



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY¹

THE § 237(a)(1)(H) FRAUD WAIVER

By AILF's Legal Action Center²

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Introduction

INA § 237(a)(1)(H) provides a discretionary waiver in removal proceedings for certain misrepresentations and fraud at admission that would otherwise render deportable a lawful permanent resident (LPR) or a self-petitioner under the Violence Against Women Act (VAWA). This waiver provides significant relief from removal for those who are eligible. For all applicants, a grant of the waiver will result in termination of proceedings. For the largest class of applicants, the waiver also will validate the applicant's LPR status back to the date of admission, even if that status was originally obtained through fraud or misrepresentation. Highlights of this waiver are that it:

- Benefits LPRs and VAWA self-petitioners who engaged in fraud or misrepresentation at the time of admission and who now are in removal proceedings because of this fraud or misrepresentation;
- Is available to LPRs who meet certain admissibility requirements and who have a qualifying U.S. citizen or LPR relative, without the necessity of demonstrating hardship to the applicant or the relative;
- Also is available to all VAWA self-petitioners without restriction;
- Applies to misrepresentations that are either willful or innocent;

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² The Legal Action Center wishes to thank D. Jackson Chaney and Gail Pendleton for providing their expertise on this issue.

- Is available in removal proceedings where the deportation charge is INA § 237(a)(1)(A) and (G);
- Can result in termination of removal proceedings, validation of LPR status back to the date of admission, and waiver of the underlying fraud.

The practice advisory will discuss the contexts in which the waiver is applicable, eligibility requirements for the waiver, and the relief that can be obtained through a favorable grant of the waiver. The practice advisory does not address what constitutes fraud or misrepresentation and also does not address ways in which the underlying removal charges can be challenged.³

What is the current version of INA § 237(a)(1)(H)?

This statutory waiver provision reads in full:

(H) Waiver authorized for certain misrepresentations. The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i) (I) is the spouse, parent, son or daughter of a citizen of the United States or an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

Were there prior versions of this waiver?

This waiver has been amended by Congress numerous times. For example, prior to 1981, the statute mandated that the waiver be granted to any applicant who met the eligibility requirements. In 1981, the waiver was amended such that it is now discretionary. It

³ On these topics, see “Fraud/Misrepresentation Bar and § 212(i) Waiver: Don’t Waive Goodbye,” Steve Morley, AILA’s Immigration and Nationality Law Handbook (2007-08) and “Fraud and Misrepresentation Waivers – Planning for Success,” Richard M. Ginsburg, AILA’s Immigration and Nationality Law Handbook (2006-07).

also has been renumbered three times. Prior to 1990, the waiver existed at INA § 241(f). In 1990, the § 241(f) waiver was amended and renumbered as INA § 241(a)(1)(H). In 1996, this waiver again was renumbered, this time as the still-current § 237(a)(1)(H). The earlier versions of the waiver will be referenced in this practice advisory to the extent that case law interpreting these earlier versions remains applicable and binding.

Why did Congress enact this fraud waiver?

The § 237(a)(1)(H) waiver is a humanitarian waiver which Congress intended would prevent the break-up of families with U.S. citizen or LPR members. *INS v. Errico*, 385 U.S. 214 (1966). This Congressional intent has influenced a number of BIA interpretations of the waiver. In some instances, the BIA interpreted the waiver liberally to give effect to Congress' purpose. *See, e.g., Matter of DaLomba*, 16 I&N Dec. 616 (BIA 1978) (expansively interpreting the requirement that a noncitizen be "otherwise admissible"); *Matter of Anaba*, 18 I&N Dec. 87 (BIA 1981) (same). However, the BIA also has relied on the purpose behind the waiver to limit its availability. *See, e.g., Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008) (Congress' purpose to unite family members is not served where the qualifying relative is deceased); *Matter of Matti*, 19 I&N Dec. 43 (BIA 1984) (denying waiver after finding that family relationships entered into solely to obtain immigration benefits are not the type of families Congress intended to preserve).

What are the eligibility requirements for this waiver and who is eligible to receive one?

The one eligibility requirement that is common to all is that the applicant cannot be a person who participated in Nazi persecution, genocide, or the commission of an act of torture or extrajudicial killing, as described in INA § 237(a)(4)(D).

