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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D. C. 20536

FILE: [Redacted] Office: Buffalo

Date: AUG 16 2002

IN RE: Applicant: [Redacted]

APPLICATION: Application to Preserve Residence for Naturalization Purposes under Section 316(b) of the Immigration and Nationality Act, 8 U.S.C. 1427

IN BEHALF OF APPLICANT:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Buffalo, New York, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant seeks to preserve his residence for naturalization purposes under section 316(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1427(b), as a lawful permanent resident who will be absent from the United States for the purpose of engaging in the development of foreign trade and commerce of the United States on behalf of an American firm or corporation or a subsidiary thereof engaged in the development of such trade and commerce.

The district director determined the applicant was not eligible for preservation of residence for naturalization purposes because he had not been physically present and residing in the United States after being lawfully admitted for permanent residence for an uninterrupted period of one year as required in section 316(b) of the Act and denied the application accordingly.

On appeal, counsel argues that both immigration law and statutory construction require the application of the "meaningfully interruptive" test announced by the Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449 (1963), to cases involving the interpretation of the "one year uninterrupted physical presence requirement found in section 316(b) of the Act." Counsel states the Service's failure to employ the "meaningfully interruptive" test is an appealable error. Counsel argues that the applicant's absences were brief, casual, and innocent. Counsel contends the one year uninterrupted physical presence requirement should not be strictly interpreted because it would frustrate Congress's underlying purpose of the statute. Counsel insists that Rosenberg v. Fleuti, is controlling precedent rather than INS v. Phinpathya, 464 U.S. 183 (1984) as stated in Matter of Graves, 19 I&N Dec. 337 (Comm. 1985). Counsel argues that the reasoning in Graves is flawed.

Section 316(b) of the Act provides, in pertinent part, that:

Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship (whether preceding or subsequent to the filing of the petition for naturalization) shall break the continuity of such residence, except that in the case of a person who has been physically present and residing in the United States after being lawfully admitted for permanent residence for an uninterrupted period of at least one year, and who thereafter is employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Attorney General, or is employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or

corporation, or is employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence, no period of absence from the United States shall break the continuity of such residence if-

(1) prior to the beginning of such period of employment (whether such period begins before or after his departure from the United States), but prior to the expiration of one year of continuous absence from the United States, the person has established to the satisfaction of the Attorney General that his absence from the United States for such period is to be on behalf of such Government, or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged in the development of such foreign trade and commerce or whose residence abroad is necessary to the protection of the property rights in such countries of such firm or corporation, or to be employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence; and

(2) such person proves to the satisfaction of the Attorney General that his absence from the United States for such period has been for such purpose.

Matter of Graves, 19 I&N Dec. 337 (Comm. 1985), holds that the uninterrupted physical presence requirement of section 316(b) of the Act may not be construed to allow departures from the United States. Any departure from the United States for any reason or period of time bars a determination that an alien has been continuously physically present in the United States or present in the United States for an uninterrupted period during the period including the departure. Matter of Graves, supra, also holds that the effect of Rosenberg v. Fleuti, 374 U.S. 449 (1963), cannot be extended to statutory schemes which include a requirement of uninterrupted or continuous physical presence.

The applicant became a lawful permanent resident on January 26, 2000, and made five departures from the United States during the one year period following lawful admission.

Counsel argues on appeal that (1) Matter of Graves, supra, erred in interpreting the statute, (2) the decision does not express the intent of Congress, (3) Chevron, USA, Inc. v. Natural Resources Defence Council, Inc., 467 U.S. 837 (1984), should prevail, and (4) the Service should give effect to the plain meaning of the statute.

Issues concerning the legislative history of section 316(b) of the Act, and Congressional intent and "uninterrupted physical presence" have been thoroughly discussed in Graves, and need not be revisited in this proceeding. This Service is bound by that precedent decision in this and related matters.

Counsel suggests that the definition of the term "admission" or "admitted" as found in section 101(a)(13)(C) of the Act, 8 U.S.C. 1101(a)(13)(C), may be substituted for the statutory requirement for the alien to be physically present and residing in the United States after being lawfully admitted for permanent residence for an **uninterrupted** period of at least one year....

The record clearly reflects the applicant was absent from the United States during a period of time in which he was required to establish uninterrupted physical presence of one year between January 26, 2000, and the filing of the application on July 5, 2001. It was determined in Graves that any departure from the United States for any reason or period of time bars a determination that an alien has been continuously physically present in the United States or present in the United States for an uninterrupted period.

In the plain language of the statute, the applicant has failed to establish that he was physically present and residing in the United States for an uninterrupted period of at least one year during the required period of time. Consequently, he does not qualify for the benefits of section 316(b) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.