U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

(b) (6)

In the Matter of:
(b) (6)

Case No.: (b) (6)

RESPONDENT

IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 7-1-10.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

( ) The respondent was ordered deported to , or in the alternative to .
( ) Respondent's application for voluntary departure was denied and respondent was ordered deported to or in the alternative to .
( ) Respondent's application for voluntary departure was granted until , with an alternate order of deportation to or .
( ) Respondent's application for asylum was ( )granted ( )denied ( )withdrawn ( )other.
( ) Respondent's application for withholding of deportation was ( )granted ( )denied ( )withdrawn ( )other.
( ) Respondent's application for suspension of deportation was ( ) granted under section 244(a)(1) or (2) ( ) granted under section 244(a)(3) ( ) denied ( ) withdrawn ( ) other.
( ) Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( )granted ( )denied ( )withdrawn ( )other.
( ) Respondent's application for _____ was ( )granted ( )denied ( )withdrawn ( )other.
(X) Proceedings were terminated, due to respondent's death;
( ) The application for adjustment of status under Section (216)(216A)(245)(249) was ( )granted ( )denied ( )withdrawn ( )other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
( ) Respondent's status was rescinded under Section 246.
( ) Other _____.
( ) Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

Date: [redacted] 7-1-2010

Robert D. Vinikoor
ROBERT D. VINIKOOR
Immigration Judge

Appeal: NO APPEAL (Alien/DHS/Both)
Appeal Due by:

ALIEN NUMBER: (b) (6)
(b) (6)

ALIEN NAME: (b) (6)

File: (b) (6) Date: APR 16 2010

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Geoffrey Heeren, Esquire

ON BEHALF OF DHS: William C. Padish
Assistant Chief Counsel

APPLICATION: Reopening

The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen his deportation proceedings. In our decision dated September 30, 2009, we dismissed the respondent's appeal from the Immigration Judge's July 10, 2008, decision which found him deportable and denied his application for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994).[1] The motion will be granted.

The respondent's motion to reopen was filed with the Board on October 28, 2009. The motion is timely.

The respondent moves to reopen proceedings to reapply for a section 212(c) waiver. The Department of Homeland Security ("DHS") states in its response that the respondent could have entered an alcohol treatment program prior to the July 10, 2008, hearing. The DHS asserts that this evidence thus could have been presented for the July 10, 2008, hearing. 8 C.F.R. § 1003.2(c)(1). The DHS is correct that the respondent could have entered a treatment program prior to the July 10, 2008, hearing. The fact remains, however, that the respondent did not do so. The respondent entered a treatment program after his July 10, 2008, hearing and therefore his evidence is new and material.

The respondent's evidence shows that he completed an outpatient alcohol and other drug abuse ("AODA") program in October of 2008 (Motion Exh. F). The respondent states in his declaration (Motion Exh. A) that after he completed the AODA program he started going to Alcoholics Anonymous ("AA") meetings. In April of 2009 the respondent started going to AA meetings from a different program on Mondays, Wednesdays, Thursdays, Fridays, and Saturdays. On Tuesdays and Sundays the respondent still goes to AA meetings from the first program. An October 12, 2009, letter from the secretary of the second program (Motion Exh. E) states that the respondent has been attending the AA meetings since April of 2009. The respondent presents letters from family members and two fellow attendees in the second AA program. *See*, e.g., Motion Exhs. B, C, H, I.

[1] The previous history of this case is discussed in our September 30, 2009, decision at 1-2.

These letters indicate that, to date, the respondent is abstaining from alcohol consumption and attending AA meetings regularly.

We find that the respondent's evidence regarding his rehabilitation program merits reopening. *See generally Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996) (reopening may be had where the new facts alleged, together with the facts already of record, make it worthwhile to develop the issues at a hearing). By granting reopening we are not ruling on the ultimate merits of the respondent's section 212(c) application. *Id.* We thus find it appropriate to grant the respondent's timely motion, reopen the proceedings, and remand to the Immigration Judge to consider the respondent's additional evidence and to make a new determination on his section 212(c) application.

Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted and the proceedings are reopened.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

Frederick D Hess

FOR THE BOARD

File: (b) (6)

Date: SEP 30 2009

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Geoffrey Heeren, Esquire

ON BEHALF OF DHS: Alexandra Kostich
Assistant Chief Counsel

CHARGES:

Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Section 212(c) waiver of inadmissibility

The respondent appeals from the Immigration Judge's July 10, 2008, decision denying his application for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(c). The Department of Homeland Security seeks a summary affirmance of the Immigration Judge's decision. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008); *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008).

This case is before the Board for the third time. It was first before us on March 21, 1997, when we dismissed the respondent's appeal from an Immigration Judge's April 29, 1996, decision finding him ineligible for a waiver under section 212(c) of the Act. On (b) (6) the United States Court of Appeals for the (b) (6) remanded this case with instructions that the Board consider the merits of the respondent's application for section 212(c) relief. In light of the (b) (6) (b) (6) directive, the Board on March 30, 2006, vacated its March 21, 1997 decision, and remanded the record to the Immigration Court.

