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Vartelas v. Holder: The Revival of the *Fleuti* Doctrine

by Sabrina Gillespie

The Supreme Court's decision in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), is the most recent case to address which parts of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), can be retroactively applied in a manner consistent with an alien's due process rights. The Court determined that section 101(a)(13)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(13)(C), could not be retroactively applied to Panagis Vartelas, a lawful permanent resident. In so finding, the Court revived its decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), long considered abrogated by many courts. This article will provide a brief historical overview of the pre-*Fleuti* cases that analyzed the definition of entry, as well as the holdings and implications of *Fleuti* and *Vartelas*, and will then proceed to examine the state of the *Fleuti*-related case law issued by the Board of Immigration Appeals and each circuit court of appeals.

The Definition of "Entry" and *Rosenberg v. Fleuti*

The Supreme Court's decision in *Fleuti* focused on the meaning of the word "entry," as defined in former section 101(a)(13) of the Act. Although a constitutional issue had been raised, the Court found the threshold issue to be whether George Fleuti, who had been a lawful permanent resident for 4 years, was making an entry within the meaning of the statute when he returned to the United States after visiting Ensenada, Mexico for "a couple hours." *Fleuti*, 374 U.S. at 452. Before beginning its analysis of this question, the Court reviewed its prior precedent defining the term "entry," as employed in the immigration laws.

First, it examined its decision in *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425 (1933), in which it strictly defined an entry as including "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." Employing this

definition, the Court upheld the exclusion of an alien who made a brief visit to Cuba after 24 years of residence in the United States. The *Fleuti* court noted that this rather severe definition of entry was subsequently employed "with express reluctance and explicit recognition of its harsh consequences" by lower courts. 374 U.S. at 454.

Next, the Court turned to its decision in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), in which it reversed the deportation of an alien who was serving on an American merchant ship that was torpedoed during World War II. Degadillo was rescued and brought to Cuba to recuperate for a week before returning to the United States. The Court, noting that it was the "exigencies of war, not his voluntary act," that led to Degadillo's presence in a foreign country, concluded that it would be "a capricious application" of the law to deem his return to the United States an entry. *Id.* at 391. In reaching this decision, the Court cited approvingly the Second Circuit's prior decision in *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947), in which the court refused to find that an alien traveling on a train from Buffalo to Detroit had effectuated an entry when the train's route took it through Canada. The *Fleuti* Court characterized the decision in *Delgadillo* as creating an "increased protection of returning resident aliens." 374 U.S. at 456. The Court noted that this increased protection influenced at least two subsequent decisions by the Ninth Circuit, which refused to find that aliens had effectuated entries into the United States when their presence in foreign countries was beyond their control. *See Carmichel v. Delaney*, 170 F.2d 239 (9th Cir. 1948) (finding that a resident alien serving with the United States Maritime Service during wartime did not effectuate an entry even though his ship stopped at foreign ports pursuant to Navy orders); *Yukio Chai v. Bonham*, 165 F.2d 207 (9th Cir. 1947) (finding no entry by an alien whose ship made an unscheduled stop in Canada).

The codification of the term "entry" in section 101(a)(13) of the Act in 1952 reflected this state of the judicial interpretation. The Court noted that the legislative history of section 101(a)(13) indicated Congress' intent to "ameliorat[e] the harsh results visited upon resident aliens by the rule" established in *Volpe*. *Fleuti*, 374 U.S. at 458.

Turning to the specific issue in *Fleuti*, the Court focused on the portion of section 101(a)(13) of the Act that stated that a lawful permanent resident "shall not be regarded as making an entry . . . if the alien proves . . . that his departure . . . was not intended or reasonably to be expected by him." Based on this statutory language, the Court held that for a returning lawful permanent resident, an entry requires "an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Fleuti*, 374 U.S. at 452, 462. Thus, "an innocent, casual, and brief excursion by a resident alien . . . may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." *Id.* at 462. The Court further elaborated on the "innocent, casual, and brief" criteria[1] by noting that the length of the resident alien's absence, the purpose of the visit abroad, and the alien's need to procure travel documents should inform a court's analysis whether a departure was meaningfully interruptive of the alien's residence. In particular, if the alien traveled abroad "to accomplish some object which is itself contrary to some policy reflected in our immigration laws," the interruption of the alien's residence would "properly be regarded as meaningful." *Id.* at 462.

Effective April 1, 1997, after over 30 years of decisions by the Board and circuit courts interpreting and applying the *Fleuti* factors, Congress amended section 101(a)(13) of the Act by replacing the definition of "entry" with definitions of the terms "admission" and "admitted." *See* IIRIRA § 301(a), 110 Stat. at 3009-575; *Matter of Collado*, 21 I&N Dec. 1061, 1063-64 (BIA 1998).

Vartelas v. Holder

In *Vartelas*, the Supreme Court addressed the permissibility of retroactively applying the definition of the term "admission" in section 101(a)(13)(C) of the Act to a lawful permanent resident with a conviction that pre-dated the effective date of the IIRIRA. Pursuant to that section, returning lawful permanent residents are seeking admission to the United States, regardless of the duration or nature of their departure, if they fall in one of six categories. The fifth category includes resident aliens who have been convicted of an offense identified in section 212(a)(2) of the Act, which includes crimes involving moral turpitude. *See* section 101(a)(13)(C)(v) of the Act.

Vartelas was admitted to the United States as a lawful permanent resident in 1989 and pled guilty

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to conspiring to make a counterfeit security, a crime involving moral turpitude, in 1994. In 2003, he took a 1-week trip to Greece to visit his parents, and when he returned, he was charged with inadmissibility and placed in removal proceedings. The Court concluded that the new definition of admission "attached a new disability (denial of reentry) in respect to past events (Vartelas' pre-IIRIRA offense, plea, and conviction)" because the law in force at the time of his conviction did not affect his ability to take brief trips abroad, while the current law prevented him, because of his conviction, from traveling abroad and returning as a lawful permanent resident. *Vartelas*, 132 S. Ct. at 1483-84. Therefore, the question whether Vartelas effectuated an entry, which would subject him to a charge of inadmissibility, was governed by the *Fleuti* doctrine, because it was in force at the time of his conviction, and not by the definition of admission contained in the IIRIRA. The Court remanded the case for the Second Circuit to evaluate Vartelas' trip under the *Fleuti* doctrine.

The effect of the Court's decision in *Vartelas* is to separate returning lawful permanent residents with convictions enumerated in section 212(a)(2) of the Act into two groups.[2] The first group, consisting of individuals whose convictions were entered after the effective date of the IIRIRA, can be treated as applicants for admission under section 101(a)(13)(C)(v) and thus can be charged with inadmissibility under section 212 of the Act. The second group, consisting of individuals whose convictions were entered before the IIRIRA, is subject to the *Fleuti* doctrine. Thus, an adjudicator must first determine if the returning resident's trip abroad was innocent, casual, and brief. If the trip can properly be characterized as such, the alien must be treated as a returning lawful permanent resident and is not subject to charges of inadmissibility, but only to charges of removability under section 237 of the Act. If the alien's trip was not innocent, casual, and brief, he may properly be considered an alien making an entry into the United States and may be charged with inadmissibility.

