



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 22041*

**JOSEPH, ASBERT FITZGERALD
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3843 STAGG AVENUE
BASILE, LA 70515**

**FEDERAL DET. CENTER-OAKDALE 2
P.O. Box 1128
OAKDALE, LA 71463**

Name: JOSEPH, ASBERT FITZGERALD

A036-805-976

Date of this notice: 9/27/2011

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:
Miller, Neil P.

Immigrant & Refugee Appellate Center | www.irac.net

Falls Church, Virginia 22041

File: A036 805 976 - Oakdale, LA

Date: SEP 27 2011

In re: ASBERT FITZGERALD JOSEPH a.k.a. Joseph Albert a.k.a. Joseph Asbert
a.k.a. Joseph Oskar Oskar

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Rebecca A. Hollaway
Assistant Chief Counsel

APPLICATION: Reopening; reconsideration

The Board entered the final administrative order of removal in this case on November 23, 2010, when it dismissed the respondent's appeal from the Immigration Judge's July 21, 2010, decision denying his motion to terminate the proceedings.¹ On July 21, 2011, the respondent filed the instant motion with the Board. The Department of Homeland Security opposes this motion. Whether construed as a motion to reopen or as a motion to reconsider, the respondent's motion is untimely. *See* sections 240(c)(6)(B), (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(6)(B), (C)(i); 8 C.F.R. §§ 1003.2(b)(2), (c)(2). The motion will be denied.

The respondent has not addressed the issue of the untimeliness of this motion, and it does not appear that any exception to the filing deadlines applies to this case. *See generally* 8 C.F.R. § 1003.2(c)(3). Further, for the reason stated below, we are not persuaded either to reopen the proceedings or to reconsider a prior Board order sua sponte. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (discussing the Board's limited sua sponte authority to reopen or reconsider cases in exceptional situations); 8 C.F.R. § 1003.2(a).

The respondent, who was residing in the United States as a lawful permanent resident while under the age of 18, claims to have automatically acquired United States citizenship under former section 321(a)(3) of the Act, 8 U.S.C. § 1432(a)(3), upon his mother's becoming a naturalized citizen when he was 16 years old. The only issue before the Immigration Court was whether the respondent's parents were legally separated and the respondent was in his mother's sole custody at the time of her naturalization. The Immigration Judge determined that the respondent had not satisfied his burden because the record reflects not only that the respondent's parents divorced on

¹ The United States Court of Appeals for the Fifth Circuit denied the respondent's petition for judicial review of our November 23, 2010, decision for lack of jurisdiction. *Joseph v. Holder*, No. 11-60428 (5th Cir. 2011). The respondent's current request that the Board reissue our November 23, 2010, decision to enable him to petition again for judicial review of that decision is denied.

May 23, 1988, but also that the divorce was vacated on May 24, 1988, i.e., prior to his mother's naturalization. The Immigration Judge and the Board rejected the respondent's assertion that a handwritten notation of unknown authorship which appeared on the judgment of divorce, and which stated that the order to vacate the judgment of divorce, filed on May 24, 1988, was entered on November 30, 2009, establishes that his parents were in fact divorced at the time of his mother's naturalization.

With the instant motion, the respondent has offered a copy of a document bearing the letterhead of The County Clerk and Clerk of the Supreme Court, New York County Court House, dated November 30, 2009, and signed by an individual of unknown capacity, stating that pursuant to an order filed on May 24, 1988, the judgement of divorce filed on May 23, 1988, was vacated on November 30, 2009. We find that the inclusion of this document in the record would not alter the conclusion, based on the Immigration Judge's analysis of New York State law, that "the Court's determination vacating the judgment of divorce controls regardless of when the clerk of (the) court enters the judgment." *See* Immigration Judge's Decision (07/21/10) at 4-5. *See also Matter of Coelho*, 20 I&N Dec. 464, 472-73 (BIA 1988) (explaining that a party who seeks a remand or to reopen proceedings to pursue relief bears a "heavy burden" of proving that if proceedings before the Immigration Judge were reopened, with all the attendant delays, the new evidence would likely change the result in the case). Accordingly, the respondent's untimely motion to reopen and reconsider will be denied.

ORDER: The motion to reopen and reconsider is denied.



FOR THE BOARD