On remand, the Immigration Judge convened a hearing, heard testimony, and admitted additional evidence. In his June 27, 2007, decision, the Immigration Judge concluded that he lacked

jurisdiction to revisit the respondent's prior order of deportation in order to consider his application for 212(c) relief. In the alternative, he concluded that the respondent's lawful permanent resident status was terminated by the execution of his 1997 order of deportation, rendering him ineligible for a 212(c) waiver. The Immigration Judge further concluded that the respondent was statutorily ineligible to apply for a 212(c) waiver because he illegally re-entered the United States in 2004. Deferring to the (b) (6) instructions, however, the Board on October 19, 2007, again remanded the record to the Immigration Judge and directed him to hold a hearing on the merits of the respondent's application for a 212(c) waiver. On remand, the Immigration Judge convened a new hearing, heard additional testimony, admitted additional evidence, and issued a new decision, which is the subject of this appeal, denying the respondent's application for a 212(c) waiver.

We review discretionary determinations *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii). In making this determination, we balance the adverse factors evidencing the respondent's undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the granting of a waiver appears in the best interests of this country. *See Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). Among the factors deemed adverse to an alien are the nature and underlying circumstances of the inadmissibility ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. *Id.*

Favorable considerations include such factors as family ties within the United States, residence of long duration in this country, evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (*e.g.*, affidavits from family, friends, and responsible community representatives). *Id.* at 584-85.

Discretion will generally not be exercised favorably on behalf of an alien convicted of a serious criminal offense if the alien fails to come forward with evidence of "unusual or outstanding" countervailing equities. *See Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). Moreover, an alien who demonstrates unusual or outstanding equities, as required, does not compel a favorable exercise of discretion; rather, absent such equities, relief will not be granted in the exercise of discretion. There are cases in which the adverse considerations are so serious that a favorable exercise of discretion is not warranted even in the face of unusual or outstanding equities. *See Matter of Edwards*, 20 I&N Dec. 191, 195-96 (BIA 1990).

The record reflects that the respondent has strong positive equities, to include his lengthy residence in the United States, his United States citizen son, the assistance he provides to his United States citizen mother, his extended family in this country, and his medical history (I.J. at 13-17). Although the respondent's mother will suffer some hardship upon his removal, she can rely upon her remaining relatives in the United States for support, including her eight children and 30 grandchildren (Tr. at 142, 147). In addition, when the respondent previously resided in Mexico for 7 years, his mother sent him money, and if the respondent is deported, the respondent believes that she would send his medications to Mexico (Tr. at 129, 137). The respondent's sister also

testified that she and the respondent's siblings would send money to the respondent in Mexico to help him purchase his medications and for other living expenses (Tr. at 163-165).

The respondent's negative equities include his serious criminal history and his failure to demonstrate genuine rehabilitation. In 1993 the respondent was convicted in (b) (6) County, (b) (6) of two felonies: possession of cocaine with intent to deliver and failure to pay a controlled substances tax in violation of (b) (6) Statutes (b) (6) (b) (6) (Exh. 5) The respondent was sentenced to 20 months of confinement for these offenses.[1] In 1995, the respondent was convicted of misdemeanor possession of cocaine in violation of (b) (6) Statutes (b) (6) and sentenced to confinement for 1 year (imposed and stayed) and 18 months probation (Exh. 4).

The respondent was also arrested for driving while intoxicated twice, and operating a motor vehicle after revocation of his driver's license (Tr. at 96; Exh. 21). The respondent admits that he was convicted and jailed for driving under the influence, and that he is an alcoholic, but he no longer attends substance abuse counseling sessions or receives treatment (Tr. at 92, 131-132). During the hearing, the respondent claimed that he no longer drinks alcohol (Tr. at 131-32); however, his sister testified that he continues to drink alcohol, and documentary evidence in the record indicates that the respondent reported drinking a six-pack of beer on Friday or Saturday nights (Tr. at 160-61; Exh. 19, October 8, 2007, Neurology Comprehensive Consultation and Report, page 2). This conflicting evidence regarding whether the respondent continues to use alcohol casts doubt upon whether he has shown genuine rehabilitation. Given the respondent's criminal history, to include a serious drug offense, and in light of the insufficient evidence of genuine rehabilitation, we conclude that the respondent's negative equities outweigh his favorable equities. Therefore, we affirm the Immigration Judge's discretionary denial of the respondent's application for a 212(c) waiver.

Respondent raises several other arguments related to his eligibility for a section 212(c) waiver. *See* Respondent's Brief at 11-20. We do not reach these issues because we affirm, for the reasons set forth above, the Immigration Judge's discretionary denial of respondent's application for a section 212(c) waiver. Accordingly, the following order shall be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

[1] The respondent was sentenced to 20 months confinement with credit for 3 days for count 1 (possession with intent to deliver). For count 2 (failure to pay controlled substance tax) he was sentenced to 20 months confinement with credit for 3 days (concurrent with count 1).

