

When the Green Card Is Issued in Error

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No less than in other areas of law, so with immigration, the statute of limitations stands as a bulwark against litigation that should have been heard while evidence is still accessible, witnesses available and memories not dimmed by the passage of time. As this article will show, however, a number of federal courts of appeal have issued decisions that effectively repeal the immigration statute of limitations. The Second Circuit recently became the sixth court of appeals to render essentially meaningless a five-year statute of limitations preventing the immigration authorities from rescinding green cards that had been granted improvidently. The Third Circuit is now further isolated as the sole circuit where immigrants can rely on the statute of limitations for protection from the agency revisiting allegedly flawed green card approvals decided five or more years ago.

In *Adams v. Holder*¹ the U.S. Court of Appeals for the Second Circuit agreed with the Fourth², Sixth³, Eighth⁴, Ninth⁵ and Eleventh⁶ Circuits in upholding what it considered to be the longstanding interpretation by the Attorney General and Board of Immigration Appeals (BIA) of Immigration and Nationality Act (INA) § 246(a), 8 USC § 1256(a). At stake is whether the immigration authorities, by initiating removal proceedings, can make an end-run around the five-year statute of limitations that applies to rescission proceedings.

By way of background, the rescission of a green card (lawful permanent resident status) returns a foreign national to the visa status (e.g., nonimmigrant or temporary) held before the green card was obtained; if the foreign national is no longer eligible for that temporary status, he or she would become removable. Rescission proceedings are governed by regulation at 8 C.F.R. § 246, as INA § 246 is silent on procedures. In contrast, the removal (formerly, the deportation or exclusion) of a foreign national results in the individual's forced departure from the United States and a minimum five-year statutory bar to reentry. Removal proceedings are governed by INA § 240, 8 USC § 1229a. INA § 246(a) provides:

If, at any time within five years after the status of a person has been otherwise adjusted ... to that of [a person] lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General⁷ that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person ... and the person shall thereupon be subject to all provisions of this chapter to the same extent as if

¹ 2012 WL 3329717 (2d Cir. 2012).

² *Asika v. Ashcroft*, 362 F.3d 264 (4th Cir. 2004).

³ *Stolaj v. Holder*, 577 F.3d 651 (6th Cir. 2009).

⁴ *Kim v. Holder*, 560 F.3d 833 (8th Cir. 2009).

⁵ *Oloteo v. Immigration and Naturalization Service*, 643 F.2d 679 (9th Cir. 1981).

⁶ *Alhuay v. U.S. Atty. Gen.*, 661 F.3d 534 (11th Cir. 2011).

⁷ In 2003, with the creation of the Department of Homeland Security, certain immigration agency functions were transferred from the Department of Justice. The Executive Office of Immigration Review, which remains part of the Department of Justice, includes immigration judges, who preside over both rescission and removal proceedings. Rescission proceedings are initiated by district directors of the U.S. Citizenship and Immigration Services (USCIS), and removal proceedings can be initiated by USCIS, Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE) officers, all of which are housed in the Department of Homeland Security.

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the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the [person]'s status prior to commencement of procedures to remove the [person] under section 1229a [INA § 240] of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the [person]'s status.

For 50 years, the first sentence of this section has produced conflicting interpretations by the Attorney General and the BIA. In *Matter of V--*⁸ the BIA held in 1956 that the INA § 246(a) required that a green card obtained by adjustment of status in the United States must first be rescinded before deportation or removal proceedings could be started. (Until 1952, the only way to obtain a green card, even if someone was already in the United States on a temporary visa, was to apply for a permanent or immigrant visa at a U.S. consulate abroad, requiring a trip overseas regardless of how long the foreign national might have been residing legally in the United States. In 1952, the process of "adjustment of status" was authorized, allowing those already in the United States to "adjust" their status to permanent resident if they meet certain conditions. These two procedural options remain today.)

In *Matter of V--*, deportation proceedings were started within five years of the green card's issuance, and the BIA terminated deportation proceedings, holding that the lawful permanent resident status must first be rescinded in accordance with INA § 249. The BIA extended this interpretation in 1962, holding that INA § 249's five-year statute of limitations prohibited deportation and exclusion proceedings if not timely initiated. This prompted the immigration agency's commissioner to certify the decision to the Attorney General, who overruled the BIA in *Matter of S--*⁹. The AG determined that INA § 246(a) provided no statute of limitations on deportation or exclusion proceedings (now both known simply as removal proceedings).

