# INA §237(a)(1)(H) Works Like Magic: Fraud Waivers

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A lawful permanent resident (LPR) is charged under Immigration and Nationality Act (INA) §237(a)(1)(A) for material misrepresentation and being inadmissible under INA §212(a)(6)(C)(i). He had entered the United States with a valid Immigrant Visa, based on a petition by a U.S. citizen (USC) spouse. However, he used a different name, and obtained identity documents in this assumed name, and married his sister in order to come to the United States. The family had been separated in a refugee camp in Kenya, and the family thought that they had lost this son forever. Many years later, a chance encounter led to them being reunited telephonically, and lead to desperation when they realized he could no longer come join them as a refugee. So, they devised a plan to get him here. When the plan was discovered, many years later, he was placed in removal proceedings. He and his family freely admitted what they had done, and that it was fraudulent, but there were extenuating circumstances, namely, the mother's advanced age, her emotional distress at the loss of her son for so many years, and the desperation that they couldn't be reunited—as they saw it—any other way.[1] The INA allows for a discretionary waiver of removal grounds related to fraud or material misrepresentation under §212(a)(6)(C) for those who have certain USC or LPR relatives, were otherwise admissible. He was granted the waiver, overcoming the charge of removability, and has since become a USC.

## SEEKING FRAUD WAIVERS FOR LPRS, CONDITIONAL RESIDENTS, AND VAWA SELF-PETITIONERS

The immigration statute grants the Attorney General discretion to waive certain misrepresentations as grounds for removing a non-citizen from the United States. INA §237(a)(1)(H) is a waiver for those who have been wrongfully admitted to the United States due to a misrepresentation under §212(a)(6)(C)(i), because they sought documentation or admission by fraud or willful misrepresentation of a material fact.

[1] INA §237(a)(1)(H).

Such persons may be eligible for a waiver of removability under INA §237(a)(1)(H). This waiver is ONLY available in removal proceedings. It does not have a filing fee, nor any forms to fill out. Non-Citizens in removal proceedings will have to be charged under INA §237(a)(1)(A) as a person who is removable, for being inadmissible at time of entry or adjustment of status.

The waiver is not limited only to those aliens who engage in fraud or misrepresentation *at the time of entry* into the United States with an immigrant visa. In *Matter of Agour*,[2] the Board of Immigration Appeals (BIA or Board) ruled that an foreign national's adjustment of status within the United States constitutes an admission for purposes of the waiver at INA §237(a)(1)(H).

The waiver is also not limited to intentional fraud, but can cover a so-called innocent misrepresentation. In *Matter of Fu*,[3] the BIA held that the contradictory reference in §237(a)(1)(H) to "aliens described in section 212(a)(6)(C)(i), whether willful or innocent" should be read to include aliens charged as inadmissible at the time of entry or adjustment not for fraud or willful misrepresentation under INA §212(a)(6)(C)(i), but only for lack of a valid immigrant visa under INA §212(a)(7)(A)(i)(I). Mr. Fu, for example, was held to have implicitly misrepresented his eligibility to obtain an immigrant visa as the son of his lawful permanent resident father, when his father had died before the immigrant visa was issued.[4] Thus, even if this implicit misrepresentation may have been innocent, and despite the lack of a charge relating to INA §212(a)(6)(C)(i), he was held to be eligible for a §237(a)(1)(H) waiver.[5]

**REQUIREMENTS FOR THE §237(A)(1)(H) WAIVER**

To qualify for a §237(a)(1)(H) waiver of removability, the person must:

- Be the spouse, parent, son, or daughter of a USC or LPR
- Have been in possession of an immigrant visa or equivalent document
- Otherwise be admissible at the time of admission to the United States.

  **NOTE:** A VAWA self-petitioner does not need to have any qualifying relatives in order to seek the §237(a)(1)(H) waiver.