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

(b) (6)

In the Matter of:
(b) (6)

Case No. (b) (6)

RESPONDENT

IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 7-10-08. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

(X) The respondent was ordered deported to [redacted] Mexico

( ) Respondent's application for voluntary departure was denied and respondent was ordered deported to or in the alternative to .

( ) Respondent's application for voluntary departure was granted until , with an alternate order of deportation to or .

( ) Respondent's application for asylum was ( )granted ( )denied ( )withdrawn ( )other.

( ) Respondent's application for withholding of deportation was ( )granted ( )denied ( )withdrawn ( )other.

( ) Respondent's application for suspension of deportation was ( ) granted under section 244(a)(1) or (2) ( ) granted under section 244(a)(3) ( ) denied ( ) withdrawn ( ) other.

(X) Respondent's application for waiver under Section 212(c) of the Immigration and Nationality Act was [redacted] (X)denied [redacted].

( ) Respondent's application for _____ was ( )granted ( )denied ( )withdrawn ( )other.

( ) Proceedings were terminated.

( ) The application for adjustment of status under Section (216)(216A)(245)(249) was ( )granted ( )denied ( )withdrawn ( )other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

( ) Respondent's status was rescinded under Section 246.

( ) Other _____.

( ) Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

Date: Jul 10, 2008

Robert D. Vinikoor
ROBERT D. VINIKOOR
Immigration Judge

Appeal: [redacted] (Alien) [redacted]
Appeal Due by: 8-11-2008

ALIEN NUMBER: (b) (6)
(b) (6)

ALIEN NAME: (b) (6)

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6)

Date: OCT 19 2007

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Geoffrey Heeren, Esquire

ON BEHALF OF DHS: Alexandra Kostich
Assistant Chief Counsel

CHARGE:

Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Section 212(c) waiver

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
2007 OCT 26 AM 10:37
CHICAGO, ILLINOIS

ORDER:

PER CURIAM. Previous to evaluating the current status of this matter, some historical perspective is required. An Order to Show Cause, charging the respondent with being deportable, was issued in October 1993 (Exh. 1). The record had shown that, in January 1993, the respondent was convicted in (b) (6) of the offenses of possession of cocaine with intent to deliver, and of failure to pay a controlled substances tax. Subsequently, in 1995, he was convicted, in (b) (6) of the offense of possession of cocaine. The Immigration Judge, in an April 29, 1996, decision, found the respondent to be deportable as charged, and, by reason of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), ineligible to seek a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996); he was ordered deported to Mexico. On March 21, 1997, we dismissed the respondent's appeal from the Immigration Judge's decision. The United States Court of Appeals for the (b) (6) on (b) (6) concluded that, pursuant to *INS v. St. Cyr,* 533 U.S. 289 (2001), the respondent was eligible to seek 212(c) relief, and remanded this case to us, directing that we consider the respondent's application for a waiver under section 212(c). *See* (b) (6) *v. Ashcroft,* (b) (6) In compliance with the court's directive, on March 30, 2006, we remanded the matter to the Immigration Judge.

(b) (6)

Subsequent to the Board's remand, in proceedings before the Immigration Judge, the respondent and his attorney advised the Immigration Judge that, after the Board's March 1997 decision dismissing his appeal, the respondent, on May 6, 1997, had been deported (Tr. at 5, 11). The Immigration Judge was further advised that he entered the United States without inspection on April 2, 2004, and was detained by the authorities at that time (Tr. at 11, 40). After filing a petition for a writ of habeas corpus and a complaint for declaratory judgment and injunctive relief in United States Southern District Court in Texas, seeking to vacate the 1997 deportation order, the Real ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat.231 (May 11, 2005) was passed, resulting in the transfer of the petition to the (b) (6) (Tr. at 5-6, 11, Exh. 12). The respondent's attorney, who did not represent the respondent in proceedings before the (b) (6) related that his understanding was that the (b) (6) was not aware that the respondent had been deported in 1997 (Tr. at 24). We note that, in the respondent's brief filed with the (b) (6) the court was not advised that the deportation order being challenged had been executed in May 1997, or that the respondent had remained in Mexico for some 7 years before entering without inspection in April 2004 (Exh. 12).

