Fraud Charges, Burdens of Proof, and Relief from Fraud/Misrepresentation Charges

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HOW DOES THE INA DEFINE "FRAUD" AND "MISREPRESENTATION" IN DIFFERENT CONTEXTS?

Understanding and properly screening for "Fraud" and "Misrepresentation" in the immigration context is one of the most important parts of the immigration practitioner's work. The statutory definition for "Fraud" and "Misrepresentation" can be found in Immigration and Nationality Act (INA) §212(a)(6)(C)(i), which states:

> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission to the United States or other benefit provided under this chapter [of the INA] is inadmissible.

The statutory definition is commonly divided into two distinct concepts: (1) Fraud; and (2) Willful Misrepresentation. False representation is generally required to be acted out with knowledge of the material fact's falsity with intent to deceive the other party.[1] Additionally, for the false representation to create inadmissibility, it must succeed in this deception.[2] On the other hand, willful misrepresentation of a material fact, does not require an intent to deceive nor evidence that the officer believes or acted upon the false representation.[3]

An allegation of fraud or misrepresentation, no matter how long ago, can have dire consequences for a noncitizen. A noncitizen can be denied admission, adjustment of status, or naturalization and

[1] *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).
[2] See *Matter of Tijam*, 22 I&N Dec. 408, 424 (BIA 1998).
[3] *Matter of S- and B-C-*, 9 I&N Dec. 435, 448–49 (AG 1961).

placed in removal proceedings charged as inadmissible[4] or deportable[5] because of fraud or misrepresentation.

Key phrases to focus on when reviewing a case for fraud or misrepresentation are "willful," "material fact," and "benefit provided under this Act." Inadmissibility for fraud or misrepresentation is not triggered unless the non-citizen seeks an immigration benefit by such actions. For example, purchasing a fraudulent document in and of itself would not make a non-citizen inadmissible unless that person sought to use that document for an immigration benefit.

INADMISSIBILITY AT THE TIME OF ADMISSION OR ADJUSTMENT OF STATUS

Common scenarios where fraud and misrepresentation can trigger inadmissibility under the INA are:

- Applicants for nonimmigrant visas who misrepresent their marital status, conceal crimes or otherwise fail to provide truthful and accurate information in Form DS-160;
- Applicants for immigrant and nonimmigrant visas who lie to a consular officer in response to any question deemed relevant to issuance of the visa;
- Visa applicants who provide false documentation to a consular officer;
- Noncitizens seeking entry to the United States who provide false information or documentation to a U.S. Customs and Border Protection (CBP) or border patrol agent including false names, false paper work, or photo-substituted passports; and
- Applicants for adjustment of status who provide false information on Form I-485, false paperwork with the application to adjust status, or who provide false information in connection with a visa petition.

This list is not exhaustive, but it is intended to provide the practitioner with issues to look for when assessing issues of inadmissibility based on fraud or misrepresentation. Thus, the practitioner must consider the context of the alleged fraud or misrepresentation, when the fraud or misrepresentation occurred, whether it was "material," and whether the fraud or misrepresentation was made by a person who was seeking an immigration benefit.

Lawful permanent residents (LPRs) charged with fraud or misrepresentation can face a host of issues depending on when the fraud or misrepresentation occurred. For starters, if the fraud or misrepresentation occurred prior to adjustment of status but was not revealed by the applicant or detected by U.S. Citizenship and Immigration Services (USCIS), LPR status was not properly obtained. This common scenario can cause the LPR to be denied citizenship and placed in removal proceedings based on the charge that the LPR obtained the status by fraud. Consequently, an LPR in this scenario would be barred from applying for Cancellation of Removal under INA §240A(a).[6]

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[4] INA §212(a)(6)(C)(i).

[5] *See* INA §237(a)(1)(a) (states "[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable" referring back to the inadmissibility ground found in INA §212(a)(6)(C)(i)).

[6] *See In Re: Kolomatangi*, 23 I&N Dec. 548, 552 (BIA 2003) ("the respondent is ineligible for cancellation of removal under §240A(a) of the Act because he was never lawfully admitted for permanent residence.").

Absent other forms of relief from removal, an LPR in this situation could easily be ordered removed and lose LPR status.

