



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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5107 Leesburg Pike, Suite 2000  
Falls Church, Virginia 22041

**Schmoke, Lauren  
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308 S. 19th Street  
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**DHS/ICE Office of Chief Counsel - ATL  
180 Ted Turner Dr., SW, Ste 332  
Atlanta, GA 30303**

**Name: MENDEZ-GARCIA, FELIPE**

**A 089-818-449**

**Date of this notice: 6/13/2016**

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:  
Grant, Edward R.  
Mann, Ana  
O'Leary, Brian M.

USCIS  
User team: Docket

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5107 Leesburg Pike, Suite 2000  
Falls Church, Virginia 22041

**MENDEZ-GARCIA, FELIPE  
A089-818-449  
DOUGLAS COUNTY CORRECTION  
70 S. 17TH STREET  
OMAHA, NE 68102**

**DHS/ICE Office of Chief Counsel - ATL  
180 Ted Turner Dr., SW, Ste 332  
Atlanta, GA 30303**

**Name: MENDEZ-GARCIA, FELIPE**

**A 089-818-449**

**Date of this notice: 6/13/2016**

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

*Donna Carr*

Donna Carr  
Chief Clerk

Enclosure

Panel Members:  
Grant, Edward R.  
Mann, Ana  
O'Leary, Brian M.

USCIS  
User team:

Falls Church, Virginia 22041

File: A089 818 449 – Atlanta, GA

Date: **JUN 13 2016**

In re: FELIPE MENDEZ-GARCIA a.k.a. Felipe Ramirez-Loarca a.k.a. Jose Martin

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lauren Schmoke, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Guatemala, appeals the decision of the Immigration Judge, mailed February 8, 2016, denying his motion to reopen. The Department of Homeland Security has not replied to the respondent's appeal.

We review Immigration Judges' findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Considering the totality of the circumstances presented in this case, we conclude that reopened removal proceedings are warranted in order to provide the respondent with a renewed opportunity to appear before an Immigration Judge to show why he should not be removed from the United States. *See* 8 C.F.R. § 1003.23(b)(1). At the present time, we express no opinion regarding the ultimate outcome of these proceedings. Accordingly, the following order is entered.

ORDER: The respondent's appeal is sustained, the order of removal, entered in absentia on December 18, 2008, is vacated, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings and the entry of a new decision.

  
FOR THE BOARD

Immigrant & Refugee Appellate Center, LLC | www.irac.net

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
180 TED TURNER DR SW, STE. 241  
ATLANTA, GA 30303

Kasaby & Nicholls  
Schmoke, Lauren  
308 S. 19th Street  
Omaha, NE 68102

Date: Feb 8, 2016

File A089-818-449

In the Matter of:  
RAMIREZ-LOARCA, FELIPE

\_\_\_\_ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before \_\_\_\_\_. The appeal must be accompanied by proof of paid fee (\$110.00).

\_\_\_\_ Enclosed is a copy of the oral decision.

\_\_\_\_ Enclosed is a transcript of the testimony of record.

\_\_\_\_ You are granted until \_\_\_\_\_ to submit a brief to this office in support of your appeal.

\_\_\_\_ Opposing counsel is granted until \_\_\_\_\_ to submit a brief in opposition to the appeal.

✓ Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

A.R.  
Immigration Court Clerk

UL

cc: DHS

Immigrant & Refugee Appellate Center, LLC | www.irac.net

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
ATLANTA, GEORGIA**

<b>IN THE MATTER OF:</b>	)	In Removal Proceedings
	)	
<b>MENDEZ-GARCIA, Felipe</b>	)	File No. A# 089-818-449
	)	
<b>Respondent</b>	)	
<hr style="width: 50%; margin-left: 0;"/>		

**APPLICATIONS:** Respondent's Motion to Reopen

**APPEARANCES**

**ON BEHALF OF THE RESPONDENT:**

Lauren Schmoke, Esq.  
Kasaby & Nicholls, LLC  
308 South 19th Street  
Omaha, Nebraska 68102

**ON BEHALF OF THE GOVERNMENT:**

Assistant Chief Counsel  
Department of Homeland Security  
180 Ted Turner Dr. SW, Suite 332  
Atlanta, Georgia 30303

**DECISION AND ORDER OF THE IMMIGRATION JUDGE**

**I. PROCEDURAL HISTORY**

Felipe Mendaz-Garcia ("Respondent") is an adult male, native and citizen of Guatemala. Respondent entered the United States without inspection as a minor on or about August 7, 2008.

On August 9, 2008, the Department of Homeland Security ("Department") issued an Notice to Appear ("NTA") charging Respondent as removable under Immigration and Nationality Act ("INA" or "Act") section 212(a)(6)(A)(i).

