Waiving the (Fraud) Flag, or, How to Flag the Right Waiver: 212(i) v. 237(a)(1)(H) v. 212(k)

1. In what circumstances is each waiver available?

212(i)	212(i) is used to waive inadmissibility under 212(a)(6)(C)(i) (fraud or willful material misrepresentation in seeking an immigration benefit), for both arriving aliens seeking admission[1] and for applicants for adjustment of status.
237(a)(1)(H)	237(a)(1)(H) is used when a respondent has *already been admitted* as an LPR[2] (whether via adjustment of status or consular processing),[3] and is charged with deportability under 237(a)(1)(A) for having been inadmissible at the time of LPR admission or adjustment due to immigration benefit fraud or a willful or innocent material misrepresentation.
212(k)	212(k) is used to waive inadmissibility under 212(a)(5) (lack of a valid labor certification) or 212(a)(7)(A)(i) (lack of a valid immigrant visa), when the applicant has arrived at a port of entry in possession of an immigrant visa which was defective for reasons that were neither known to the bearer nor discoverable by the exercise of reasonable diligence prior to traveling to the port of entry. The waiver is also available if such an individual is later charged with having been inadmissible at the time of immigrant admission for lack of a valid labor certification or immigrant visa.[4]

[1] Under *Matter of Pena*, 26 I&N Dec. 613 (BIA 2015), an LPR who allegedly acquired that status by fraud and is subsequently returning from a trip abroad should generally be charged with deportability under 237(a)(1)(A), rather than inadmissibility under 212(a), and may therefore be eligible for a 237(a)(1)(H) waiver. However, a returning LPR can still be deemed an applicant for admission and charged with any applicable grounds of inadmissibility if DHS shows by clear and convincing evidence that one or more of the conditions in 101(a)(13)(C) applies. *See id.; Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

[2] By the waiver's own terms, a VAWA self-petitioner, as defined in INA § 101(a)(51), need not have been admitted as an LPR in order to seek a 237(a)(1)(H) waiver. Moreover, in the Ninth Circuit, a conditional LPR whose status has been terminated based upon a finding of marriage fraud can seek a 237(a)(1)(H) waiver as relief from a charge of removability under 237(a)(1)(D)(i). *See Vasquez v. Holder*, 602 F.3d 1003, 1012 (9th Cir. 2010) ("By its terms, then, the waiver covers not only subparagraph 237(a)(1)(A), which provides for the removal of aliens on the ground that they were inadmissible at the time of admission, including aliens who sought to procure admission by fraud, but also any other provisions of paragraph 237(a)(1) bearing on or connected to the removal of aliens on that ground."). *See also Matter of Agour*, 26 I&N Dec. 566, 574 n.12 (BIA 2015) ("[W]e do not suggest that section 237(a)(1)(A) of the Act is the sole ground of deportability that may be waived under section 237(a)(1)(H) . . . ."). Additional citations and discussion on this topic appear at Note 23 of this presentation.

[3] *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015).

[4] 212(k) cannot be used to cure a defect in adjustment of status because it requires the applicant to be in possession of an immigrant visa issued abroad. *See* INA § 101(a)(16) ("[The term 'immigrant visa' means an immigrant visa . . . properly issued by a consular officer at his office outside of the United States to an eligible immigrant."). The Ninth Circuit has held that despite this definition's use of the phrases "properly issued" and "eligible immigrant," the requirement of § 212(k) that the waiver applicant be "in possession of an immigrant visa" cannot refer solely to a valid visa; otherwise, the waiver would not be needed in the first place. *See Shin v. Mukasey*, 607 F.3d 121, 1219-20 (9th Cir. 2010) ("The substantive flaw in the Shins' visas is a precondition, rather than a bar, to their seeking § 212(k) relief."); *see also Mayo v. Ashcroft*, 317 F.3d 867 (8th Cir. 2003) (finding eligibility for 212(k) waiver where applicant honestly but mistakenly believed she was not legally married at the time she was issued a visa as an unmarried daughter of an LPR).

