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U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

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[Redacted]

FILE:

[Redacted]

Office: ANCHORAGE, AK

Date:

**JUL 11 2008**

IN RE:

Applicant:

[Redacted]

APPLICATION:

Application for Certificate of Citizenship under Section 320 of the Immigration and Nationality Act; 8 U.S.C. § 1431.

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Form N-600, Application for Certificate of Citizenship (Form N600) was denied by the Field Office Director, Anchorage, Alaska. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the field office director for further action.

The applicant was born on August 21, 1984, in Mexico. He turned eighteen on August 21, 2002. The applicant's father was born in Mexico, and he became a naturalized U.S. citizen on September 27, 1996, when the applicant was twelve years old. The applicant's mother was born in Mexico. She is not a U.S. citizen. The applicant's parents were married on January 26, 1982. The applicant presently seeks a certificate of citizenship pursuant to section 320 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1431.

The field office director determined that the applicant's U.S. citizen father had failed to file a Form I-130, Petition for Alien Relative (Form I-130) on the applicant's behalf, and that the applicant was erroneously granted U.S. lawful permanent resident status on the basis of a Form I-130 filed by his lawful permanent resident mother. An immigrant visa was not available to the applicant under his mother's Form I-130 petition, and the field office director determined accordingly, that the applicant had not obtained an immigrant visa from the U.S. Department of State prior to his adjustment to U.S. lawful permanent resident status. On this basis, the field office director concluded that the applicant had failed to satisfy the section 320 of the Act requirement that he be admitted into the United States pursuant to a lawful admission for permanent residence prior to his eighteenth birthday. The Form N600 was denied accordingly.

On appeal the applicant asserts, through counsel, that he was granted lawful permanent resident status on May 12, 2000, and is thus eligible for U.S. citizenship. Alternatively, the applicant asserts that he should be given an opportunity to correct the error in his case, and he requests that the matter be remanded to the relevant district office for resolution of his lawful permanent residence status.<sup>1</sup>

Section 320 of the Act allows a child born outside of the U.S. to automatically become a citizen of the United States upon fulfillment of the following conditions:

- (a) (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
- (2) The child is under the age of eighteen years.
- (3) The child is residing in the United States in the legal and physical custody of the citizen parent *pursuant to a lawful admission for permanent residence* (emphasis added.)

U.S. lawful permanent resident information contained in the record reflects that the applicant was granted U.S. lawful permanent resident status on May 12, 2000, when he was fifteen years old. The record reflects,

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<sup>1</sup> Counsel indicated on the Form I-290B Notice of Appeal to the Administrative Appeals Office (Form I290B) that she would send a brief and or evidence to the AAO within 30 days of filing the Form I290B. No brief or evidence was received by the AAO within the requested time period. On April 10, 2008, the AAO faxed a request for copies of any documents that might have been submitted by counsel in the applicant's case. Counsel was advised to respond to the faxed AAO request within five business days. The AAO received no response from counsel.

however, that the lawful permanent resident status was erroneously granted based on a Form I-130 filed by the applicant's lawful permanent resident mother. The record reflects that the applicant's U.S. citizen father did not file a Form I-130 on the applicant's behalf prior to his eighteenth birthday.<sup>2</sup> Moreover, the record reflects that at the time the applicant was granted U.S. lawful permanent resident status, on May 12, 2000, no immigrant visa was available through his lawful permanent resident mother's Form I-130 petition.

Section 101(a)(20) of the Act, 8 U.S.C. § 1101(a)(20) defines the term "lawfully admitted for permanent residence" as, "[t]he status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." "[L]awfully denotes compliance with substantive legal requirements, not mere procedural regularity." *Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1186 (8<sup>th</sup> Cir. 2005) (quotations and citations omitted.) The term "lawfully admitted for permanent residence" does not apply to aliens who "obtained their permanent residence by fraud, or had otherwise not been entitled to it." *Id.* at 1187.

The field office director determined, in the present matter, that because the applicant was erroneously granted lawful permanent resident status, he was not lawfully admitted into the United States for permanent residence, for section 320(a)(3) of the Act purposes. The Form N600 application was denied accordingly.

The AAO notes that specific statutory and regulatory procedures must be followed in order to rescind an alien's lawful permanent resident status. The field office director's determination regarding the applicant's lawful permanent resident status was therefore premature, and the Form N600 denial was in error.

Section 246(a) of the Act, 8 U.S.C. § 1256(a), provides in pertinent part that:

If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or section 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General [Secretary, Department of Homeland Security] that the person was not in fact eligible for such adjustment of status, the Attorney General [Secretary] shall rescind the action taken granting an adjustment of status to such person and canceling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General [Secretary] to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

The regulation at 8 C.F.R. § 246.1 describes the procedure for rescinding lawful permanent resident status at the district level, by stating in pertinent part that:

If it appears to a district director that a person residing in his or her district was not in fact eligible for the adjustment of status made in his or her case . . . a proceeding shall be commenced by the personal service upon such person of a notice of intent to rescind, which

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<sup>2</sup> It is noted that on January 15, 2008, the applicant's father filed a Form I-130 on the applicant's behalf.

shall inform him or her of the allegations upon which it is intended to rescind the adjustment of his or her status. In such a proceeding the person shall be known as the respondent. The notice shall also inform the respondent that he or she may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he or she may, within such period, request a hearing before an immigration judge in support of, or in lieu of, his or her written answer. The respondent shall further be informed that he or she may have the assistance of or be represented by counsel or representative of his or her choice qualified under part 292 of this chapter, at no expense to the Government, in the preparation of his or her answer or in connection with his or her hearing, and that he or she may present such evidence in his or her behalf as may be relevant to the rescission.

In the present matter, more than five years have passed since the applicant was erroneously granted U.S. lawful permanent resident status. The field office director is thus barred from initiating rescission of lawful permanent resident status proceedings at the district level. The five-year limitation on rescission of adjustment of status does not, however, apply to the initiation of removal proceedings. *Asika v. Ashcroft*, 362 F.3d 264 (4<sup>th</sup> Cir. 2004.) Furthermore, “[a]n order of removal issued by an immigration judge shall be sufficient to rescind the alien’s status.” *Id.* at 268.

The field office director denied the applicant’s citizenship application based on the determination that the applicant erroneously obtained U.S. lawful permanent resident status in May 2002, and was thus not lawfully admitted to the U.S. for permanent residence prior to his eighteenth birthday. The field office director did not, however, follow the removal hearing, rescission of adjustment of status procedures set forth in section 246(a) of the Act, prior to denying the applicant’s Form N600 application. As such, the applicant remains a U.S. lawful permanent resident.

Under the present circumstances, the AAO finds that it is proper to remand the matter to the field office director for initiation of removal proceedings to resolve, or rescind the applicant’s lawful permanent resident status, and for issuance of a new decision which, if adverse to the applicant shall be certified to the AAO for review.

**ORDER:** The matter is remanded to the field office director for further action consistent with this decision, and for issuance of a new decision which, if adverse to the applicant, shall be certified to the AAO for review.