



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF R-C-

DATE: SEPT. 12, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-918, PETITION FOR U NONIMMIGRANT STATUS

The Petitioner seeks “U-1” nonimmigrant classification as a victim of qualifying criminal activity. *See* Immigration and Nationality Act (the Act) sections 101(a)(15)(U) and 214(p), 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p). The U-1 classification affords nonimmigrant status to victims of certain crimes who assist authorities investigating or prosecuting the criminal activity.

The Director, Vermont Service Center, denied the Form I-918, Petition for U Nonimmigrant Status (U petition). The Director concluded that as a lawful permanent resident of the United States, the Petitioner is ineligible for U-1 nonimmigrant classification.<sup>1</sup>

The matter is now before us on appeal. On appeal, the Petitioner submits a brief, an *amici curiae* brief, and additional evidence, claiming that she is not a permanent resident of the United States.

Upon *de novo* review, we will dismiss the appeal.

#### I. APPLICABLE LAW

The Act differentiates immigrants from nonimmigrants. *See* section 101(a)(15) of the Act (providing that every alien is an immigrant except those aliens in specified nonimmigrant classifications, such as U nonimmigrants). Lawful permanent residents are immigrants. *See* section 101(a)(20) of the Act (defining a lawful permanent resident as a person who has “been lawfully accorded the privilege of residing permanently in the United States *as an immigrant* . . . (emphasis added).” Conditional residents are also lawful permanent residents. *See Matter of Paek*, 26 I&N Dec. 403, 406 (BIA 2014) (providing that the plain language of section 216 of the Act, 8 U.S.C. § 1186a, establishes that a person admitted as a conditional permanent resident is lawfully admitted for permanent residence under section 101(a)(20) of the Act).

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<sup>1</sup> In her decision, the Director also indicated that the Petitioner was ineligible for U nonimmigrant status because she is inadmissible to the United States as a lawful permanent resident. However, because lawful permanent residency is not a ground of inadmissibility under section 212(a) of the Act, 8 U.S.C. § 1182(a), that portion of the Director’s decision is withdrawn.

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Lawful permanent residency does not end upon the commission of acts that make the individual removable, but upon its termination, rescission, or relinquishment. *Matter of Gunaydin*, 18 I&N Dec. 326, 328 (BIA 1982). Lawful permanent residency may also be lost through abandonment. *Matter of Huang*, 19 I&N Dec. 749 (1988).

The burden of proof is on a petitioner to demonstrate eligibility by a preponderance of the evidence. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). A petitioner may submit any evidence for us to consider in our *de novo* review; however, we determine, in our sole discretion, the credibility of and the weight to give that evidence. See section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

## II. FACTS AND PROCEDURAL HISTORY

The Petitioner is a native and citizen of Mexico who was granted conditional lawful permanent residency on March 7, 2005, based on her 2004 marriage to her U.S. citizen spouse, J-C-<sup>2</sup>. Upon approval of her status as a lawful permanent resident, the Petitioner was issued a Form I-551, Permanent Resident Card, with an expiration date of March 7, 2007.

On July 26, 2012, the Petitioner attempted to enter the United States using her expired Form I-551. At the port-of-entry, a U.S. Customs and Border Patrol (CBP) Officer questioned the Petitioner to determine whether she was a returning lawful permanent resident. The Petitioner testified to the CBP Officer that she moved to Mexico in May 2006 and J-C- joined her approximately four months later, where the couple lived together until J-C- decided to return to the United States in March or April 2011 to seek medical treatment. The Petitioner stayed behind in Mexico until the time of her attempted entry into the United States.

The Petitioner testified to the CBP officer that she had never been back to the United States since leaving in May 2006 and that J-C- was “in charge of all those [conditional residency] documents and he never told [her] anything” about being a conditional resident. The CBP Officer initiated removal proceedings against the Petitioner under section 240 of the Act, 8 U.S.C. § 1229a, stating that the Petitioner was inadmissible under section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), because she was not in possession of a valid, unexpired immigration document. The Petitioner remains in removal proceedings before the ██████████ Alaska, Immigration Court.

The Petitioner filed her U petition in 2013, and the Director denied it, noting the Petitioner’s ineligibility for nonimmigrant classification because she remained a lawful permanent resident when filing her U petition. The Petitioner filed a timely appeal, asserting, in part, that when she left the United States for Mexico in 2006, she abandoned her lawful permanent residency.

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<sup>2</sup> Name withheld to protect identity.

### III. ANALYSIS

#### A. Lawful Permanent Residents Cannot Be Accorded a U Visa or U Nonimmigrant Status

Because lawful permanent residents, to include conditional residents, are defined at section 101(a)(20) of the Act as immigrants, and the U nonimmigrant classification is excepted from the definition of immigrant at section 101(a)(15) of the Act, it follows that a lawful permanent resident cannot be granted U nonimmigrant status until the individual's lawful permanent residency has been lost through termination, rescission, relinquishment, or abandonment. Only those lawful permanent residents who seek A, E, or G status may adjust to these specific nonimmigrant classifications.<sup>3</sup> See section 247 of the Act, 8 U.S.C. § 1257.

#### B. Lawful Permanent Residency Must Have Ended as of the Filing Date of the U Petition

The Act provides for an annual numerical limitation on U-1 visas or grants of U-1 nonimmigrant status. Section 214(p)(2) of the Act. U.S. Citizenship and Immigration Services (USCIS) assigns each U petition a priority date, which is the petition's filing date, as a U-1 visa or U-1 status is allocated according to priority date. See 8 C.F.R. § 214.14(d). Because lawful permanent residents may not also hold U nonimmigrant status, lawful permanent residency must have terminated prior to the assigned priority date. See 8 C.F.R. § 103.2(b)(1)(providing that eligibility for an immigration benefit must be established as of the filing date of a visa petition).