The Immigration Judge entered a decision on June 27, 2007. In that decision, he found that, as section 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), preserved the old law for any alien who was in deportation proceedings, and the respondent's deportation proceedings began in 1993, the pre-IIRIRA rules relating to the judicial review of deportation orders were applicable. Section 106(c) of the Act, 8 U.S.C. § 1105a(c) (repealed 1996), specifically provided that an order of deportation shall not be reviewed by any court if the alien has departed from the United States after the issuance of the order. The Immigration Judge concluded that he did not have jurisdiction to revisit the respondent's prior deportation order in order to consider his application for 212(c) relief. The Immigration Judge, finding that the entry of the final deportation order, followed by respondent's departure, executed the outstanding order and terminated his lawful permanent resident status, also concluded that the respondent was statutorily ineligible for such relief. The Immigration Judge finally concluded that the respondent's illegal re-entry rendered him ineligible for 212(c) relief. *See* 8 C.F.R. § 1003.44(k)(2).

The respondent argues on appeal that the Immigration Judge erred by failing to follow the mandate of the Board and the (b) (6) to allow him to seek 212(c) relief. He asserts that, under the "law of the case" doctrine, once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case. He avers that, before the Immigration Judge, he was not seeking review of his deportation order but a section 212(c) hearing. He argues that the order had already been vacated, and that the (b) (6) had already undertaken an extensive analysis of its own jurisdictional authority.

We first note that, in (b) (6) *v. Ashcroft*, (b) (6) the court, in setting out the relevant procedural factual predicate, observed that the Board dismissed the respondent's appeal in 1997, and that he did not seek judicial review of that decision, but erroneously believed that he had remained in the United States, apparently because he is still in prison, filing, in 2004, the petition which was transferred to the court. The (b) (6) may well have reached the same conclusion that the Immigration Judge has, had the court been similarly made fully aware of the facts. However, we will nevertheless defer to the (b) (6) instructions to permit the respondent a hearing

(b) (6)

on the merits of his application for 212(c) waiver. Accordingly, the record is remanded for the Immigration Judge to conduct a 212(c) merits hearing for the purpose of entering an alternative ruling, addressing the merits of the respondent's application for 212(c) waiver.

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents without opinion.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
(b) (6)

File: (b) (6) Date: June 27, 2007

In the Matter of:

(b) (6)

Respondent.

IN DEPORTATION PROCEEDINGS
ON REMAND

CHARGES: Former Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA") – Convicted of an aggravated felony at any time after entry.

Former Section 241(a)(2)(B)(i) of the INA – Convicted of a violation of a law or regulation of a State, relating to a controlled substance.

APPLICATIONS: Section 212(c) of the INA, 8 U.S.C. § 1182(c) (1990) (repealed) – Waiver of inadmissibility.

ON BEHALF OF THE RESPONDENT:
Geoffrey Heeren, Esq.
Travelers and Immigrants Aid
(b) (6)

ON BEHALF OF THE GOVERNMENT:
Seth B. Fitter, Assistant Chief Counsel
Department of Homeland Security
(b) (6)

AMENDED DECISION OF THE IMMIGRATION JUDGE

The respondent seeks a waiver of inadmissibility under Section 212(c) of the INA. For the reasons below, I deny his applications.

I. BACKGROUND

The respondent, (b) (6) is a forty-eight-year-old male native and citizen of Mexico, who became a lawful permanent resident on June 26, 1980. (See Ex. 1 and Resp't's Test. on Mar. 9, 1994). On or about (b) (6) the respondent pled guilty in (b) (6) County Circuit Court to possession of a controlled substance (cocaine) with the intent to deliver, in violation of (b) (6) State Statutes sections (b) (6), and failure to pay controlled substance tax, in violation of the (b) (6) State Statutes sections (b) (6) (See Exs. 1-2.) As a result of this conviction, the then-Immigration and Naturalization Service ("INS")[1] commenced deportation proceedings against the respondent by issuing an Order to Show Cause ("OSC") on October 19, 1993, charging the respondent with

[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, Title IV, Subtitles C-F, 116 Stat. 2135 (Nov. 25, 2002), abolished the Immigration and Naturalization Service and placed its removal-related functions within the Department of Homeland Security ("DHS").

Exh #6

deportability under the then numbered sections 241(a)(2)(A)(iii) (convicted of an aggravated felony) and 241(a)(2)(B)(i) (convicted of a violation of a law relating to a controlled substance) of the INA. (See Ex. 1.) At a deportation hearing on March 9, 1994, the respondent admitted the allegations contained in the OSC, except for the conviction mentioned in allegation number 5. The Government attorney offered a certified record of conviction that supported factual allegation number 5. (See Ex. 2.) At a subsequent hearing, the respondent stipulated that the conviction record related to him and the Court held that the respondent was subject to deportation by clear, unequivocal and convincing evidence, as required by section 240(c)(3) of the INA.

