UNITED STATES IMMIGRATION COURT

(b) (6)

IN THE REMOVAL CASE OF

(b) (6)

RESPONDENT

CASE NO.: (b) (6)

ORDERS

[X] This is a memorandum of the Court's Decision and Orders entered on 10-2-2012. This memorandum is solely for the convenience of the parties. The oral or written Findings, Decision and Orders is the official opinion in this case. ( ) Both parties waived issuance of a formal oral decision in the case.

[ ] The respondent was ordered REMOVED from the United States to _____ ( ) in absentia.

[ ] Respondent's application for VOLUNTARY DEPARTURE was DENIED and respondent was ordered removed to _____, in the alternative to _____.

[ ] Respondent's application for VOLUNTARY DEPARTURE was GRANTED until _____, upon posting a voluntary departure bond in the amount of $_____ to DHS within five business days from the date of this Order, with an alternate Order of removal to _____ or _____. Respondent shall present to DHS within ( ) thirty days ( ) sixty days from the date of this Order, all necessary travel documents for voluntary departure.

[ ] Respondent's application for ASYLUM was ( ) granted ( ) denied .
( ) withdrawn with prejudice.
( ) subject to the ANNUAL CAP under the INA section 207(a)(5).
( ) Respondent knowingly filed a FRIVOLOUS asylum application.

[ ] Respondent's application for WITHHOLDING of removal under INA section 241(b)(3) was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for WITHHOLDING of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for DEFERRAL of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for CANCELLATION of removal under section ( ) 203(b) of NACARA, ( ) 240A(a) ( ) 240A(b)(1) ( ) 240A(b)(2) of the INA, was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that the DHS issue all appropriate documents necessary to give effect to this Order. Respondent ( ) is ( ) is not subject to the ANNUAL CAP under INA section 240A(e).

[X] Respondent's application for a WAIVER under the INA section 212(c) was (X) granted ( ) denied ( ) withdrawn or ( ) other _____. ( ) The conditions imposed by INA section 216 on the repondent's permanent resident status were removed.

[ ] Respondent's application for ADJUSTMENT of status under section _____ of the ( ) INA ( ) NACARA ( ) _____ was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that DHS issue all appropriate documents necessary to give effect to this Order.

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[ ] Respondent's status was RESCINDED pursuant to the INA section 246.

[ ] Respondent's motion to WITHDRAW his application for admission was ( ) granted ( ) denied. If the respondent fails to abide by any of the conditions directed by the district director of DHS, then the alternate Order of removal shall become immediately effective without further notice or proceedings: the respondent shall be removed from the United States to _____.

[ ] Respondent was ADMITTED as a _____ until _____. As a condition of admission, the respondent was ordered to post a $ _____ bond.

[ ] Case was ( ) TERMINATED ( ) with ( ) without prejudice ( ) ADMINISTRATIVELY CLOSED.

[ ] Respondent was orally advised of the LIMITATION on discretionary relief and consequences for failure to depart as ordered.
[ ] If you fail to voluntarily depart when and as required, you shall be subject to civil money penalty of at least $1,000, but not more than $5,000, and be ineligible for a period of 10 years for any further relief under INA sections 240A, 240B, 245, and 248 (INA Section 240B(d)).
[ ] If you are under a final order of removal, and if you willfully fail or refuse to 1) depart when and as required, 2) make timely application in good faith for any documents necessary for departure, or 3) present yourself for removal at the time and place required, or, if you conspire to or take any action designed to prevent or hamper your departure, you shall be subject to civil money penalty of up to $500 for each day under such violation. (INA section 274D(a)). If you are removable pursuant to INA 237(a), then you shall further be fined and/or imprisoned for up to 10 years. (INA section 243(a)(1)).

[ ] Other:

Date: 10-2-2012

Margaret R. Reichenberg
MARGARET R. REICHENBERG, Judge

APPEAL: (X) waived ( ) reserved by ( ) Respondent ( ) DHS (X) Both

DUE BY:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: [ ] MAIL [X] PERSONAL SERVICE
TO: [X] DHS [ ] ALIEN [X] Alien's ATT/REP [ ] ALIEN c/o Custodial Officer
DATE: 10-2-2012 BY: [ ] COURT STAFF [X] JUDGE mrr

Y2

File: (b) (6) Date:

In re: (b) (6) SEP 27 2011

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marina M. Blake, Esquire

ON BEHALF OF DHS: Joseph Silver
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 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. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(B))

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Termination; section 212(c) waiver

In a decision dated May 23, 2007, an Immigration Judge ordered the respondent removed to his native Jamaica after finding him ineligible for a waiver of deportability under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994). This Board affirmed the Immigration Judge's removal order in a July 9, 2008 decision; however, in finding the respondent ineligible for section 212(c) relief, we relied on grounds different from those invoked by the Immigration Judge. The respondent sought judicial review of his removal order in the United States Court of Appeals for the (b) (6) which has now remanded the matter to us for further review. (b) (6) *v. Att'y Gen. of U.S.*, (b) (6) The respondent and the Department of Homeland Security ("DHS") have filed briefs on remand. Upon further consideration, we will remand the record for further proceedings.