In *INS v. Errico*,[6] the U.S. Supreme Court noted in regard to the earliest version of the waiver that "[t]he fundamental purpose of this legislation was to unite families."

Conditional permanent residents may also apply for a §237(a)(1)(H) waiver in certain situations in removal proceedings for those charged under INA §237(a)(1)(A) or "related provisions" of §237(a)(1), such as INA §237(a)(1)(D).

[2] 26 I&N Dec. 566 (BIA 2015).
[3] 23 I&N Dec. 985 (BIA 2006).
[4] *Matter of Fu*, 23 I&N Dec. at 986, 988.
[5] *Id.* at 988.
[6] 385 U.S. 214, 224 (1966).

A conditional LPR whose status was terminated based on fraud or misrepresentation should benefit from this waiver, in lieu of filing an I-751 in court.[7] Qualifications are the same as above, however, you may not use the spouse—which was the basis for the fraud finding—as a relative, for the purposes of the waiver.[8]

### *Discretion vs. Hardship*

While INA §237(a)(1)(H) requires a relationship to a qualifying relative where the applicant is "the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence," no specific hardship to that relative is required.

INA §237(a)(1)(H) has a precursor in the pre-IIRAIRA[9] §241(a)(1)(H), which was also a discretionary waiver, and the Board cases regarding that earlier waiver are still used today.[10] Specifically, the Board continues to cite to *Matter of Tijam*[11] in evaluating both the adverse and favorable factors that the immigration court has to balance when determining how to utilize their discretion under section 237(a)(1)(H). In *Tijam*, the Board listed the following adverse factors: *the nature and underlying circumstances of the fraud or misrepresentation involved;* the nature, seriousness, and recency of any criminal record; and any other additional evidence of the foreign national's bad character or undesirability as an LPR of the United States.[12] These are to be compared to the positive factors, listed as: family ties in the United States; residence of a long duration in this country, particularly where it commenced when the alien was young; *evidence of hardship to the alien or her family if deportation occurs;* a stable employment history; the existence of property or business ties; evidence of value and service to the community; and other evidence of the alien's good character.[13]

Therefore, unlike Cancellation of Removal under INA §240A(b), or inadmissibility waivers such as INA §§212(h and i) and other related forms of relief, there is no statutory requirement for a showing of hardship to anyone under INA §237(a)(1)(H). Instead, hardship to family members is a factor to be balanced like these others, not a disqualifying element on its own. So, while much of a §237(a)(1)(H) presentation to the court will be similar to other waivers and even Cancellation of Removal, this important distinction should be addressed to the immigration judge (IJ), as they may not be aware of it. Keep in mind, of course, that the fraud that created the need for the waiver itself is a factor to be considered. See above.

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[7] See *Vasquez v. Holder*, 602 F.3d 1003 (9th Cir. 2010).
[8] See *Matter of Matti*, 19 I&N Dec. 43 (BIA 1984), where the BIA refused to allow the respondent to use his relationship to the "spouse" he married in a sham marriage as a basis for establishing eligibility for a waiver of fraud at admission.
[9] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.
[10] See, *Matter of Agour*, 26 I&N Dec. 566, 583 (BIA 2015).
[11] 22 I&N Dec. 408, 412−13 (BIA 1998).
[12] *Tijam* at 412 (emphasis added).
[13] Tijam at 412–13 (emphasis added).

Because this wavier is purely discretionary, there is limited review in circuit courts due to INA §242(a)(2)(B)(ii), which bars circuit court review of discretionary decisions.[14] However, review of purely legal and constitutional challenges may proceed on issues such as the applicable standard of review the Board utilized, or due process violations in the underlying proceedings.[15]

## PREPARING FOR TRAVEL, DETENTION, AND WAIVER APPLICATION PROSPECTIVELY

While many clients will come to you regarding a possible §237(a)(1)(H) waiver only after they have already been placed in removal proceedings, some may seek advice regarding the manner in which they acquired LPR status before removal proceedings have begun. This could occur, for example, because an application for naturalization has been denied on the basis that LPR status was not lawfully acquired.