Despite being deportable for obtaining LPR status through fraud or misrepresentation, some LPR's may be eligible to waive the fraud while in removal proceedings. Certain LPR's in this situation who are placed in removal proceedings subsequent to obtaining LPR status, can apply for a waiver under INA §237(a)(1)(H). This waiver requires a qualifying relative, but covers a wide breath of misrepresentations and can be applied for in removal proceedings without the need to file a form or pay a filing fee.[7]

If the fraud or misrepresentation is disclosed in the adjustment process, the applicant for adjustment would be eligible for a waiver provided he/she has a qualifying relative.[8] Note that "children" of the applicant are not qualifying relatives for the fraud waiver. However, for VAWA[9] self-petitioners the hardship can be to the applicant and/or the applicant's U.S. citizen (USC) or LPR parent or child.

THE VARIOUS FORMS OF MARRIAGE FRAUD

Standard of Proof in Marriage Fraud

A finding of marriage fraud will obviously lead to a denial of the visa petition but, even worse, it is the death of any subsequent potential immigrant petition. If a finding of marriage fraud has been made against a client, they will be barred from having any other petition approved, regardless of the basis.[10] The individual did not have to obtain the benefit to be subject to INA §204(c), they can simply conspire.[11] There is no waiver as this is not a finding of inadmissibility. However, there is a difference between marriage fraud, fraud and not meeting the burden of proof.

A petitioner bears the burden of demonstrating that a marriage is bona fide by a preponderance of the evidence.[12] However, the failure of the couple to meet their burden of demonstrating that the marriage is bona fide does not always rise to the level of fraud.

The determination that the marriage is fraudulent must be when there is substantial and probative evidence of such an attempt or conspiracy.[13] Thus, a subsequent petition cannot be denied later based on INA §204(c) unless that standard of proof is met.

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[7] "[S]ection 237(a)(1)(H) of the Act is best interpreted as authorizing a waiver of removability under section 237(a)(1)(A) based on charges of inadmissibility at the time of entry under section 212(a)(7)(A)(i)(I) of the Act, as well as under section 212(a)(6)(C)(i), where there was a misrepresentation made at the time of admission, whether innocent or not." *In re Li Fu*, 23 I&N Dec. 985, 988 (BIA 2006).
[8] *See* INA § 212(i) for the fraud waiver based on extreme hardship to qualifying relatives.
[9] Violence Against Women Act of 1994 (VAWA 1994), Pub. L. No. 103-322, §§40701–03, 108 Stat. 1796, 1953–55.
[10] *See* INA §204(c).
[11] See 8 CFR §204.2(a)(1)(ii) (1993).
[12] *Matter of Singh*, 27 I&N Dec. 598 (BIA 2019).
[13] *See* 8 CFR § 204.2(a)(1)(ii) (1993); *Matter of Tawfick*, 20 I&N Dec. 166 (BIA 1990); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978).

Two recent decisions by the Board of Immigration Appeals (BIA or Board) provided guidance on how to determine whether and when INA §204(c) can apply and what is meant by substantial and probative. In 2019, the Board held that given the consequence of engaging in marriage fraud under INA §204(c) is a permanent bar to the approval of any future visa petition, the evidence of fraud must be relatively high to trigger the bar and that the evidence must be substantial and probative.[14] The Board went on to state that the degree of proof necessary to constitute "substantial and probative evidence" is more than a preponderance of evidence, but less than clear and convincing evidence.[15] Significantly, the Board held that the nature, quality, quantity, and credibility of the evidence of marriage fraud contained in the record should be considered in its totality and both direct and circumstantial evidence may be considered and circumstantial evidence alone may be sufficient.[16]

In a subsequent decision BIA went on to state that an immigration officer has the right to review the bona fides of a previous marriage petition and make a determination it is fraudulent, even if the initial petition was only denied for lack of evidence.[17]

Both cases are important to read as they give tips on how to analyze whether marriage fraud exists. It is not uncommon to receive an Intent to Deny a subsequent petition citing INA §204(c) or an Intent to Revoke a petition accidentally approved by USCIS. However, the failure of the couple to meet their burden of proof that the marriage is bona fide by a preponderance of the evidence does not necessarily establish the marriage is fraudulent by substantial and probative evidence. As a result, you must pick apart the facts USCIS attempts to use to state the marriage is fraudulent and explain why certain facts are not discrepancies or relevant to the marriage. In addition, as the caselaw states that an officer can make his own determination in a subsequent petition, attorneys can try to attack the finding in a previously denied petition.[18] At the very least, the practitioner should argue that the beneficiary did not meet his/her burden of proof, which does not necessarily mean that the marriage was fraudulent based on the substantial and probative evidence.

