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237(A)(1)(H) WAIVER AFTER DENIAL OF NATURALIZATION APPLICATION?

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At the naturalization interview the noncitizen applicant could face a rude shock if the examiner reveals that they made a misrepresentation in a long forgotten application for an immigration benefit filed in the distant past.

For example, the applicant could have been misled by an unauthorized practitioner when she first came to the US three decades back in filing a fabricated asylum application who did not inform her about the asylum interview. This ultimately resulted in the issuance of a Notice to Appear resulting in the applicant being placed in a removal proceeding. At the Master Calendar Hearing the noncitizen withdrew the asylum application in exchange for receiving voluntary departure from the Immigration Judge and the asylum application was never adjudicated on its merits, leave alone reviewed by the judge or the government opposing counsel. The noncitizen timely left the US timely under voluntary departure, and a few years later, came to the US in H-1B status and ultimately obtained permanent residence through the employer who filed a labor certification, an I-140 petition and subsequently an I-485 adjustment of status application.

At the time of filing the I-485 application the noncitizen failed to mention in the I-485 application that she had made a misrepresentation to obtain an immigration benefit through the asylum application. Although in the asylum application she had claimed to be a member of a political party that resulted in her arrest for political reasons, the noncitizen failed to indicate in the I-485 application that she had ever been a member of a political party or that she had been arrested. On the other hand, the noncitizen disclosed in the I-485 application that she had been placed in removal proceedings and had left the

US pursuant to voluntary departure.

This individual retains an immigration attorney who in good faith prepares and files the N-400 application. The attorney inquired about how his client obtained permanent residency and is satisfied with the explanation from the client that she was sponsored by her employer through a bona fide labor certification, I-140 petition and I-485 application. The client desires that the N-400 application be filed quickly so that she can become a US citizen in time to vote in the presidential election and indicates to her attorney that it would not be necessary to file a request for her records under the Freedom of Information Act. When preparing the N-400 application, the attorney disclosed that his client had been placed in removal proceedings, but relying in good faith on what his client told him, he did not acknowledge in the N-400 that his client gave any information that was false, fraudulent or misleading or had lied to a government official to obtain an immigration benefit.

At the naturalization interview, the examiner goes through the questions on the N-400 and then confronts the client for not admitting that she had been a member of a political party as she had stated in her asylum application. The examiner also questions the client for not admitting that she had been arrested. The attorney is caught by surprise and asks for a short break to speak to the client. The client confesses to the attorney that she vaguely remembers that she was mislead into filing a fabricated asylum application, but she did not think much about it, as she withdrew the asylum application before an IJ in exchange for voluntary departure.

The attorney explains all of this to the naturalization examiner after conversing with his client. The examiner believes that if the client had filed a false asylum application, she should have disclosed that she had sought an immigration benefit by lying in her I-485 application and should have sought a waiver under INA § 212(i) prior to adjusting status and obtaining permanent residence. The attorney argues that his client withdrew the application under the supervision of the Immigration Judge who granted her voluntary departure. She was also misled into filing this asylum application.

Notwithstanding the attorney's pleas on behalf of his client, the USCIS issued a denial of the N-400 application on the ground that she had not met all the requirements for naturalization including having been lawfully admitted for permanent residence under INA §316. The client appealed the denial by filing

Form N-336, and a more senior naturalization officer again affirmed the original denial.

Although the USCIS asserted that the client has not been lawfully admitted for permanent residence, she sill technically remains a permanent resident until she is subject to a final order of removal. She can continue to remain in the US as a permanent resident as well as use the I-551 card if she needs to verify her status with a new employer as well as travel in and out of the US. And herein lies the paradox. If the USCIS issues a Notice to Appear (NTA) and places the client in removal proceedings, it will benefit her as she will be eligible for a waiver under INA § 237(a)(1)(H), which provides:

> *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 1182(a)(6)(C)(i) of this title, 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--*
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> 1. *(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 1182(a) of this title which were a direct result of that fraud or misrepresentation. OR*
> 2. *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.*

A noncitizen in removal proceedings may apply for this waiver under INA § 237(a)(1)(H) after being inadmissible for fraud or willful misrepresentation under INA § 212(a)(6)(C)(i). The waiver would apply whether the noncitizen filed at application for an immigrant visa at a consular post or even during

adjustment of status. *See Matter of Agour*, 26 I&N Dec. 566 (BIA 2015). The waiver also applies even if the misrepresentation was not willful such as if the noncitizen mistakenly received an immigrant visa after the petitioner died and is not even charged under INA 212(a)(6)(C)(i) and instead under the more general INA 212(a)(7)(A)(i)(I) for lack of a valid visa or entry document. See *Matter of Fu*, 23 I&N Dec. 985 (BIA 2006). This sort of innocent misrepresentation can occur if the USICS adjusts an applicant for permanent residence under an employment-based preference when the final action date was not current. At the naturalization interview, the applicant's N-400 can be denied because he was not properly admitted as a lawful permanent resident. It may also occur if a diplomat who is subject to diplomatic immunity adjusts status to permanent residence without submitting a waiver of diplomatic privileges and immunities.

If the noncitizen is placed in removal proceeding, and has the requisite qualifying relative, which is she must be the spouse, parent, son, or daughter of a citizen of the United States or of a lawful permanent resident, she can request a waiver before an Immigrant Judge. There is no form to file a § 237(a)(1)(H) waiver. The IJ has discretion to grant or deny the waiver after taking into consideration all the favorable an adverse factors. The initial fraud can also be considered as a factor in considering the waiver. *See Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998). If the waiver is granted and removal proceedings are terminated, the applicant can get quickly naturalized provided she met all the other requirements for naturalization.

The problem is that the USCIS these days seldom places noncitizens who have been denied naturalization based on not being admitted as lawful permanent residents in removal proceedings. Even repeatedly requesting USCIS to issue an NTA falls upon deaf ears. The reason could either be that the DHS does not have the resources to process NTAs, or it could be more cynical, which is that the DHS does not wish to place them in removal proceedings so that they may then seek a benefit. As a result, noncitizens whose applications have been denied will forever remain lawful permanent residents and never be able to become US citizens unless they can successfully challenge the denial of the N-400 application in federal court.

DHS may wish to consider promulgating a rule that would allow noncitizens to apply for §237(a)(1)(H) waivers administratively outside removal proceedings. Historically, 8 CFR 212.3(a) and (c) has allowed for the filing of waivers under

INA § 212(c) with the USCIS. Under § 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), eligible individuals could apply for cancellation of removal administratively, which got implemented under 8 CFR §1240.66. Allowing administrative filings of § 237(a)(1)(h) waivers would increase efficiency in the immigration system and provide a more humane approach for individuals who have demonstrated eligibility as well as compelling equities and humanitarian factors. It would also reduce the burdens on the already backlogged courts, allowing them to focus on more complex cases.