Beyond this, the eligibility requirements for a § 237(a)(1)(H) waiver are specific to two classes of applicants: 1) non-citizens with a qualifying family member who meet certain other requirements and 2) VAWA self petitioners.

1. The first class, specified in § 237(a)(1)(H)(i)(I) and (II), consists of non-citizens who:
 - Have a qualifying family member (a spouse, parent, son or daughter who is a U.S. citizen or LPR);
 - Were in possession of an immigrant visa or equivalent document at the time of admission; and
 - Were otherwise admissible at the time of admission except for inadmissibility under INA §§ 212(a)(5)(A) and (7)(A) that was a direct result of the fraud or misrepresentation.

Qualifying relative: To fall within this first class, the waiver applicant must be the spouse, parent, son or daughter of a U.S. citizen or an LPR. The existence of a qualifying relationship at the relevant time is sufficient to satisfy this requirement. Unlike other types of immigration relief, there is *no* requirement

that the applicant also demonstrate “hardship” to the qualifying relative or to the applicant.

The BIA has held that § 237(a)(1)(H) requires a relationship with a living relative. *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008). Additionally, according to one court, the relationship must currently exist, at least as of the date of the immigration judge decision. *Kalezic v. INS*, 647 F.2d 290 (9th Cir. 1981) (finding waiver applicant ineligible where divorce from U.S. citizen wife was final at the time of the immigration judge’s decision). The relationship need not have existed at the time of admission, however. *Matter of Gonzalez*, 16 I&N Dec. 564 (BIA 1978). The qualifying relative also must be living in the U.S. *Chung Wook Myung v. District Director*, 468 F.2d 627, 628 (9th Cir. 1972) (noncitizen ineligible where his U.S. citizen child lived in Korea as unity with the citizen child would not be promoted by a grant of the waiver).

Whether a noncitizen is a parent is determined according to the definition of “parent” in INA § 101(b)(2). *Matter of Sandin Nova*, 14 I&N Dec. 88 (BIA 1972). For “illegitimate” children, the definition of a “parent” requires that the parent demonstrate that the child has been legitimated under the law of the child’s residence or domicile. *See, e.g., Matter of Johnson*, 13 I&N Dec. 644 (BIA 1970) (respondent unable to prove that he was the “parent” of a U.S. citizen child where he did not establish adoption of his child born out of wedlock under California law); *Matter of Sandin Nova*, 14 I&N Dec. 88 (BIA 1972) (parent of U.S. citizen child of bigamous marriage fell within waiver where the child was legitimated under California law); *Matter of Alzona*, 14 I&N Dec. 496 (BIA 1973) (parent ineligible for a waiver where the child “illegitimate” under DC law).

Possession of an immigrant visa or equivalent document: The second requirement for eligibility within this class is that the waiver applicant possessed an immigrant visa or equivalent document with which they gained admission. An immigrant visa or equivalent document that was procured by fraud or misrepresentation will satisfy this requirement, as the waiver – if granted in the exercise of discretion – is specifically intended to forgive this fraud or misrepresentation.

Because an applicant in this first class must have possessed an immigrant visa or equivalent document at the time of admission, the waiver is available only to noncitizens who gained LPR status at admission.⁴ Thus, the BIA has held that the waiver is not available to *nonimmigrants* who gained entry by fraud or misrepresentation. *See, e.g., Matter of Mangabat*, 14 I&N Dec. 75 (BIA 1972) (interpreting the former § 241(f) waiver). This holding remains applicable to this

⁴ The term “equivalent document” is not defined in the statute or in any cases. Arguably, it could include any document that allowed for the admission of a non-citizen as an LPR.

first class of applicants; however, it may not be applicable to the second class of applicants, VAWA self-petitioners. *See* discussion below.

Otherwise admissible: The third requirement for this first class of applicants is that the applicant was “otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs 5(A) and 7(A) of section 212(a) which were a direct result of that fraud or misrepresentation.” INA § 237(a)(1)(H)(i)(II). The Supreme Court has interpreted this provision as requiring that the non-citizen have been admissible at the time of admission on all grounds other than those stemming from the fraud or misrepresentation. *INS v. Errico*, 385 U.S. 214, 217 (1966).⁵ As specified in this provision, inadmissibility due to the lack of a labor certification (INA § 212(a)(5)(A)) or a valid admission document (§ 212(a)(7)(A)), will not interfere with the applicant’s eligibility for the waiver, provided the lack of these documents was a result of the fraud or misrepresentation.

