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

IN THE MATTER OF:

(b) (6)

RESPONDENT

November 13, 2006

In Removal Proceedings

CHARGE: Immigration and Nationality Act ("INA") Section 212(a)(7)(A)(i)(I): Immigrant Who, At the Time of Application for Admission to the United States, Is Not In Possession of a Valid Unexpired Immigrant Visa, Reentry Permit, Border Crossing Card, or Other Valid Entry Document

APPLICATION: INA § 245: Adjustment of Status

On Behalf of Respondent
Robert M. Warren, Esq.
(b) (6)

On Behalf of the Department[1]
Office of the Chief Counsel
Assistant Chief Counsel
(b) (6)

DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

(b) (6) ("Respondent"), is a fifty-two year old native and citizen of the Dominican Republic. The Respondent entered the United States without inspection on or about an unknown date at or near an unknown place.

[1] The Homeland Security Act of 2002, as amended, transferred the enforcement, services, and administrative functions of the Immigration and Naturalization Service ("INS") to the Department of Homeland Security ("DHS"). 68 *Fed. Reg.* 9824 (2003).

On September 26, 1996, the Respondent filed an Application for Adjustment of Status (Form I-485) with DHS on the basis of her marriage to (b) (6) a United States citizen. While the Application for Adjustment of Status was pending with DHS, the Respondent left the United States to travel to the Dominican Republic. On April 10, 1998, the Respondent was paroled into the United States pending adjudication of the adjustment of status application.

On October 23, 2000, DHS denied the Respondent's Application for Adjustment of Status on the grounds of "lack of prosecution." On that same day, DHS also served the Respondent with a Notice to Appear ("NTA") instructing her to appear before the (b) (6) Immigration Court.

At a removal hearing subsequently held on July 18, 2002, the (b) (6) Immigration Court pretermitted the Respondent's Application for Adjustment of Status and ordered her removed from the United States.

On July 11, 2002, the Respondent filed an appeal with the Board of Immigration Appeals ("BIA"). On December 10, 2003, the BIA affirmed the Court's decision and dismissed the Respondent's appeal.

The Respondent subsequently filed an appeal with the United States Court of Appeals for the (b) (6) On (b) (6) the United States Court of Appeals for the (b) (6) vacated the July 18, 2002, order of removal, and remanded the Respondent's removal proceedings to the BIA for further proceedings consistent with *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005).

On June 30, 2005, the BIA vacated its December 10, 2003, decision and remanded the Respondent's removal proceedings to the (b) (6) Immigration Court for "further proceedings consistent with the Court's decision in this case and the decision in *Succar v. Ashcroft*." On March 27, 2006, the (b) (6) Immigration Court advised the Respondent that she was scheduled to appear at a removal hearing on October 17, 2006.

At the October 17, 2006, hearing, the Respondent, through counsel, asserted that she is eligible to renew her Application for Adjustment of Status before the Court in light of *Succar v. Ashcroft, supra,* or, alternatively, that her removal proceedings should be administratively closed so as to enable her to reapply for Adjustment of Status before DHS. In response, DHS argued that the Court has no jurisdiction over the Respondent's Application for Adjustment of Status in light of recently promulgated regulations regarding the eligibility of arriving aliens to adjust status before the Court. DHS also opposed administratively closing the Respondent's removal proceedings, as her previous adjustment of status application had been denied for lack of prosecution and that she had a full and fair opportunity to pursue her request for relief from removal. At the conclusion of the hearing, the Court informed both parties that it would issue a written decision as to the Respondent's eligibility for adjustment of status and as to administrative closure.

II. STANDARDS OF LAW

A. Adjustment of Status

An arriving alien is an applicant for admission coming or attempting to come into the United States at a port of entry, and includes those individuals who are paroled into the United States pursuant to a grant of parole. 8 CFR § 1003.6(2006), *as amended by Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status*, 71 Fed. Reg. 27, 585, at 27, 591 (May 12, 2006).

8 CFR § 1245.1(c)(8)(2006) provides that arriving aliens in removal proceedings are ineligible to adjust their status to that of lawful permanent residents. On January 5, 2005, the United States Court of Appeals for the (b) (6) invalidated 8 CFR § 1245.1(c)(8)(2006) to the extent that it barred arriving aliens in removal proceedings from applying for adjustment of status. *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir 2005).

Subsequent to the (b) (6) Court of Appeals' decision in *Succar*, amendments to the regulations regarding the availability of adjustment of status in removal proceedings for arriving aliens were promulgated. *Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status*, 71 Fed. Reg. 27, 585-592 (May 12, 2006). The amended regulations clarify that the Court generally does not have jurisdiction to adjudicate an application for adjustment of status filed by an arriving alien in removal proceedings *except* in the limited circumstances involving individuals who had previously filed applications for adjustment of status, had departed the United States and reentered pursuant to advance parole, and were subsequently placed in removal proceedings. *Id.* at 27, 591-592 (to be codified at 8 CFR § 1245.2(a)(1)(ii))(emphasis added). These regulations are applicable to all cases pending administrative review on or after May 12, 2006. *Id.* at 27, 588.

B. Administrative Closure

Administrative closure is a convenience "which allows the removal of cases from the calendar in *appropriate* situations." *Matter of Gutierrez-Lopez*, 21 I & N Dec. 479, 480 (BIA 1996), *qtg. Matter of Amico*, 19 I & N Dec. 652, 654 n.1(BIA 1988)(emphasis added).

