 years of her removal.[5] The respondent does not allege, and the record does not reveal, that the respondent is eligible for a

[4] The respondent does not allege that she had either requested or been granted a waiver under section 211(b) of the Act or that she was in possession of an approved Application for Waiver of Passport and/or Visa (Form I-193).

[5] The respondent's argument that she "likely received status" in conjunction with an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) (Respondent's Br. at 7) is without merit. Even assuming that she had obtained such permission (which is not reflected in the record), a Form I-212 waiver will not cure her inadmissibility under section 212(a)(9)(C)(i)(II) of the Act. *See Matter of Torres-Garcia*, 23 I&N Dec. 866, 873-76 (BIA 2006).

waiver of section 212(a)(9)(C)(i)(II) of the Act under section 212(a)(9)(C)(iii) (regarding waivers for aliens who are VAWA self-petitioners). Because the Immigration Judge properly sustained the charge under section 212(a)(9)(C)(i)(II), the respondent is removable. *See* 8 C.F.R. § 1240.8. *See Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003) (holding that where permanent resident status has been wrongly conferred, i.e., as lacking substantive "lawfulness," it is deemed never to have been properly granted and is void ab initio).

In the alternative, the respondent argues that she is not inadmissible because her 1998 removal was not legally valid, and she reiterates the arguments made below (Respondent's Br. at 4-9). We agree with the Immigration Judge that removal proceedings pursuant to 235(b)(1) of the Act are the exclusive province of the DHS, and the Act specifies that these removal orders are only subject to administrative appeal in circumstances not present here (May 13, 2010, I.J. at 4). *See* sections 235(b)(1)(A)(i), (C), (D); 8 C.F.R. § 1235.3(b)(2)(ii); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 497-98 (9th Cir. 2007) (holding that it is not within the province of the Immigration Judge to review the propriety of the prior removal order, even if the underlying removal proceeding itself violated due process); *Matter of W-C-B-*, 24 I&N Dec. 118, 122-23 (BIA 2007). We need not address further the arguments made by the respondent regarding her collateral attack on her prior removal. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed

FURTHER ORDER: The respondent is ordered removed to Mexico.

Patricia A. Cole

FOR THE BOARD

File: A076 626 660 - Los Angeles, CA

Date: FEB 18 2014

In re: ESPERANZA ALCARAZ-DE VASQUEZ a.k.a. Alicia Ortiz-Herrera

CONCURRING OPINION: Roger A. Pauley, Board Member

This case is subject to proper resolution on a different and much simpler basis than that relied on by Board Member Cole. Despite the respondent's argument to the contrary, I agree with the Immigration Judge and the opinion of Board Member Cole that it is clear that, by virtue of having been subject to expedited removal prior to being granted lawful permanent resident (LPR) status, such status was wrongfully conferred, irrespective of whether the respondent was responsible or culpable for the prior removal not being brought to the attention of the immigration authorities. It follows that the respondent was never a lawful permanent resident under our decision in *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003), where we determined that where permanent resident was wrongly conferred, i.e., as lacking substantive "lawfulness," it is deemed never to have been properly granted and is void ab initio.

Not being vested with valid LPR status when she appeared at the point of entry, the respondent was ultimately determined to have been properly charged as an arriving alien. Furthermore, the time and place for resolving the correctness of removal charges is during proceedings before an Immigration Judge. *Matter of Valenzuela-Felix*, 26 I&N Dec. 53 (BIA 2012). Here, the Immigration Judge rightly found that the DHS met its burden to show that the respondent's ostensible LPR status was wrongly obtained. IJ (Interim Opinion) at 6.