The respondent sought relief under the then-existing section 212(c) of the INA and filed an application for said relief with the Immigration Court on August 8, 1994. (See Resp't's Mot. for 212(c) Waiver.) In hearings on October 6, 1994 and June 8, 1995, it was determined that the respondent had been arrested on a new criminal charge relating to narcotics. The respondent's attorney requested that the case be continued until the final resolution of that arrest. The respondent's attorney offered a certified record of conviction showing that on or about August 18, 1995, the respondent pled guilty in (b) (6) County Circuit Court to possession of a cocaine without a prescription, in violation of (b) (6) State Statute section (b) (6) (See Resp't's Certified R. of Conviction.) A hearing on the merits of his section 212(c) application, covering both offenses, was scheduled for April 29, 1996. However, on April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") was enacted, section 440(d) of which rendered individuals convicted of such offenses ineligible for section 212(c) relief. On April 29, 1996, without conducting a hearing on the merits of the respondent's section 212(c) application, the Court concluded that due to his drug convictions, the respondent was no longer eligible for said relief, and ordered his deportation. The respondent timely appealed to the Board of Immigration Appeals ("BIA"). The BIA dismissed the respondent's appeal on March 21, 1997.

According to the respondent's testimony on December 12, 2006 and the Notice of Intent/Decision to Reinstate Prior Order, the respondent was deported to Mexico on May 6, 1997. He then illegally re-entered the United States without admission or inspection on April 2, 2004. On or about April 2, 2004, the Government commenced removal proceedings against the respondent by issuing a Notice of Intent/Decision to Reinstate Prior Order. Shortly after the respondent returned to the United States, the respondent was criminally charged with illegal re-entry into the United States. There is no evidence in the record of the disposition of that case.

However, it was likely unfavorable, because on September 27, 2004, the respondent's attorney filed a petition for a Writ of Habeas Corpus under 28 U.S.C. § 2241, and a Complaint for Declaratory and Injunctive Relief under 28 U.S.C. §§ 1331, 1346(a)(2) and 2201 et seq., in the Southern District of Texas, McAllen Division, where the respondent was detained. (See Appellant's Br., (b) (6) v. Gonzales, (b) (6) The respondent sought to vacate the BIA's 1997 order of deportation and restore the *status quo ante*. (Id.)

The respondent's habeas petition was still pending on May 11, 2005, when the REAL ID Act of 2005 was enacted. Section 106(c) provided that:

> If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. § 1252), as amended by this section, or under section 309(c) (4) (D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. § 1101 note).

Pursuant to this provision, on June 10, 2005, the District Court severed the count of the respondent's habeas petition challenging his deportation order and transferred it to the (b) (6) (b) (6) Because the underlying deportation proceedings had been conducted in (b) (6) (b) (6) th (b) (6) transferred the petition to the (b) (6) (See Appellant's Br., (b) (6) v. Gonzales (b) (6) The District Court stayed proceedings on the Complaint for Declaratory and Injunctive Relief until the respondent's challenge to his deportation order was resolved. (Id.)

The (b) (6) treated the respondent's habeas petition as a petition for review of his deportation order, pursuant to section 106(c) of the REAL ID Act. The (b) (6) granted the respondent's petition and remanded with instructions that the agency consider on the merits his application for section 212(c) relief. Th (b) (6) deemed the petition timely despite the long delay in seeking judicial review, stating that section 106(c) of the REAL ID Act required that they do so:

> 'The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242, except that subsection (b)(1) of such section shall not apply.' Subsection (b)(1) contains the time limit, which therefore 'shall not apply.' This means that all collateral proceedings pending on May 11, 2005, when the REAL ID Act took effect, and transferred to courts of appeals under § 106(c), must be treated as timely petitions for review, no matter how long it has been since the Board rendered its decision.

(b) (6) v. Gonzales, (b) (6)

On remand, the BIA vacated its decision dated March 21, 1997 and remanded the record to this Court for further proceedings consistent with the (b) (6) decision above.

II. ISSUES

The issues addressed below are: 1) whether a court has jurisdiction under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") transitional rules to review an order of deportation after the alien has been deported; 2) whether the respondent is statutorily eligible for relief under the now-repealed section 212(c) of the INA; and 3) whether the respondent's 1997 deportation from the United States terminated the respondent's permanent residence status.

IV. FINDINGS AND ANALYSIS

The respondent seeks a waiver of inadmissibility under the now-repealed Section 212(c) of the INA. I find that this Court does not properly have jurisdiction over his case. I further find that even if this Court did have jurisdiction, the respondent's permanent residence status was terminated by the execution of his order of deportation, rendering him statutorily ineligible to apply for relief under the former section 212(c). Therefore, I will deny his application.

A. This Court Lacks Jurisdiction

As a threshold matter, I find that under the pre-IIRIRA judicial review provisions, a court does not have jurisdiction to review an order of deportation after the alien has been deported. Therefore, this Court does not properly have jurisdiction to consider the respondent's section 212(c) application.

