

Twitter Thread by Matthew Hoppock



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On Jan 4 the Eighth Circuit issued a pretty awful opinion on eligibility for a fraud waiver after a person is denaturalized for fraud, essentially endorsing gamesmanship by the DHS without notice. The case is *Herrera Gonzalez v. Rosen*.

Petitioner admitted she had gotten her permanent residence through fraud (which led to a criminal conviction and later denaturalization). The government charged her with removability for the fraud, and she applied for the waiver that is allowed under that section.

After the judge had sustained the fraud charge, the DHS added a new charge that the marriage fraud conviction was a "crime involving moral turpitude." Then, at trial, the DHS withdrew the fraud charge, leaving only the CIMT charge, and argued there was no waiver for just the CIMT

Citing *Matter of Tima*, the Eighth Circuit agreed that the "fraud waiver" couldn't be used if the DHS plays this game of charging the same conduct under a different section, and that not doing that until the moment of trial didn't violate her right to due process.

There are problems with this. One is that *Matter of Tima* largely erases part of the fraud waiver statute - the part that says a fraud waiver under that section does waive other related grounds of removability. I wrote about it here when *Tima* was issued. <https://t.co/XpKqeUVYFA>

The BIA's decision in *Tima* doesn't even mention that last sentence of the fraud waiver statute, which pretty clearly says the fraud waiver can waive other related grounds of removability "directly resulting from" the act of fraud.

Another is that prior BIA precedent said the fraud waiver could waive related removability grounds, and *Tima* left those in place. E.g. *Matter of K* allowed the same fraud waiver to waive a separate ground of removability for a false claim to citizenship. <https://t.co/oXDX2yprXP>

A third problem - Justice Kagan pretty clearly rejected this practice in *Judulang*, calling this manner of charging the same conduct under different sections to get around waiver eligibility a "sport of chance."

In this new decision, the Eighth Circuit doesn't address Judulang, the remaining text of the waiver statute, Matter of K, or the limitations of Matter of Tima. It just says if DHS chooses to change the charge from "fraud" to "CIMT" (even if for the same conduct), then no waiver.

The remaining problem is the court's due process analysis, which is all of a single sentence. Apparently the DHS changing which charge they're going to pursue on the day of trial "does not implicate" due process just because...

P.S. one last problem is the court's reliance on Matter of Koloamatangi. The BIA's decision in Matter of Agour seems to call into question the premise of Koloamatangi (without squarely addressing it). <https://t.co/gSR0niKhB8>

Koloamatangi says if you get your status through fraud, ur not "lawfully admitted for permanent residence" so ur ineligible for cancellation of removal. Agour assumed a fraudulent marriage still met that standard.