The dissent's position that *any* returning alien who has acquired LPR status must be charged under the regime set forth in section 101(a)(13)(C), even if it is later found that the status was wrongly obtained, is at odds with *Matter of Valenzuela-Felix*, *supra*, where we upheld the parole (which is not an "admission," see section 212(d)(5)) of a returning LPR facing criminal charges for a possible crime involving moral turpitude (CIMT). The validity of the charge was later determined in the alien's removal proceeding, and was upheld due to the alien's having been subsequently convicted of the crime to answer which we had paroled him and that we found was a CIMT. But the charge would not have been sustained if the alien had been acquitted. Presumably, the same kind of treatment, i.e., one that does not call for the returning LPR's "admission," would be proper where a returning LPR was believed to have abandoned his or her status, but the congeries of facts governing that often complex determination would not be available to an immigration officer when the alien arrived at the port of entry.

Moreover, the dissent's position requires a stark violation of the bedrock principle of statutory construction that the same term, in this case "lawfully admitted for permanent residence," which is defined in the Act at section 101(a)(20), should not be accorded two different meanings. As noted, we held—and the courts of appeals, including in the Ninth Circuit where this case arises, have endorsed our interpretation—that the term means that the status of LPR must have been substantively rightly obtained. Moreover, this understanding long preceded the enactment of section 101(a)(20). *See, e.g., Matter of T*, 6 I&N Dec. 136 (BIA, A.G 1954);

Matter of Longstaff, 716 F.2d 1439 (5th Cir. 1983); *Monet v. INS*, 791 F.2d 752 (9th Cir. 1986). *Congress chose to use the same term* in section 101(a)(13)(C), and should be found to have intended that only LPRs *with valid status* are subject to its regime. It would have been easy for Congress to preface section 101(a)(13)(C) with language stating that an alien "admitted for permanent residence" (thereby eliminating the word "lawfully") shall not be regarded as seeking an admission unless one of the six enumerated exceptions applies. By using the very term it defined in the same section (indeed the same subsection) of the Act, however, Congress clearly expressed its intent that the definition therein applies, such that *Matter of Koloamatangi*, *supra*, governs.

For the foregoing reasons, I would find that the Immigration Judge correctly applied *Matter of Koloamatangi* to uphold the respondent's charges under section 212 of the Act.

Roger A. Pauley
Board Member

File: A076 626 660 - Los Angeles, CA Date: FEB 18 2014

In re: ESPERANZA ALCARAZ-DE VASQUEZ a.k.a. Alicia Ortiz-Herrera

DISSENTING OPINION: Teresa L. Donovan, Temporary Board Member

This case involves an important question that affects how aliens who have been granted lawful permanent resident (LPR) status must be charged when returning from abroad, when such status is found in removal proceedings to have been wrongfully conferred. The question before us is whether an alien whose LPR status was unlawfully acquired should be charged under section 237 of the Immigration and Nationality Act, 8 U.S.C. § 1227, unless one or more of the enumerated exceptions in section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C) applies, or under section 212 of the Act, 8 U.S.C. § 1182, since such alien was never entitled to that status. I conclude that a returning LPR, whose status is later determined to have been unlawfully acquired, is properly charged under section 237 of the Act, unless one or more of the 101(a)(13)(C) exceptions applies.

The answer to this question lies in the statutory definition of admission at section 101(a)(13) of the Act. The terms "admission" and "admitted" are defined in section 101(a)(13)(A) of the Act as "the *lawful entry* of the alien into the United States after inspection and authorization by an immigration officer" (emphasis added). In *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010), we considered whether the respondent was required to establish that her entry was substantively lawful in order to show she had been "admitted" within the meaning of section 101(a)(13)(A) of the Act. We recognized that we had consistently interpreted the terms "inspected and admitted" in section 245(a) of the Act, as requiring only procedural regularity. We concluded that when Congress enacted section 101(a)(13)(A) of the Act, it did not intend to require that an alien's entry be substantively lawful in order to qualify for adjustment of status. Accordingly, we held that "by themselves, the terms 'admitted' and 'admission,' as defined in section 101(a)(13)(A) continue to denote procedural regularity for purposes of adjustment of status, rather than compliance with substantive legal requirements." *Id.* at 290. *See also Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010) (concluding that the term "admission" as defined in section 101(a)(13)(A) of the Act, refers to a procedurally regular admission, not a substantively lawful one).

