



U.S. Department of Justice

Executive Office for Immigration Review

***Board of Immigration Appeals
Office of the Clerk***

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Name: MALVAIS-HERNANDEZ, PEDRO

A089-284-493

Date of this notice: 7/17/2012

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:

Holmes, David B.
Kendall-Clark, Molly
Miller, Neil P.

Immigrant & Refugee Appellate Center | www.irac.net

SM

Falls Church, Virginia 22041

File: A089 284 493 - Chicago, IL

Date: JUL 17 2012

In re: PEDRO MALVAIS-HERNANDEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gerardo S. Gutierrez, Esquire

ON BEHALF OF DHS: Sarah E. Zeld
Assistant Chief Counsel

On September 22, 2011, an Immigration Judge ordered the respondent removed from the United States to Mexico. The Immigration Judge purported to order the respondent removed “in absentia”. The respondent has appealed the Immigration Judge’s decision to the Board. The Department of Homeland Security (the “DHS”) filed a brief in support of the Immigration Judge’s decision. The appeal will be sustained.

An order of removal may be entered against an alien who “does not attend” a removal proceeding, after receiving proper notice. Section 240(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5).

At one point during the September 22, 2011, hearing the respondent, on counsel’s advice, declined to answer questions posed by the DHS attorney (Tr. at 13-15). These questions concerned such issues as where the respondent was born, and whether he had a passport. *Id.* The respondent declined to state his name (Tr. at 14). The Immigration Judge said that the respondent would be ordered removed in absentia for refusing to identify himself (Tr. at 15).

As counsel noted during the hearing, however, Tr. at 15, the respondent had earlier identified himself during the September 22, 2011, hearing, as Pedro Malvais (Tr. at 8). While the respondent was not under oath at the time, the respondent still clearly provided his name to the Immigration Judge. *Id.*

Under the circumstances of this case, therefore, it was not appropriate for the Immigration Judge to have entered an “in absentia” order of removal based on the respondent’s failure to appear for the removal hearing, under section 240(b)(5) of the Act. Rather, the respondent was present at the removal hearing, as evidenced by the respondent providing his name to the Immigration Judge (Tr. at 8).

An order of removal issued following proceedings conducted in absentia pursuant to section 240(b)(5) of the Act may be rescinded only upon a motion to reopen filed with the Immigration Judge. Section 240(b)(5)(C)(i) of the Act; *Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999). In this case, however, the Immigration Judge should not have entered an in absentia order, given that the respondent was in attendance at the September 22, 2011, hearing. Therefore, we will sustain the respondent's appeal of the Immigration Judge's decision.

ORDER: The appeal is sustained.

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

A handwritten signature in black ink, appearing to be 'DM', is written above a horizontal line.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
CHICAGO, IL 60603

In the Matter of:

MALVAIS-HERNANDEZ, PEDRO

Respondent

A 089-284-493

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

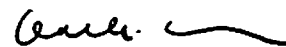
This is a summary of oral decision entered on SEPTEMBER 22, 2011. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

- ☒ The respondent was ordered removed from the United States to MEXICO.
☒ in absentia on the charges as set out in the notice to appear.
- ☐ 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 alternative 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 withholding/deferral of removal under Article 3 of the Torture Convention 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 under Section 240A(b) was () granted () denied () withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
- ☐ Respondent's application for a waiver under Section ____ of the INA was () granted () denied () withdrawn () 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, without prejudice.
- ☐ Proceedings were administratively closed.
- ☐ Other: _____.

Date: 09/22/11

Appeal: WAIVED/RESERVED(A/I/B)

APPEAL DUE BY: _____



Carlos Cuevas
Immigration Judge