In such cases, you can prepare in advance with your client to increase the chances of success in a future waiver application. Besides the obvious step of gathering documents that will be relevant to the equities of a future waiver application, there are other forms of advance preparation that would be advisable.

One important form of preparation that might be less obvious is preparing to argue to CBP upon your client's return to the United States, or to an immigration judge if necessary, that your client should not be charged in removal proceedings as an "arriving alien" inadmissible to the United States, regardless of whether there was a defect in the way your client became an LPR. Such charges could make your client ineligible for a bond hearing before the immigration judge if the U.S. Department of Homeland Security (DHS) chooses not to release them from custody, and could, if sustained, render a §237(a)(1)(H) waiver unavailable. According to BIA precedent, however, such charges are improper, assuming that your client does not fall into any of the exceptions of INA §101(a)(13)(C), such as having been outside of the United States for a continuous period of more than 180 days.[16] In *Matter of Pena*,[17] the BIA answered in the negative "the question whether a returning lawful permanent resident can be treated as an arriving alien based on an allegation that he acquired his status unlawfully."[18] It held that "a lawful permanent resident who does not fall within one of the exceptions in section 101(a)(13)(C) of the Act, cannot be regarded as an arriving alien."[19]

It is also important to consider whether a §237(a)(1)(H) waiver is the only form of relief available for your client's past misstatements. Depending on the mechanism by which they gained Lawful Permanent Resident status, and the circuit in which removal proceedings are commenced, there may be other options as well. Clients considering travel should therefore, under many circumstances, be counseled to take circuit law into account in determining the location at which they will return to the United States.

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[14] *Alhuay v. U.S. Att'y Gen*., 661 F.3d 534, 549 (11th Cir. 2011).
[15] *Hussam F. v. Sessions*, 897 F.3d 707, 720–22 (6th Cir. 2018).
[16] *See* INA §101(a)(13)(C)(ii).
[17] 26 I&N Dec. 613 (BIA 2015).
[18] *Matter of Pena*, 26 I&N Dec. at 615.
[19] *Id*. at 620.

If your client gained LPR status through consular processing of an immigrant visa, and has a reasonable argument that he or she did not know and could not have known of the problem with the visa before departing for the United States, then a waiver under INA §212(k) may be a possibility. That waiver is available when the "inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission." At least under U.S. Court of Appeals for the Ninth Circuit law, it can also waive removability of one who has already been admitted.[20] And unlike a §237(a)(1)(H) waiver, a §212(k) waiver does not require a qualifying relative, although it is still discretionary.

Another reason to prefer the Ninth Circuit would be if your client has only a deceased qualifying relative for a §237(a)(1)(H) waiver. According to the BIA, a deceased qualifying relative is insufficient, but according to the Ninth Circuit, an applicant continues to be a son (or daughter) of a U.S. citizen after their parent dies.[21]

If your client became an LPR through adjustment of status more than five years ago, then Third Circuit law is the most preferable. According to *Garcia v. Att'y Gen.*,[22] the five-year statute of limitations on recission of adjustment of status provided by INA §246 cannot be evaded by the use of removal proceedings rather than recission proceedings. So even if your client obtained adjustment of status through fraud, if it was more than five years ago, then under Third Circuit law no waiver will be necessary. (This can be problematic in the long run if your client wishes to naturalize, however: termination of proceedings under *Garcia*, unlike a waiver, will not enable later naturalization.)

If your client became an LPR through adjustment of status more than five years ago, and has a good argument that they did not commit fraud but gained permanent residence through some innocent government error which the government may claim made them inadmissible under INA §212(a)(7)(A) at the time of adjustment, then Eleventh Circuit law is also favorable. Under *Ortiz-Bouchet v. Att'y Gen.*, [23] a charge of removability under INA §237(a)(1)(A) based on inadmissibility at the time of admission under INA §212(a)(7)(A) cannot be brought against a respondent who adjusted status. Unlike the *Garcia* argument which also covers fraud, but is available only in the U.S. Court of Appeals for the Third Circuit, this argument is an open one in most circuits, but is supported by clear circuit-level precedent only in the U.S. Court of Appeals for the Eleventh Circuit.