The State of the *Fleuti* Doctrine

The innocent, casual, and brief factors have been widely interpreted by the circuit courts and the Board. While some courts have primarily relied on the *Fleuti* factors, others have broadened the scope of their inquiry to include the manner of the alien's entry, the alien's age, and the hardship to the alien. In addition, there is disagreement about whether the doctrine applies to lawful permanent residents charged with entering the United States without inspection, applicants for legalization, and temporary lawful residents. *See, e.g.*, *Assa'ad v. U.S. Att'y Gen.*, 332 F.3d 1321, 1332 (11th Cir. 2003) (finding that the *Fleuti* doctrine has no bearing on whether an applicant for legalization can be placed in exclusion proceedings); *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1277 (9th Cir. 1996) (remanding to the Board for application of the *Fleuti* doctrine to an applicant for legalization); *Matter of Singh*, 21 I&N Dec. 427, 433 (BIA 1996) (holding that a returning applicant for legalization cannot invoke the *Fleuti* doctrine to challenge charges of excludability). Several circuits have applied the *Fleuti* factors to determine if an alien can establish the requisite continuous physical presence for suspension of deportation.[3] This article will discuss courts' interpretations of the *Fleuti* factors in all of these contexts. Although it is beyond the scope of this article, an adjudicator should bear in mind that certain courts have expressed stricter or more liberal views of the *Fleuti* factors when applying them to aliens who are not lawful permanent residents. Thus, when evaluating the *Fleuti* doctrine in the context of nonresident aliens seeking relief, the courts may not employ the same analysis that they would to a returning lawful permanent resident.[4]

Board of Immigration Appeals

The Board has often addressed the applicability of the *Fleuti* doctrine, focusing on the length of the alien's absence, the purpose of the trip, the need to procure travel documents, and the manner of the alien's entry. Like several of the circuit courts, the Board has also identified a variety of scenarios in which the *Fleuti* doctrine has no application. For those circuits that have not addressed the applicability or meaning of the *Fleuti* factors, the Board's case law remains binding. In addition, given the virtually infinite combination of lengths, purposes, and travel documents required for trips abroad that may be considered in a *Fleuti* analysis, it is very likely that a circuit court will not have issued a decision addressing the exact set of facts that may be presented in a particular case. Thus, the Board's case law provides valuable guidance even in circuits that have interpreted the *Fleuti* factors.

The Board has found that trips lasting up to 1 week do not interrupt an alien's residence or physical presence when the trip was for an innocent purpose, such as visiting family or sightseeing, and when the alien required only his alien registration card to travel and reenter the United

States. *See, e.g.*, *Matter of Quintanilla-Quintanilla*, 11 I&N Dec. 432, 435 (BIA 1965); *Matter of Yoo*, 10 I&N Dec. 376, 379 (BIA 1963). In *Matter of Karl*, 10 I&N Dec. 480, 482-83 (BIA 1964), the Board found that a 10-day vacation was sufficiently long to interrupt an alien's permanent residence, noting also that the alien had made a false claim to citizenship upon his return. The Board has suggested that trips of such a length, even if innocent in nature, meaningfully interrupt a resident's status when they are characterized by an element of personal choice. *See Matter of Janati-Ataie*, 14 I&N Dec. 216, 224 (BIA, A.G. 1972) (distinguishing a trip of more than 1 month to visit family from the 3-week employer-mandated trip in *Itzcovitz v. Selective Service Local Board Number 6*, 447 F.2d 888 (2d Cir. 1971)).

In addressing the purpose of a trip abroad, the Board has found that aliens interrupt their residence when they travel outside of the United States to smuggle aliens or controlled substances. *See Matter of Valdovinos*, 14 I&N Dec. 438, 440 (BIA 1973) (alien smuggling); *Matter of Alvarez-Verduzco*, 11 I&N Dec. 625, 626-27 (BIA 1966) (drug smuggling). It is immaterial that the alien may have departed the United States before forming his criminal intent. *Alvarez-Verduzco*, 11 I&N Dec. at 626. The Board has also determined that an alien interrupts his residence or physical presence when he travels abroad to fraudulently procure a visa or to assist another in doing so. *See Matter of Herrera*, 18 I&N Dec. 4, 7-8 (BIA 1981) (finding that an alien's trip abroad to fraudulently procure a visa was not innocent or casual); *Matter of Leal*, 15 I&N Dec. 477, 479 (BIA 1975) (finding that an alien who assisted his girlfriend's attempt to procure a visa by fraud did not make an innocent or casual trip). Finally, the Board has found that an alien who travels to countries restricted by the immigration laws has not made an innocent or casual departure. *See Matter of Hemblen*, 14 I&N Dec. 739, 742 (BIA 1974).

When addressing the "casual" factor, the Board has explicitly rejected the proposition that the presentation of an alien registration card upon a lawful permanent resident's return to the United States is evidence of a meaningfully interruptive departure. *See Quintanilla-Quintanilla*, 11 I&N Dec. at 434. The Board has, however, consistently found that procurement of any other travel document, such as a passport or a visa, is evidence of such a departure. *See, e.g.*, *Hemblen*, 14 I&N Dec. at 742 (holding that the alien's procurement of travel documents evidenced that her departure was not casual); *Matter of Kukla*, 14 I&N Dec. 681, 685 (R.C. 1974) (finding the alien's departure was not casual because he procured a visa to enter Barbados); *Janati-Ataie*, 14 I&N Dec. at 224 (noting that the alien's renewal of his passport and his wife's obtainment of a passport and visa involved "far more than a casual 'stepping across an international border'"); *Matter of Guimaraes*, 10 I&N Dec. 529, 532 (BIA 1964) (noting that the procurement of a passport and airline tickets evidenced a planned trip). Beyond the examination of travel documents, the Board found that a departure to engage in long-term employment in another country is not casual because it should reasonably cause the resident alien to fully consider the implications of leaving the country. *See Matter of Nakoi*, 14 I&N Dec. 208, 212 (BIA 1972). In addition, a resident alien who commutes each day across the border for employment in the United States is not protected by *Fleuti* because his daily departures to his home abroad cannot be considered casual. *See Matter of Diaz*, 15 I&N Dec. 488, 489 (BIA 1975).