2. The second class of applicants consists of VAWA self-petitioners. INA § 237(a)(1)(H)(ii). A VAWA self petitioner is defined in INA § 101(a)(51).⁶ There are no additional specific limitations on the eligibility of a VAWA self-petitioner for a § 237(a)(1)(H) waiver, as there are for the first class of applicants. VAWA self-petitioners must show only that they were admitted to the U.S. and that the admission involved fraud or misrepresentation (innocent or willful).

⁵ In *INS v. Errico*, 385 U.S. 214, 217 (1966), the government argued that the term “otherwise admissible” in former § 241(f) required a showing that the waiver applicant would have been admitted at the time of the initial admission if no fraud or misrepresentation had occurred. The government argued that the non-citizens in *Errico* were not “otherwise admissible” because – had the non-citizens not lied about their preference status – quota restrictions would have prevented them from gaining admission at that time. *Id.* The Supreme Court rejected this interpretation as it would have rendered the waiver virtually meaningless.

⁶ INA § 101(a)(51) reads:

The term “VAWA self-petitioner” means an alien, or the child of the alien, who qualifies for relief under—

- (A) clause (iii), (iv), or (vii) of section 204(a)(1)(A);
- (B) clause (ii) or (iii) of section 204(a)(1)(B);
- (C) section 216(c)(4)(C);
- (D) the first section of Public Law 89-732 (8 U.S.C. § 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty;
- (E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. § 1255 note);
- (F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act; or
- (G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).

Unlike the first class of applicants, not all VAWA self-petitioners will be LPRs when they apply for the waiver. Those seeking removal of conditions from their LPR status will be LPRs. *See* INA § 216(c)(4)(C). Others also may be LPRs. Still others, however, may be in the process of applying for LPR status as VAWA self-petitioners. For the non-LPR VAWA self-petitioners, their status upon admission is not relevant to eligibility for the § 237(a)(1)(H) waiver, and arguably could even include admission as non-immigrants.⁷

To date, there are no published cases interpreting the VAWA provision in § 237(a)(1)(H).

What does INA § 237(a)(1)(H) waive?

Section 237(a)(1)(H) is a waiver of deportability based upon removal charges under INA § 237(a)(1)(A). The waiver applies to any underlying inadmissibility ground that directly resulted from the fraud or misrepresentation committed at admission. Additionally, the waiver also waives the underlying fraud or misrepresentation. The following explains each of these three points more fully.

- 1. Section 237(a)(1)(H) waives removability based primarily upon the deportability ground § 237(a)(1)(A):** Section 237(a)(1)(H) is available to non-citizens who have been admitted and thus is a waiver of deportation grounds of removal. It is not available where the removal charge is a ground of inadmissibility found in INA section § 212. *See, e.g., Matter of Pendon*, 13 I&N Dec. 769 (BIA 1971) (holding that the former 241(f) waiver was not available in former exclusion proceedings).

Section 237(a)(1)(H) primarily operates to waive the deportation ground INA § 237(a)(1)(A). This ground renders a person deportable if, at the time of entry or adjustment of status,⁸ he or she was within a class of non-citizens who were

⁷ The first class of applicants is limited to those who were in possession of an “immigrant” visa at the time of entry, *see* § 237(a)(1)(H)(i)(II), which is why the BIA found that the waiver was not available to members of this first class who entered as non-immigrants. *Matter of Mangabat*, 14 I&N Dec. 75 (BIA 1972). That statutory limitation is not present for the second class of waiver applicants, VAWA self-petitioners.

⁸ Whether the current § 237(a)(1)(H) waiver is available to waive deportation that is based on fraud committed during an adjustment of status – as opposed to an entry – is an open question. The BIA held that the former § 241(f) waiver was not available to waive fraud committed during adjustment of status. *Matter of Connelly*, 19 I&N Dec. 156 (BIA 1984). However, former § 241(f) was limited to fraud or misrepresentation committed at “entry.” The current waiver is applicable to fraud or misrepresentation committed at “admission.” The BIA has held that, at least in some contexts, an adjustment of status is an admission. *See, e.g., Matter of Rosas*, 22 I&N Dec. 616 (BIA

inadmissible.⁹ The waiver is available where the inadmissibility at admission was due to fraud or misrepresentation, whether willful or innocent.