Of course, if a client does not reside in the jurisdiction of the relevant circuit, simply traveling to an airport or other port of entry in that circuit does not guarantee that their removal proceedings will continue to be conducted within that circuit. The location of initial proceedings if the client is

[20] See *Shin v. Holder*, 607 F.3d 1213 (9th Cir. 2010).
[21] Compare *Federiso v. Holder*, 605 F.3d 695 (9th Cir. 2010), with *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008).
[22] 553 U.S. F.3d 724 (3d Cir. 2009).
[23] 714 F.3d 1353, 1355–56 (11th Cir. 2013).

detained may still be relevant, however, and a change of venue can potentially be opposed even after the client is released from detention and the case administratively transferred to a non-detained court, if appropriate.

An LPR who acquired status by fraud and flies into Philadelphia or Newark Airport, for example, will likely be placed in proceedings in Pennsylvania or New Jersey, within the Third Circuit, unless he or she is sent on to deferred inspection closer to home. If so, termination of proceedings can be sought under *Garcia*. (Historically, some non-criminal respondents have been transferred from JFK Airport in New York City to the Elizabeth Contract Detention Facility in Elizabeth, NJ, as well, although this is not a certainty, so JFK can also be considered as a potential destination for clients who could benefit from *Garcia*, albeit a less-favorable possibility in this regard than Newark.)

## APPROVED FRAUD WAIVER'S IMPACT ON FUTURE APPLICATIONS FOR RELIEF OR NATURALIZATION

The grant of an INA §237(a)(1)(H) waiver retroactively validates the applicant's LPR status effective as of the date of admission as an LPR.[24] Since the grant of the waiver is retroactive to the original validity date of the LPR's status, it is recommended that he or she file for naturalization as soon he or she meets the requisite time period for eligibility. It is often the case, given the length of removal proceedings and retroactive date of the LPR status, that the respondent is eligible for naturalization as soon as the waiver is granted and removal proceedings are completed. Clients should seek naturalization to prevent an unlikely scenario in which the he or she is placed back in removal proceedings and may be found ineligible for other types of discretionary relief (*e.g.*, INA §212(h) waiver to cure criminal grounds) based on having previously been granted the INA §237(a)(1)(H) waiver. Once the waiver is granted, the government cannot pursue removal based on the same grounds that the waiver cured.

In preparing the application for naturalization, the question relating to fraud should be answered in the affirmative if a client was previously granted an INA §237(a)(1)(H) waiver. The application should then note in an addendum that a waiver was previously granted in removal proceedings which cured the admission by fraud.

A naturalization applicant must show that he or she has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the INA in effect at the time off admission or adjustment.[25] U.S. Citizenship and Immigration Services (USCIS) may take the position that the applicant is not eligible for naturalization because he or she was not being properly admitted for LPR status. USCIS may incorrectly allege that the applicant was not lawfully admitted for permanent residence because the LPR status was obtained by fraud, willful misrepresentation, or that the admission was otherwise not in compliance with the law. To rebut this allegation, practitioners should be prepared to argue that the INA §237(a)(1)(H) waiver cured the improper admission by fraud and that he or she was not otherwise inadmissible at the time of

[24] See *Matter of Sosa-Hernandez*, 20 I&N Dec. 758, 763 (BIA 1993) (discussing the effect of grant of waiver under INA §241(f), the predecessor to INA §237(a)(1)(H)).
[25] See INA §318.

admission. An INA §237(a)(1)(H) waiver cures any fraud at admission, and does not cure other inadmissibility on other grounds.