The Attorney General in *Matter of S--* based his decision in part on the fact that Congress had not provided for any statute of limitations in those provisions governing removal proceedings and in part on Congress's failure to explain why it would provide the procedural benefit of a statute of limitations to adjustment applicants and not to those who entered the United States on an immigrant visa. In 1977, the BIA in *Matter of Saunders*¹⁰ upheld *Matter of V--* and distinguished *Matter of S--* (in *Saunders*, unlike in *S--*, five years had not yet passed).

A concurring opinion in *Saunders* provides the most sensible interpretation of the statute of limitations on rescission proceedings:

[S]ection 246 does permit of another interpretation. As to any ground of deportation or exclusion, known and embraced by the grant of adjustment of status, the five-year rule should apply with full force, and operate as a full statute of limitations. As to any ground arising before the grant of adjustment, and not known at the time of adjustment, deportation or exclusion proceedings should lie without regard to rescission and the five-year rule. In short, section 246 should be read as a

⁸ 7 I. & N. Dec. 363 (BIA 1956).

⁹ 9 I. & N. Dec. 548, 555 (AG 1962).

¹⁰ 16 I. & N. Dec. 326 (BIA 1977).

waiver and adjustment of known grounds of disability.... With this interpretation the Congressional intent is given meaning and the existing case law reconciled.¹¹

The Third Circuit, initially in *Bamidele v. Immigration and Naturalization Service*¹² and reaffirmed in *Garcia v. U.S. Atty. Gen.*¹³ is the only court of appeals to give any real meaning to INA § 246(a), although its rationale (that the BIA has no specific expertise in statutes of limitations and its interpretation does not therefore warrant deference) is different from that in *Saunders*. (*Bamidele* was decided before Congress amended INA § 246(a) in 1996¹⁴ by adding the last sentence to allow the immigration agency to pursue removal without first initiating rescission proceedings; that addition did not alter the Third Circuit's analysis of the first sentence.)

Unfortunately, all of the courts of appeals, including the Third, have ignored the 1977 *Saunders* decision and the concurring opinion's analysis, and have focused instead on *Matter of S--*, the 1962 Attorney General decision. In doing so, a number of the circuits, including the Second, have accepted as a foregone conclusion the Attorney General's assessment that the five-year limitation on rescission proceedings "may be of little practical value" to the immigrant.¹⁵ Except for those residing in the Third Circuit, INA § 246(a) indeed by virtue of these rulings has little or no practical value.

Why are so many courts willing to make INA § 246(a) a dead letter? Admittedly, the facts in most of these cases are quite unsympathetic: For example, Adams (the foreign national in the 2nd Circuit case) lied on his visa application, claiming that he had never been in the United States, even though, while in the United States on an expired visitor's visa, he had been arrested for attempting to sell cocaine and had given a fake name in court. Alhuay (11th Circuit) married a green card holder in the United States while still married to her first husband in Peru, and lied repeatedly in her green card application about her first marriage. Kim (8th Circuit) or his employer bribed a corrupt immigration official to obtain the green card for him. Oloteo (9th Circuit) obtained his green card by claiming to be the unmarried child of a lawful permanent resident, when in fact he was married. And Stolaj (6th Circuit) bribed an asylum officer to obtain his green card. However, neither Garcia's misdeeds (she misrepresented that the petitioner was her mother when in fact it was her aunt) nor Bamidele's (marriage fraud) stopped the Third Circuit from finding in their favor and applying the statute of limitations. So bad facts alone do not explain these decisions.

The Attorney General's rationale in *Matter of S--* had and has merit. It is difficult to decipher why Congress enacted INA § 246(a) without a similar statute of limitations on removal proceedings. The fact that Congress amended the statute in 1996 – leaving the first sentence of 246(a) intact rather than repealing it – makes the judicial jurisprudence rendering INA § 246(a) "of little practical value" that much more baffling. The *Adams* Court argues in support of its holding that "it does not effectively nullify the five-year limitation on rescission proceedings."¹⁶ Instead, it claims that the five-year statute of limitations still applies in the rescission

¹¹ *Matter of Saunders*, concurring opinion by BIA member Irving Appleman (16 I. & N. Dec. at 334-335).