The Board has also addressed a number of cases involving aliens whose trips abroad were required by foreign law enforcement or judicial bodies. In *Matter of Scherbank*, 10 I&N Dec. 522, 524 (BIA 1964), the Board found that a trip to Canada to make a court appearance in connection with criminal charges was not innocent in nature. Similarly, in *Matter of Wood*, 12 I&N Dec. 170, 175-76 (BIA 1967), the Board determined that an alien who departs to surrender himself to a foreign court on an outstanding warrant, and who subsequently departs to attend his trial, has not made innocent or casual trips. In other similar cases, the Board has found that an alien's departure was compelled by "legal process." *See, e.g.*, *Matter of Caudillo-Villalobos*, 11 I&N Dec. 15, 19 (BIA 1965) (finding that an alien's departures to sign a bond book in Mexico following his conviction for incest were occasioned by legal process). Such departures fall outside of the intent exception in former section 101(a)(13) of the Act, which is not applicable to "a person whose departure from the United States was occasioned by deportation proceedings, extradition or other legal process." *Id.* Thus, under the Board's precedent, a lawful permanent resident who leaves the country because of criminal proceedings in a foreign jurisdiction is likely to be seeking entry upon return to the United States, either because he falls outside the intent exception upon which the *Fleuti* doctrine is based or because his departure is not sufficiently innocent or casual to be protected under *Fleuti*.

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CIRCUIT COURT DECISIONS FOR MARCH 2013

by John Guendelsberger

The United States courts of appeals issued 177 decisions in March 2013 in cases appealed from the Board. The courts affirmed the Board in 150 cases and reversed or remanded in 27, for an overall reversal rate of 15.3%, compared to last month's 15.6%. There were no reversals from the First, Fourth, Fifth, Sixth, Seventh, Eighth, and, Tenth Circuits.

The chart below shows the results from each circuit for March 2013 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	2	0	0.0
Second	22	21	1	4.5
Third	20	19	1	5.0
Fourth	8	8	0	0.0
Fifth	16	16	0	0.0
Sixth	9	9	0	0.0
Seventh	6	6	0	0.0
Eighth	3	3	0	0.0
Ninth	79	56	23	29.1
Tenth	2	2	0	0.0
Eleventh	10	8	2	20.0
All	177	150	27	15.3

The 177 decisions included 82 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 42 direct appeals from denials of other forms of relief from removal or from findings of removal; and 53 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	82	64	18	22.0
Other Relief	42	38	4	9.5
Motions	53	48	5	9.4

The 18 reversals or remands in asylum cases involved credibility (7 cases), past persecution (3 cases), the 1-year bar to asylum (3 cases), nexus, well-founded fear, humanitarian asylum, and disfavored group analysis.

The four reversals or remands in the "other relief" category addressed the smuggling ground for removal, voluntary departure, temporary protected status, and recognition of nunc pro tunc adoptions.

The five motions cases involved ineffective assistance of counsel (two cases), changed country conditions, late appearance for a hearing, and waiver of appeal.

The chart below shows the combined numbers for the first 3 months of 2013 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Eleventh	28	20	8	28.6
Tenth	8	6	2	25.0
First	10	8	2	20.0
Ninth	259	209	50	19.3
Seventh	22	19	3	13.6
Eighth	9	8	1	11.1
Third	67	63	4	6.0
Fifth	36	34	2	5.6
Second	27	26	1	3.7
Fourth	28	27	1	3.6
Sixth	27	27	0	0.0
All	521	447	74	14.2

Last year's reversal rate at this point (January and February 2012) was 11.2%, with 667 total decisions and 75 reversals.

The numbers by type of case on appeal for the first 3 months of 2013 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	240	197	43	17.9
Other Relief	139	120	19	13.7
Motions	142	130	12	8.5

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RECENT COURT OPINIONS

Supreme Court:

Moncrieffe v. Holder, 2013 WL 1729220 (U.S. Apr. 23, 2013) (No. 11-702): The Supreme Court held that a conviction for marijuana distribution is only for an aggravated felony if it involved either remuneration or more than a small amount of marijuana. The petitioner, who had been found with 1.13 grams of marijuana in his car, pled guilty under Georgia law to possession of marijuana with intent to distribute. Because he was a first time offender, Georgia law permitted the petitioner's judgment and imposition of sentence to be withheld pending the completion of 5 years of probation, after which the charges against him could be expunged.

The petitioner was placed into removal proceedings and was charged as an aggravated felon illicit trafficker in a controlled substance under section 101(a)(43)(B) of the Act based on his Georgia conviction. The Immigration Judge sustained the charge and the Board affirmed on appeal. The United States Court of Appeals for the Fifth Circuit denied the petitioner's petition for review, after which the Supreme Court granted certiorari.

Applying the categorical approach, the Court examined whether a conviction under the Georgia statute would necessarily be for a felony under the Controlled Substance Act ("CSA"), as required under section 101(a)(43)(B) of the Act. Although the CSA punishes possession with the intent to distribute less than 50 kilograms of marijuana as a felony, the Court pointed to an exception in 21 U.S.C. § 841(b)(4) that treats violations involving a small amount for no remuneration as a simple possession misdemeanor. The Court thus held that offenses involving the possession with intent to distribute a small amount of marijuana for no remuneration are not aggravated felonies and remanded the record for further proceedings.

Second Circuit:

Santana v. Holder, No. 10-2307-ag, 2013 WL 1707830 (2d Cir. Apr. 22, 2013): The Second Circuit dismissed the petition for review of the Board's decision affirming an Immigration Judge's order of removal. The Immigration Judge had found the petitioner removable as an aggravated felon based on his conviction for second-degree attempted arson under sections 150.15 and 110.00 of the New York Penal Law. As a result, the Immigration Judge ruled that the petitioner (a long-time lawful permanent resident) was ineligible for cancellation of removal. The circuit court specifically considered whether the attempted arson conviction was for a crime of violence aggravated felony under section 101(a)(43)(F) of the Act. The court noted that the Fourth and Fifth Circuits (in published decisions), and the Third and Sixth Circuits (in unpublished decisions) have previously found arson to be an aggravated felony. Conducting its own analysis, the court found that second-degree attempted arson under the New York statute satisfied the definition of a "crime of violence" under the categorical approach. The court ruled that fire constitutes a physical force and that the crime in question involves both the intentional use of such physical force and the substantial risk that it may be used against the person or property of another. In response to the petitioner's argument that arson can involve setting fire to one's own property, the court cited the statutory requirement that a person must be present in the building, holding that the crime will therefore always create the substantial risk of physical force being used against the person of another. Because the petitioner's conviction was found to be for an aggravated felony, the court dismissed his petition for review for lack of jurisdiction.