On October 14, 2008, Respondent was released into the custody of his father, Mateo Jacinto Ramirez.

By Notice of Hearing dated November 13, 2008, Respondent was properly notified that he was scheduled to appear before the Atlanta Immigration Court on December 18, 2008. Respondent failed to appear for his hearing before the Court on December 18, 2008, and was ordered removed to Guatemala *in absentia*.

On December 22, 2015, Respondent filed a Motion to Reopen, which the Department of Homeland Security ("Department") opposed, and a Motion for Stay of Removal. The Court denied Respondent's Motion for Stay of Removal on December 29, 2015. The Court has carefully reviewed *the entire record*

before it. All evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court will deny Respondent's Motion to Reopen.

## II. DISCUSSION

### a. Respondent's Motion is untimely.

Generally, motions to reopen for the purpose of rescinding an *in absentia* removal order must be filed within 180 days after the date of the removal order, and must demonstrate that the failure to appear was due to exceptional circumstances. See INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii).<sup>1</sup> Respondent filed his Motion to Reopen on December 22, 2015, over seven (7) years after he was ordered removed *in absentia* on December 18, 2008. Respondent's Motion to Reopen is thus untimely.

### b. Respondent has not demonstrated eligibility for the tolling of his filing deadline.

The Eleventh Circuit has held that the filing deadline for motions to reopen can be equitably tolled; however, the Court finds Respondent has not established sufficient cause for equitable tolling in his case. See *Avila-Santoyo v. U.S. Att'y. Gen.*, 713 F.3d 1357, 1362 (11th Cir. 2013). The Eleventh Circuit has held that, generally, equitable tolling "requires a litigant to show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Ruiz-Turcios v. U.S. Att'y. Gen., 717 F.3d 847, 851 (11th Cir. 2013).

Respondent's Motion indicates that Respondent's father began the process of filing a motion to reopen by creating an affidavit after Respondent failed to appear at his hearing. See Resp. Mot. to Reopen at Resp. Affidavit & Affidavit of Mateo Ramirez Jacinto.<sup>2</sup> Although Respondent alleged that his father was ordered to depart the United States in February 2009, Respondent provides the Court with no explanation for his actions between February 2009 and December 22, 2015, other than to say he moved to Nebraska to live with family. The Court further notes that Respondent turned 18-years-old on September 8, 2011. Respondent has not provided the Court with any explanation for why he did not file his Motion to Reopen until more than four (4) years after he reached the age of majority. For the foregoing reasons, the Court finds that Respondent cannot show that he acted with due diligence in pursuing his rights. See *Ruiz-Turcios v. U.S. Att'y. Gen.*, 717 F.3d at 851. Consequently, the Court finds Respondent has not established that he is eligible for the tolling of the deadline for filing his Motion to Reopen.

### c. The Court will not exercise its discretion to reopen Respondent's case sua sponte.

The Court may *sua sponte* reopen a case over which it has jurisdiction at any time. 8 C.F.R. § 1003.23(b)(1); see also *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). However, such power should only

<sup>1</sup> The Court notes that motions to reopen for the purpose of rescinding an *in absentia* removal order may be filed at any time, including after the 180-day deadline, if the alien argues that he did not receive notice of the hearing or was in Federal or state custody and the failure to appear was through no fault of his own. See INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii). However, in the present case, Respondent admits to having actual notice of his hearing. See Resp. Mot. to Reopen at Resp. Affidavit. Moreover, the Motion does not contain an allegation that Respondent was in Federal or state custody at the time of his hearing.

<sup>2</sup> The affidavits from Respondent and his father indicate that Respondent failed to appear because he and his father could not find the Court building.

be exercised in cases of "exceptional situations." Matter of J-J-, 21 I&N Dec. at 984. A respondent has the burden to show that an exceptional situation exists. Matter of Beckford, 22 I&N Dec. 1216, 1218-19 (BIA 2000). Moreover, the power to reopen a case *sua sponte* "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing may result in hardship." Matter of J-J-, 21 I&N Dec. at 984. The Court "invokes [its] *sua sponte* authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." Matter of G-D-, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (citing Matter of J-J-, *supra*).

The Court finds that Respondent has not established an exceptional situation justifying the Court's exercise of its *sua sponte* authority. See Matter of J-J-, 21 I&N Dec. 976, 984 (BIA 1997). In light of the foregoing, the Court will enter the following order:


**ORDER**

**It is ordered that:**

Respondent's Motion to Reopen is hereby  
**DENIED.**

2-2-2016

Date

  
J. Dan Pelletier  
Immigration Judge  
Atlanta, Georgia