

**Immigration Court: BIA****Case:** *In re M-S-*, 22 I&N Dec. 349 (BIA 1998)**Date:** Oct. 30, 1998

**Adjudicated by:** En banc Board: Schmidt, Dunne, Holmes, Villageliu, Filppu, Rosenberg, Grant; Guendelsberger (Concurring Opinion); Hurwitz (Dissent joined by:) Vacca, Heilman, Cole, Mathon, Jones.

**Opinion:** Villageliu**Tags:** Immigration, MTR, in absentia, removal order, AOS, EWI, recission**Questions Presented:**

1. Is **recission** of a removal order an implied condition precedent to reopening deportation proceedings for other purposes?  
[Problem here: Recission is only available if the failure to appear was based on exceptional circumstances / incarceration / lack of service.]
2. Is respondent eligible for a **reopened** removal order in order to address her AOS?

**Holdings:**

- **Recission** is not a prerequisite for reopening.
- Respondent is entitled to a **reopening** of proceedings in order to address her application for adjustment of status.

**Rationale:** Applicant is not seeking to rescind in absentia removal order, but applying for a form of relief that was unavailable to her at the time of the hearing.

**Facts:** Citizen of Ghana entered U.S. EWI in 1993. Submitted asylum application. INS referred application to an IJ and scheduled respondent for hearing. “According to the Order to Show Cause, the warnings of the consequences of failing to appear at the deportation hearing were not read to the respondent, whose native language is Twi.” 350

**Procedural History:**

- **Dec. 15, 1995**—respondent marries USC.
- **Jan. 17, 1996**—failed to appear for deportation hearing; ordered deported *in absentia* for being EWI.
- **Feb. 27, 1996**—USC spouse files I-130.
- **March 4, 1996**—files motion to reopen with AOS documentation.
- **March 1996: IJ**—denied motion to rescind in absentia deportation order, MTR, motion to stay deportation because exceptional circumstances for failure to appear were not evident.
- **May 24, 1996**—visa petition approved

- **May 31, 1996**—filed new MTR
- **June 1996**—IJ denied this MTR also because of failure to appear in January.

#### Appeals to Statute & Precedent:

- **INA 242B(c)(3) / 8 U.S.C. § 1252b(c)(3) [1994]:** (not the current numbering—see U.S. History below.) Recission only if an MTR is filed within 180 days and there's a demonstration of exceptional circumstances (or anytime if the NTA was invalid or not served / alien was in Federal or State custody).

#### Relevant U.S. History:

- **1996: IIRIRA**—struck INA 242B, and now it's INA 240 / 8 U.S.C. §1229a.

#### Discussion:

- **Recissions:**
  - “The only reasons that will support such recission are exceptional circumstances which prevented the alien from appearing, the alien’s incarceration which prevented her appearance, or lack of notice of the hearing.” 353
  - “Once an in absentia order is rescinded, the alien is then given a new opportunity to litigate the issues previously resolved against her at the in absentia hearing.” 353
  - differs from “reopening” because it actually returns noncitizen to the status she had prior to the in absentia order. (Reopening by itself doesn’t change anything about the immigrant’s status.)
  - “When we reopen proceedings for a purpose other than recission of an in absentia order, what transpired at previously conducted proceedings is not necessarily abrogated.” 354
- In this case, the deportation order doesn’t need to be **rescinded** in order for the case to be **reopened** so the respondent can present her case for adjustment of status (now that her visa has been approved).
- “The language of section 242B(e)(1) of the Act, requiring oral warnings of the consequences for failing to appear before precluding relief from deportation, is clear.” 355
- **If oral warnings are not given**, the respondent doesn’t have to establish exceptional circumstances / incarceration / lack of service to excuse their failure to appear.

(Concurrence & Dissent omitted)