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By E1



FILE: [Redacted] Office: HARTFORD, CONNECTICUT Date: **FEB 02 2009**

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.

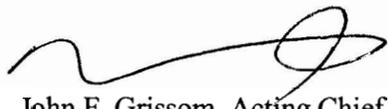
ON BEHALF OF APPLICANT:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Hartford, Connecticut. The matter is now before the Administrative Appeals Office (AAO) on appeal. Although the field office director's decision will be withdrawn in part, the appeal will be dismissed and the application denied.

The applicant is a lawful permanent resident who is employed by the publicly-traded pharmaceutical company, [REDACTED]. 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.

The director determined that the applicant was not eligible for benefits under section 316(b) of the Act for two reasons. First, because the applicant was employed by [REDACTED] before he became a United States lawful permanent resident, the field office director concluded he was ineligible for the benefit sought. Second, the field office director concluded that the applicant failed to establish that he was continuously physically present and residing in the United States for the requisite one-year period after being lawfully admitted for permanent residence. Relying on the decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), the field office director further concluded that, because the applicant's absences were meaningful and significant, the absences interrupted the continuous physical presence requirement in section 316(b). The application was denied accordingly.

On appeal, counsel to the applicant asserts that the bar in section 316(b) of the Act to which the field office director referred applies only to persons who have been employed by a public international organization prior to obtaining lawful permanent resident status. Counsel asserts that the section 316(b) of the Act bar does not apply to persons who were employed by an American firm or corporation prior to obtaining lawful permanent resident status, and thus the applicant is not required to establish that his employment with [REDACTED] began after he became a lawful permanent resident. Counsel, also citing *Fleuti*, argues that the applicant's absences from the United States were not interruptive of the continuous physical presence requirement in section 316(b).

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 United States 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 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 (whether preceding or subsequent to the filing of the application 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 . . . 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 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 [Secretary of Homeland Security] that his absence from the United States for such period is 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 [Secretary] that his absence from the United States for such period has been for such purpose.

(Emphasis added).

The first issue in the present matter concerns whether the applicant is eligible for the benefit sought under section 316(b) of the Act even though he was employed by [REDACTED] before being admitted to the United States as a lawful permanent resident.

The AAO notes that the statutory language contained in section 316(b) of the Act does not require a person to establish that he or she became a United States lawful permanent resident subsequent to the commencement of employment with an American firm or corporation. Rather, the statutory language specifying that an alien may not be employed by an organization prior to lawful admission for permanent residence refers only to section 316(b) provisions pertaining to employment by public international organizations.

Furthermore, the Immigration and Naturalization Service (INS), now U.S. Citizenship and Immigration Services, interpreted § 316(b) of the Act to require that an alien who began employment with a United States company prior to becoming a lawful permanent resident need only establish that he or she was physically present and residing in the United States after being lawfully admitted for permanent residence for at least one year prior to his employment abroad. *Matter of Warrach*, 17 I&N Dec. 285, 286 (Reg. Comm. 1979).

Accordingly, the AAO agrees with counsel that the applicant was not required to establish that his employment by ██████████. commenced after his admission as a lawful permanent resident, and the field office director's decision shall be withdrawn in part.

The second issue in the present matter concerns whether the applicant has established that he has been continuously physically present in the United States for the requisite one-year period after being lawfully admitted for permanent residence.

In support of his application, the applicant submitted a list of his absences from the United States since he became a lawful permanent resident on March 18, 2004. This list confirms that the applicant has not been continuously physically present in the United States for one year since being admitted as a permanent resident. Specifically, the applicant admits in his response to question 2, part 3, of the Form N-470 that he has not resided in, and been physically present in, the United States for an uninterrupted period of at least one year.

On July 31, 2007, the field office director denied the application concluding that the applicant was not continuously physically present and residing in the United States for the requisite one-year period after being lawfully admitted for permanent residence. Relying on the decision in *Fleuti*, the field office director concluded that, because the applicant's absences were meaningful and significant, the absences interrupted the continuous physical presence requirement in section 316(b).

On appeal, counsel, also relies on *Fleuti and* argues that the applicant's absences from the United States were not interruptive of the continuous physical presence requirement in section 316(b).

Upon review, neither counsel's nor the field office director's reasoning is consistent with the current precedent decisions interpreting the continuous physical presence requirement in section 316(b). Nevertheless, because the applicant was not continuously physically present in the United States for one year, and the AAO agrees with the field office director's ultimate conclusion, the appeal will be dismissed, and the application will be denied.

Both the director and counsel erred by applying the so-called "*Fleuti* doctrine" to evaluate whether the applicant's departures were interruptive of his physical presence in the United States. As noted above, the field office director and counsel relied on a 1963 Supreme Court decision, *Rosenberg v. Fleuti*, 374 U.S. at 449, in addressing whether the applicant's numerous trips abroad were "meaningfully interruptive" or "significant." The AAO notes that the *Fleuti* decision, and the doctrine of "brief, casual, and innocent" departures, was nullified by the enactment of section 301(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-575 ("IIRIRA"). The *Fleuti* doctrine, with its origins in the no longer existent statutory definition of "entry," did not survive as a judicial doctrine beyond the enactment of IIRIRA. *Matter of Collado*, 21 I&N Dec. 1061, 1065 (BIA 1998). Accordingly, the director erred when he weighed whether the applicant's absences were meaningful and significant.

Furthermore, specific to the case at hand, more recent INS precedent decisions confirm that the reasoning of the *Fleuti* decision is inapplicable to applications to preserve residence for naturalization purposes. *See*

Matter of Graves, 19 I&N Dec. 337 (Comm. 1985); *Matter of Copeland*, 19 I&N 788 (Comm. 1988). In a binding precedent decision, the INS concluded in 1985 that "it is not possible to construe the uninterrupted physical presence requirement of section 316(b) to allow departures." *Matter of Graves*, 19 I&N Dec. at 337-339. Thus, the *Fleuti* reasoning cannot be extended to statutory schemes, such as section 316(b), which include a plain requirement of uninterrupted or continuous physical presence. Instead, all departures are deemed to be interruptive:

[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. at 788.

Accordingly, as the applicant in this matter has not been continuously physically present in the United States for one year after his admission as a lawful permanent resident on March 18, 2004, he is statutorily ineligible for the benefit sought. It simply does not matter whether his absences from the United States were significant or meaningful. Any departure from the United States renders applicants ineligible under section 316(b). The application was correctly denied by the field office director.

The burden of proof is on the applicant to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has failed to meet his burden of proof in the present matter. The appeal will therefore be dismissed, and the application will be denied.

ORDER: The appeal is dismissed. The application is denied.