Marriage Fraud or Plain Old Fraud

"Marriage" fraud? In some scenarios, clients will have filed for adjustment of status by submitting a fraudulent marriage certificate or previously lied on visa application stating they were married when, in fact, they weren't. This is NOT marriage fraud, it is straight up fraud and, although serious if the client has no qualifying relative and the fraud is material, a new visa petition is not barred pursuant to INA §204(c). As a result, attorneys may be in the awkward position of admitting his/her client submitted fraudulent documents and as a result, may need a waiver, but are not permanently barred from having a petition approved.

FALSE CLAIMS TO U.S. CITIZENSHIP

[14] *Matter of Singh*, 27 I&N Dec. 598 (BIA 2019).
[15] *Id*.
[16] *Id*.
[17] *Matter of Pak*, 28 I&N Dec. 113 (BIA 2020).
[18] *Matter of Tawfick*, 20 I&N Dec. 166 (BIA 1990).

There is a specific ground of inadmissibility that addresses false claims to U.S. citizenship for any purpose under the Immigration and Nationality Act or any other federal or state law.[19] If there is a finding of a false claim to citizenship, in general, there is no waiver, and the individual is permanently barred from admission.

This ground of inadmissibility only applies to false claims made after September 30, 1996.[20] A false claim may be done orally, in writing or by providing evidence. It does not need to be made under oath. The false claim does not need to be made to a government official; it can be made to an employer.

> ***Practice Pointer***: Stating you are a U.S. citizen on an I-9 application could be a false claim to citizenship. This will only apply if the I-9 was completed after April 3, 2009, as the previous form asked if you were a "citizen or national." Claiming you are a national of the United States does not render you inadmissible to the United States.[21]

It is important to note that a false claim must be made with the *intent* to obtain a purpose or benefit of the INA or any other federal or state law.[22]It is the applicant's burden to show that he/she did not have the subjective intent to obtain the benefit.[23]

In addition, U.S. citizenship must matter for that purpose or benefit, i.e., being a citizen is material to obtaining that purpose or benefit.[24]

The purpose could be to avoid additional evidentiary requirements that U.S. citizens are not required to present. For example, filling out an I-9 application.

> ***Practice Pointer***
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> - The representation needs to be made for the individual's benefit.
> - If the false claim is timely retracted, that is before an officer relies on the information, then the individual may not be inadmissible.
> - A false claim made by an attorney or agent renders the individual inadmissible.[25]

Recently, the BIA issued a decision, clarifying that a person's false claim to citizenship does not have to be made knowingly for the person to be found inadmissible.[26] That is, it is irrelevant that the person claiming to be a U.S. citizen did not know he/she was not a citizen. Previously in order

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[19] *See* INA §212(a)(6)(C)(ii).
[20] *See* §344(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub.L. 104-208, 110 Stat. 3009-546, 3009-637 (September 30, 1996).
[21] *See* INA §212(a)(6)(C)(ii)(I).
[22] *See* INA §212(a)(6)(C)(ii).
[23] *See Matter of Richmond*, 26 I&N Dec. 779,786-87 (BIA 2016).
[24] *Id at* 787 (BIA 2016).
[25] *See* USCIS Policy Manual, Chapter 2 -Determining False Claim to US Citizenship.
[26] *Matter of Zhang*, 27 I&N Dec. 559 (BIA 2019).

to be found inadmissible, the individual had to know they were making a false statement, but that is no longer the case and any reference to demonstrating there was a knowing element they were not U.S. citizens was taken out of the USCIS Policy manual. In addition, any affirmative defense that the individual was a minor because they did not have the capacity is no longer possible.

