U.S. Department of Justice

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Name: GARCIA GARCIA, JOSE

A 206-156-310

Date of this notice: 9/17/2015

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.

Userteam: Docket

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File: A206 156 310 - Guaynabo, PR

Date: SEP 17 2015

In re: JOSE GARCIA GARCIA a.k.a. Janziel Rivas Machuca

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rosaura Gonzalez-Rucci, Esquire

ON BEHALF OF DHS: Jose Rivera
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

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

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

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

APPLICATION: Voluntary departure

The respondent appeals the Immigration Judge's April 14, 2014, decision finding him removable as charged, denying his application for voluntary departure, and ordering him removed from the United States.[1] The record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

The primary issue raised by the respondent in this appeal is whether the Immigration Judge erred in finding him removable under section 212(a)(6)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(C)(ii), based on evidence that the respondent used a fraudulent driver's license and boarding pass to attempt to board a flight from Puerto Rico to New York on October 10, 2013, without providing him the opportunity to establish that he "timely recanted"

[1] The respondent does not dispute the Immigration Judge's decision denying his request for administrative closure. Therefore, we deem this issue waived.

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his false claim to United States citizenship (I.J. at 3-4).[2] In particular, the respondent argues that the Immigration Judge erred in concluding that he is removable and ineligible for relief without having taken evidence as to whether he "timely and voluntarily" recanted his claim of citizenship based on use of fraudulent documents. We find a remand is necessary for fact-finding and consideration of whether the respondent has met his burden in establishing a "timely recantation."[3]

Initially, notwithstanding the respondent's contentions on appeal, we find no error in the Immigration Judge's finding that he is inadmissible under section 212(a)(6)(C)(ii) of the Act based on the evidence in the record (I.J. at 3-4; Exh. 2). In this regard, it is the government's burden to prove by clear and convincing evidence the fraud charge in these proceedings. *See Atunnise v. Mukasey*, 523 F.3d 830, 834 (7th Cir. 2008); *Monter v. Gonzales*, 430 F.3d 546, 553–55 (2d Cir. 2005); *Forbes v. INS*, 48 F.3d 439, 441–43 (9th Cir. 1995); *Mwongera v. INS*, 187 F.3d 323, 330 (3d Cir. 1999). In support of the charge, the government submitted the respondent's conviction records which, as found by the Immigration Judge, may be used in meeting its burden of proof (I.J. at 3). *See Pichardo v. INS*, 216 F.3d 1198 (9th Cir. 2000).[4] The conviction records show that the respondent agreed to the government's version of the facts in pleading guilty and those facts indicate that the respondent presented a fraudulent Puerto Rican identification document to immigration officials (Exh. 2). Therefore, we find no reason to disturb the Immigration Judge's decision finding the government met its burden in establishing the respondent's inadmissibility under section 212(a)(6)(C)(ii) of the Act based on the evidence in the record (I.J. at 3-4).[5]

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[2] The respondent was charged with a violation of 18 U.S.C. § 1546(a), fraud and misuse of visas, permits, and other documents but ultimately pled to a violation of 18 U.S.C. § 1352(a)(3), improper entry by an alien (Exh. 2; I.J. at 2). The evidence shows that, in attempting to travel to New York, he possessed a fraudulent Puerto Rico birth certificate issued under a name not his own and a fraudulent social security under the same name, both of which he purchased (I.J. at 3-4; Exh. 2). The respondent also had a Puerto Rico driver's license in the same name and used these items to purchase an airline ticket and secure a boarding pass in the same name, not his own (I.J. at 4).

[3] The respondent does not dispute the charges under sections 212(a)(6)(A)(i), (C)(i), and (7)(A)(i)(I), to which he conceded during the proceedings.

[4] On appeal, the respondent contends that the Immigration Judge erred in relying on *Pichardo* because the facts of his case differ from the facts in that case. However, the Immigration Judge did not compare the respondent's case to that in *Pichardo*. Rather, the Immigration Judge relied on *Pichardo* only to support her use of the conviction documents in relation to the fraud charge (I.J. at 3). Therefore, we find the respondent's arguments in this regard lack merit.

[5] While the respondent asserts on appeal that the Immigration Judge "interpreted" the facts differently in different portions of her decision, the fact remains that the evidence presented in this case shows the respondent presented a fraudulent Puerto Rican document to immigration officials in order to establish that he was lawfully permitted to be in the United States (Exh. 2).