2. Which waivers require a qualifying relative or a showing of extreme hardship?

212(i)	212(i), in its current form, generally requires a showing of extreme hardship to a qualifying relative (USC or LPR spouse or parent, not a child).[5] For VAWA self-petitioners (as defined in INA § 101(a)(51)), the hardship must relate to the applicant herself or himself, or to a USC, LPR, or VAWA-qualified parent or child.[6] Even where a 212(i) applicant makes a threshold hardship showing, the waiver is discretionary and requires a balancing of positive and negative equities, including the fraud itself.[7]
237(a)(1)(H)	237(a)(1)(H) generally[8] requires the existence of a qualifying relative (USC or LPR spouse, parent, or child/son/daughter), but no particular level of hardship is required.[9] The waiver is discretionary, and requires a balancing of positive and negative equities, including the fraud.[10]
212(k)	212(k) does not require a qualifying relative or any showing of hardship, but is explicitly subject to the adjudicator's exercise of discretion.

[5] Note that INA § 204(l) makes special provisions for the death of a petitioner or principal beneficiary, so long as the waiver applicant resided in the United States at the time of the death and continues to do so. USCIS takes the position that where the qualifying relative is the deceased petitioner or principal beneficiary, the waiver application can still be made and hardship is presumed. USCIS Policy Memorandum PM-602-0017, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act" (December 16, 2010) at 10-11.

[6] USCIS reads the phrase "qualified alien parent or child" in 212(i) to refer to a parent or child described in the VAWA self-petition provisions at 204(a)(1)(A)(iii)-(iv). *See* USCIS Policy Manual, Vol. 9, Pt. G, Chap. 2.B.1 n.4.

[7] *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999).

[8] VAWA self-petitioners, as defined in INA § 101(a)(51), do not need a qualifying relative.

[9] In the Ninth Circuit, even a deceased qualifying relative is acceptable for 237(a)(1)(H) purposes, *see Federiso v. Holder*, 605 F.3d 695 (9th Cir. 2010), but outside the Ninth Circuit a current, living relative is required. *See Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008) (holding that Congress' purpose in enacting precursor to 237(a)(1)(H) waiver was to promote family unity, and that loss of qualifying relationship via death or divorce renders waiver unavailable).

[10] *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996); *Matter of Tijam*, 22 I&N Dec. 408, 412–13 (BIA 1998).

3. How does the applicant's knowledge of the fraud affect eligibility for each waiver?

212(i)	If the applicant[11] did not engage in fraud or make a willful material misrepresentation, he or she is not inadmissible under 212(a)(6)(C)(i),[12] and the waiver is not needed. Assuming 212(a)(6)(C)(i) does apply, the 212(i) waiver is discretionary even where a threshold hardship showing has been made, and requires a balancing of positive and negative equities, including the nature and extent of the fraud itself.[13]
237(a)(1)(H)	237(a)(1)(H) is available for both willful and innocent misrepresentations, and can be used to waive deportability under 237(a)(1)(A) even where no fraud or willful misrepresentation is alleged in the NTA.[14] The applicant's degree of knowledge or involvement in any deliberate fraud or misrepresentation should be addressed as a discretionary factor in the adjudication of the waiver request.[15]
212(k)	The waiver requires possession of an immigrant visa that is defective for reasons that were neither known to the bearer at the time nor discoverable by the exercise of reasonable diligence prior to traveling to the port of entry. Thus, any fraud or willful material misrepresentations will disqualify the applicant.[16]

[11] *See Singh v. Gonzales*, 451 F.3d 400 (6th Cir. 2006) (barring imputation of a parent's fraudulent conduct to a child when assessing a charge under 212(a)(6)(C)(i)).

[12] 212(a)(6)(C)(i) "contains two alternative bases for removability: (1) fraud; or (2) willful misrepresentation of a material fact. While fraud requires an intent to deceive, willful misrepresentation of a material fact does not." *Parlak v. Holder*, 578 F.3d 457 (6th Cir. 2009) (collecting cases from circuit courts and BIA regarding development of this distinction over time). Willful misrepresentation does, however, require "a finding that the misrepresentation was deliberate and voluntary," and made with "knowledge of the falsity of the representation." *Mwongera v. INS*, 187 F.3d 323, 330 (3rd Cir. 1999).

[13] *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999).

[14] *Matter of Fu*, 23 I&N Dec. 985, 988 (BIA 2006) (holding that those who made innocent misrepresentations as to the validity of their immigrant visa are entitled to the same recourse to 237(a)(1)(H) as those who made willful misrepresentations, and that no reference in the NTA to 212(a)(6)(C)(i) is required where 212(a)(7)(A)(i)(I) is referenced).

[15] *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996); *Matter of Tijam*, 22 I&N Dec. 408, 412–13 (BIA 1998).