Thus, in order to be found inadmissible for making a false claim to citizenship: (1) the individual must make a representation of citizenship; (2) the representation was false; and (3) the representation was made for any purpose under the INA or any other federal or state purpose.So far, the U.S. Department of State (DOS) Foreign Affairs manual has not changed guidance and a minor can still make the affirmative defense due to a lack of capacity.[27]

FORMS OF RELIEF AVAILABLE FOR SUSTAINED FRAUD FINDINGS: CANCELLATION, WAIVERS, ETC.

There are several forms of relief that may assist a non-citizen in remaining in the United States in spite of a finding of fraud.

- ***§212(i) Waiver***: available in proceedings (as well as before USCIS and DOS) to those who inadmissible under §212(a)(6)(C)(i), are the spouse or child of a U.S. citizen or LPR and whose qualifying relatives will face extreme hardship or are a VAWA self-petitioner or child of a VAWA self-petitioner who will face hardship. Important note – Hardship to children is not considered under this waiver.

- ***§237(a)(1)(H) Waiver***: available in proceedings to those who were inadmissible at the time of adjustment or admission due to fraud (whether willful or innocent), but who were nevertheless granted LPR status. To be eligible for the waiver, one must be the spouse, parent, son or daughter of a U.S. citizen or LPR; and was otherwise admissible when granted LPR status "except for those grounds of inadmissibility that were the direct result of fraud or misrepresentation". This waiver is also available in removal proceedings for VAWA applicants who are in proceedings and charged as inadmissible at the time of admission under §212(a)(6)(C)(i). For VAWA self-petitioners, there is no requirement to have a qualifying relative. The statute does not require the immigration judge to make a finding of hardship, equities, or any other factors in making the decision to grant, BUT it does make the grant discretionary.[28]

- ***§209(c) Waiver***: available to refugees who have not yet adjusted to permanent residency and who may be charged with grounds of deportability.[29] Important Note – this waiver CAN also be used to waive a false claim to U.S. citizenship. [30]

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[27] *See* 9 FAM 302-9-5.

[28] *Matter of Tijam*, 22 I&N Dec. 408, 417 (1998) (stated that the immigration judge must look at adverse factors, including the fraud, and, in light of those factors, whether the waiver should be granted to maintain the Respondent's family unity and strong ties to the United States.).

[29] *See Matter of D-K-*, 25 I&N Dec. 761, 2012 WL 1386855 (B.I.A. 2012) (holding that a refugee who has not adjusted his status to become a lawful permanent resident may be placed in removal proceedings and must be charged with the grounds of deportability). *See also Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004) (termination is not mandatory where asylee merits AOS and waiver under INA 209(c)).

[30] *See In re K-A-*, 23 I&N Dec. 661, 664-67 (BIA 2004).

- ***§212(d)(3) Waiver***: available to non-immigrant (used frequently for U-visa applicants) "who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General." In some jurisdictions, the immigration judge may have jurisdiction to adjudicate the §212(d)(3) waiver.[31]

- ***§212(d)(13) Waiver***: available T-visa applicants and grants the Attorney General discretion to waive health related and public charge grounds and any other ground of inadmissibility (except security and related, int'l. child abduction, former USC who renounces) if the activities were caused by or incident to a severe form of trafficking.

- ***§212(d)(14) Waiver***: available to U-visa applicants has slightly different eligibility bars to the §212(d)(3), and employs a different standard. INA §212(d)(14) waiver is available to waive all grounds (including fraud) except bars relating to Nazi persecution, genocide, torture, or extrajudicial killing.[32] The statutory standard for a §212(d)(14) waiver permits that a waiver may be granted "if the Secretary of Homeland Security considers it to be in the public or national interest." Under case law related to §212(d)(3) waiver, the immigration judge MAY have jurisdiction.

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[31] *Meridor v. U.S. Att'y Gen.*, 891 F.3d 1302 (11th Cir. 2018)(holding that the BIA in *Matter of Khan*, 26 I&N Dec. 797 (BIA 2016) erred in applying the wrong the standard of review as "clear error" was the appropriate standard.); *But see Matter of Khan*, 26 I&N Dec. 797 (BIA 2016) held that IJs do not have the authority to adjudicate a waiver request under 212(d)(3)(A) for a U visa applicant.

[32] INA §212(d)(14).