Sixth Circuit:

Sejdini v. Holder, No. 12-3222, 2013 WL 1694606 (6th Cir. Apr. 19, 2013): The Sixth Circuit denied a petition for review challenging the Immigration Judge's pretermission of the petitioner's application for cancellation of removal. The petitioner arrived in the U.S. with his family in 1987 and in 2003 was granted "special rule" cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act ("NACARA"). In 2010, he was convicted of possession of a controlled substance, after which he was placed into removal proceedings where he applied for cancellation of removal under section 240A(a) of the Act. However, because the petitioner had previously been granted cancellation of removal under the NACARA, the Immigration Judge pretermitted the application pursuant to section 240A(c)(6), which bars individuals whose removal has previously been canceled "under section 240A" from later seeking cancellation. On appeal, the Board adopted and affirmed the Immigration Judge's order. The petitioner argued that although section 240A(c)(6) bars those who were previously granted cancellation "under section 240A," his prior cancellation arose from the NACARA and therefore was not granted under the specified section. The court observed that

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section 203(f)(1) of the NACARA, the applicable section under which the petitioner had been granted relief, allowed certain classes of aliens to have their removal canceled "under section 240A" of the Act. Because the statute was unambiguous and the Immigration Judge did not misread the statute, the petition for review was denied.

Jabr v. Holder, 711 F.3d 835 (7th Cir. 2013): The Seventh Circuit granted the petition for review of the Board's decision affirming an Immigration Judge's denial of asylum. The petitioner, a Palestinian who resided in the West Bank, was a member of the political party Fatah. He was targeted for recruitment by the Palestinian Islamic Jihad ("PIJ"), which the court described as an "avowed terrorist organization" that "violently opposes the existence of Israel." As a result of his refusal to join them, the petitioner was harassed, brutally beaten, and labeled a traitor by the PIJ. In denying asylum, the Immigration Judge held that the petitioner was not persecuted on account of a protected ground, concluding that the PIJ's motive was to recruit members. On review, the court found sufficient evidence of record to distinguish the facts from those in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), by establishing a nexus to the petitioner's political opinion. The court pointed to the petitioner's testimony that he made clear to the PIJ that his refusal to join was because of his disagreement with the group's beliefs. The court also found that the contents of a threatening letter from the PIJ established that the group specifically targeted the petitioner on account of his political opposition. The court thus distinguished this case from others involving forced recruitment claims, because the petitioner's refusal to join was due to his political opinion, a fact that the petitioner explicitly expressed to his recruiters.

Ninth Circuit:

Rodriguez v. Robbins, No. 12-56734, 2013 WL 1607706 (9th Cir. Apr. 16, 2013): The Ninth Circuit affirmed the decision of a district court judge entering a preliminary injunction against the Government's policy of prolonged detention and requiring bond hearings before an Immigration Judge. Appellees constitute a class consisting of "individuals detained in southern California for six months or longer" pursuant to either section 236(c) of the Act (certain aliens removable on criminal grounds) or section 235(b) (certain inadmissible arriving aliens). While the Government argued that both statutes require unlimited mandatory detention, the appellees claimed that such detention without review by a neutral arbiter is unconstitutional. They therefore requested a preliminary injunction guaranteeing them, when detention exceeds 6 months' duration, the right to a hearing to determine whether continued detention is necessitated by concerns of flight risk or danger to the community. The court concluded that the appellees satisfied each of the four requirements for a preliminary injunction, finding that, based on prior circuit case law, both subclasses of detainees (criminal and inadmissible) are likely to succeed on the merits; that in the absence of an injunction, the deprivation of constitutional rights would cause the class members irreparable harm; that the Government has not shown that it would suffer harm from an injunction; and that a preliminary injunction would serve the public interest.

Blandino-Medina v. Holder, No. 11-72081, 2013 WL 1442508 (9th Cir. Apr. 10, 2013): The Ninth Circuit granted in part the petition for review of a decision of the Board holding that the petitioner's conviction for a "particularly serious crime" rendered him ineligible for the relief of withholding of removal. The conviction in question was based on the petitioner's 2008 guilty plea under section 288(a) of the California Penal Code for the felony offense of lewd and lascivious conduct with a child under the age of 14. The petitioner was sentenced to 1 year of imprisonment, 5 years' probation, and registration as a sex offender. The Board determined that the offense constitutes "a 'particularly serious crime' *per se*." The court held, however, that the Board cannot designate certain offenses as "particularly serious crimes" per se. It must instead conduct an individualized analysis based on the factors enumerated in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), and as modified by subsequent case law, unless the alien was convicted of one or more aggravated felonies for which an aggregate sentence of 5 years or more was imposed. The court therefore remanded for the Board to conduct a case-specific analysis applying the *Frentescu* factors to determine if the conviction was for a particularly serious crime. It denied, however, the petition for review in regard to the Board's denial of relief under the Convention Against Torture.

Eleventh Circuit:

Ferreira v. U.S. Att'y Gen., No. 11-14074, 2013 WL 1566636 (11th Cir. Apr. 16, 2013): The Eleventh Circuit granted the petition for review and vacated a decision of the Board denying the petitioner's motion

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for a continuance. The petitioner was placed in removal proceedings for overstaying his visitor's visa and sought a continuance from the Immigration Judge, claiming to be the beneficiary of an approved I-140 petition filed by his employer. Since the priority date was 6 years from being current, the Immigration Judge found no good cause for a continuance, noting the "extensive period of time" before the petitioner would be eligible for an immigrant visa. The Immigration Judge therefore ordered the petitioner removed to Brazil. The Board dismissed the appeal and denied the petitioner's subsequent motion for reconsideration. Before the circuit court, the petitioner argued that the Board's decision did not adhere to its own precedent decisions in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), and *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009). The court noted that the factors articulated in those cases focused on "the likelihood of success on the adjustment application" and acknowledged that according to *Rajah*, good cause for a continuance may not exist even where the I-140 is prima facie approvable if "visa availability is too remote." However, the court further observed that *Rajah* required an evaluation of the individual factors of each case and that all such relevant factors "should be considered and articulated." The court found that remand was appropriate because, although the Board properly considered the lengthy period before a visa would be available, it did not otherwise identify the additional *Rajah/Hashmi* factors or explain the weight afforded to them.

BIA PRECEDENT DECISIONS

In *Matter of Central California Legal Services, Inc.*, 26 I&N Dec. 105 (BIA 2013), the Board held that a recognized organization's application for initial accreditation of a proposed representative must show that the individual has recently completed at least one formal training course that was designed to give new practitioners a solid overview of the fundamentals of immigration law and procedure. Although the organization's application for recognition had been approved, the Board had previously denied its request for partial accreditation for one of its representatives to represent aliens before the DHS, finding that she showed good moral character but did not establish the requisite broad knowledge of immigration law and procedure. According to the Board, "broad knowledge" means more than specialized knowledge of specific topics; it also requires an understanding and command of the fundamentals. Noting the benefits of training focused specifically on immigration fundamentals in complement with more in-depth courses and seminars, the Board found that a successful application for initial accreditation must show that the proposed representative has recently completed at minimum one formal training course that provided a sound overview of immigration law and procedure for new practitioners. Since the organization had submitted such proof for its proposed representative, the Board approved the application.