¹² 99 F.3d 557 (3d Cir. 1996).

¹³ 553 F.3d 724 (3d Cir. 2009).

¹⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 378(a), Pub.L. No. 104-208, 110 Stat. 3009-546, 649 (effective April 1, 1997).

¹⁵ *Matter of S--*, 9 I. & N. Dec at 555, cited in *Adams* at 25.

¹⁶ *Adams* at 25.

context, which has fewer statutorily imposed procedural protections than in the removal context. Given the removal procedures mandated by INA § 240 and the absence of any statutorily mandated procedures for rescission, so the reasoning goes, “the Attorney General need not afford the same procedural safeguards [in a rescission proceeding].... But the limitations period imposed by 1256(a) [INA § 246(a)] cabins the Attorney General’s authority to use this informal rescission process for up to five years....”¹⁷

Even if one were persuaded by this reasoning, it remains a distinction without a difference. The USCIS’s own Adjudicator’s Field Manual¹⁸ acknowledges that rescission is rare: “In most cases, USCIS ... can and should place the [lawful permanent resident or LPR] into removal proceedings under Section 240 of the Act with a Notice to Appear. Any subsequent order of removal issued by an immigration judge is now sufficient to rescind the LPR’s status. Because most cases that formerly required rescission (e.g., adjustment obtained by fraud) now may be resolved in the context of proceedings under Section 240 of the Act, rescission should be an infrequent process.”

Ironically, it is the USCIS Adjudicator’s Field Manual, in describing rescission as “a cumbersome process once required as a prelude to initiating proceedings against certain lawful permanent residents,”¹⁹ that cites to *Matter of Saunders*, the case that offers the most sensible interpretation of INA § 246(a), without of course endorsing that interpretation. The Adjudicators Field Manual goes on to provide that

[t]he fact that an [LPR] was not eligible for adjustment of status does not automatically mean that you must rescind the [LPR]’s lawful permanent resident status. If the [LPR] was not aware of the ineligibility and intended no fraud or deception in obtaining lawful permanent resident status, you may decide not to institute rescission proceedings, particularly if the [LPR] has accrued other equities during his or her residence. ... Once the decision not to rescind is made, the matter may not be reconsidered unless new facts are uncovered that were not known at the time of the original decision.²⁰

While there is some comfort that the USCIS has provided for discretionary authority not to pursue rescission, it is a dim shadow of the safeguards that would be provided by a meaningful statute of limitations.

So what does a permanent resident do who suspects or knows that his or her green card might have been issued in error? Three suggestions: 1. Move to New Jersey (or somewhere else in the Third Circuit), so as to be able to rely on INA § 246(a)’s statute of limitations. 2. Don’t apply for naturalization to US citizenship if you live outside of the Third Circuit – the erroneous green card issuance of the immigrants in three of the circuit court cases (*Asika*, *Alhuay* and *Garcia*) came to light in the context of naturalization applications they

¹⁷ *Id.*

¹⁸ Available to the public in redacted form on the USCIS website, www.uscis.gov, under the heading Laws and the subheading Immigration Handbooks, Manuals and Guidance, or directly at <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm>.

¹⁹ Adjudicator’s Field Manual, Ch. 26.1.

²⁰ Adjudicator’s Field Manual, Ch. 26.1(g), Discretionary Authority to Not Pursue Rescission.

filed. 3. Don't travel internationally – in two of the cases (*Adams* and *Kim*), the validity of the immigrants' green cards were challenged at the border upon their return to the United States. And if any green card holders end up litigating INA § 246(a) in any of the remaining circuits, let's hope that the reasoning in *Matter of Saunders* gets the attention it deserves.

And what should immigration lawyers do on behalf of their clients? Argue the *Saunders* reasoning with zeal, and advocate to Congress and the immigration agencies that a five-year statute of limitations or comparable regulation should be promulgated. This would accord procedural justice to long-time permanent residents who may be unable to assemble the testimony and evidence needed to preserve green card status whenever in the distant future the government tries to take it away.

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