

LATENT CONSEQUENCES OF FRAUD AND MISTAKES

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Introduction

When a foreign national obtains lawful permanent residence, or even naturalization, in the United States, the battle isn't over. Should Immigration discover within five years of a person adjusting status that such adjustment was procured by fraud or mistake, it may bring rescission proceedings under § 246 of the Immigration and Nationality Act (INA). Even if that foreign national has naturalized following her adjustment of status, upon rescission of the adjustment Immigration may bring denaturalization proceedings under § 340 of the INA to revoke the person's naturalization and, eventually, deport her. Likewise, if a person obtains naturalization by fraud, that status can be revoked under § 340 of the Act, without the government first having to rescind her permanent residence.

Rescission

Rescission proceedings are governed by INA § 246 and the regulation at 8 C.F.R. § 246. The rescission of lawful permanent residence status returns a foreign national to the status (nonimmigrant, temporary, or none) held before lawful permanent resident status was obtained.

Rescission proceedings serve the goal of taking away a foreign national's lawful permanent resident status when the government determines that the foreign national was not eligible for such status at the time he/she adjusted. The old law was that the government had to use rescission, rather than removal, proceedings to take away the lawful permanent status of a person who had adjusted within the past five years. See Matter of Saunders, 16 I&N Dec. 326 (BIA 1977).

These days the five-year statute of limitations on revoking adjustment of status applies only to rescission and not to removal proceedings. Alhuay v. Attorney General, 661 F.3d 534 (11th Cir. 2011). Only in the Third Circuit is this not true.

That court has held that the government must initiate either rescission or removal proceedings within five years of a person obtaining permanent residence, or else is barred from initiating removal proceedings. Garcia v. Attorney General, 553 F.3d 724 (3d Cir. 2009). That decision is an outlier and applies only to cases within the Third Circuit. Every other federal court of appeals to address the issue has found to the contrary, as has the BIA. See Matter of Cruz De Ortiz, 25 I&N Dec. 601 (BIA 2011).

As a matter of policy, the government does not use rescission proceedings if the adjustment was granted by an immigration judge. Furthermore, rescission is only available in cases where the foreign national obtained lawful permanent residence through adjustment of status; it is not available in cases in which the foreign national obtained lawful permanent residence through consular processing. Add to that that rescission proceedings are a bit cumbersome, see 8 C.F.R. § 246, and you get the result that Immigration rarely resorts to rescission proceedings, preferring to use removal proceedings instead.

Relief Under § 237(a)(1)(H)

One very useful but probably underused defense in rescission proceedings is found in § 237(a)(1)(H) of the Act. What is now § 237(a)(1)(H) of the Act has been in effect in one form or another since 1957. In 1966, the Supreme Court, examining the statutory predecessor of § 237(a)(1)(H) (prior § 241(f) of the INA), interpreted the statute liberally and held that, in light of its humanitarian purposes of uniting families, its benefits include the waiver of quota and other restrictions evaded by a misrepresentation. Errico v. INS, 385 U.S. 214, 222, 224-225 (1966). The §237(a)(1)(H) waiver is frequently used in the hidden marriage situation, that is, when a person immigrates claiming to be single in a category that requires the person to be single in order to immigrate, but the person is in fact married at the time he/she immigrates. See, e.g., Cason v. INS, 8 F.3d 700 (9th Cir. 1993). It is also useful in removal proceedings arising from a fraudulent marriage, See Matter of Koloamantagi, 23 I&N Dec. 548, 552 (BIA 2003), and those involving fraudulent divorces. See Matter of Aldecoaotalora, 18 I&N Dec. 430, 431 (BIA 1983).

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