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The doctrine of "timely recantation" is of long standing and ameliorates what would otherwise be an unduly harsh result for some individuals who, despite a momentary lapse, simply have humanity's usual failings, but are being truthful for all practical purposes. *See Llanos-Senarillos v. United States*, 177 F.2d 164 (9th Cir. 1949). We have long recognized the virtue of applying that principal when an alien "voluntarily and prior to any exposure of the attempted fraud corrected his testimony that he was" entitled to admission to the United States. *See Matter of R-R-*, 3 I&N Dec. 823 (BIA 1949). But, the recantation must be timely. *See Matter of Namio*, 14 I&N Dec. 412 (BIA 1973).

For example, in *Matter of R-R-*, the alien, when applying for admission to the United States, claimed to be a citizen of the United States and exhibited a birth certificate of a younger brother, the dates on the certificate having been altered. *See id.* at 826. The alien then executed a certificate before the primary inspector alleging he was his brother and a citizen by birth in the United States. *See id.* Right after executing this affidavit the alien admitted to the *primary* inspector that he had lied. *See id.* (emphasis added). Thus, in that case, the recantation was made to the primary inspector and not after referral to secondary inspection and was timely (I.J. at 6). In *Matter of M-*, 9 I&N Dec. 118 (BIA 1960), the alien made a statement to an immigration officer at the airport stating that he was an alien lawfully residing in the United States. *See id.* at 119. However, prior to the completion of the statement, the alien volunteered that he entered the United States unlawfully. *See id.* Thus, the alien retracted his false statement before its falsity had been or was about to be exposed and was timely. *See id.* (alien's retraction made "without delay" if he "voluntarily and without prior exposure comes forward and corrects his testimony").

In this case, the Immigration Judge did not engage in any fact-finding on this issue and did not give the respondent the opportunity to present evidence of his claim that he "timely recanted" such that he may be eligible for relief from removal. Given the severe consequences of finding that the respondent made a false claim to United States citizenship this is an important issue in this case, and we find it necessary to remand the record for the Immigration Judge to determine whether the respondent has shown that he "timely recanted." *See Matter of M-, supra.*

Accordingly, the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

FOR THE BOARD

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
GUAYNABO, PUERTO RICO

IN THE MATTER OF:

GARCIA GARCIA, JOSE	)	
A 206-156-310	)	**In Removal Proceedings**
Respondent	)	
	)	

CHARGES: (i) Section 212 (a)(6)(A)(i) of the Immigration and Nationality Act ("Act"), as amended, as an alien present in the United States without being admitted or paroled, or who arrives in the U.S. at any time or place other than as designated by the Attorney General;

(ii) Section 212 (a)(6)(C)(i) of the Act, as amended, as an alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procured or has procured) a visa, other documentation, or admission into the U.S. or other benefit as provided under this Act;

(iii) Section 212 (a)(6)(C)(ii) of the Act, as amended, as an alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the U.S. for a purpose or benefit under the Act (including section 274A) or any other Federal or State law;

(iv) Section 212 (a)(7)(A)(i)(I) of the Act, as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act;

ON BEHALF OF RESPONDENT
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ON BEHALF OF DHS
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DECISION ON REMOVABILITY

I. RELEVANT FACTS AND PROCEDURAL HISTORY

José García García ("Respondent") is a native and citizen of the Dominican Republic. See [Exh. 1]. Respondent claims that on November 26, 2003, he arrived in the U.S. at or near Rincón, PR. See id. He was not admitted or paroled after inspection by an Immigration Officer. See id.

On October 10, 2013, while trying to board a flight from San Juan, PR to New York, NY Respondent was inspected at preflight by Customs and Border Protection officers at Luis Munoz Marin International Airport pursuant to 8 C.F.R. § 235.5.[1] See id.

Upon preflight inspection, Respondent claims he presented to the CBP officers, a Puerto Rico driver license in the name of Janziel Amado Rivas Machuca with Respondent's photograph and claimed to be said person. See id.[2] He also presented a boarding pass under said assumed name.

On this day, Respondent was served in person with a Form I-862, Notice to Appear ("NTA"). See id. The NTA charges Respondent with inadmissibility pursuant to: INA §§ 212 (a)(6)(A)(i) (present without admission or parole), 212 (a)(6)(C)(i) (fraud or willfully misrepresenting a material fact), 212 (a)(6)(C)(ii) (false claim to U.S. citizenship), and 212 (a)(7)(A)(i)(I) (not in possession of valid entry documentation). In addition, he was criminally charged before the U.S. District Court, District of Puerto Rico for the offense of Fraud and Misuse of Visas/Permits in violation of 18 U.S.C. § 1546(a).