[16] A parent's knowledge of fraud or misrepresentation is imputed to his or her otherwise innocent child for 212(k) purposes. *See, e.g., Mushtaq v. Holder*, 583 F.3d 875 (5th Cir. 2009); *Senica v. INS*, 16 F.3d 1013 (9th Cir. 1994). *But see Singh v. Gonzales*, 451 F.3d 400 (6th Cir. 2006) (distinguishing *Senica* and barring imputation of a parent's fraudulent conduct to a child when assessing a charge under 212(a)(6)(C)(i) rather than a 212(k) waiver request).

4. Who has jurisdiction over each waiver application?

212(i)	Jurisdiction lies with DHS unless removal proceedings are pending.[17] In removal proceedings, the IJ can adjudicate a 212(i) waiver request no matter whether it is an initial application or a renewal of an application previously denied by DHS.
237(a)(1)(H)	Jurisdiction lies only with the Immigration Court, since deportability under 237(a)(1) can only be addressed in deportation or removal proceedings.
212(k)	Jurisdiction lies with DHS unless removal proceedings are pending.[18] In removal proceedings, the IJ can adjudicate a 212(k) waiver request no matter whether it is an initial application or a renewal of an application previously denied by DHS.[19]

[17] If an arriving alien is placed in removal proceedings and seeks a waiver of inadmissibility in conjunction with an application for adjustment of status, then USCIS has jurisdiction over that application and any "concurrent applications to overcome grounds of inadmissibility." *See* 8 CFR § 245.2(a)(1); § 1245.1(f); § 1245.2(a)(1)(ii); *Matter of Dawson*, 16 I&N Dec. 693, 696 (BIA 1979).

[18] *See* Note 17, *supra*.

[19] 8 CFR § 1212.10, which has not been updated since 1982, states, "Any applicant for admission who is in possession of an immigrant visa, and who is excludable under sections 212(a)(14), (20), or (21) of the Act, may apply to the district director at the port of entry for a waiver under section 212(k) of the Act. If the application for waiver is denied by the district director, the application may be renewed in exclusion proceedings before an immigration judge as provided in part 1236 of this chapter." However, *Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987), makes it clear that the IJ can be the initial adjudicator of a 212(k) waiver request even if the District Director has never considered the request.

5. Which application form is used, and which waivers require biometrics scheduling via the Texas Service Center?

212(i)	212(i) applicants must file Form I-601, and the IJ should ensure DHS serves the standard biometrics and fingerprint update instructions.[20] Background checks are required under 8 CFR § 1003.47(b)(3).
237(a)(1)(H)	237(a)(1)(H) does not use an application form, but it is good practice to require a declaration setting forth the misrepresentations. Background checks are required under 8 CFR § 1003.47(b)(3). DHS should serve the fingerprint update instruction page rather than the initial biometrics page, since there is nothing to file or fee in at the Texas Service Center.
212(k)	212(k) applicants file Form I-193 without a fee, according to CBP.[21] Background checks are required under 8 CFR § 1003.47(b)(3). DHS should serve the fingerprint update instruction page rather than the initial biometrics page, since there is nothing to file or fee in at the Texas Service Center.

[20] An I-601 filed in conjunction with a refugee, asylee, public interest parolee/Lautenberg parolee, HRIFA, registry, or any other adjustment application that is exempt from public charge grounds of inadmissibility can qualify for a fee waiver. *See* 8 CFR § 1103.7(c); § 103.7(c)(4). The I-601 filing fee thus cannot be waived if the individual is requesting LPR status based on a family-based or employment-based petition, other than a VAWA self-petition.

[21] CBP Inspector's Field Manual, Chapter 17.5(c) (April 19, 2007) states:

> Waivers for New Immigrants. An alien inadmissible from the U.S. under section 212(a)(5)(A) or (7)(A)(i), who is in possession of an immigrant visa may, if otherwise admissible, be admitted by applying to the district director at the port-of-entry at which the alien arrived for a waiver on Form I-193, under the conditions described in §212(k) of the Act and 8 CFR 212.10. . . . [This waiver] is available both at a port-of-entry at the time of initial admission or nunc pro tunc. No fee is required. Adjudicate the application and attach the form to the immigrant visa packet. If denied, application for a section 212(k) waiver may be renewed before an immigration judge in removal proceedings.