The Immigration Judge found the respondent deportable under section 237(a)(1)(A) of the Act, 8 U.S.C. § 1227(a)(1)(A), on the ground that he was inadmissible under section 212(a)(6)(C)(i) of the Act at the time of his adjustment to conditional lawful permanent resident ("LPR") status

in 1994 (I.J. at 6-7). The Immigration Judge also found the respondent deportable under sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Act based on his 1995 New Jersey conviction for possession of marijuana with intent to distribute (I.J. at 4-5).

In his initial appeal to this Board, the respondent did not challenge the Immigration Judge's removability findings. On remand from the (b) (6) however, the respondent contends that these proceedings are time-barred by the 5-year "statute of limitations" set forth in section 246(a) of the Act, 8 U.S.C. § 1256(a), which pertains to the rescission of lawful permanent resident status (Respondent's Remand Br. at 15-17). In support of his argument, the respondent invokes *Bamidele v. INS*, 99 F.3d 557 (3d Cir. 1996), in which the Third Circuit held that an alien could be charged with deportability "on the sole grounds of his misconduct in obtaining his adjustment of status" only if such charges were brought within 5 years after LPR status was granted. *Id.* at 558, 565. We observe, moreover, that the Third Circuit has extended the rationale of *Bamidele* to cover removal charges under section 237(a)(1)(A) of the Act. *Garcia v. Att'y Gen. of U.S.*, 553 F.3d 724 (3d Cir. 2009).

The respondent's removal proceedings commenced in 2006, more than 5 years after he adjusted status in 1994, and thus if the DHS had charged him with removability "on the sole grounds of his misconduct in obtaining his adjustment of status," *Bamidele* and *Garcia* would necessitate termination of the proceedings. Termination is not appropriate here, however, because the respondent is also removable under sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Act on the independent ground that he was convicted of possession of marijuana with intent to distribute in 1995, *after* adjusting his status. *Bamidele* and *Garcia* do not preclude the initiation of removal proceedings against aliens who are convicted of drug offenses after adjusting status, and thus we affirm the Immigration Judge's determination that the respondent is removable from the United States.

Because the respondent is removable, he bears the burden to prove that he qualifies for, and merits, relief from removal. Section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A). The only form of relief the respondent seeks on appeal is a section 212(c) waiver.[1] To qualify for such a waiver, the respondent must establish that he is an alien "lawfully admitted for permanent residence" who has established "lawful unrelinquished domicile of seven consecutive years" in the United States, among other things. 8 C.F.R. § 1212.3(f)(1), (2). The Immigration Judge found that the respondent had not been "lawfully admitted for permanent residence" because he had procured his LPR status by willfully misrepresenting a material fact (I.J. at 8). *Matter of T-*, 6 I&N Dec. 136 (BIA 1954).

In our decision of July 9, 2008, we did not rely on the Immigration Judge's "willful misrepresentation" rationale for denying section 212(c) relief. Instead, we concluded that the respondent had not been "lawfully admitted for permanent residence" because of his 1995 drug

[1] The Immigration Judge found the respondent ineligible for cancellation of removal and denied his request for administrative closure of the removal proceedings. The respondent does not challenge those aspects of the Immigration Judge's decision on appeal.

conviction, which we mistakenly believed had occurred before he became a lawful permanent resident. In fact, that conviction had occurred after he became a conditional LPR, but before the conditional basis for his LPR status was removed. The(b) (6) decision to remand the record was prompted largely by this mistake, which we now correct.

In 1994, the respondent was admitted to LPR status on a conditional basis under section 216 of the Act, 8 U.S.C. § 1186a, and the conditional basis for his LPR status was removed in 1996. We now clarify that an alien is "lawfully admitted for permanent residence" within the meaning of former section 212(c) of the Act as of the date he obtains *conditional* LPR status, provided such status has not been terminated or rescinded before the application for section 212(c) relief is adjudicated. *See Matter of Chavez-Calderon*, 20 I&N Dec. 744, 747 (BIA 1993) (observing that section 212(c) relief "is limited to lawful permanent residents.").[2] Our 2008 decision proceeded from a mistaken assumption that the respondent had obtained his LPR status in 1996, when in fact that was merely the year in which the conditional basis for his lawful permanent residence was removed. Accordingly, we vacate our prior decision and reinstate the respondent's appeal. We turn now to a review of the Immigration Judge's reasons for finding the respondent ineligible for section 212(c) relief.

