



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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**Name: BHATT, KANUBHAI LALBHAI**

**A 073-183-507**

**Date of this notice: 10/28/2013**

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.  
Manuel, Elise  
Hoffman, Sharon

yungc  
Userteam: Docket

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*SK*

Falls Church, Virginia 22041

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File: A073 183 507 – Atlanta, GA

Date:

OCT 28 2013

In re: KANUBHAI LALBHAI BHATT a.k.a. Bhatt a.k.a. Kanubhai Bhatt  
a.k.a. Jayantibhai Becharabhai Patel a.k.a. Kanubhai

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marcia Kasdan, Esquire

ON BEHALF OF DHS: Morris I. Onyewuchi  
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of India, appeals the Immigration Judge's decision, dated July 26, 2012, denying his request to reopen proceedings to allow him to apply for adjustment of status. The Department of Homeland Security filed a request for summary affirmance. The appeal will be sustained.

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

After our review and based on the totality of the circumstances, including the serious health condition of the respondent's lawful permanent resident wife and the respondent's current potential eligibility for relief, we find that the respondent has established an exceptional situation that warrants *sua sponte* reopening. *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Accordingly, we will sustain the appeal and reopen these proceedings to allow the respondent an opportunity to apply for relief from removal.

ORDER: The appeal is sustained, and these removal proceedings are reopened.

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

  
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FOR THE BOARD

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

IN THE MATTER OF:	)	In Removal Proceedings
	)	
BHATT, a.k.a. Kanubhai, a.k.a. Kanubhai Lalbhai	)	
Bhatt, a.k.a. Jayantibhai Becharabhai Patel,	)	File No. A073-183-507
	)	
Respondent	)	
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**APPLICATION:** Motion to Reopen *In Absentia* Removal Proceedings and Stay of Removal

**APPEARANCES**

**ON BEHALF OF THE RESPONDENT:**

Marcia S. Kasdan, Esq.  
Law Office of Marcia Kasdan  
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Hackensack, New Jersey 07601

**ON BEHALF OF THE GOVERNMENT:**

Assistant Chief Counsel  
Department of Homeland Security  
180 Spring Street, SW, Suite 332  
Atlanta, Georgia 30303

**DECISION AND ORDER OF THE IMMIGRATION JUDGE**

**I. PROCEDURAL HISTORY**

Respondent is a male native and citizen of India who was admitted to the United States at New York, New York on or about August 6, 1993 as a non-immigrant visitor. The Department of Homeland Security ("Department") placed Respondent into removal proceedings through the issuance of a Notice to Appear ("NTA") on May 13, 2003. Respondent failed to appear for his master calendar hearing scheduled for October 22, 2003 and was ordered removed from the United States *in absentia*. On December 30, 2011, Respondent filed the instant Motion to Reopen and Motion to Stay Removal with the Court. On January 24, 2012, the Department filed its opposition to Respondent's motion to reopen.

The Court has carefully reviewed the arguments of both parties and considered the entire record before it. For the reasons set forth below, the Court will deny the Respondent's Motion to Reopen and Motion to Stay Removal.

**II. APPLICABLE LAW**

Generally, motions to reopen for purposes of rescinding an *in absentia* removal order must be filed within 180 days after the date of the removal order if the alien demonstrates that the failure to appear was because of exceptional circumstances. See INA § 240(b)(5)(C)(i); 8 C.F.R.

§ 1003.23(b)(4)(ii). However, if the alien argues that he did not receive notice of the hearing or asserts that he was in Federal or state custody and the failure to appear was through no fault of his own, an order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time. 8 C.F.R. § 1003.23(b)(4)(ii). Only one such motion may be filed by the alien. Id.

As with all motions to reopen, the applicant must state new facts that will be proven at a hearing if the motion is granted, and it must be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3); see also INS v. Abudu, 485 U.S. 94 (1988). Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and supporting documentation. Id. Finally, if the ultimate relief is discretionary, the Immigration Judge may deny a motion to reopen even if the moving party demonstrates *prima facie* eligibility for relief. Id.

The Code of Federal Regulations also grants an Immigration Judge *sua sponte* authority to reopen, at any time, any case in which she has made a decision. See 8 C.F.R. § 1003.23(b). The Board has explained that exercising *sua sponte* authority is an “extraordinary remedy reserved for truly exceptional situations.” Matter of G-D-, 22 I&N Dec. 1132, 1134 (BIA 1999) (citing Matter of J-J-, 21 I&N Dec. 976 (BIA 1997)). The movant has the burden of proving that an exceptional situation exists such that the Court may exercise its *sua sponte* authority. See Matter of Beckford, 22 I&N 1216, 1218 (BIA 2000).

### III. DISCUSSION

#### *i. The Respondent’s Motion to Reopen is untimely.*

Respondent was ordered removed *in absentia* on October 22, 2003. He filed his Motion to Reopen and Motion to Stay Removal on December 30, 2011. Therefore, the Respondent’s Motion to Reopen was filed more than 180 days after the date of the removal order and is untimely. See INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii).

The record reflects that Respondent received proper notice of his removal hearing. Respondent personally signed the certificate of service on the NTA. The NTA states that Respondent’s removal hearing was scheduled for October 22, 2003. The record also reflects that Respondent’s former counsel filed a Motion to Allow Telephonic Hearing for the October 22, 2003 hearing on September 24, 2003. The record shows that Respondent’s previous counsel informed the Court on October 22, 2003 that she instructed the Respondent to appear at the hearing on that date. However, Respondent failed to appear. In his current motion, Respondent states that he did not understand the information contained in the NTA and that he did not understand that he had to appear at the Immigration Court.

The Respondent’s Motion to Reopen is untimely. In addition, he does not argue that his failure to appear was due to exceptional circumstances. See INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii). Further, the Court finds that the Respondent was properly notified of his hearing date and his obligation to appear. Therefore, the Respondent’s motion to reopen is denied. See id.

- ii. *The Respondent's Motion to Reopen does not merit an exercise of the Court's sua sponte authority.*

Respondent argues that his proceedings should be reopened *sua sponte* due to the illness of his lawful permanent resident spouse. However, the Court's authority to reopen a case *sua sponte* "is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship." Matter of J-J-, 21 I&N Dec. at 976. The Court does not find that the record reflects evidence of a "truly exceptional situatio[n]." Matter of G-D-, 22 I&N Dec. at 1134. Therefore, the Court will not exercise its *sua sponte* authority to reopen proceedings.

#### IV. CONCLUSION

Because the Court denies the Respondent's Motion to Reopen, the Respondent's Motion to Stay Removal is moot. See 8 C.F.R. § 1003.23(b)(4)(ii) ("The filing of a motion under this paragraph shall stay the removal of the alien pending disposition of the motion by the Immigration Judge.").

#### ORDER OF THE IMMIGRATION JUDGE

It is ORDERED as follows: Respondent's Motion to Reopen is hereby **DENIED**.

Date

\_\_\_\_\_  
Madeline Garcia  
United States Immigration Judge  
Atlanta, Georgia