In *Matter of Butt*, 26 I&N Dec. 108 (BIA 2013), the Board held that an applicant for adjustment of status under section 245(i) of the Act who is seeking to be "grandfathered" must be the beneficiary of a labor certification application that was "approvable when filed." The labor certification will be presumed to be "meritorious in fact" if the application was "properly filed" and "non-frivolous," and if no apparent bars to approval of the labor certification existed at the time it was filed.

The respondent's employer had filed an application for labor certification on April 30, 2001, but after the employer failed to respond to a request for additional information, the application was denied. In March 2005, the employer filed a new labor certification on the respondent's behalf, which was approved. The employer then filed an I-140 visa petition and the respondent applied for section 245(i) adjustment of status. Although the I-140 petition was approved, the United States Citizenship and Immigration Services denied the respondent's adjustment application because it determined that the original labor certification was not "approvable when filed" and thus did not "grandfather" the respondent for purposes of establishing eligibility for adjustment under section 245(i). In the ensuing removal proceedings, the Immigration Judge agreed, denied the respondent's renewed adjustment application, and ordered him removed.

On appeal, the Board examined whether the initially filed labor certification served to "grandfather" the respondent under section 245(i) of the Act. To resolve the issue, the Board determined that it must resolve whether the labor certification was "approvable when filed" because it was (1) "properly filed," (2) "meritorious in fact," and (3) "non-frivolous" pursuant to 8 C.F.R. §§ 1245.10(a)(1)(i)(B), (2)(ii), and (3).

The Board concluded that a "properly filed" labor certification must be complete and timely. However, a complete application that raises additional questions

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during the adjudication process remains properly filed notwithstanding the need for the employer to supply additional information to obtain a favorable adjudication. Additionally, the Board concluded that a labor certification is "meritorious in fact" if it was "properly filed" and "non-frivolous" and if there are no apparent bars to its approval. Thus, a "properly filed" and "non-frivolous" labor certification generally will be "meritorious in fact," so that it is "approvable when filed." A "frivolous" labor certification or visa petition is one that is "patently without substance."

Applying this test to the respondent's case, the Board concluded that he is a grandfathered alien because the labor certification initially filed by his employer met all of the regulatory requirements set forth at 8 C.F.R. § 1245.10(a)(1)-(3). The appeal was sustained and the record was remanded for consideration of the respondent's section 245(i) application for adjustment of status.

REGULATORY UPDATE

78 Fed. Reg. 19,400 (April 1, 2013)
DEPARTMENT OF JUSTICE

8 CFR Part 1292
[Docket No. EOIR 138F; A.G. Order No. 3377–2013]
RIN 1125-AA 39

Registry for Attorneys and Representatives

AGENCY: Executive Office for Immigration Review, Department of Justice.
ACTION: Final rule; request for comments.
SUMMARY: This final rule adopts, as amended, the proposed rule to authorize the Director of the Executive Office for Immigration Review (EOIR), or his designee, to register attorneys and accredited representatives as a condition of practicing before immigration judges and the Board of Immigration Appeals (Board or BIA). The final rule provides that the Director may establish registration procedures, including a requirement for electronic registration, and may administratively suspend from practice before EOIR any attorney or accredited representative who fails to provide certain registration information. This rule is part of an initiative to create an electronic case access and filing system within EOIR. The Department of Justice (Department) will publish a notice in the **Federal Register** prior to implementing the registration process. Although this rule is published as a final rule, post-promulgation public comments will be considered as EOIR moves forward with other phases of its electronic access and filing initiative.
DATES: *Effective date*: This rule is effective May 31, 2013. *Comment date*: Written comments must be submitted on or before May 31, 2013.

78 Fed. Reg. 20,123 (April 3, 2013)
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

[CIS No. 2528-12; DHS Docket No. USCIS-2012-0016]
RIN 1615-ZB18

Extension of the Designation of Honduras for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.
ACTION: Notice.
SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) is extending the designation of Honduras for Temporary Protected Status (TPS) for 18 months from July 6, 2013 through January 5, 2015.
For full text of this notice, see http://www.justice.gov/eoir/vll/fedreg/2012_2013/fr03apr13hon.pdf
DATES: The 18-month extension of the TPS designation of Honduras is effective July 6, 2013, and will remain in effect through January 5, 2015. The 60-day re-registration period runs from April 3, 2013 through June 3, 2013.

78 Fed. Reg. 20,128 (April 3, 2013)
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

[CIS No. 2529–12; DHS Docket No. USCIS–2012–0015]
RIN 1615–ZB19

Extension of the Designation of Nicaragua for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.
ACTION: Notice.
SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) is extending the

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designation of Nicaragua for Temporary Protected Status (TPS) for 18 months from July 6, 2013 through January 5, 2015. The extension allows currently eligible TPS beneficiaries to retain TPS through January 5, 2015.
For full text of this notice, see http://www.justice.gov/eoir/vll/fedreg/2012_2013/fr03apr13nic.pdf
DATES: The 18-month extension of the TPS designation of Nicaragua is effective July 6, 2013, and will remain in effect through January 5, 2015. The 60-day re-registration period runs from April 3, 2013 through June 3, 2013.

78 Fed. Reg. 24,225 (April 24, 2013)
DEPARTMENT OF HOMELAND SECURITY

Exercise of Authority Under the Immigration and Nationality Act

AGENCY: Office of the Secretary, DHS.
ACTION: Notice of determination.
Authority: 8 U.S.C. 1182(d)(3)(B)(i).
For full text of this notice relating to the Nationalist Republican Alliance (Alianza Republicana Nacionalista, or ARENA), see http://www.justice.gov/eoir/vll/fedreg/2012_2013/fr24apr13.pdf

78 Fed. Reg. 24,225 (April 24, 2013)
DEPARTMENT OF HOMELAND SECURITY
Office of the Secretary

Exercise of Authority Under the Immigration and Nationality Act

AGENCY: Office of the Secretary, DHS.
ACTION: Notice of determination.
Authority: 8 U.S.C. 1182(d)(3)(B)(i).
For full text of this notice relating to the Farabundo Martı´ National Liberation Front (FMLN), see http://www.justice.gov/eoir/vll/fedreg/2012_2013/fr24apr13.pdf

78 Fed. Reg. 24,669 (April 26, 2013)
DEPARTMENT OF JUSTICE

Executive Office for Immigration Review
8 CFR Parts 1003 and 1292

[EOIR Docket No. 174; A.G. Order No. 3384–2013]
RIN 1125–AA66

Reorganization of Regulations on the Adjudication of Department of Homeland Security Practitioner Disciplinary Cases

AGENCY: Executive Office for Immigration Review, Department of Justice.
ACTION: Final rule.
SUMMARY: This final rule adopts without change an interim rule with request for comments published in the Federal Register on January 13, 2012. The interim rule amended regulations of the Executive Office for Immigration Review (EOIR) at the Department of Justice (Department) by removing unnecessary provisions in its regulations that are the responsibility of the Department of Homeland Security (DHS). This rule also transferred certain provisions to another CFR part. Finally, the interim rule made revisions to reference applicable DHS regulations and to make technical and clarifying amendments to regulations in that part.
DATES: This rule is effective June 25, 2013.