However, proceedings may not be administratively closed "if opposed by either of the parties." *Gutierrez-Lopez*, 21 I & N Dec. at 480; *see also Matter of Peugnet*, 20 I & N Dec. 233 (BIA 1991); *Matter of Lopez-Barrios*, 20 I & N Dec. 203 (BIA 1990); *Matter of Munoz-Santos*, 20 I & N Dec. 205 (BIA 1990).

III. CONCLUSIONS OF LAW

A. Adjustment of Status

The Respondent is an arriving alien within the meaning of 8 CFR § 1003(q)(2006). As there

is no evidence in the Record of Proceedings as to whether the Respondent had, indeed, departed the United States and reentered pursuant to advance parole, the Court therefore has no jurisdiction to consider her Application for Adjustment of Status. *See Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status,* 71 Fed. Reg. 27, 585-592 (May 12, 2006).[2]

B. Administrative Closure

As discussed previously, DHS opposes administratively closing the Respondent's removal proceedings on grounds that the previous Application for Adjustment of Status was denied for lack of prosecution, and as such, that she has had a full and fair opportunity to pursue her request for relief from removal. The Court therefore declines to administratively close the Respondent's removal proceedings. *See Gutierrez-Lopez,* 21 I & N Dec. at 480, *et al.*

IV. ORDERS

For the foregoing reasons, the following **ORDERS** are **HEREBY ENTERED**:

It is **HEREBY ORDERED** that Respondent's Request to Renew her Application for Adjustment of Status be **DENIED**.

It is **FURTHER ORDERED** that Respondent's Request for Administrative Closure be **DENIED**.

It is **FURTHER ORDERED** that the July 18, 2002, order of removal be **REINSTATED**. Respondent is hereby ordered **REMOVED** from the United States to the **DOMINICAN REPUBLIC.**

January 3, 2007
Date

PAUL M. GAGNON
United States Immigration Judge

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2 The Court notes that the Respondent is not without relief, as she may reapply for Adjustment of Status before DHS. *See generally Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status,* 71 Fed. Reg. 27, 585-592 (May 12, 2006). Alternatively, the Respondent may travel outside the United States and apply to adjust her status to that of lawful permanent resident at the United States Consulate in Santo Domingo, Dominican Republic.

File: (b) (6) [redacted] Date: SEP - 8 2008

In re: (b) (6) [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert M. Warren, Esquire

APPLICATION: Adjustment of status

This case was last before us on June 30, 2005, when we remanded proceedings to the Immigration Judge for consideration of the respondent's application for adjustment of status. Upon remand, the Immigration Judge pretermitted the respondent's application. The respondent filed a timely appeal of that decision. The appeal will be dismissed.

During the course of these proceedings, there have been amendments to the applicable regulations. *See* "Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status." 71 Fed. Reg. 27,585-592 (May 12, 2006). The new amendments are applicable to all cases pending administrative or judicial review on or after May 12, 2006, and therefore the amendments apply to this case.

The amended regulations clarify that, with one narrow exception not applicable to this case, arriving aliens such as the respondent may not submit or renew applications for adjustment of status in removal proceedings. 8 C.F.R. § 1245.2(a)(1)(ii)).

The Immigration Judge correctly concluded that there was no evidence in the record that the respondent had entered the United States under a grant of advance parole. *See* I.J. at 4. The respondent argues on appeal that there is implicit evidence supporting a grant of advance parole, *see* Respondent's Br. at 5, but the evidence referred to by the respondent is circumstantial at best and insufficient to support a conclusion that she had in fact been granted advanced parole.[1]

For the foregoing reason, we agree that the Immigration Judge lacks jurisdiction to adjudicate the respondent's application for adjustment of status. We also agree with the Immigration Judge that the respondent's request for administrative closure cannot be granted over the objections of the Department of Homeland Security.

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[1] This issue was addressed in our decision dated Dec 10, 2003, where we stated that "[t]he respondent claims that she left the United States pursuant to a grant of advance parole, but she has not offered any evidence of this fact. The documents contained in the record also do not indicate that the respondent left under a grant of advance parole."

(b) (6)

We have no jurisdiction to rule on the constitutionality of the statutes and regulations we administer, and therefore cannot rule on the constitutional challenges made by the respondent. *See Matter of Fede*, 20 I&N Dec. 35 (BIA 1989). As the regulations permit the respondent to pursue adjustment of status with United States Citizenship and Immigration Services, his argument that he is entitled to a forum for pursuing that application does not affect the outcome of this case.

ORDER: The appeal is dismissed.

FOR THE BOARD

File: (b) (6)

Date: JUN 30 2005

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Warren, Esquire

APPLICATION: Adjustment of status

ORDER:

PER CURIAM. This case is presently before us pursuant to the (b) (6) decision of the United States Court of Appeals for the (b) (6) The court noted that this case presents issues "overlapping" with those resolved by the court in a decision also released on January 5, 2005, *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). The case held invalid the regulation that bars arriving aliens from adjusting their status in the United States, as it applies to aliens who have been granted parole status. *See* 8 C.F.R. § 1245.1(c)(8). The Board relied on that regulation in finding the respondent in this case ineligible to apply for adjustment of status. It appears that the respondent in this case comes within the holding of *Succar*.

Accordingly, the decision of the Board in this case dated December 10, 2003, is vacated and the record is remanded to the Immigration Judge for further proceedings consistent with the court's decision in this case and the decision in *Succar v. Ashcroft*, *supra*.

FOR THE BOARD