First, I must determine what law applies to the respondent's case. The respondent was placed into deportation proceedings on October 19, 1993, prior to the enactment of IIRIRA, which amended the laws governing deportation. However, section 309(c) of the IIRIRA preserved the application of the prior deportation law to those cases already on-going at the time of its enactment, i.e., for those aliens whose deportation proceedings began under the pre-IIRIRA law or for aliens whose deportation proceedings were governed by the transitional rules in effect between the enactment of IIRIRA on September 30, 1996 and its effective date of April 1, 1997. The respondent falls in the latter category. Judicial review of deportation orders from proceedings commenced before April 1, 1997 is governed by the transitional rules set forth in section 309 of the IIRIRA.

IIRIRA's transitional rules provide that the pre-IIRIRA judicial review provisions govern, with limited exceptions not applicable here. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-128, 110 Stat. 3546 (1996). See Sofinet v. INS, 188 F.3d 703, 708 (7th Cir. 1999); Robledo-Gonzales v. Ashcroft, 342 F.3d 667, 674 n. 7 (7th Cir. 2003); Patel v. Ashcroft, 378 F.3d 610, 612 (7th Cir. 2004). Thus, the pre-IIRIRA law relating to judicial review of deportation orders – i.e., the former section 106(c) of the INA – applies here.

Under the pre-IIRIRA law, this Court lacks jurisdiction over this case. Former section 106(c) of the INA provides that "[a]n order of deportation . . . shall not be reviewed *by any court* if the alien . . . has departed from the United States after the issuance of the order." INA § 106(c), 8 U.S.C. § 1105a(c) (1990) (emphasis added). Here the respondent concedes that he departed the U.S. – in fact, was deported – after his appeal to the BIA was dismissed on March 21, 1997. Therefore, former section 106(c) divests any court of jurisdiction to revisit that order.

Had the respondent's proceedings commenced after April 1, 1997, the respondent's case would be governed by IIRIRA's amendments, which repealed section 106(c) of the INA and amended the INA to allow courts of appeal to retain jurisdiction over an alien no longer in the United States after an order of deportation had been issued. However, the Government commenced deportation proceedings against the respondent on October 19, 1993. This timing materially impacts the respondent's case. Harsh or arbitrary as it may seem, under the pre-IIRIRA provisions, because the Government was able to execute his order of deportation in the years prior to the respondent's petition for review, this Court is now precluded from revisiting that order.[2] Under former section 106(c), the respondent's order of deportation is no longer reviewable by any court because he was deported after the issuance of the order.

Before this Court, the respondent's attorney argued that the respondent's deportation in 1997 was unconstitutional under INS v. St. Cyr, 533 U.S. 289 (2001), and therefore void. In St. Cyr, the Supreme Court held that the provisions of AEDPA and IIRIRA repealing discretionary relief from deportation did not apply retroactively to aliens who had pled guilty to crimes prior to the enactment of those statutes. But St. Cyr was decided in June 2001, more than four years after the respondent's deportation. It is a well-settled principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Bd. of City of Richmond, 416 U.S. 696, 711 (1974). See also Lara-Ruiz v. INS, 241 F.3d 934, 945 (7th Cir. 2000) ("In applying [the repeal of Section 212(c) relief] to Lara-Ruiz' case, the BIA applied the law in effect at the time that it rendered its decision, and therefore did not violate Lara-Ruiz' due process rights."). This Court and the BIA applied the law that was in effect at the time of the respondent's deportation, and therefore the respondent's deportation was legally valid.

It may be questioned why, if no court had jurisdiction to review the respondent's order of deportation once he was deported, this issue is only being addressed at this stage, on remand from the (b) (6) The reason is that the execution of the respondent's deportation order has only been acknowledged at this stage of the proceedings. It appears that the respondent's prior counsel failed to inform the(b) (6) that the respondent had been deported to Mexico on May 6, 1997, after the BIA issued the order of deportation, and that the respondent

[2] There is a judicially created exception to this rule. Federal courts may retain jurisdiction to hear questions of constitutional dimensions such as a claim cognizable under the Due Process Clause. Jideonwo v. INS, 224 F.3d 692, 696-97 (7th Cir. 2000). Therefore, if a respondent had a claim that the Government had violated Due Process during the proceedings or the execution of the deportation order, the courts would have jurisdiction to hear that claim. The respondent makes no such claim about the execution of his deportation.

had illegally re-entered after deportation. There is no direct evidence from the respondent's prior attorney that she failed to inform the (b) (6) However, Mr. Geoffrey Heeren, the respondent's current attorney, stated that while he did not represent the respondent during his appeal to the (b) (6) it was Mr. Heeren's understanding that the respondent's attorney at the time did not inform the (b) (6) that the respondent had already been deported, "because he had pending litigation in Texas on that issue."[3] When Mr. Heeren was asked by this Court if he was conceding that the (b) (6) did not know that the respondent had been deported at the time it heard the respondent's petition for review, Mr. Heeren responded, "That is my understanding, judge, yes."