Section 101(a)(13)(C) of the Act sets forth a specific regime for determining when a returning LPR may be charged as an applicant for admission, and provides that with certain specified exceptions, LPRs are not considered to be seeking admission. *See generally Matter of Collado*, 21 I&N Dec 1061 (BIA 1998). If aliens who were granted LPR status may be found to be applicants for admission, based on a determination that the status was wrongly conferred, this would violate the regime created by Congress and constitute, in effect, a seventh exception. This would impose a condition precedent, namely, that the alien in fact *be* an alien "lawfully admitted for permanent residence." But there is no indication that the term—LPR—as used in this context is intended to distinguish those who *lawfully* acquired LPR status from those who did so *unlawfully*. Nor does the section distinguish those whose LPR status was lawful from those who

previously obtained LPR status, but later are determined to have been accorded such status in violation of law. Rather, the term LPR as used in the context of the definition of admission is used as a term of art to distinguish aliens who have been accorded LPR status whether lawfully or not from aliens who have not acquired such status. Generally, we do not view statutory language in isolation, but must read the words in their context and with a view to their place in the overall statutory scheme. *See Matter of C-T-L-*, 25 I&N Dec. 341, 345 (BIA 2010) (citing *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

I recognize that in other contexts we have interpreted the term "an alien lawfully admitted for permanent residence," to require that an alien's acquisition of LPR status be substantively lawful. For example, *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003), we construed "lawfully admitted for permanent residence" as defined in section 101(a)(20) of the Act, as requiring "compliance with substantive legal requirements, not mere procedural regularity." We determined that where permanent resident status has been wrongly conferred, i.e., as lacking substantive "lawfulness," it is deemed *never* to have been properly granted and is void ab initio. But *Koloamatangi* did not clearly resolve the issue presented in this case because it (and the cases on which it relied) was rendered in the context of eligibility for relief, and did not involve a charging issue or a returning LPR alien in the context of an admission to the United States.

Significantly, and perhaps an unintended consequence of the majority's approach, is that it not only treats a returning LPR as an applicant for admission, but it removes the alien's status as an LPR. This is contrary to our well established precedent holding that an LPR retains such status until entry of a final administrative order of removal. *See Matter of Lok*, 18 I&N Dec. 101 (BIA 1981); 8 C.F.R. § 1001.1(p). The majority disregards the historical fact that the respondent applied for and was granted LPR status. This is not to say that an alien who wrongfully acquires LPR status is immune from prosecution. The issue of whether LPR status was *correctly* granted remains relevant in terms of the charges that may be brought under section 237 of the Act. As in this case, the respondent must be charged under 237 and not as an arriving alien under 212.

The majority's approach raises another question, that is, which party bears the burden of proof for removability. In this case, although the respondent was an LPR for over 5 years, her status was treated as void ab initio by the Immigration Judge. The burden of proof was placed on the respondent to establish that she was clearly and beyond a doubt entitled to be admitted to the United States (I.J. May 13, 2010 decision at 8). *See* section 240(c)(2)(A) of the Act; 8 U.S.C. § 1229a(c)(2)(A) (applicants for admission bear the burden of proving that they are clearly and beyond doubt entitled to be admitted and are not inadmissible under section 212(a) of the Act).

I would vacate the May 13, 2010 and October 15, 2010 decisions of the Immigration Judge and remand this case to afford the DHS the opportunity to properly charge the respondent under section 237 of the Act.

Teresa L Donovan

Teresa L. Donovan
Temporary Board Member

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No.:	**A 76 626 660**	)
		)
In the Matter of		)
		)
ALCAREZ DE VASQUEZ, Esperanza	)	**IN REMOVAL PROCEEDINGS**
		)
		)
Respondent.		)

CHARGES: Section 212(a)(6)(C)(i) of the Immigration and Nationality Act ("Act")
—alien who by fraud or willful material misrepresentation procures documentation.

Section 212(a)(7)(A)(i)(I) of the Act
—immigrant not in possession of valid entry documents at the time of application for admission.