On January 15, 2014, pursuant to a plea agreement, the 18 U.S.C. § 1546(a) charge was dismissed and he plead to improper entry by an alien, in violation of 18 U.S.C. § 1325(a)(2). See [Exh. 2]. For his violation, Respondent was sentenced to time served. See id.

On March 4, 2014, and after having been placed in Removal Proceedings, Respondent concedes to charges of inadmissibility under § 212 (a)(6)(A)(i) and 212 (a)(7)(A)(i)(I) and requests a hearing on the merits as to the remaining administrative charges. He also requests as relief from removal that the Court close his case administratively under the parameters of Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012), and in the alternative that he be allowed to depart voluntarily pursuant to INA § 240B(B). Respondent has the burden of establishing that he is

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[1] Under 8 C.F.R. § 235.5, in the case of any aircraft proceeding directly from a U.S. territory to any one of the States of the U.S. or the District of Columbia without touching at a foreign port or place, preflight inspection may be made in accordance with sections 232, 235, and 250 of the Act. Final determination of admissibility will be made prior to the departure of the aircraft.

[2] The NTA charges Respondent with presenting counterfeit documents under the name, Janxael Amado Rivas Machuca. See [Exh. 1]. On the fraudulent Social Security Card that Respondent possessed appears the spelling "Janxael". The spelling that appears on the copy of the drivers' license is "Janziel" and the same appears on the fraudulent Puerto Rico Birth Certificate. See [Exh. 2]. For purposes of this decision, the Court will employ the spelling "Janziel."

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clearly and beyond doubt entitled to be admitted and that he is eligible for the reliefs requested and that as a matter of discretion he should be afforded said reliefs.

II. LEGAL STANDARDS AND ANALYSIS

A. This Court sustains removability charges under INA § 212(a)(6)(C)(i).

To be removable under INA § 212(a)(6)(C)(i), the fraud or willful misrepresentation of a material fact in the procurement, or attempted procurement of a visa, or other documentation, must be made to an authorized official of the U.S. Government. Matter of Y-G-, 20 I&N 794, 796 (BIA 1994) (citations omitted). Evidence that the respondent presented or intended to present fraudulent documents or documents containing material misrepresentations to an official of the U.S. government is requisite to find "fraud or willful misrepresentation of a material fact". See id. at 797 (reasoning that though the respondent possessed documents that were not his own, he was not inadmissible because he gave his true name and did not lie).

Here, this Court finds that on October 10, 2013, Respondent committed fraud and wilfully misrepresented material facts at the time of inspection. While attempting to board a flight from San Juan, PR to New York, NY, he claimed to the CBP Officers at preflight, to be Janziel A. Rivas Machuca. See [Exhs.] 1, 2. As proof of identity, during said inspection, Respondent presented a Puerto Rico driver license with his own picture but with the name Janziel Amado Rivas Machuca, as well as a boarding pass under the assumed name. Respondent claimed to be the rightful owner of the driver license. See [Exh. 2]. Based on the facts, Respondent clearly presented fraudulent documents containing material misrepresentations to an official of the U.S. Government. First, the documents he presented to CBP Officers were obtained through fraudulent means. Moreover, Respondent also claimed a false identity under a fake name. See Matter of Y-G-, 20 I&N at 797. Therefore, this Court finds that such actions constituted fraud and wilful misrepresentation of material facts and sustains Respondent's charge of inadmissibility under INA § 212 (a)(6)(C)(i).

B. This Court sustains removability charges under INA § 212(a)(6)(C)(ii).

Section 212(a)(6)(C)(ii) renders inadmissible any 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 this Act. In determining whether a respondent falsely represented himself as a citizen of the U.S., the content of the plea agreement and respondent's usage of a false birth certificate are factors that this Court may consider. See Pichardo v. INS, 216 F.3d 1198, 1201 (9th Cir. 2000) (finding that an alien's guilty plea and admission to using a false birth certificate when trying to enter the U. S. established an independent and non-waivable ground for inadmissibility under section 212(a)(6)(C)(ii)).

During his individual merits hearing, Respondent testified that he purchased fraudulent documents in order to travel to New York. When attempting to travel to New York, Respondent possessed in his bag, a fraudulent Puerto Rico Birth Certificate issued under the same name of Janziel Amado Rivas Machuca and a fraudulent Social Security Card under the name of Janxael

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Amado Rivas-Machuca, both of which he had purchased. See [Exh. 2]. Respondent stated that since he was not legal "here" he could not have a driver's license under his name and that even though he had a Dominican passport, he could not fly with said document. He also secured an airline ticket and boarding pass under the fraudulent name.