Further, there is no mention of the respondent's actual deportation or his illegal re-entry after deportation in the respondent's brief submitted to th (b) (6) in his appeal relating to these proceedings. (See Appellant's Br. (b) (6) v. Gonzales, (b) (6) (b) (6) The (b) (6) clearly relied upon the respondent's representation of his status, writing in its decision that the respondent "did not seek judicial review of [his 1997 order of deportation] – *but he did remain in the United States, apparently because he is still in prison,* and in 2004 filed the petition that has been transferred to us." (b) (6) (b) (6) (emphasis added). Thus, because the (b) (6) was given an incorrect factual premise, the court did not confront the issue of whether the execution of the respondent's order of deportation divested the court of jurisdiction to review the deportation order under the pre-IIRIRA law (made applicable to the respondent by IIRIRA's transitional rules).

The respondent argues that the doctrine of the law of the case applies to the respondent's case at this stage of the proceedings.[4] It is true that an Immigration Court does not have authority or jurisdiction to overrule the (b) (6) or the BIA, and this Court is bound by the issues decided in the (b) (6) prior decision under the doctrine of the law of the case. However, the doctrine only applies if the (b) (6) actually addressed the issue. The law of the case is a rule of practice, based on "sound policy," that when an issue is litigated and decided, "that should be the end of the matter." Creek v. Village of Westhaven, 144 F.3d 441, 445 (7th Cir. 1998). "Therefore, it is essential to determine what issues were actually decided in order to define what is the 'law of the case'." Id. See also Snow-Erlin v. U.S., 470

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[3] This Court amends this decision at the request of the respondent's counsel, concerning his stated reasons for prior counsel's failure to disclose the prior deportation to the (b) (6) on appeal. This Court inferred from Mr. Heeren's statement that it was prior counsel's legal strategy not to disclose this information because of the respondent's pending criminal prosecution for illegal reentry in the District Court in Texas. Inasmuch as Mr. Heeren did not state explicitly that the prior counsel had made a strategic legal decision, I am amending this portion of the decision.

[4] Although the respondent also argues that the issue of jurisdiction is barred by the doctrine of *res judicata*, this is a misstatement. This Court is in a subsequent stage of the same litigation that was before the (b) (6) Here, the doctrine of law of the case, which governs the weight that interim rulings are to be given in the subsequent stages of that litigation, applies, not *res judicata*. See Amcast Indus. Corp. v. Detrex Corp., 45 F.3d 155, 157 (7th Cir. 1995). "The black-letter rule is that the doctrine of res judicata requires a final judgment," and "is normally asserted in a separate case from the one in which the judgment or ruling sought to be used as a bar to further litigation was rendered." Id. at 158.

F.3d 804, 807 (9th Cir. 2006) ("[F]or the law of the case doctrine to apply, we must actually have decided the matter, explicitly or by necessary implication, in our previous disposition."). "Law of the case is limited insofar as it applies only to issues that were decided in the former proceeding but not to questions which might have been decided but were not." Roboserve, Inc. v. Kato Kagaku Co., Ltd., 121 F.3d 1027, 1032 (7th Cir. 1997). Therefore, because the (b) (6) (b) (6) did not, and could not, have addressed the issue of the effect that the respondent's deportation has on the court's jurisdiction to review his order of deportation, the doctrine of the law of the case does not apply.

Additionally, the respondent argues that because the Attorney General failed to raise the jurisdictional issue before the (b) (6) and agreed with the respondent's position at that time, no issue of jurisdictional defect can be raised now. But federal courts can exercise jurisdiction only where it is granted to them by Congress, and Congress expressly denied the courts jurisdiction to review executed deportation orders under the provision that applies here, the former section 106(c) of the INA, 8 U.S.C. § 1105a(c) (1990). Federal courts have an obligation to assure themselves of their own jurisdiction. See Commercial Nat'l Bank of Chicago v. Demos, 18 F.3d 485, 487 (7th Cir. 1994) ("That the parties have not contested, nor the district court considered jurisdiction does not impede our inquiry ... [W]e must consider the issue *sua sponte* when it appears from the record that jurisdiction is lacking."). The issue of jurisdiction cannot be waived. See Freytag v. Comm'r of Internal Revenue, 501 U.S. 868 (1991). Thus, regardless of the Attorney General's position before the (b) (6) previously, this Court must address the issue of jurisdiction here.

Because the respondent departed – more precisely, was deported – after the BIA issued its final order of deportation, no court possesses jurisdiction to review that order, under the transitional rules of IIRIRA that incorporated the pre-IIRIRA judicial review provision, former section 106(c), 8 U.S.C. § 1105a(c) (1990). Therefore, this Court does not have jurisdiction to revisit the respondent's prior order of deportation in order to consider the respondent's application for section 212(c) relief.

B. Respondent Is Statutorily Ineligible for Section 212(c) Relief

Even assuming *arguendo* that this Court does have jurisdiction to consider the respondent's application for section 212(c) relief on its merits, I find that the respondent would be statutorily ineligible for such relief because he is no longer an alien lawfully admitted for permanent residence, he proceeded abroad under an order of deportation, and because he illegally returned to the United States.

