



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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Hartford, CT 06123-0217**

**Name: DE FIGUEIREDO, JOSE OSMAR**

**A 200-029-818**

**Date of this notice: 8/23/2016**

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:  
Adkins-Blanch, Charles K.  
O'Leary, Brian M.  
Grant, Edward R.

USCIS  
User team: Docket

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Falls Church, Virginia 22041

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File: A200 029 818 – Hartford, CT

Date: AUG 23 2016

In re: JOSE OSMAR DE FIGUEIREDO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Flavia Marinho Martins, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Brazil, has appealed the Immigration Judge's decision dated September 2, 2015. The Immigration Judge denied the respondent's motion to reopen proceedings in which he was ordered removed in absentia. The appeal will be sustained, proceedings will be reopened, and the record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The Board possesses discretion to reopen or reconsider cases sua sponte. *See* 8 C.F.R. § 1003.2(a); *see also Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Based on the totality of the circumstances in this case, including the fact that the Department of Homeland Security joined in the motion to reopen filed on July 13, 2015, we will grant the respondent's motion to reopen to rescind his in absentia order pursuant to our sua sponte authority. *See* 8 C.F.R. § 1003.2(a); *see also Matter of J-J-, supra*. Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, the proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.

  
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
HARTFORD, CONNECTICUT

In the Matter of :

Jose Osmar DE FIGUEIREDO  
A200 029 818  
Respondent

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)  
)

Removal Proceedings

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT:

Flavins Martins  
100 Church Street, 8<sup>th</sup> Floor  
New York, NY 10007

ON BEHALF OF THE DHS

DECISION OF THE IMMIGRATION JUDGE

The respondent was personally served with a notice to appear (NTA) on July 2, 2005 by the Border Patrol. The NTA contained the time and place of the respondent's removal hearing in Hartford. The hearing was set for January 31, 2006 at 9:30 a.m. The respondent failed to appear on January 31, 2006 and this Immigration Judge issued an in absentia order of removal. The notice of the order was mailed to the respondent and was not returned by the Post Office as undeliverable.

On July 16, 2015, the respondent filed a motion to reopen. The respondent seeks reopening because he is the beneficiary of an I-130 petition filed by his US citizen wife which CIS approved in April of 2014. The respondent's affidavit asserts that, the day before his hearing, he drove around looking for the Court, but was unable to locate it due to lack of a zip code. He claims that, on the day of his hearing, he failed to appear in Court due to a diarrhea attack. He married a US citizen on January 27, 2013 who petitioned for his children. He claims that his wife suffers from a skin disease. The respondent seeks to consular process through the I-601A process.

It is clear from this record that the respondent was properly served with the NTA which contained the time, date, and place of the respondent's hearing as well as the consequences of failure to appear. The record is clear that he was served with the NTA which provided both the hearing notice and the warnings. In his affidavit, the respondent acknowledges he was aware of his hearing date. Furthermore, the Form I-213 reflects that the respondent was notified orally of his hearing date in Hartford and of the consequences for failure to appear in the Portuguese language.

The only basis to rescind an in absentia order is either lack of notice or exceptional circumstances. See section 240(b)(5)(C) of the Act. Since respondent was served with the NTA, which contained the hearing date and place and he was aware of the hearing date, he has failed to demonstrate lack of notice. The omission of the Court's zip code on NTA does not impact whether the respondent received adequate notice since the NTA provided the Court's address and name of the building. It is unclear how having the Court's zip code could assist the respondent in locating the Court.

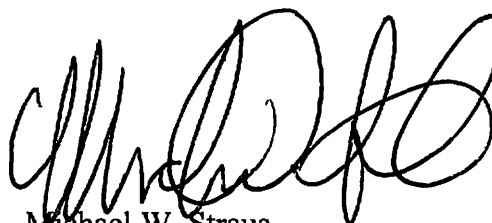
Any claim based on exceptional circumstances is untimely since it was not filed within 180 days of the order. Secondly, the respondent has failed to demonstrate exceptional circumstances for his failure to appear beyond his control pursuant to section 240(e) of the Act. While the respondent's claimed illness on the day of the hearing may have constituted exceptional circumstances, there is nothing to document it. But, more importantly, it appears the respondent took no steps to rescind the order within 180 days. Therefore, there is no basis to rescind the in absentia order under section 240(b)(5)(C) of the Act.

The Court finds no basis to reopen these proceedings "sua sponte." Section 240(b)(5)(C) of the Act states that an in absentia order can be rescinded **only** based on lack of notice or exceptional circumstances. See Matter of G-D-, 22 I&N Dec. 1132 (BIA 1999). The fact that DHS does not oppose the motion is insufficient to warrant reopening. Acquiring equities after remaining in the United States for many years and resulting hardships to spouses or children following an in absentia order is common. The BIA's authority to reopen sua sponte is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations where enforcing them might result in hardship. See Matter of J-J-, 21 I&N Dec. 976 (BIA 1997). Furthermore, granting this motion would undermine the validity of any in absentia order.

In sum, the Court finds that the respondent has not established that these proceedings be reopened.

ORDER, the respondent's motion to reopen is denied.

Sept 2, 2015  
Date



Michael W. Straus  
Immigration Judge