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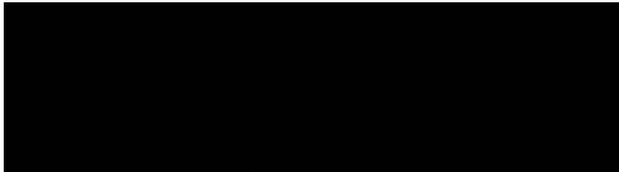
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

Office: CLEVELAND, OH

Date: MAR 07 2008

IN RE:

Applicant:



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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Form N-470, Application to Preserve Residence for Naturalization Purposes (N-470 application) was denied by the District Director, Cleveland, Ohio. The Administrative Appeals Office (AAO) dismissed the matter on appeal. The matter is presently before the AAO on a motion to reconsider. The motion will be granted. The previous March 30, 2007, AAO decision will be affirmed and the application will be denied.

The applicant seeks to preserve her residence for naturalization purposes pursuant to section 316(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1427(b), as a lawful permanent resident who 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.

Section 316(a)(1) of the Act, 8 U.S.C. § 1427(a)(1) provides in pertinent part that:

No person . . . shall be naturalized, unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time

Section 316(b) of the Act, 8 U.S.C. § 1427(b) addresses the effect of absences during the required five-year period of continuous residence, and provides in pertinent part that:

[A]bsence 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 . . . 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 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.

In a decision dated, November 30, 2006, the district director determined that the applicant was not eligible for benefits under section 316(b) of the Act because she was outside of the United States for a period of more than one year after being lawfully admitted for permanent residence in the United States. The application was denied accordingly.

The AAO agreed on appeal that the applicant had not been physically present in the United States for an uninterrupted period of at least one year since she obtained lawful permanent resident status, as required by section 316(b) of the Act. The AAO was unconvinced by the applicant's assertion that she met section 316(b) physical presence requirements based on unrelated Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) provisions. Rather, the AAO found that under *Matter of Graves*, 19 I&N Dec. 337, 339 (Comm. 1985), "[i]t is not possible to construe the uninterrupted physical presence requirement of section 316(b) to allow departures", and that:

[A]ny 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. An applicant's failure to establish he or she has been present in the United States for 1 year after lawful admission for permanent residence bars eligibility for preservation under section 316(b).

Matter of Copeland, 19 I&N Dec. 788, 789 (Comm. 1988.) The AAO referred to the decisions as Board of Immigration Appeals (Board) decisions, and the AAO held that 8 C.F.R. §§ 103.3(c) and 1003.1(g), provided that published Board decisions are binding on U.S. Citizenship and Immigration Services (CIS) in its administration of the Act unless or until the decisions are modified or overruled by later precedent decisions, and that because *Matter of Graves, supra* and *Matter of Copeland, supra* have not been modified or overruled, the AAO must apply their provisions to the applicant's case.

On motion to reconsider, counsel for the applicant asserts that the *Matter of Graves* and *Matter of Copeland* decisions were issued by the Commissioner of the Immigration and Naturalization Service (INS Commissioner) rather than by the Board, and that 8 C.F.R. § 103.3(c) therefore does not apply in the present matter. Counsel asserts further that the passage of IIRAIRA and consistency with prior Commissioner guidance reflect that breaks in physical presence are allowed under section 316(b) of the Act provisions.

The AAO agrees with counsel's assertion that the AAO erred when it stated that *Matter of Graves, supra* and *Matter of Copeland, supra* were decided by the Board rather than the INS Commissioner, and when it stated that the decisions were precedential Board decisions under 8 C.F.R. § 103.3(c). The AAO finds, however, that the above error does not change its decision to dismiss the present case.

The complete language contained in 8 C.F.R. § 103.3(c) (2007) states:

Service precedent decisions. The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General. In addition to Attorney General and Board decisions referred to in 1003.1(g) of chapter V, designated Service decisions are to serve as precedents in all proceedings involving the same issue (s). Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the Act. Precedent decisions must be published and made available to the public as described in § 103.9(a) of this part.

The regulation at 8 C.F.R. § 103.3(c) as it existed when *Matter of Graves, supra* and *Matter of Copeland, supra* were decided stated:

In addition to the decisions of the Attorney General and the Board, referred to in § 3.1(g) of the chapter, Service officers' decisions selected by the Commissioner shall serve as

precedents in all proceedings involving the same issue or issues and, except as they may be modified or overruled by subsequently selected decisions, shall be binding on all officers and employees of the Service in the administration of the Act. All such decisions shall be published and made available to the public in the manner provided in § 103.9(a). (8 C.F.R. § 103.3(e) (1989).)

The AAO notes that both *Matter of Graves, supra* and *Matter of Copeland, supra* are published decisions selected by the INS Commissioner to serve as precedent in future § 316(b) of the Act cases. Counsel has provided no legal evidence to establish that the *Matter of Graves* or *Matter of Copeland* decisions have been modified or overruled. The decisions are thus binding on the AAO under 8 C.F.R. § 103.3(c).

The burden of proof in these proceedings rests solely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Counsel reasserts on motion that section 316(b) of the Act should be interpreted to allow for interruptions in its continuous physical presence requirement. As discussed in the March 30, 2007 AAO decision, however, *Matter of Graves, supra* and *Matter of Copeland, supra* specifically hold that the uninterrupted physical presence requirement contained in section 316(b) of the Act does not allow for any departure from the United States. The applicant in the present matter failed to establish that she was physically present in the U.S. for an uninterrupted period of at least one year after being lawfully admitted for permanent residence. The applicant is thus ineligible for preservation of her residence for naturalization purposes under section 316(b) of the Act. Accordingly, the previous March 30, 2007, AAO decision will be affirmed and the application denied.

ORDER: The March 30, 2007, AAO decision is affirmed. The application is denied.