Moreover, Respondent also claimed that he was then referred to a more thorough interview and a closer examination of the documents that he presented, due to the fact that the documents did not appear to be genuine. After further inspection, CBP officers found in his possession a Puerto Rico Birth Certificate and a Social Security Card as proof of identity both containing the same assumed name and that Respondent "claimed to be the rightful owner of the Identification Card containing his photo, of the Security card, and of the Puerto Rico Birth Certificate, all issued under the name of Janziel A. RIVAS-MACHUCA." See [Exh. 2] at 4-5, 8-9. The record of proceedings also shows that after this incident, Respondent was placed under oath and at this point, he admitted that his true name was Jose Garcia, a national and citizen of the Dominican Republic.

For these criminal acts, Respondent was originally charged with fraud and misuse of visas/permits. Nonetheless, on January 15, 2014, Respondent, while represented by an attorney, entered into a plea agreement where in exchange to pleading guilty to the improper entry by an alien in violation of 18 U.S.C. § 1325(a)(2), the charge under 18 U.S.C. §1546(a) was dismissed. In the process of pleading guilty, Respondent acknowledged that if he would have gone to trial, DHS would have proven beyond a reasonable doubt that he claimed to be Janziel Amado Rivas-Machuca, a citizen of the United States and that he presented a Puerto Rico Identification Card (driver's license) to a U.S. Customs and Boarder Protection Officer during the preflight inspection process.

This Court finds important the facts that Respondent conceded to in his plea agreement. Respondent acknowledged that DHS would prove beyond a reasonable doubt that Respondent claimed to be a U.S. citizen through the usage of fraudulent documents. As Respondent testified, the purpose of obtaining such documents was to travel to New York, which he believed was not possible with his Dominican passport. Therefore, based on the facts underlying Respondent's conviction and Respondent's testimony that he believed he needed false documents travel to New York, this Court finds that Respondent falsely represented himself to be a U.S. citizen to CBP Officers at the time of his application for admission. Accordingly, this Court sustains the charge of inadmissibility under INA § 212 (a)(6)(C)(ii).

III. RELIEFS REQUSTED

A. Administrative closure per Matter of Avetisyan

As a temporary relief from removal Respondent requested the Court to proceed to close the case at bar administratively pursuant to the BIA decision in Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012). Respondent claims that he has recently married a United States citizen who filed a visa petition on his behalf on December 30, 2013. See [Exh. 3]. If the court closes his case administratively, Respondent can remain in the U.S. until USCIS adjudicates the visa

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petition and if approved, he can file for an I-601A waiver in order to waive his illegal presence in the United States prior to his departure foreign. He asserts that there is likelihood that he will succeed on the pending petition and that he has not contributed with the delay.

In Matter of Avetisyan, the BIA established a set of criteria for assessing whether to grant a request for administrative closure. Administrative closure is a procedural mechanism to temporarily stop removal proceedings by removing the case from the Court or the BIA calendar. The case is administratively close in order to allow an event outside the control of the parties to occur. The BIA cautioned that all relevant factors presented in the case should be evaluated in making the administrative closure decision including: 1) the reason administrative closure is sought; 2) the basis for any opposition to administrative closure; 3) the likelihood Respondent will succeed on the petition, application, or other action that is being pursued outside the removal proceeding; 4) the anticipated time period of the closure; 5) the responsibility of either party in contributing to the delay; and 6) the expected outcome of removal proceedings when the case is finally re-calendared. See id.

DHS opposes administrative closure in this case because DHS understands that Respondent's false claim to citizenship will have a direct impact on Respondent's future immigration status. The undersigned is in fact reluctant to close this case administratively in as much, Respondent has failed to meet the parameters under Mater of Avetisyan. Respondent claims that he has had a four year relationship with a USC yet married immediately after having been placed in removal proceedings; he has made a false claim to US citizenship and submitted fraudulent documents in order to be able to go through the airport checkpoint trying to conceal his irregular status in the United States and there is no anticipated time period for the closure.

B. Voluntary Departure

At the conclusion of his merit hearings, Respondent also requested voluntary departure. This Court finds that Respondent does not qualify for voluntary departure.

Under section 240B(b) of the Act, the court may grant voluntary departure in lieu of removal. INA § 240B(b). If requesting voluntary departure, the alien bears the burden to establish both that he is eligible for relief and that he merits a favorable exercise of discretion. See Matter of Gamboa, 14 I& N Dec. 244 (BIA 1972); see also Matter of Arguelles, 22 I&N Dec. 811 (BIA 1999).

