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NATURALIZATION WHILE WORKING ABROAD FOR AN AMERICAN FIRM

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It is not uncommon for a permanent resident to receive a plum posting for an American corporation overseas or for its subsidiary. This is a frequent occurrence these days in a globalized world, and especially when jobs have become more scarce in the US since the economic downturn. While such an assignment may provide a great boost to the permanent resident's career, he or she may still wish to preserve the ability to naturalize, but the overseas posting presents a challenge since it may be difficult to maintain continuous residence. One of the key requirements for applying for US citizenship under INA § 316(a) is the need to be physically present for half the time in the US during the qualifying period, which may either be five or three years (if one is married to a US citizen) and to have also resided continuously during this period. The challenges of maintaining residence while on an overseas assignment were addressed in a prior blog, *Naturalizing In A Flat World*, http://cyrusmehta.blogspot.com/2010/07/naturalizing-in-flat-world.html.

This blog specifically examines the inadequacy of the exception in INA 316(b), which was designed to avoid the need to maintain continuous residence for purposes of naturalizing if a permanent resident is employed by an American firm overseas, or its subsidiary, that engages in the development of foreign trade and commerce of the United States. INA § 316(b) further provides for exemptions when one works overseas for the US government, an American research institution or a public international organization. The USCIS requires the applicant to file Form N-470, http://1.usa.gov/h8HTyj, to seek this exemption.

So far so good. Unfortunately, very few can avail of this exception since INA §

316(b) also requires that the individual be physically present and residing in the US, after being admitted as a permanent resident, for an uninterrupted period for at least one year. One would think that a brief trip to Canada, even for a few hours, would still qualify as an uninterrupted period of at least one year. Wrong, according to the United States Citizenship and Immigration Services. In order to qualify, the permanent resident must demonstrate that he or she never left the US for even a single day (or less if it was to a neighboring country like Mexico or Canada) during that 365 day period. Even a single departure precludes the permanent resident from qualifying for this exception.

We can surely advocate for a re-interpretation of what constitutes an uninterrupted period of one year. Why should an "uninterrupted period of one year" require the individual to stay put in the US for an entire 365 day stretch? Let's dig a little deeper. In *Phinpathya v. INS*, 464 US 183 (1984), the Supreme Court interpreted another unrelated statute, INA § 244(a)(1), with similar but not identical language, which granted suspension of deportation to a non-citizen who inter alia "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application.."

The Supreme Court in *Phinpathya* reasoned that the ordinary meaning of these words does not admit any exception, and that the individual who qualifies for suspension of deportation must have been physically present without having departed during the 7 year period. Following the Supreme Court decision, the Commissioner of the then Immigration and Naturalization Service adopted a strict interpretation of the physical presence requirement under INA § 319(b) in *Matter of Copeland*, 19 I&N Dec. 788 (Comm'r 1988) and *Matter of Graves*, 19 I&N Dec. 337 (Comm'r 1985).

The author gives credit to David Isaacson for pointing out that the INA § 316(b) language and the INA § 244 language at issue in *Phinpathya* are a little bit different. § 316(b) refers to "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" in one of the protected classes. The § 244(a)(1) language at issue in *Phinpathya* referred to an applicant who "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application," which is not quite the same thing. § 316(b) does say "physically present," but it uses the word "uninterrupted" rather than the word "continuous". Much of *Phinpathya,* according to Isaacson, goes on

and on about the meaning of "continuous". Although "uninterrupted" sounds similar, that doesn't necessarily mean it should be interpreted in exactly the same way—especially because much of § 316 uses the word "continuous", so the distinction between "continuous" and "uninterrupted" presumably means something.

Incidentally, INA §244(a)(1) no longer exists. The current version of suspension of deportation, now known as cancellation of removal, allows the individual to have been out of the US for a period of not longer than 90 days on any trip and for an aggravated period of not more than 180 days to still qualify for this relief. *See* INA § 240(d)(2). Even long before cancellation of removal replaced suspension of deportation, Congress restored the "brief, casual and innocent" departure exception to suspension applicants, as set forth in *Rosenberg v. Fleuti*, 374 U.S. 183 (1963) in the Immigration Reform and Control Act of 1986. The rationale for the Service to cling on to the rigid interpretation is that Congress never amended 319(b), while it explicitly provided an exception for applicants seeking relief from deportation Prior to *Phinpathya*, the interpretation of 316(b) was more in line with the "brief, casual and innocent" test, and the old pre-*Phinpathya* interpretation ironically still remains. *See* USCIS Interpretation 316.1(c), http://1.usa.gov/fBeMMU. One can only assume that the USCIS has inadvertently failed to withdraw these interpretations and has not left them there purposefully.

Ideally, it would be simple for Congress to fix it. We are not asking for Comprehensive Immigration Reform here ! But we know that Congress may never act. On the other hand, there is no reason for lawyers not to advance a more generous interpretation of the uninterrupted physical presence requirement under INA § 319(b) to allow brief trips outside the US in an age when frequent overseas travel has become the norm. It is impossible for a high level executive to remain land locked within the US for 365 days. Apart from the two decisions of the INS Commissioner in *Graves* and *Copeland*, no federal court has interpreted this provision. In addition to the distinction of the terms "continuous" and "uninterrupted," from a policy perspective, it makes no sense to analogize 316(b), which furthers our commercial and trade interests overseas, with a defunct provision that allowed undocumented non-citizens to seek a waiver from deportation. Moreover, the term "uninterrupted" appears nowhere else in the statute, except in § 316(b) and in a parallel naturalization provision, INA § 317, for religious workers who work overseas. Why cannot

"uninterrupted" allow for short trips that do not meaningfully interruptive of physical presence? Such an interpretation, while consistent with the "brief, casual and innocent" test set forth by the Supreme Court in *Rosenberg v. Fleuti* to the defunct "entry" doctrine, can also further the trade and commerce of the United States, one of the goals of INA § 316(b), by permitting the executive to take up an overseas assignment for an American firm without fearing the loss of the coveted naturalization benefit at the end of the assignment.

As a practical matter, though, until Congress provides a fix, or there is a sensible reinterpretation of the INA § 319(b) exception to continuous residence, one should only file Form N-470 upon meeting the uninterrupted 365 day requirement.