The § 237(a)(1)(H) waiver also waives the deportation ground for marriage fraud at § 237(a)(1)(G). This ground renders a non-citizen deportable for having procured a visa or other documentation by fraud, within the meaning of INA § 212(a)(6)(C)(i).

While § 237(a)(1)(H) is a deportation waiver that requires a prior admission, it also requires that, at the time of that admission, the applicant was inadmissible due to fraud or misrepresentation. The BIA has held that the waiver is not available if the fraud or misrepresentation occurred subsequent to the admission. *See, e.g., Salas-Velasquez v. INS*, 34 F.3d 705, 708 (8th Cir. 1994) (former § 241(f) waiver unavailable where applicant entered U.S. on a valid visitor visa and subsequently entered into a fraudulent marriage with a U.S. citizen); *Matter of Connelly*, 19 I&N Dec. 156 (BIA 1984) (addressing the former § 241(f) waiver).

The waiver also is not available where the ground of removal is not dependent on a finding that the individual was inadmissible at admission due to fraud or misrepresentation, even if such fraud or misrepresentation actually existed. For example, in *Reid v. INS*, 420 U.S. 619 (1975), the Court held that the former 241(f) waiver did not waive the deportation ground of entry without inspection because this ground was not based on a finding that the non-citizen was excludable at entry. Similarly, in *Matter of Gawaran*, 20 I&N Dec. 938 (BIA 1995) *aff'd* *Gawaran v. INS*, 95 F.3d 1332 (9th Cir. 1996), the BIA held that the former § 241(f) waiver did not waive deportability based upon the ground that the non-citizen's conditional permanent resident status was terminated (even where marriage fraudulent), since this is an entirely separate ground of deportation that is not dependant on fraud or misrepresentation.

- 2. A § 237(a)(1)(H) waiver applies to any underlying inadmissibility ground that directly resulted from the fraud or misrepresentation committed at admission:** The deportation ground § 237(a)(1)(A) renders a non-citizen

1999). A number of courts of appeals have rejected this conclusion, however. *See, e.g., Aremu v. DHS*, 450 F.3d 578 (4th Cir. 2006) (citing other cases).

⁹ INA § 237(a)(1)(A) reads in full:

(b) Classes of deportable aliens.— Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at the time of entry or adjustment of status or violates status.—

(A) Inadmissible aliens.— Any 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.

deportable if at the time of entry or adjustment of status, he or she was within a class of non-citizens inadmissible by law. Thus, removal on this deportation ground is dependant on the person having been inadmissible at admission under INA § 212. A § 237(a)(1)(H) waiver will apply to any underlying inadmissibility ground that directly results from the fraud or misrepresentation at admission, including specifically § 212(a)(6)(C)(1)¹⁰ – which is referenced in § 237(a)(1)(H) – but also other inadmissibility grounds.

For example, in *Matter of Fu*, 23 I&N Dec. 985 (BIA 2006), the BIA held that § 237(a)(1)(H) waives deportability under § 237(a)(1)(A) that is based on inadmissibility under § 212(a)(7)(A)(i)(I). This inadmissibility ground applies to a noncitizen not in possession of a valid entry document at the time of application for admission. In *Matter of Fu*, the respondent was the beneficiary of a petition that his LPR father filed on his behalf. The petition was granted but there was a delay in visa issuance. Before the son's entry into the U.S., the father died. When the visa was issued, the son used it to enter as the son of an LPR, despite the fact that his father was deceased. DHS subsequently discovered this misrepresentation and initiated removal. DHS initially charged him as removable under § 237(a)(1) as being inadmissible for fraud at entry under § 212(a)(6)(C)(i), but later withdrew the § 212(a)(6)(C)(i) ground and substituted a charge of removability based upon inadmissibility at entry under INA § 212(a)(7)(A)(i)(I). This charge was sustained.¹¹

The BIA found that respondent could use a § 237(a)(1)(H) waiver to waive inadmissibility under § 212(a)(7)(i)(I), regardless of whether the misrepresentation was innocent or willful. The BIA also noted that there are other grounds of inadmissibility directly resulting from misrepresentation at the time of entry that could be waived by § 237(a)(1)(H), including INA § 212(a)(5)(A) (relating to labor certification requirements). *Matter of Fu, supra*. Under *Matter of Fu*, the government should not be allowed to preclude a § 237(a)(1)(H) waiver when the basis of removal is misrepresentation or fraud at entry, simply by charging the non-citizen with an underlying ground of inadmissibility other than for fraud under § 212(a)(6)(C)(i).

