



**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

**Wong, Margaret W.  
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Cleveland, OH 44114**

**DHS LIT./York Co. Prison/YOR  
3400 Concord Road  
York, PA 17402**

**Name: PADILLA-ANDRADE, ESMERIO**

**A 208-443-549**

**Date of this notice: 5/9/2016**

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:  
Kendall-Clark, Molly

Userteam: Docket

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Falls Church, Virginia 22041

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File: A208 443 549 – York, PA

Date:

MAY - 9 2016

In re: ESMERIO PADILLA ANDRADE

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Margaret W. Wong, Esquire

APPLICATION: Remand

The respondent has filed an appeal from the Immigration Judge's decision dated February 8, 2016. During the pendency of the appeal, the respondent filed a motion to reopen and to withdraw voluntary departure. The record before us does not contain a response to the appeal or a reply to the motion from the Department of Homeland Security (DHS). The record will be remanded.

The record establishes that the respondent's former attorney advised the Immigration Judge that the respondent wished to apply only for voluntary departure (Tr. at 3-4).<sup>1</sup> Thereafter, the respondent was granted voluntary departure (I.J. at 4-5). The Immigration Judge's order states that the respondent waived appeal. On appeal, however, the respondent argues that his waiver was not "knowing and voluntary." See *Matter of Patino*, 23 I&N Dec. 74 (BIA 2001) (providing that respondent may argue that appeal was not knowing or intelligent by filing either a motion to reopen with the Immigration Judge or an appeal with the Board).

This Board has held that an alien's waiver of his appeal rights must be knowing, intelligent, and express. See *Matter of Ocampo*, 22 I&N Dec. 1301 (BIA 2000); *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320 (BIA 2000). In the matter before us, the respondent was not asked whether he wished to waive his appeal rights and at no time stated that he would waive appeal. Consequently, any waiver was not express. Furthermore, based on the respondent's allegations that his former attorney did not talk to him about his right to apply for asylum or the terms of the Immigration Judge's grant of voluntary departure, the waiver was also not knowing or intelligent.

The respondent's motion, which is deemed to be a motion to remand, requests that the respondent be allowed to pursue an application for asylum, withholding of removal, and protection under the Convention Against Torture. The respondent has submitted a copy of his

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<sup>1</sup> It appears that the respondent was in the custody of the Department of Homeland Security at the time of the hearing. The respondent's attorney appeared telephonically (Tr. at 1).

application with his motion, along with his own statement explaining that his former attorney did not discuss his asylum options with him.

Under the circumstances, we will grant the motion to remand, and remand the record to the Immigration Judge for further proceedings.

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

  
\_\_\_\_\_  
FOR THE BOARD

IMMIGRATION COURT  
3400 CONCORD ROAD, SUITE 2  
YORK, PA 17402

In the Matter of

Case No.: A208-443-549

PADILLA-ANDRADE, ESNERIO

Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

*A. Lively*  
This is a summary of the oral decision entered on Feb 8, 2016  
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 MEXICO or in the alternative to .
  - ☒ Respondent's application for voluntary departure was granted until April 19, 2016 upon posting a bond in the amount of \$ 10,000 with an alternate order of removal to MEXICO.

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: Feb 8, 2016

*[Signature]*  
WALTER A. DURLING  
Immigration Judge

*[Signature]* Appeal: Waived/Reserved Appeal Due By: