



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 22041

**LINARES-VALENCIA, JOSE JAVIER
A059-170-269
STEWART DETENTION CENTER
P.O. BOX 248
LUMPKIN, GA 31815**

**DHS/ICE Office of Chief Counsel - SDC
146 CCA Road
Lumpkin, GA 31815**

Name: LINARES-VALENCIA, JOSE JAV... A 059-170-269

Date of this notice: 8/23/2012

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:
Adkins-Blanch, Charles K.
Hoffman, Sharon
Guendelsberger, John

TranC
Userteam: Docket

Immigrant & Refugee Appellate Center | www.irac.net

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Falls Church, Virginia 22041

File: A059 170 269 - Lumpkin, GA

Date: **AUG 23 2012**

In re: JOSE JAVIER LINARES-VALENCIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Waiver

The respondent, a native and citizen of El Salvador, who was previously granted lawful permanent resident status in the United States, has appealed from the Immigration Judge's decision dated April 10, 2012. The record will be remanded.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). This Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

I. FACTUAL AND PROCEDURAL HISTORY

The respondent was placed in removal proceedings on March 25, 2012. His first and only removal hearing was held on April 10, 2012. He was detained and pro se at that hearing. The record does not reflect that the Immigration Judge advised the respondent of his rights, including the right to be represented by counsel, before the Immigration Court. He did not confirm that the respondent had received the list of qualified organizations and attorneys that provide free legal services, ask him if he wanted a continuance to find an attorney, or ask him if he waived his right to counsel (Tr. 1-77). The Immigration Judge took the respondent's pleadings and concluded that the respondent was removable for having been convicted of a crime involving moral turpitude (Tr. at 77-79, 81).

Concerning potential relief, counsel for the Department of Homeland Security (DHS) and the Immigration Judge discussed whether the respondent was potentially eligible for a waiver, but though the Immigration Judge concluded that he was not eligible, he did not explain to the respondent why he was not eligible.

The Immigration Judge did not prepare a decision, so this Board was not provided any analysis concerning removability or ineligibility for relief from removal. The Immigration Judge may have been under the impression that the respondent wished to have an order of removal entered to El Salvador (Tr. at 78). However, the respondent also reserved his right to appeal (Tr. at 81).

II. ISSUES

A. Removal Hearing Procedures

The procedures to be followed by an Immigration Judge during a removal hearing are outlined in the regulations at 8 C.F.R. § 1240.10. The regulations provide that the Immigration Judge shall:

- (1) advise the respondent of his statutory¹ and regulatory² privilege of being represented by counsel of his choice at no expense to the Government;
- (2) advise the respondent of the availability of qualified organizations and attorneys that provide free legal services;³
- (3) confirm receipt of a list of those qualified organizations and attorneys by the respondent;
- (4) advise the respondent that he will have a reasonable opportunity to examine and object to evidence against him, present evidence in his own behalf and cross-examine witnesses presented by the government;
- (5) place the respondent under oath; and
- (6) read the allegations and charges in the Notice to Appear to the respondent and explain them in non-technical terms. 8 C.F.R. §§ 1240.10(a)(1)-(6).

The Immigration Judge also shall require the respondent to plead to the Notice to Appear by stating whether he or she admits or denies the factual allegations and removability charges and shall ask the respondent to designate a country of removal. 8 C.F.R. § 1240.10(c) and (f).

B. Missing Immigration Judge Decision.

While the Immigration Judge issued an order of removal that indicates it is a summary of an oral decision, that decision is not in the record. The decision of the Immigration Judge may be either oral or written. However, even a transcribed oral decision must include findings as to removability, provide the reasons for granting or denying any request, and end with the Immigration Judge's order. In addition, the transcribed oral decision must be separate from the remainder of the transcript. *See*

¹ Section 240(b)(4)(A) of the Act provides: "[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings...." Section 292 of the Act provides: "In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

² 8 C.F.R. § 1003.16(b) provides: "The alien may be represented in proceedings before an Immigration Judge by an attorney or other representative of his or her choice in accordance with 8 CFR part 1292, at no expense to the government." 8 C.F.R. § 1240.3 provides: "The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 1292."

³ *See* sections 239(a)(1)(E) and 239(b)(2) of the Act, 8 U.S.C. §§ 1229(a)(1)(E); (b)(2).

8 C.F.R. § 1240.12(a); *Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999). In this case, the oral decision is not identified or separated from the transcript.

Alternatively, if the Immigration Judge intended this decision to be a summary decision, it would not be proper in this case. A summary decision may only be issued by an Immigration Judge in removal proceedings in lieu of a separate written or transcribed oral decision when the respondent has expressly admitted to both the factual allegations and the charges of removability and, either (1) the respondent's ineligibility for any form of relief is clearly established on the pleadings, or (2) the respondent chooses not to apply for any form of relief for which it appears he/she may be eligible, after being given an appropriate advisement and an opportunity to do so, or (3) the respondent only applies for, and is granted, the relief of voluntary departure. Otherwise, a full decision is needed to provide the factual and legal basis for the decision. *See* 8 C.F.R. §§ 1240.12(a), (b);⁴ *Matter of A-P-*, *supra*.

In this case, the respondent was not asked if he conceded removability, and the Immigration Judge did not explain why his conviction constituted a crime involving moral turpitude. Moreover, the discussion of a waiver gave the respondent the sense that he may be statutorily eligible for a waiver. Consequently, a decision was necessary.

III. CONCLUSION

Because the failure to follow the procedures set forth in the federal regulations rendered the proceedings in this particular case fundamentally unfair, a new hearing is required. The appeal will be sustained, and the record will be remanded to the Immigration Judge to provide the respondent a new hearing in compliance with the regulatory requirements of 8 C.F.R. § 1240.10.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The order of the Immigration Judge is vacated.

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



FOR THE BOARD

⁴ Summary decisions are allowed only "where inadmissibility or deportability is determined on the pleadings pursuant to § 1240.10(b) and the respondent does not make an application under § 1240.11, the alien is statutorily ineligible for relief, or the respondent applies for voluntary departure only and the Immigration Judge grants the application" *See* 8 C.F.R. § 1240.12(b).

IMMIGRATION COURT
146 CCA ROAD
LUMPKIN, GA 31815

In the Matter of

Case No.: A059-170-269

LINARES-VALENCIA, JOSE JAVIER
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 4/10/12.
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.

- ☒ The respondent was ordered removed from the United States to ~~or in the alternative to~~ *El Salvador*
- ☐ Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the 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.
- ☐ Withholding of removal was () granted () denied () withdrawn.
- ☐ A Waiver under Section _____ was () granted () denied () withdrawn.
- ☐ Cancellation of removal under section 240A(a) was () granted () denied () withdrawn.

Respondent's application for:

- ☐ Cancellation under section 240A(b)(1) was () granted () denied () withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
- ☐ Cancellation under section 240A(b)(2) was () granted () denied () withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
- ☐ Adjustment of Status under Section _____ was () granted () denied () withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
- ☐ Respondent's application of () withholding of removal () deferral of removal under Article III of the Convention Against Torture was () granted () denied () withdrawn.
- ☐ 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: Apr 10, 2012

[Signature]
BARRY S. CHAZZ
Immigration Judge

Appeal Due 5-10-12
Appeal: Waived Reserved Appeal Due By:

by Govt by Respondent.