6. Can the waiver be combined with other forms of relief?

212(i)	A 212(i) waiver can be combined with other waivers such as 212(h) if an applicant has other, separately waivable grounds of inadmissibility.
237(a)(1)(H)	A 237(a)(1)(H) applicant must show that he or she was "otherwise admissible[22] to the United States *at the time* of such admission [to LPR status] except for those grounds of inadmissibility specified under paragraphs (5)(A) [lack of valid labor certification] and (7)(A) [lack of valid immigrant visa] which were a direct result of that fraud or misrepresentation."[23] (Emphasis added). Events occurring *after* the admission or adjustment that render a respondent removable on other grounds do not preclude use of a 237(a)(1)(H) waiver to cure deportability under 237(a)(1)(A). A grant of the waiver allows a respondent to move on to request any relief generally available to LPRs for any remaining grounds of removability triggered by events that took place after the original LPR admission, such as criminal convictions.[24]
212(k)	A 212(k) applicant must show that he is "otherwise admissible" to the United States except for paragraphs 212(a)(5)(A) (lack of valid labor certification) and 212(a)(7)(A)(i) (lack of valid immigrant visa). Thus, any other, separate grounds of inadmissibility will disqualify him or her.

[22] By the 237(a)(1)(H) waiver's own terms, a VAWA self-petitioner, as defined in INA § 101(a)(51), need not have been "otherwise admissible."

[23] *See Corona-Mendez v. Holder*, 593 F.3d 1143, 1146-48 (9th Cir. 2010), and cases cited therein for a discussion of impermissible bootstrapping of applications. There, the applicant was inadmissible at the time of admission on a ground unrelated to his misrepresentations, having been deported on a prior occasion and having failed to secure permission to apply for readmission after deportation; he was therefore found ineligible for a 237(a)(1)(H) waiver. Even where the inadmissibility at the time of admission resulted solely from fraud, if grounds of deportability outside 237(a)(1) also apply, 237(a)(1)(H) cannot be used to waive them. *See, e.g., Fayzullina v. Holder*, 777 F.3d 807 (6th Cir. 2015) (holding that 237(a)(1)(H) cannot waive criminal ground of removal under 237(a)(2) even where crime was part of marriage fraud scheme); *Gourche v. Holder*, 663 F.3d 882, 887 (7th Cir. 2011) (same finding as to document fraud conviction under 237(a)(3), noting that "the phrase 'this paragraph' in subparagraph (H)'s waiver provision refers only to paragraph (1) of subsection (a)"); *Taggar v. Holder*, 736 F.3d 886 (9th Cir. 2013) (same). However, at least in the Ninth Circuit, a conditional LPR whose status has been terminated can seek a 237(a)(1)(H) waiver as relief from a charge of removability under 237(a)(1)(D)(i) where termination was based on a finding of marriage fraud, but not if it was based on failure to file a joint I-751 petition. The Court reached this conclusion because only the latter charge is based on subsequent events independent of any fraud at the time of admission. *See Vasquez v. Holder*, 602 F.3d 1003, 1012 (9th Cir. 2010) (distinguishing *Matter of Gawaran*, 20 I&N Dec. 938 (BIA 1995), and holding "[b]y its terms, then, the waiver covers not only subparagraph 237(a)(1)(A), which provides for the removal of aliens on the ground that they were inadmissible at the time of admission, including aliens who sought to procure admission by fraud, but also any other provisions of paragraph 237(a)(1) bearing on or connected to the removal of aliens on that ground."). *See also Matter of Agour*, 26 I&N Dec. 566, 574 n.12 (BIA 2015) ("[W]e do not suggest that section 237(a)(1)(A) of the Act is the sole ground of deportability that may be waived under section 237(a)(1)(H) . . . .").

[24] *See Matter of Sosa-Hernandez*, 20 I&N Dec. 758 (BIA 1993) (permitting respondent to receive a 241(a)(1)(H) waiver, thus revalidating LPR status nunc pro tunc, and then to use his time as an LPR to seek a 212(c) waiver of deportability for a criminal conviction occurring after the original LPR admission); *but see Torres-Rendon v. Holder*, 656 F.3d 456 (7th Cir. 2011) (holding that an LPR who fraudulently acquired that status and later was convicted of a controlled substance offense could not invoke *Sosa-Hernandez* where DHS pursued only a controlled substance charge and elected not to charge him with having been inadmissible at the time of admission).