Vartelas v. Holder: The Revival of the *Fleuti* Doctrine *continued*

Additionally, the Board has looked to the manner of an alien's entry when analyzing whether his departure was brief, casual, and innocent. In *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 356 (BIA 1996), the Board found that the former Immigration and Naturalization Service's decision to readmit an alien as a returning applicant for legalization supported the alien's argument that his departure was brief, casual, and innocent and thus did not interrupt his physical presence for the purpose of suspension of deportation. In *Matter of Wong*, 12 I&N Dec. 271, 274 (BIA 1967), the Board determined, based on a controlling Ninth Circuit decision, that an alien who made multiple brief trips to Canada and, upon his returns, made false claims to United States citizenship was not precluded from establishing the requisite physical presence for suspension. *See Git Foo Wong v. INS*, 358 F.2d 151 (9th Cir. 1966).

Finally, the Board has excluded certain aliens from the ambit of the *Fleuti* doctrine. Specifically, the Board has determined that lawful temporary residents and returning resident aliens charged with entering the United States without inspection are not protected by the *Fleuti* doctrine. *See Matter of Chavez-Calderon*,

20 I&N Dec. 744, 748 (BIA 1993) (lawful temporary residents); *Matter of Kolk*, 11 I&N Dec. 103, 105 (BIA 1965) (returning residents charged with entry without inspection).

First Circuit

The First Circuit has acknowledged the *Fleuti* decision but has not issued any precedent decisions interpreting the *Fleuti* factors. *See, e.g.*, *Bernal-Vallejo v. INS*, 195 F.3d 56, 62 (1st Cir. 1999).

Second Circuit

The Second Circuit's interpretation of the *Fleuti* doctrine, although addressing the length of the alien's absence and the need for travel documents, has primarily focused on the "innocent" factor, including the manner of the alien's entry upon his return to the United States. For example, a 3-week trip mandated by an alien's employer for training purposes was deemed to be both brief and innocent and thus not meaningfully interruptive of an alien's permanent residence. *See Itzcovitz*, 447 F.2d at 894. However, a 6-week trip by nonresident aliens to visit ailing relatives, which required the procurement of new passports and visas, was meaningfully interruptive of the physical presence required for suspension of deportation. *See Heitland v. INS*, 551 F.2d 495, 502 (2d Cir. 1977). Significantly, the use of nonimmigrant visas by these aliens to reenter the United States was not innocent because they intended to remain permanently, in violation of the terms of the visas. The Second Circuit considered the manner of the aliens' entries to be another indicator of whether the trip abroad was "innocent." Finally, the court, like the Board in earlier decisions, found that a lawful permanent resident who attempted to smuggle controlled substances into the United States was not returning from an innocent trip abroad and therefore could properly be placed in exclusion proceedings. *See Correa v. Thornburgh*, 901 F.2d 1166, 1174 n.9 (2d Cir. 1990); *accord Alvarez-Verduzco*, 11 I&N Dec. at 626-27.

Third Circuit

When evaluating the *Fleuti* factors, the Third Circuit has addressed the length of the alien's absence, the necessity of procuring travel documents, and the manner of the alien's reentry. A 2-month business trip, which required the procurement of two visas, was meaningfully interruptive of an alien's permanent residence, despite the innocent nature of the trip. *See Dabone v. Karn*, 763 F.2d 593, 596 (3d Cir. 1985). The fact that the resident had frequently taken international trips did not convert his last trip into a "casual" one for the purposes of the *Fleuti* doctrine. *Id.* Like the Second Circuit, the Third Circuit has also looked to the manner of a resident's reentry as an indicator of whether his trip was innocent. In *Bufalino v. INS*, 473 F.2d 728, 731 (3d Cir. 1973), the court determined that a lawful permanent resident was not returning from an innocent excursion when he reentered the country by falsely claiming United States citizenship. Such a return could not be characterized as innocent because it frustrated the immigration law's policy of inspecting entering aliens. The decision in *Bufalino* may be a break from the Board's earlier decision in *Wong*, although it should be noted that the Board was applying the *Fleuti* factors to an applicant for suspension of deportation, not a returning resident.

Fourth Circuit

The Fourth Circuit initially appeared to take a strict reading of the *Fleuti* doctrine. In *McColvin v. INS*, 648 F.2d 935, 938 (4th Cir. 1981), the court expressed doubt that the doctrine was even applicable in the context of suspension of deportation, and then it found that even if the doctrine did apply, an alien's 1-day absence under an order of voluntary departure was meaningfully interruptive of his physical presence. Two years later, the court construed the doctrine in a seemingly more generous fashion in the case of an applicant for adjustment of status. In *Joshi v. District Director, INS*, 720 F.2d 799 (4th Cir. 1983), the alien returned from a 6-week business trip pursuant to a grant of advance parole authorization. The court determined that his procurement of the advance authorization reaffirmed his intent "to preserve, rather than meaningfully interrupt" his presence. *Id.* at 801. The court's decision may diverge from the Board's earlier decisions, which consistently found that the procurement of travel documents evidenced a meaningfully interruptive departure. *See, e.g.*, *Hemblen*, 14 I&N Dec. at 742; *Kukla*, 14 I&N Dec. at 685; *Janati-Ataie*, 14 I&N Dec. at 224; *Guimaraes*, 10 I&N Dec. at 532.

Fifth Circuit

The Fifth Circuit's examination of the *Fleuti* doctrine, although touching on the length of absence and

the alien's intent, has focused heavily on the "innocent" factor, examining the purpose of the trip abroad and the manner of the alien's reentry. In *Yanez-Jacquez v. INS*, 440 F.2d 701 (5th Cir. 1971), a lawful permanent resident entered Mexico with an ice pick, seeking to avenge an earlier assault and robbery in Juarez. He failed to find his attackers and reentered the United States by crossing the Rio Grande River half a mile from a port of entry. The court, while acknowledging that the alien's purpose was "less than salutory in nature," found that he did not intend to interrupt his permanent residence with this brief trip abroad. *Id.* at 704. Moreover, contrary to the Third Circuit's approach in *Dabone*, the Fifth Circuit found that Yanez-Jacquez's frequent, brief visits to Mexico supported the conclusion that he did not intend to meaningfully interrupt his permanent residence with his most recent brief visit.

