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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FABIAN CRUZ-HERNANDEZ,

Petitioner,

v.

ERIC H. HOLDER Jr., Attorney General,

Respondent.

No. 05-70954

Agency No. A078-679-743

MEMORANDUM*

FABIAN CRUZ-HERNANDEZ,

Petitioner,

v.

ERIC H. HOLDER Jr., Attorney General,

Respondent.

No. 05-75707

Agency No. A078-679-743

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted February 11, 2010
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: NOONAN, BERZON and IKUTA, Circuit Judges.

The government concedes that the Immigration Judge (IJ) erred under 8 U.S.C. § 1229a(b)(5)(A) in refusing to issue Cruz-Hernandez's removal order *in absentia*, where it is undisputed that Cruz-Hernandez was not in fact present at his hearing and there is no evidence in the record that he agreed the proceedings be conducted in his absence, *see* 8 U.S.C. § 1229a(b)(2)(A). We agree, and therefore grant Cruz-Hernandez's petition for review of the Board of Immigration Appeals' (BIA) denial of Cruz-Hernandez's motion to reopen. We remand to the BIA with directions to remand to the IJ for a new removal hearing.

Because the IJ based his determination that Cruz-Hernandez was removable on the sole ground that the Attorney General had "reason to believe" that Cruz-Hernandez had been involved in illicit trafficking in a controlled or listed substance or chemical, pursuant to 8 U.S.C. § 1182(a)(2)(C)(i), Cruz-Hernandez's claim that the crime for which he was indicted was not a controlled substance offense is not germane and we do not reach it here. Nor do we reach Cruz-Hernandez's other claims, which are based on errors related to Cruz-Hernandez's absence at his prior removal hearing. Cruz-Hernandez's remaining claims are therefore dismissed. For the same reasons, we dismiss Cruz-Hernandez's petition

for review of the BIA's denial of his appeal from the IJ's determination of removability.

Each party will bear its own costs on appeal.

**PETITION FOR REVIEW of Appeal No. 05-75707 GRANTED in part;
DISMISSED in part; REMANDED with instructions that Cruz-Hernandez
receive a rehearing.**

PETITION FOR REVIEW of Appeal No. 05-70954 DISMISSED.