7. What is the effect of granting the waiver?

212(i)	Grant of a 212(i) waiver allows the application for admission or adjustment of status to proceed without 212(a)(6)(C)(i) as an impediment to admissibility.[25]
237(a)(1)(H)	Grant[26] of a 237(a)(1)(H) waiver validates LPR status nunc pro tunc, as though it had been properly acquired at the outset.[27] A respondent may then immediately use that status in the same manner as any other LPR, for example, to apply for naturalization or for further relief from removal that requires LPR status, such as 240A(a) or 212(c) relief.
212(k)	Grant of a 212(k) waiver admits the applicant to the United States as a lawful permanent resident.[28]

[25] In some instances, a 212(i) waiver can be used even for material misrepresentations contained in a post-April 1, 1997 asylum application that ordinarily would trigger the 208(d)(6) frivolous asylum bar to all immigration benefits. This scenario most commonly arises when a respondent who had filed an asylum application containing material misrepresentations later seeks adjustment of status through a family visa petition, and wishes to confess his or her asylum fraud. If, and only if, neither the IJ nor DHS wishes to raise the frivolous asylum bar, the adjustment application can proceed in conjunction with a fraud waiver under 212(i). *Matter of X-M-C-*, 25 I&N Dec. 322, 324 n.1 (BIA 2010) ("The Immigration Judge may raise the issue of frivolousness, but given the adversarial nature of the proceedings, the Immigration Judge is not required to evaluate whether an application is frivolous if the Government does not raise the issue."). Note that an adverse credibility finding in the asylum context is distinct from and has a lower evidentiary threshold than either a frivolous finding or a finding of fraud or willful material misrepresentation. *See, e.g.*, *Matter of Y-L-*, 24 I&N Dec. 151, 156 (BIA 2007); *Xing Yang Yang v. Holder*, 770 F.3d 294, 304 (4th Cir. 2014).

[26] Aliens described in INA § 237(a)(4)(D) (participants in Nazi persecution, genocide, extrajudicial killing, or torture) cannot be granted a 237(a)(1)(H) waiver.

[27] *Matter of Sosa-Hernandez*, 20 I&N Dec. 758 (BIA 1993).

[28] Nunc pro tunc grants are permitted where the applicant was previously admitted as an immigrant but the visa that formed the basis of that admission was later found to be defective. *See Matter of S-C-Y-*, 8 I&N Dec. 131 (BIA 1958); *Shin v. Holder*, 607 F.3d 1213, 1218 n.7 (9th Cir. 2010).

8. What amendments have been made to the waiver statutes?

212(i)	212(i) has changed in scope over the years.[29] It was first enacted as part of section 7 of the Act of Sept. 11, 1957, Pub. L. No. 85-316, § 7, 71 Stat. 639, 640-41.[30] Prior to June 1, 1991, no qualifying relative was required. IMMACT90 required a qualifying relative, but only if the fraud had occurred within the ten years prior to the application for a visa, entry, or adjustment of status; the list of qualifying relatives included adult and minor children, and no specific hardship showing was required. On September 30, 1996, IIRIRA §§ 344 and 349 added the extreme hardship requirement, removed children as qualifying relatives, and designated false claims to U.S. citizenship made on or after September 30, 1996 as a separate ground of inadmissibility that cannot be waived under 212(i).[31]
237(a)(1)(H)	Current 237(a)(1)(H) was formerly 241(f) and then 241(a)(1)(H); a precursor statute was section 7 of the Act of Sept. 11, 1957, Pub. L. No. 85-316, § 7, 71 Stat. 639, 640-41.[32]
212(k)	Current 212(k) was added in 1981; a similar provision appeared at former section 211(c) of the 1952 Act, but was inadvertently deleted in 1965.[33]

[29] The Sixth Circuit has held that EOIR has the authority to grant a 212(i) waiver nunc pro tunc under the law as it existed at the time of a prior fraudulently-obtained entry or admission, so long as the applicant could have qualified for relief at the time of the past entry or admission. *See Patel v. Gonzales*, 432 F.3d 685, 692-95 (6th Cir. 2005).

[30] *See Matter of Diaz*, 15 I&N Dec. 488, 490 (BIA 1975).

[31] The 1996 amendment applies even to applications already pending as of the date of its enactment. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999); *Cervantes-Gonzalez v. INS*, 244 F.3d 1001 (9th Cir. 2001); *Okpa v. INS*, 266 F.3d 313 (4th Cir. 2001).

[32] For more detailed legislative history, see *Matter of Agour*, 26 I&N Dec. 566, 574-77 (BIA 2015), and *Matter of Federiso*, 24 I&N Dec. 661, 663 (BIA 2008).

[33] H.R. Rep. 97-264, 34, *reprinted in* 1981 U.S.C.C.A.N. 2577, 2603.