**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**Sniffin, Ondine Galvez**
**The Law Office of Ondine G. Sniffin, Esq.**
**11 S. Angell St. #495**
**Providence, RI 02906**

**DHS/ICE Office of Chief Counsel - BOS**
**P.O. Box 8728**
**Boston, MA 02114**

**Name: F[redacted] A[redacted], L[redacted]**

**A [redacted]-919**

**Date of this notice: 12/18/2019**

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:
Couch, Stuart V.
Kelly, Edward F.
Gorman, Stephanie

Userteam: Docket

File: A[redacted]-919 – Boston, MA

Date: DEC 18 2019

In re: L[redacted] F[redacted] A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ondine G. Sniffin, Esquire

APPLICATION: Reopening; reconsideration

The respondent, a native and citizen of Guatemala, was ordered removed from the United States in absentia on August 1, 2018. He has filed an appeal from the Immigration Judge's decision dated November 2, 2018, denying the respondent's motion to reconsider the October 3, 2018, decision denying his motion to reopen the August 1, 2018, removal order. The Department of Homeland Security (DHS) has not filed a brief in response to the appeal. The appeal will be sustained.

Upon de novo review, 8 C.F.R. § 1003.1(d)(3)(ii), we conclude that reopening is warranted in light of the totality of the circumstances presented in this case. In particular, the Immigration Judge found that the respondent had met his burden to show that he did not receive notice of his hearing and it was through no fault of the respondent (IJ Dec, October 2, 2018). The respondent had a pending asylum application, alleging a fear of harm on account of his race and membership in a particular social group (Exh. 2). The respondent showed due diligence in promptly seeking to redress the situation by filing his motion less than two months after the issuance of the in absentia order, and DHS did not file an opposition to either the motion or the appeal. The respondent has also submitted an application for cancellation of removal (Form 42-B) and evidence of U.S. citizen children, who are qualifying relatives.

In *Matter of M-S-*, 22 I&N Dec. 349, 353 (BIA 1998), we held that "[o]nce an in absentia order is rescinded, the alien is then given a new opportunity to litigate the issues previously resolved against [the alien] at the in absentia hearing. In other words, the deportation proceedings go back to the start, the Service must proceed to prove deportability under the allegations in the original Order to Show Cause, and the alien must establish any eligibility for relief. ...The alien is returned to the same status [he or] she had prior to the in absentia hearing, namely, an alien charged with deportability and subject to the already-initiated deportation proceedings."

The Immigration Judge here improperly denied the motion to reopen for failure to establish prima facie eligibility for relief. Instead, because the respondent established that he never received notice of his hearing, the proceedings should be rescinded. *Matter of M-S-*, 22 I&N Dec.at 353.

Thus, we will sustain the appeal and reopen the proceedings to allow the respondent another opportunity to appear for a hearing before an Immigration Judge. Accordingly, the following orders shall be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The Immigration Judge's August 1, 2018, order of removal is vacated, proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing.

FOR THE BOARD