¹⁰ INA § 212(a)(6)(C)(i) reads:

(6) *Illegal entrants and immigration violators.*—

(C) *Misrepresentation.*—

(i) In general.— 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 into the United States or other benefit provided under this Act is inadmissible.

¹¹ The BIA explained that the respondent was removable for lack of a valid entry document because, when his father died prior to his entry, the visa was automatically revoked. Therefore, he had no valid visa upon admission. *See Matter of Fu, supra*.

3. **A §237(a)(1)(H) waiver also waives the underlying fraud:** In *Matter of Sosa Hernandez*, 20 I&N Dec. 758 (BIA 1993), the BIA held that a waiver under former § 241(f) waives not only the non-citizen's deportability but also the underlying fraud or misrepresentation. Consequently, because the fraud at admission is excused, the admission has been excused of illegality. Where the individual was admitted as an LPR, this retroactive waiver of the fraud ensures that the person is an LPR from the time of admission. *Matter of Sosa Hernandez, supra.*

How does an applicant benefit from the grant of a § 237(a)(1)(H) waiver?

Where the waiver is granted, the applicant cannot be removed due to the fraud or misrepresentation. As a result, where the only charge of removability is § 237(a)(1)(A) premised on inadmissibility relating to the fraud or misrepresentation at admission, a grant of the waiver will result in termination of removal proceedings.

In cases in which there are multiple grounds of removal, all of which do not directly result from the fraud or misrepresentation, the § 237(a)(1)(H) waiver will be available only where there is independent relief available to overcome all other grounds of removal. *See, e.g., Matter of Sosa-Hernandez*, 20 I&N Dec. 758 (BIA 1993) (terminating proceeding where BIA found that non-citizen charged on two grounds of removal was independently eligible for two forms of relief – waivers under both former §§ 241(f) and 212(c)); *Matter of Roman*, 19 I&N Dec. 855 (BIA 1988) (a non-citizen cannot establish combined eligibility for *nunc pro tunc* permission to reapply for admission and a former § 241(f) waiver where she was not separately eligible for either form of relief).¹²

In addition to termination of the removal proceedings, for those applicants who were admitted as an LPR,¹³ a grant of a § 237(a)(1)(H) waiver will leave the non-citizen in LPR status, retroactive to the date of admission. In *Matter of Tadena*, 15 I&N Dec. 458 (BIA 1975), the BIA interpreted the former §241(f) waiver and held that where a noncitizen is admitted upon the presentation of an immigrant visa and in subsequent deportation proceedings is granted a waiver, he is lawfully admitted for permanent residence. The BIA reasoned that if the waiver recipient were not found to be an LPR, the waiver would have the anomalous result of rendering the recipient non-deportable but without any lawful immigration status. *Matter of Tadena, supra.*

¹² In *Matter of Roman*, the BIA reasoned that the non-citizen could not “‘bootstrap’ eligibility from one waiver to the other where she is not separately eligible for either.” In contrast, in *Matter of Sosa Hernandez*, the BIA held that the case was not an attempt to “bootstrap” eligibility from one waiver to another. Instead, it held that the respondent was independently eligible for the § 241(f) waiver. The BIA also noted that the respondent's need for § 212(c) relief was based upon a conviction that occurred ten years after admission, and that this was an entirely separate issue from the retroactive validating of the respondent's LPR status through the fraud waiver.

¹³ This would include all applicants within the first class and VAWA self-petitioners seeking to remove the conditions on the LPR status.

As *Matter of Sosa Hernandez*, 20 I&N Dec. 758 (BIA 1993), illustrates, the retroactive impact of the waiver can be critical in some circumstances. In that case, the respondent was charged with two deportation grounds: as excludable at entry due to the fraud or misrepresentation and also as having been convicted of a deportable offense (this conviction occurred approximately 13 years after his entry). He sought to waive the first deportation ground with a former § 241(f) waiver, and the second ground with a former § 212(c) waiver. To be eligible for the § 212(c) waiver, he had to demonstrate seven years in LPR status. Because the BIA found that the § 241(f) waiver operated retroactively, and that he thus had been an LPR since entry, it also found that he had accrued the necessary seven years in LPR status to be eligible for the § 212(c) waiver.

