

ISSUES IN RELIEF FROM REMOVAL

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I.

RELIEF UNDER §237(a)(1)(H)

What is now § 237(a)(1)(H) of the Immigration and Nationality Act ("INA") has been in effect in one form or another since 1957. In 1966, the Supreme Court, examining the statutory predecessor of § 237(a)(1)(H) (prior § 241(f) of the INA), interpreted the statute liberally and held that, in light of its humanitarian purposes of uniting families, its benefits include the waiver of quota and other restrictions evaded by a misrepresentation. Errico v. INS, 385 U.S. 214, 222, 224-225 (1966). The §237(a)(1)(H) waiver is frequently used in the hidden marriage situation, that is, when a person immigrates claiming to be single in a category that requires the person to be single in order to immigrate, but the person is in fact married at the time he/she immigrates. See, e.g., Cason v. INS, 8 F.3d 700 (9th Cir. 1993). It is also useful in removal proceedings arising from a fraudulent marriage, See Matter of Koloamantagi, 23 I&N Dec. 548, 552 (BIA 2003), and those involving fraudulent divorces. See Matter of Aldecoaotalora, 18 I&N Dec. 430, 431 (BIA 1983).

After 1981 amendments that clarified the statute and made the waiver discretionary, the current version reads as follows:

(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 of 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 deportation 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.

INA § 237(a)(1)(H). INA § 237(a)(1)(H) has generally been interpreted liberally by the BIA and the courts.

In Matter of Fu, 23 I&N Dec. 985 (BIA 2006), the respondent had been admitted to the United States as the son of a lawful permanent resident by concealing the fact that his petitioning father had died before respondent was admitted. Mr. Fu was charged with removability under §

237(a)(1)(A) of the Act for having been inadmissible under § 212(a)(7)(i)(I). Id. at 986. The BIA found that the specific purpose of the 1981 amendments to prior § 241(f) of the INA was to make sure that the waiver of deportability set forth in that provision would be available to an alien who believed he was admissible and made an innocent misrepresentation to obtain permanent residence, id. The BIA concluded that the statute means just what it says, that is that § 237(a)(1)(H) authorizes a waiver of removability under § 237(a)(1)(A) based on charges of inadmissibility at the time of entry under § 212(a)(7)(i)(I) of the Act or under § 212(a)(6)(C)(I), where there was a misrepresentation at the time of admission, regardless of whether the misrepresentation was innocent or willful. Id. at 988.

Other decisions have followed Errico's command that the waiver should be interpreted liberally to give effect to Congress' purpose. See e.g., Matter of DaLomba, 16 I&N Dec. 616 (BIA 1978)(interpreting expansively the requirement that a non- citizen be "otherwise admissible"), Matter of Anaba, 18 I&N Dec. 87 (BIA 1981)(same), Matter of Sosa-Hernandez, 20 I&N Dec. 758, 761 (1993)(effect of waiver is not only to waive deportability but also to waive the underlined fraud or misrepresentation, thus ensuring that the person is a lawful permanent resident from the time of admission). Note, however, that §237(a)(1)(H) is not infinitely broad. While it waives removability for fraud, it does not waive removability for a conviction for a crime involving moral turpitude, even if that conviction is based on the same underlying fraud that the §237(a)(1)(H) application seeks to waive. See Matter of Tima, 26 I&N Dec. 839 (BIA 2016).

Prior to 1996, established law was that the underlying fraud or misrepresentation was not to be considered as an adverse factor with regard to an application for a waiver under § 237(a)(1)(H) of the Act. In that year, however, the Supreme Court ruled otherwise; specifically, that the statutory language imposes no limitations on the factors that can be taken into account in determining whether a person merits relief under § 237(a)(1)(H). Immigration and Naturalization Service v. Yang, 519 U.S. 26, 29 (1996).

Unlike other provisions of the INA, § 237(a)(1)(H) contains no requirement that the person seeking relief establish any sort of hardship to him/her self or family members. See Casem v. Immigration and Naturalization Service, 8 F.3rd 700, 702 (9th Cir. 1993). Hardship to U.S. citizen children is nonetheless a key consideration. Id. at 703. Beyond that, since the waiver is discretionary, the normal criteria for the exercise of discretion apply. Those normal criteria require:

a balancing of an alien's undesirability as a permanent resident with the social and humane considerations present to determine whether a grant of relief is in the best interests of this country. Adverse factors may include 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 alien's bad character or undesirability as a lawful permanent resident of the United States. Favorable considerations may include 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

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