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**U.S. Citizenship
and Immigration
Services**



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FILE:



Office: LOS ANGELES

Date: **DEC 19 2006**

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 application to preserve residence for naturalization purposes was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) 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 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.

The district director determined that the applicant was not eligible for benefits under section 316(b) of the Act because he failed to show that he had been present in the United States for an uninterrupted period of at least one year after being admitted for lawful permanent residence. *Decision of the District Director*, dated August 30, 2005. The application was denied accordingly.

On appeal, counsel asserts that the district director's decision is based on the holding in *Matter of Graves*, 19 I&N Dec. 337 (Comm'r 1985), yet that case was overturned by Congress by enacting the Immigration Reform and Control Act ("IRCA") of 1986 which amended section 244 of the Act. *Statement from Counsel on Appeal*, submitted September 9, 2005. Counsel further contends that the presence requirements of section 316(b) of the Act should be interpreted consistently with those of section 244 of the Act. *Id.* Counsel asserts that section 244 allows absences from the United States without interrupting continuous physical presence where such absences were brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence, thus the applicant's absences did not interrupt his continuous physical presence for purposes of section 316(b) of the Act. *Id.*

In order to be naturalized as a United States citizen, the Act requires, in part, that a person reside continuously in the United States as a lawful permanent resident for at least five years prior to filing an application for naturalization, and that the person be physically present in the U.S. for at least one half of the required residency period. *See generally*, section 316 of the Act, 8 U.S.C. § 1427. Section 316(b) of the Act 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.

The N-470 application information contained in the record reflects that the applicant will work and reside in Korea for an extended period. The applicant obtained permanent residence on October 30, 2001. Since that date, he provides that he was absent from the United States from December 22, 2001 to December 29, 2001; from February 19, 2002 to March 7, 2002; from July 20, 2002 to August 3, 2002; From September 13, 2002 to September 21, 2002; from October 19, 2002 to November 6, 2002; from November 9, 2002 to November

22, 2002; from December 1, 2002 to December 13, 2002; from January 11, 2003 to January 25, 2003; from February 21, 2003 to February 28, 2003; from April 15, 2003 to June 9, 2003; from June 14, 2003 to July 30, 2003; from August 3, 2003 to August 23, 2003; from September 5, 2003 to November 22, 2003; from December 1, 2003 to February 29, 2004; from March 7, 2004 to June 5, 2004; from June 18, 2004 to July 13, 2004; from July 17, 2004 to August 23, 2004; from September 2, 2004 to June 12, 2005, and; from June 21, 2004 to the present. The applicant filed the present application on August 26, 2005. Thus, the applicant was absent from the United States for 899 days between becoming a permanent resident on October 30, 2001 and the date he filed his application on August 26, 2005, with absences lasting as long as 283 days. The applicant has not been physically present in the United States without interruption for a continuous year.

Matter of Graves, 19 I&N Dec. 337 339 (Comm'r 1985) held that, "[i]t is not possible to construe the uninterrupted physical presence requirement of section 316(b) to allow departures." In *Matter of Copeland*, 19 I&N Dec. 788, 789 (BIA 1988), the Board of Immigration Appeals reaffirmed its holding in *Matter of Graves* and stated 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).

The AAO is not persuaded by counsel's assertion that the holding in *Matter of Graves* should not be followed in the applicant's case. Counsel contends that the holding in *Matter of Graves* was superceded by the enactment of the IRCA. However, the BIA affirmed its decision in *Matter of Graves* when issuing its decision in *Matter of Copeland* after the IRCA was passed, thus *Matter of Graves* and *Matter of Copeland* serve as controlling precedent in this matter. Pursuant to Volume 8 of the Code of Federal Regulations (8 C.F.R.) sections 103.3(c) and 1003.1(g), published Board of Immigration Appeals decisions are binding on CIS in its administration of the Act unless or until the decisions are modified or overruled by later precedent decisions. Because the Board of Immigration Appeals decisions relevant to the present case (*Matter of Graves* and *Matter of Copeland*) have not been modified or overruled, the AAO must apply their reasoning to the applicant's case.

Counsel references the Supreme Court's decision in *INS v. Phinpathya*, 464 U.S. 183 (1984) to stand for the proposition that that the presence requirements of section 316(b) of the Act should be interpreted consistently with those of section 244 of the Act, effectively allowing absences from the United States without breaking continuous presence. However, the decision in *INS v. Phinpathya* does not specifically address the requirements of section 316(b) of the Act. Further, the decision in *INS v. Phinpathya* predates *Matter of Graves*, *Matter of Copeland*, and the enactment of the IRCA, thus it does not constitute the Supreme Court's interpretation or limitation of those decisions or the ICRA. Accordingly, counsel has not established that *INS v. Phinpathya* affords the applicant the possibility to establish that he has been present in the United States for one uninterrupted year since becoming a permanent resident, when in fact he has not.

The applicant in the present matter has failed to establish that he was physically present in the United States for an uninterrupted period of at least one year after being lawfully admitted for permanent residence. The

applicant is thus ineligible for preservation of his residence for naturalization purposes under section 316(b) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.