Section 212(a)(9)(C)(i)(II) of the Act
—alien who reenters the United States without admission after removal.

APPLICATION: Respondent's Motion to Terminate.

ON BEHALF OF RESPONDENT:
Xavier Rosas, Esquire
Law Offices of Elsa Martinez
523 West 6th Street, Suite 633
Los Angeles, California 90014

ON BEHALF OF THE GOVERNMENT:
Assistant Chief Counsel
U.S. Department of Homeland Security
606 S. Olive Street, 8th Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

On May 13, 2010, the Court issued a written interim order finding that Respondent was properly charged, and sustaining the Government's charges under sections 212(a)(9)(C)(i)(II) and 212(a)(7)(A)(i)(I) of the Act. See Order of the Immigration Judge. At a hearing held on May 21, 2010, Respondent indicated that she would not seek any form of relief.

Respondent has submitted an additional brief, in which she asserts that according to the policy and law existing at the time of her adjustment, her application was validly granted despite

the prior expedited removal order. The Court will consider Respondent's additional argument before entering a final order in her case.

II. Law & Analysis

Respondent asserts that the former Immigration and Naturalization Service ("INS") had the authority to approve her application for adjustment of status notwithstanding an expedited removal order. In support of her contention, she cites to a decision by the Board of Immigration Appeals and a memorandum issued by the legacy INS. The Court will analyze each in turn.

Respondent first cites to a March 3, 2000, INS memorandum issued by Michael Pearson, Executive Associate Commissioner, Office of Field Operations (HQADN 70/21.1, 24-P, AD 00-07) ("Pearson Memo"). She states that according to the Pearson Memo, "a properly filed affirmative Adjustment of Status application under INA § 245(i) was considered time consented to by the Attorney General." Respondent's Brief at 2. Thus, "[Respondent] had no unlawful presence, and an approval by INS was considered *nunc pro tunc* meaning her whole time was authorized thus obviating any ability by the former INS to even issue an expedited removal order." Id. However, the Pearson Memo addresses only the accrual of unlawful presence while an adjustment application is pending; it provides no guidance on the instant issue of whether adjustment can be granted notwithstanding an expedited removal order. Therefore, Respondent's citation to the Pearson Memo does not persuade the Court that her application for adjustment of status was validly granted.

Respondent next cites to Matter of Castro, 21 I&N Dec. 379 (BIA 1996) in support of her argument. In Castro the respondents filed a motion to reopen their exclusion proceedings in order to apply for adjustment of status. The Board held that in exclusion proceedings, jurisdiction over an alien's application for adjustment of status lies with the district director of the INS rather than with the Court. The Board further stated that the respondents could file their adjustment applications with the district director of the INS, "who can act on the application independently of these proceedings." Id. at 380. Respondent asserts that in light of Castro, "it seemed likely to the INS officer that they too could approve of and have jurisdiction over the updated version of exclusion orders that became expedited removal orders." Respondent's Brief at 2. First, Respondent's argument conflates exclusion orders with expedited removal orders. Moreover, the Board did not address in Castro whether an applicant with a prior expedited removal order would nonetheless be eligible for adjustment. Therefore, the Court finds Respondent's arguments do not alter the analysis set forth in the previously issued interim order regarding removability.

III. Conclusion

The Court previously found that Respondent was properly charged as an arriving alien seeking admission under section 212(a) of the Act. Respondent did not prove that she is clearly and beyond a reasonable doubt entitled to be admitted to the United States; therefore, the Court sustained the charges under sections 212(a)(9)(C)(i)(II) and 212(a)(7)(A)(i)(I) of the Act. Respondent did not seek any relief from removal.

Accordingly, the following order will be entered:

ORDER

IT IS HEREBY ORDERED that Respondent be **REMOVED** to Mexico based on the charges under sections 12(a)(9)(C)(i)(II) and 212(a)(7)(A)(i)(I) of the Act.

Date: 10-15-10

Isabel B. Bronzina
IMMIGRATION JUDGE