Under the now-repealed section 212(c) of the INA, "[a]liens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . ." INA § 212(c), 8 U.S.C. § 1182(c) (1990) (repealed).

Legal permanent residence status can terminate, however. "The term lawfully admitted for permanent residence means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion, deportation, or removal." 8 C.F.R. § 1.1(p) (1997).[5] "[O]nce the applicant departs and thereby executes the outstanding order of deportation, his status will have changed and he may no longer be considered an alien 'lawfully admitted for permanent residence' within the meaning of [8 C.F.R. § 1.1(p)]." Matter of Mosqueda, 14 I&N Dec. 55, 57 (BIA 1972), superseded in other part by Matter of Lok, 18 I&N Dec. 101 (BIA 1981). In the present case, when the respondent was deported from the United States on May 6, 1997, his status changed, such that he can no longer be considered an alien "lawfully admitted for permanent residence" under 8 C.F.R. § 1.1(p). Since the respondent's lawful permanent residence status was terminated when the respondent was deported on May 6, 1997, he therefore can no longer meet the statutory requirement in section 212(c) of being lawfully admitted for permanent residence.

In addition to section 212(c)'s statutory requirement of being lawfully admitted for permanent residence, an alien must meet the requirement in of "temporarily proceed[ing] abroad voluntarily and not under an order of deportation." The respondent did not proceed abroad voluntarily; instead he proceeded abroad under an order of deportation. Since the respondent was forcibly deported, he cannot meet section 212(c)'s statutory requirement of proceeding abroad voluntarily and not under an order of deportation.

Finally, the respondent's illegal re-entry independently renders him ineligible for section 212(c) relief. The respondent admits that he illegally returned to the United States on April 2, 2004, after being deported. Under 8 U.S.C. § 1003.44(k)(2), "[a]liens with a final order of deportation who have illegally returned to the United States" are precluded from applying for section 212(c) relief. See Robledo-Gonzales v. Ashcroft, 342 F.3d 667, 682 (7th Cir. 2003). Thus, even if the respondent's lawful permanent residence status had not been terminated, he would be precluded from applying for section 212(c) relief under 8 U.S.C. § 1003.44(k)(2) because he illegally returned to the United States after his final order of deportation was executed.

VI. CONCLUSION

The Court does not have jurisdiction to revisit the respondent's prior order of deportation. Even assuming *arguendo* that it does, the respondent's permanent residence status was terminated by the execution of his order of deportation. Furthermore, the respondent's forcible departure under order of deportation and his subsequent illegal re-entry render him statutorily

[5] Upon first reading, 8 C.F.R. § 1.1(p) might appear to state that legal permanent residence status terminates upon the entry of a final administrative order of deportation before it is even executed. But in Henry v. INS, 8 F.3d 426 (7th Cir. 1993), the Seventh Circuit held that the language stating that "such status terminates upon entry of a final administrative order of exclusion, deportation, or removal" is limited to the termination of an alien's period of "lawful unrelinquished domicile" under section 212(c).

ineligible to apply for relief under the former section 212(c). Therefore, his application for relief under the former section 212(c) is denied.

ORDER

IT IS ORDERED that the respondent's application for a section 212(c) waiver of deportation is DENIED.

IT IS FURTHER ORDERED that the respondent be removed to Mexico on the charges contained in the Order to Show Cause.

ROBERT D. VINIKOOR
IMMIGRATION JUDGE

(b) (6)

U. S. DEPARTMENT OF JUSTICE
IMMIGRATION COURT
(b) (6)

In the Matter of
(b) (6)
Respondent

File A (b) (6)

IN REMOVAL PROCEEDINGS

On Behalf of the Respondent
Geoffrey Heeren, ESQ.

On Behalf of the INS
Seth B. Fiter, ESQ.

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the Written decision entered on 6-21-07. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Mexico; ~~or in the alternative to _____~~.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternate order of removal to _____.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[X] Respondent's application for a waiver under section 212(c) of the INA was ~~( ) granted~~ (X) denied ~~( ) withdrawn~~ or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision

[ ] Proceedings were terminated.

[ ] Other _____

Date: 6-21-07
Administrative Control Court: (b) (6)
Appeal: ~~WAIVED~~ RESERVED ~~(ABS)~~
APPEAL DUE BY: 7-23-07

Robert D. Vinikoor
Immigration Judge

Exh #15
2/09/08

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: (b) (6) Date: MAR 30 2006

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Section 212(c) waiver

ORDER:

PER CURIAM. Pursuant to the January 24, 2006, decision of the United States Court of Appeals for the (b) (6) the decision of the Board in this case dated (b) (6) is vacated and the record is remanded to the Immigration Judge for further proceedings consistent with the court's decision.

FOR THE BOARD

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS
2006 APR 10 AM 9:47

Ex #10
6/21/07