To be statutorily eligible for voluntary departure, the applicant must establish that (1) he has been physically present in the United States for at least one year preceding the date the NTA was served; (2) he is and has been a person of good moral character for the five years preceding the application for voluntary departure; (3) he is not removable under section 237(a)(2)(A)(iii) or 237(a)(4); and (4) there is clear and convincing evidence that he has the means and intent to depart the United States. See INA § 240B(b)(1); 8 C.F.R. § 1240.26(c)(2).

An applicant for voluntary departure bears the burden of establishing not only statutory eligibility, but also that he or she merits discretionary relief. See Matter of Seda, 17 I&N Dec. 550, 554 (BIA 1980), overruled on other grounds by Matter of Ozkok, 19 I&N Dec. 546 (BIA

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1988) (superseded in part by statute INA § 322(a)). To determine whether an exercise of discretion is warranted, the Court must weigh all relevant adverse and positive factors. Matter of Arguelles, 22 I&N Dec. 811, 817 (BIA 1999) (citing Matter of Gamboa, 14 I&N Dec. 244, 248 (BIA 1972)). Negative factors include the applicant's prior immigration violations; the existence, seriousness, and recency of any criminal record; and other evidence of the undesirability of the applicant as a lawful permanent resident. See id. All unfavorable conduct, including criminal conduct which has not culminated in a final conviction for purposes of the Act, may be considered in the exercise of discretion. See Matter of Thomas, 21 I&N Dec. 20, 23 (BIA 1995); see also White v. INS, 17 F.3d 475, 480 (1st Cir. 1994). Countervailing positive equities include the applicant's length of residence and ties in the United States; existence of United States citizen or lawful permanent resident family members; and humanitarian needs. Matter of Arguelles, 22 I&N Dec. at 817 (citing Matter of Gamboa, 14 I&N Dec. at 248).

The Court finds that Respondent has met the above statutory prerequisites. Nonetheless, as a matter of discretion, this Court finds that Respondent's illegal conduct were not within the parameters of acceptable behavior and finds that Respondent does not merit the relief of voluntary departure. See Matter of Seda, 17 I&N Dec. at 554. In weighing the relevant factors, the Court notes that Respondent has a United States citizen spouse who has recently filed an I-130 petition on his behalf. His wife's testimony was proffered to the effect that they had married, that she had a health condition and that she was a US citizen. However, even though Respondent claims that he had had a relationship with this lady for over four years, it was not until after he was placed in removal proceedings that they married and she field a visa petition for him. Respondent initially arrived in the U.S. without admission or parole by an Immigration Officer. He also secured a fraudulent driver's license, birth certificate, and social security card to travel to New York. Thus, this Court finds that Respondent does not merit the relief sought because of his impromptu marriage, the fact that he made a fraudulent representation of U.S. citizenship for his benefit and misrepresented the truth of his identity to U.S. government officials while trying to board a flight to the continental United States under an assumed name.

Therefore, the Court finds that Respondent's past immigration history and his deception outweighs any countervailing equities. See Matter of Arguelles, 22 I&N Dec. at 819. Therefore, Respondent does not merit a favorable exercise of discretion.

Thus, under INA § 240(B)(b), this Court denies voluntary departure as a matter of discretion.

IV. ORDERS

WHEREFORE, IT IS HEREBY ORDERED that the inadmissibility charges that appear in the Notice to Appear under INA § 212(a)(6)(C)(i) and INA § 212(a)(6)(C)(ii) are **SUSTAINED** and Respondent's removability established.

IT IS HEREBY FURTHER ORDERED that Respondent's request for **ADMINISTRATIVE CLOSURE UNDER MATTER OF AVESTIYAN AND VOLUNTARY DEPARTURE** under section 240B(b) of the Act be **DENIED**.

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Having Respondent initially admitted inadmissibility pursuant to §§ 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I) , having the court sustained removability under §§ 212(a)(6)((C)(i) and 212(a)(6)(C)(ii) and having the Court denied Respondent's applications for relief,

IT IS HEREBY FURTHER ORDERED that Respondent be **REMOVED** from the United States to the **DOMINICAN REPUBLIC** on the charges contained in the NTA.

IRMA LOPEZ-DEFILLO
Immigration Judge
Date signed: April 14, 2014

CC: ***CHIEF COUNSEL***
COUNSEL FOR RESPONDENT/APPLICANT
RESPONDENT/APPLICANT

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL (P)
TO: ( ) ALIEN ( ) ALIEN c/o custodial officer (M) ALIEN'S ATTY/REP (M) DHS
DATE: 4/15/14 BY: COURT STAFF
ATTACHMENTS: ( ) EOIR-33 ( ) EOIR-28 ( ) LEGAL SERVICES LIST ( ) OTHER

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