According to the Immigration Judge, the respondent was not "lawfully admitted for permanent residence" because he willfully misrepresented a material fact on his adjustment application (Form I-485), which he filed in April 1994 (I.J. at 8; Exh. 4). To be precise, the Immigration Judge found that the respondent falsely represented on the application that he had never been "arrested . . . for breaking or violating any law or ordinance," when in fact he knew that he had been arrested in New Jersey in September 1993 on suspicion of committing a drug crime. The respondent counters that he may not have been "arrested" in September 1993. Alternatively, he contends that even if he was technically "arrested," he did not realize the fact until after he applied for adjustment, meaning that his disavowal of any arrests on the application was an innocent mistake rather than a willful misrepresentation. The Immigration Judge discounted these explanations as "self-serving."

Whether the respondent willfully misrepresented his arrest record on the Form I-485 is a question of fact, and thus the Immigration Judge's findings with respect to that question are reviewed for clear error and cannot be supplemented by appellate fact-finding. 8 C.F.R. §§ 1003.1(d)(3)(i), (iv) (2010). If we affirm the Immigration Judge's findings with respect to that question, then we would have to conclude that the respondent was inadmissible under section 212(a)(6)(C)(i) of the Act and, by extension, ineligible for adjustment of status as of the date in 1994 when he became a conditional LPR, which in turn means that he was never "lawfully admitted for permanent residence" within the meaning of former section 212(c) of the Act. *Matter of T-*, *supra*, at 137-38; *see also* (b) (6) *v. Att'y Gen. of U.S.*, *supra*, (b) (6) "[W]e defer to the BIA's interpretation of § 212(c) that 'an

[2] If a conditional LPR successfully petitions to remove the conditional basis for his LPR status by means of fraud or a willful misrepresentation, he may be precluded from demonstrating 7 consecutive years of "*lawful* unrelinquished domicile" in the United States, a separate prerequisite for section 212(c) relief. We need not explore this issue further, however, because we conclude that the respondent was never lawfully admitted to conditional LPR status.

alien whose status has been adjusted to lawful permanent resident but who is subsequently determined in an immigration proceeding to have originally been ineligible for that status has not been 'lawfully admitted for permanent residence.'" (citations omitted)).

With all respect, we find ourselves unable to affirm the Immigration Judge's factual findings on the present record. To be precise, we conclude that the Immigration Judge's adverse credibility finding—i.e., her decision to discount the respondent's claim of ignorance as to the fact of his arrest—is not sufficiently detailed. The Immigration Judge appears to have discounted the respondent's credibility because his assertions were "self-serving" (I.J. at 9) and contradicted by the "totality of the record" (I.J. at 6). While the Immigration Judge may well be correct in this respect, her decision did not point to specific evidence—such as conviction records or prior inconsistent statements—which would serve to explain *why* the respondent's self-serving claims are not worthy of belief.

In its decision, the (b) (6) appeared to express some skepticism about the respondent's claim that he was ignorant of having been arrested, noting that '(b) (6) was detained and questioned, and although he claims that he did not know he had been formally arrested, he appears to have spent three or four days in custody." (b) (6) *v. Att'y Gen. of U.S.*, *supra*, at (b) (6) *see also* Exh. 2. If in fact the evidence shows that the respondent "spent three or four days in custody" after his arrest, this would certainly tend to undermine the plausibility of his claim that he was unaware of having been arrested. As the respondent is seeking relief from removal, moreover, *he* would bear the burden of explaining why such evidence does not undermine his credibility. Yet the Immigration Judge did not discuss this evidence or explain why it was in tension with the respondent's testimony. The Board cannot engage in such fact-finding in the first instance, *see* 8 C.F.R. § 1003.1(d)(3)(iv), and thus we find it necessary to remand the record for the entry of additional findings and a new decision. *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002).

In conclusion, the respondent is removable based on his 1995 drug conviction. The respondent's eligibility for section 212(c) relief remains an open question, however, because the specific factual basis for the Immigration Judge's adverse credibility finding remains obscure. Accordingly, the record will be remanded to the Immigration Judge for such additional proceedings as she deems necessary, and for the entry of supplemental findings of fact and a new decision.

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

FOR THE BOARD

Board Member Roger A. Pauley concurs in the finding that the respondent is removable but respectfully dissents from the majority's decision to remand inasmuch as I would find no clear error in the Immigration Judge's factual determination, based on the totality of the record, that the respondent willfully misrepresented that he was never arrested.