Similarly, in certain marriage fraud cases, the retroactive validation of the applicant's LPR status is critical. Specifically, where a non-citizen has been found to have committed prior marriage fraud, but now is in a valid marriage to a U.S. citizen or LPR, INA § 204(c) would bar approval of a visa petition filed by the second spouse. Thus the non-citizen would be barred from ever immigrating through this second, valid marriage. However, in *Virk v. INS*, 295 F.3d 1055, 1059 (9th Cir. 2002), the Ninth Circuit held that, where the non-citizen was admitted as an LPR based upon the fraudulent marriage, the grant of a § 237(a)(1)(H) waiver would waive the underlying fraud and the non-citizen would retain LPR status. As such, the court found that there was no need for a new visa petition by the second spouse and INA § 204(c) was inapplicable.

What factors can the immigration judge consider when deciding whether to exercise discretion and grant a § 237(a)(1)(H) waiver?

Even when an applicant is statutorily eligible for a § 237(a)(1)(H) waiver, an immigration judge may deny it in the exercise of discretion. In *INS v. Yang*, 519 U.S. 26 (1996), the Supreme Court held that, in deciding whether to grant a former § 241(a)(1)(H) waiver, an immigration judge may take into consideration as an adverse factor the fraud committed by the applicant in connection with his admission into the U.S. The Court reached this conclusion after finding that, while the statute contained prerequisites for eligibility, it imposed no limits on the factors that the government could consider in determining whether to grant a waiver.

Following *Yang*, the BIA held that in considering whether to grant a waiver, an immigration judge “must look at each of the adverse factors, including the alien’s initial fraud, to determine whether, in light of all of the factors presented, a waiver of deportability should be granted to maintain the alien’s family unity and strong ties to the United States.” *Matter of Tijam*, 22 I&N Dec. 408, 417 (1998). The BIA concluded that only in this way could an immigration judge determine whether the applicant’s “after-acquired family ties” outweighed the fraud. *Id.*

Matter of Tijam also sets forth the various factors – both negative and positive – that are to be considered by an immigration judge when determining whether to grant a § 237(a)(1)(H) waiver. The Ninth Circuit has held that the BIA must take into account all

relevant factors, both negative and positive, when exercising discretion and may not give weight to any plainly irrelevant factors. *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002) (citations omitted) (considering former § 241(f) waiver).

How does the INA § 237(a)(1)(H) waiver differ from the INA § 212(i) waiver?

Waivers under §§ 237(a)(1)(H) and 212(i) are similar in that they both are discretionary fraud waivers. There also are significant differences, however. As noted, § 237(a)(1)(H) applies to non-citizens who are deportable due to the fraud, while a § 212(i) waiver applies to non-citizens who are inadmissible due to the fraud. Additionally, § 237(a)(1)(H)'s eligibility requirements are less stringent. Section 237(a)(1)(H) includes among the qualifying relatives a U.S. citizen or LPR son or daughter, which a § 212(i) waiver does not. Finally, § 237(a)(1)(H) does not require any showing of hardship to the qualifying relative; § 212(i) requires a showing of extreme hardship.

How does a respondent in removal proceedings apply for a § 237(a)(1)(H) waiver?

8 C.F.R. § 1240.11(d)¹⁴ specifies that a respondent may apply for relief from removal under § 237(a)(1)(H) with an immigration judge. There is no form to use when filing this waiver. *See* AILA InfoNet Doc. No. 05112371 (Oct. 17, 2005) (Question 11); AILA InfoNet Doc. No. 06051668 (Mar. 22, 2006) (Question 10). Some immigration judges reportedly, and mistakenly, ask for submission of Form I-601. This form is not designed for a § 237(a)(1)(H) waiver, but instead is limited to inadmissibility waivers.

There also is no fee for a § 237(a)(1)(H) waiver. The only fee that will be required is for biometric processing. *See* 8 C.F.R. § 1003.47. Note, however, that where an immigration judge demands submission of Form I-601, there is a fee associated with the filing of this form. In these circumstances, practitioners will have to make a strategy decision about whether to oppose the immigration judge with respect to filing the form I-601.

¹⁴ This regulation applies to § 237(a)(1)(H) waivers filed in removal proceedings. The corresponding regulation with respect to deportation proceedings that began prior to April 1, 1997 is 8 C.F.R. § 1240.49(d).