In *Solis-Davila v. INS*, 456 F.2d 424, 427 (5th Cir. 1972), the court determined that a lawful permanent resident was not returning from an innocent excursion when he departed for "the express purpose of unlawfully smuggling several aliens into this country." According to the court, such an objective is "'itself contrary to some policy reflected in our immigration laws.'" *Id.* (quoting *Fleuti*, 374 U.S. at 462). In *Vargas-Banuelos v. INS*, 466 F.2d 1371, 1373-74 (5th Cir. 1972), the court refined this proposition, finding that a resident's intent to smuggle aliens must be formed at the time of his departure from the United States for the departure to be meaningfully interruptive of his residence. Vargas-Banuelos, who did not form his criminal intent until he was already in Mexico, did not effectuate an entry upon his return. In this regard, the Fifth Circuit has diverged from the Board, which has declined to draw a distinction between a criminal intent formed before departure and one formed while outside of the United States. *See, e.g.*, *Alvarez-Verduzco*, 11 I&N Dec. at 626.

Five years later, the court again addressed the intersection of alien smuggling and the *Fleuti* doctrine. *See Laredo-Miranda v. INS*, 555 F.2d 1242 (5th Cir. 1977). Laredo-Miranda, a lawful permanent resident, traveled to Mexico with a companion who he knew intended to smuggle aliens into the United States, but he did not intend to participate in the smuggling himself. While in Mexico, he realized that he had left his alien registration card in the United States and decided to reenter the country by wading across the Rio Grande River with the group of smuggled aliens, while his companion lawfully reentered at a port of entry. Laredo-Miranda was charged with deportability for entering the United States without inspection. The court distinguished the case from *Yanez-Jacquez* and *Vargas-Banuelos*, finding that the combination of Laredo-Miranda's illicit intent to smuggle aliens formed after his departure and his subsequent unlawful reentry was sufficient to meaningfully interrupt his residence.

The precedent continued to develop when the court addressed the actions of an inebriated lawful permanent resident who reentered the United States with a companion to purchase beer. *See Carbajal-Gonzalez v. INS*, 78 F.3d 194 (5th Cir. 1996). The two men were not inspected by an immigration officer at the time of their entry, and Carbajal-Gonzalez's companion was not in possession of documentation that allowed him to enter the United States. Carbajal-Gonzalez was charged with deportability for entering without inspection and for alien smuggling. The court distinguished his actions from those of Laredo-Miranda, finding that the resident alien must have a "*fully consummated* intent to participate actively in alien smuggling, whether formed prior to or after departure from the United States," to meaningfully interrupt his residence. *Id.* at 199. Carbajal-Gonzalez's "drunken imprudence" did not constitute such an intent. *Id.* at 201.

Sixth Circuit

The Sixth Circuit's *Fleuti* doctrine case law is limited. The court determined that the doctrine provided no protection to a border commuter who traveled over the Mexican-American border on a daily basis for more than a year to attend school in Juarez. *See Kabongo v. INS*, 837 F.2d 753, 757 (6th Cir. 1988); *accord Diaz*, 15 I&N Dec. at 489. Although the most recent of these trips lasted less than 1 day, the trips cumulatively created a meaningful interruption of his presence in the United States.

Seventh Circuit

The Seventh Circuit has expanded the *Fleuti* doctrine beyond the traditional factors by also considering the alien's intent and the uprooting that would be caused by deportation. In *Zimmerman v. Lehmann*, 339 F.2d 943 (7th Cir. 1965), the court applied the *Fleuti* doctrine to a lawful permanent resident who had taken a 6-day family

vacation and a subsequent 24-hour trip to Canada, finding that both of these trips were brief and that the vacation was also innocent. Moreover, Zimmerman's mistaken claim to U.S. citizenship, based upon a genuine belief that he had acquired citizenship through an adoption, did not change the nature of his excursion. Although the court did not directly address the hardship to Zimmerman, it did note that he had maintained his resident alien status for 39 years, was married to a U.S. citizen, had three U.S. citizen children, and owned a residence and a business in Chicago. Thus, it "would border on the absurd to ascribe to him an intention of impairing his status as a permanent resident." *Id.* at 949.

In *Lozano-Giron v. INS*, 506 F.2d 1073, 1077 (7th Cir. 1974), the court took the extra step and declared that the "effect of the uprooting caused by the deportation" was a relevant factor in the *Fleuti* analysis. The analysis of this effect is informed by factors including how long the alien had been a permanent resident; whether he had a spouse or children in the United States; whether he owned a business, home, or other property in United States; the nature of the environment to which he would be deported; and his relation to that environment.

Despite the court's consideration of these new factors, it still determined that Lozano-Giron's departure had meaningfully interrupted his residence. The court first noted that his 27-day absence might not be brief, given that he had been absent three times in the last 2 years for a total period of 7 months. Moreover, Lozano-Giron flew to Colombia for the purpose of marrying a Colombian citizen. Such a departure was meaningfully interruptive of his residence because his future wife might not be admissible to the United States or might insist that the couple reside in Colombia. The court also suggested that his trip to Colombia, which is not contiguous to the United States, and which would likely require him to show his alien registration card upon his return, was not as casual as Fleuti's across-the-border excursion to Mexico. Turning to the alien's intent, the court found that Lozano-Giron evidenced an intent to remain in Colombia for an extended period of time because he traveled with a sizable amount of Colombian currency, despite knowing that the Colombian Government did not permit individuals to depart the country in possession of more than a nominal amount of Colombian currency and that Colombian banks would not exchange a traveler's Colombian currency for American dollars. Finally, his deportation was likely to cause minimal uprooting in his life, because he presented no evidence of a spouse, children, property ownership, or gainful employment in the United States or that his life would be in danger in Colombia.

More recently, the Seventh Circuit has interpreted the "innocent" factor as it applies to resident aliens who engage in alien smuggling. The court broke from the Fifth Circuit's approach in *Vargas-Banuelos* and followed the Board's lead, finding that even when a resident alien departs the United States with an innocent intention, his trip cannot be characterized as innocent if he subsequently forms the intent to smuggle aliens and acts on that intention. *See Selimi v. INS*, 312 F.3d 854, 860 (7th Cir. 2002); *accord Alvarez-Verduzco*, 11 I&N Dec. at 626.

In addition, the Seventh Circuit diverged from the Fifth Circuit's application of the *Fleuti* doctrine to lawful permanent residents charged with entering the United States without inspection. The court instead followed the Board's approach and found *Fleuti* inapplicable in such situations, regardless of the purpose or duration of a resident's trip abroad. *See Leal-Rodriguez v. INS*, 990 F.2d 939, 948 (7th Cir. 1993) (finding "that the *Fleuti* doctrine should not apply to cases of entries without inspection"); *see also Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1090 (7th Cir. 1994) (citing *Leal-Rodriguez* and rejecting the rule established by the Fifth Circuit in *Laredo-Miranda*); *accord Kolk*, 11 I&N Dec. at 105.

