

Falls Church, Virginia 22041

File: [REDACTED] Houston, TX

Date: FEB 18 2009

In re [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: [REDACTED]

ON BEHALF OF DHS: James Edward Manning
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Remand; cancellation of removal

The respondent, a native and citizen of Mexico, has appealed an Immigration Judge's July 24, 2008, decision pretermining his application for cancellation of removal pursuant to section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b, and ordering him removed to Mexico. The Department of Homeland Security (DHS) has filed a Motion for Summary Affirmance. The appeal will be sustained, and the record will be remanded for further proceedings.

The respondent testified that he is not a United States citizen and that he entered the United States illegally (Tr. at 2). The Immigration Judge determined that the evidence shows that the respondent is incapable of speaking for himself (I.J. at 1; Tr. at 4). The Form I-213 Record of Deportable Alien indicates that the respondent suffers from paranoid schizophrenia and depression (Exh. 2). In addition, his criminal record indicates that a court found him criminally insane and dismissed a charge of burglary. However, the Immigration Judge noted that the respondent's conversations with the Immigration Court were lucid, and his statements recorded on the Form I-213 were sufficient to establish his removability (I.J. at 2). Further, the Immigration Judge held that the respondent failed to present documentary evidence or witnesses in support of his application for cancellation of removal and thus failed to establish eligibility for such relief (I.J. at 2-3).

On appeal, the respondent argues that it is not in dispute that he is mentally incompetent. He claims that because he is incompetent, the Immigration Judge should have requested a custodian or appointed a representative to appear on his behalf. See 8 C.F.R. § 1240.4. In addition, the respondent argues that the Immigration Judge did not follow 8 C.F.R. § 1240.10(c) by requiring the DHS to prove alienage and that he erred in pretermining his application for cancellation of removal. Finally, the respondent claims that the Immigration Judge erred by not allowing the respondent to

designate a country of removal and failing to advise him of a right to apply for asylum or inquiring about his fear of return to Mexico.

When an alien is mentally incompetent and therefore cannot be present at a proceeding, "the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent." 8 C.F.R. § 1240.4. Further, Immigration Judges shall not accept an admission of removability from an unrepresented respondent who is incompetent. 8 C.F.R. § 1240.10.

Although the Immigration Judge stated that the respondent was lucid, he also found reason to believe that he is incapable of speaking for himself. Indeed, the respondent appeared confused when asked basic questions about the ages of his children and the immigration status of his wife (Tr. at 16-17; 22-25). While the respondent did in fact appear at his hearing, the evidence of record indicates that he is mentally incompetent. Thus, we find it appropriate to remand the record so that the Immigration Judge can take reasonable measures to obtain an attorney or other representative to assist the respondent in these proceedings. Moreover, we find that the Immigration Judge failed to conduct the proceedings in accordance with 8 C.F.R. § 1240.10(a), which requires the Immigration Judge to advise an alien in removal proceedings of certain procedural rights guaranteed to him by the Immigration and Nationality Act and the Constitution of the United States. In this case, the record contains no evidence that the Immigration Judge advised the respondent of the availability of free legal services, ascertained that he received a list of such programs, or read the factual allegations and charges in the notice to appear to the respondent and explained them in non-technical language. 8 C.F.R. § 1240.10(a). Further, the record does not contain evidence that the respondent was provided the opportunity to designate a country of removal. See section 241(b)(2)(A) of the Act. In view of the evidence of procedural shortcomings that characterized the respondent's hearing, we determine that it is appropriate that the record be remanded to the Immigration Judge for a new removal hearing that complies more faithfully with the requirements of 8 C.F.R. § 1240.10(a). Upon remand, the respondent shall be allowed to designate a country of removal and to present evidence in support of any relief from removal for which he may be eligible, including asylum, withholding of removal and protection under the Convention Against Torture.

Accordingly, the following orders are entered.

ORDER: The appeal is sustained and the Immigration Judge's decision is vacated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing order and for entry of a new decision.



FOR THE BOARD