#### C. The Petitioner was a Lawful Permanent Resident When She Filed Her U Petition

The record of proceedings does not contain evidence of a formal adjudication by either USCIS or the Executive Office for Immigration Review (EOIR) that the Petitioner has actually lost her lawful permanent residency.

First, the Petitioner has not demonstrated that her conditional residency automatically terminated upon the expiration of her Form I-551. Although the regulation at 8 C.F.R. § 216.4(a)(6) refers to the automatic termination of conditional residency for failure to file a timely Form I-751, Petition to Remove Conditions on Residence, this same regulation allows for an untimely filing of a Form I-751, and restoration to lawful permanent residency by USCIS, if the individual establishes good cause for failing to file on time. More importantly, the Act specifically conditions the termination of lawful permanent residency upon review in removal proceedings, as the failure to file a Form I-751 is not the only basis for the loss of conditional residency. See sections 216(b)(2);(c)(2)(B),(3)(D) of the Act. USCIS' policy of issuing a Form I-551 stamp to conditional residents pending the outcome of removal proceedings is further evidence that conditional residency does not automatically terminate based solely on the failure to file a timely Form I-751 or an individual's possession of an expired Form I-551. Cf. *Etuk v. Slattery*, 936 F.2d 1433, 1447 (2d Cir. 1991) ("To revoke [a lawful

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<sup>3</sup> The A, E, and G nonimmigrant classifications are for foreign government officials, treaty traders and investors, and representatives to international organizations, respectively. See 8 C.F.R. § 214.2.

permanent resident's] green card pending completion of the deportation process would severely undermine the integrity of the process itself[.]”).

Second, regarding her claims to have relinquished or abandoned her lawful permanent residency upon her relocation to Mexico, the facts in the Petitioner's record of proceedings indicate that she may have abandoned her lawful permanent residency at that time; however, an Immigration Judge would determine if the Petitioner is a returning lawful permanent resident through the removal proceedings initiated against her, and her proceedings remain pending. As we stated earlier in this decision, lawful permanent residency does not end upon the commission of acts that make the individual removable, but upon its termination, rescission, relinquishment, or abandonment. *Matter of Gunaydin* and *Matter of Huang, supra*.<sup>4</sup> Because an Immigration Judge has not yet determined the lawfulness of the Petitioner's permanent resident status, she is not the subject of an order of removal terminating her lawful permanent residency. See 8 C.F.R. § 1.2 (defining the term *lawfully admitted for permanent residence* as a status that “terminates upon entry of a final administrative order of exclusion, deportation, or removal”).

Third and finally, the Petitioner's attempt to abandon her lawful permanent residency through the submission of a Form I-407, Abandonment of Lawful Permanent Resident Status, which she signed after filing her appeal, also does not equate to a proper abandonment of lawful permanent resident status. According to its *Form Instructions*, a Form I-407 is “used by lawful permanent resident aliens who are outside of the United States or at a Port of Entry who want to abandon [lawful permanent residency].” The *Form Instructions* further provide that an individual files the Form I-407 with a USCIS international field office, a U.S. Department of State (DOS) Embassy or Consulate, or a CBP officer at a U.S. Port of Entry.

*Amicus curiae* contend that USCIS' refusal to accept a domestically filed Form I-407 goes against its own practices and cites to memoranda allowing USCIS field offices to accept and process certain Forms I-407.<sup>5</sup> The USCIS memoranda to which *amicus curiae* cites involve the EB-5 Immigrant Investor Program, and discusses a Form I-407 in terms of executing one when the departure from the United States of the EB-5 conditional resident is imminent, or when the immigrant investor's business plan has changed during the period of conditional residency and the immigrant investor is seeking a consideration of a new business plan. Neither of these scenarios is similar to the Petitioner's situation, as she is seeking to abandon lawful permanent residency solely for the purpose of establishing eligibility for a nonimmigrant classification to which she is not entitled as an immigrant. See sections 101(a)(15),(20) of the Act. We do not recognize this type of putative abandonment of lawful permanent residency. Cf. *Matter of Aldecoaotalora*, 18 I&N Dec. 430, 431 (BIA 1983)(quoting *Gregory v. Helvering*, 293 U.S. 465 (1935), for the proposition that where a

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<sup>4</sup> The Petitioner asserts that the issuance of a removal order is not the only means by which lawful permanent residency ends, and she cites to *U.S. v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005); and *Severino v. Mukasey*, 549 F.3d 79 (2nd Cir. 2008). *Yakou* and *Severino* are not precedent in the Ninth Circuit, where this case arises.

<sup>5</sup> *Amicus curiae* also note that consular posts have issued nonimmigrant visas to applicants who have filed a Form I-407. As filing of a Form I-407 at a consular post is consistent with the form instructions, this argument is not relevant as to whether a lawful permanent resident can file a Form I-407 domestically.

(b)(6)

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transaction on its face is outside the plain intent of the statute involved, it should be disregarded because to do otherwise “would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose”).

Although the Petitioner’s Form I-407 was signed by a CBP officer in ██████████ Alaska on October 2014, there is no evidence that the Petitioner executed this document while she was outside of the United States, or, while at a U.S. Port of Entry, she was seeking to gain admission into the United States or imminently departing from the United States. Accordingly, we do not recognize the Petitioner’s execution of a Form I-407 as an abandonment of her lawful permanent residency.

#### IV. CONCLUSION

In summary, the Petitioner is ineligible for U nonimmigrant classification because lawful permanent residents may not simultaneously hold U nonimmigrant status, and the Petitioner was (and remains) a lawful permanent resident when she filed her U petition in 2013.

In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of R-C-*, ID# 56486 (AAO Sept. 12, 2016)