Eighth Circuit

The Eighth Circuit has addressed only one of the *Fleuti* factors: the purpose of the trip. Like the Board, the court found that a lawful permanent resident's intent to engage in alien smuggling at the time of his departure from the United States converted his otherwise "short, casual sojourn" into a meaningful disruption of his residence. *See Longoria-Castenada v. INS*, 548 F.2d 233, 237 (8th Cir. 1977); *accord Valdovinos*, 14 I&N Dec. at 440. In addition, the court joined the Seventh Circuit and determined that the uprooting caused by deportation is a relevant factor in the *Fleuti* analysis. The court concluded that Longoria-Castenada's illicit purpose, however, outweighed the uprooting effect of deportation, even though he was married to a lawful permanent resident, had eight U.S. citizen children, and had lived and worked lawfully in the United States for nearly 20 years.

Ninth Circuit

The Ninth Circuit has been the most prolific circuit to address the *Fleuti* doctrine. As discussed below, it has expanded the doctrine beyond its traditional factors. At the same time, the court has clearly indicated that the doctrine only applies to returning lawful residents, including temporary lawful residents. *See Mendoza v. INS*, 16 F.3d 335, 337 (9th Cir. 1994); *see also Aguilera-Medina v. INS*, 137 F.3d 1401, 1403-04 (9th Cir. 1998) (noting that the *Fleuti* doctrine applies to temporary lawful residents under the Special Agricultural Workers program and rejecting the Board's decision in *Chavez-Calderon*). *But see Biggs v. INS*, 55 F.3d 1398, 1401 (9th Cir. 1995) (finding that the *Fleuti* doctrine does not apply to an alien who obtained her permanent residence through fraud).

When addressing the length of an alien's trip abroad, the court has found that trips of up to 3 days' duration are sufficiently brief as to not constitute a meaningful interruption of the alien's presence. *See Maldonado-Sandoval v. U.S. INS*, 518 F.2d 278, 281 (9th Cir. 1975). On the other hand, an absence of 30 days to care for an ailing relative was long enough to meaningfully interrupt an alien's permanent residence. *See Munoz-Casarez v. INS*, 511 F.2d 947, 948 (9th Cir. 1975). The court's interpretation of the "brief" factor, however, expands beyond the length of the trip. In *Toon-Ming Wong v. INS*, 363 F.2d 234, 236 (9th Cir. 1966), the court remanded the case of a minor child seeking suspension of deportation who was sent by his guardians to reside with relatives abroad for 6 months, directing the Board to determine "whether the minor's intent, that of the parent, or of both, is controlling" in the *Fleuti* analysis.

When addressing the purpose of the trip, the court, like the Board, has examined whether an alien traveled to a country restricted by the immigration laws. Thus, it found a 2-month trip to be meaningfully interruptive of an alien's permanent residence because, during his absence, the alien traveled to Cuba for 2 weeks. *See Bilbao-Bastida v. INS*, 409 F.2d 820, 823 (9th Cir. 1969); *accord Hemblen*, 14 I&N Dec. at 742. Similarly, the court has followed the Board's lead regarding aliens engaged in criminal activity at the time of their reentry and has determined that aliens interrupt their permanent residence or presence in the United States by engaging in alien or drug smuggling after their departure, regardless of when they form their unlawful intent. *See Cuevas-Cuevas v. INS*, 523 F.2d 883, 884 (9th Cir. 1975) (alien smuggling); *Palatian v. INS*, 502 F.2d 1091, 1093 (9th Cir. 1974) (drug smuggling); *accord Alvarez-Verduzco*, 11 I&N Dec. at 626-27.

Conversely, the court has found that a "bona fide and lawful purpose" that demonstrates a resident alien's "intent to preserve, not interrupt, his permanent resident status," such as tying up affairs and preparing to immigrate the resident's relatives to the United States, can outweigh a longer absence. *See Jubilado v. United States*, 819 F.2d 210, 213 (9th Cir. 1987) (finding that a 3-month absence was not meaningfully interruptive of an alien's residence). Similarly, an alien who departs the United States to apply for an immigrant visa does not interrupt his presence for the purpose of suspension of deportation. *See Castrejon-Garcia v. INS*, 60 F.3d 1359, 1362-63 (9th Cir. 1995) (noting that a contrary holding would "penalize[] a good faith effort to comply with the immigration laws"*).*

The Ninth Circuit has construed the procurement of travel documents in an apparently contradictory manner. For example, the court determined that acquiring a passport or a visa to enter another country indicated that an alien's departure was meaningfully interruptive of his residence because "the necessity of procuring the[] documents should have caused [the alien] 'to consider more fully the implications involved in his leaving the country.'" *Bilbao-Bastida*, 409 F.2d at 823 (quoting *Fleuti*, 374 U.S. at 462). However, the court also noted that acquiring travel documents for relatives who intend to immigrate to the United States could demonstrate an alien's intent to preserve his permanent residence, because these documents would enable his relatives to return with him. *See Jubilado*, 819 F.2d at 214. Similarly, an alien who departed with the documents required to acquire another nonimmigrant visa at a consulate abroad might also indicate his intent to preserve his presence in the United States, even if his travel required renewing his passport. *See Kamheangpatiyooth*, 597 F.2d at 1258-59. This decision, in particular, seems to diverge from the Board's stricter interpretation of the procurement of travel documents, including the renewal of passports. *See, e.g.*, *Janati-Ataie*, 14 I&N Dec. at 244.

Tenth Circuit

The Tenth Circuit's analysis of the *Fleuti* factors is limited to examining the length and casualness of the

alien's absence. In *Rubio-Rubio v. INS*, 23 F.3d 273, 277 (10th Cir. 1994), the court determined that an alien who traveled to Mexico to remain indefinitely interrupted her physical presence in the United States during her 9-month absence. Given her intent to remain in Mexico permanently, her departure could not be considered brief or casual.

Eleventh Circuit

The Eleventh Circuit has addressed the *Fleuti* factors in a limited context. In *Fidalgo/Velez v. INS*, 697 F.2d 1026, 1029 (11th Cir. 1983), the court found that an alien's 1-day trip to Canada to unlawfully obtain an immigrant visa meaningfully interrupted her physical presence for the purpose of suspension of deportation. Similar to the Board's earlier decision in *Herrera*, the court acknowledged that although Fidalgo-Velez's departure was brief, it was not innocent because she had attempted to obtain a visa to which she was not entitled. *Accord Herrera*, 18 I&N Dec. at 7-8. Additionally, even though she did not need to obtain travel documents, the court found that her trip to obtain a visa was not casual.

Conclusion

The *Vartelas* decision heralded the return of the *Fleuti* doctrine, and with it, the necessity for adjudicators to evaluate the *Fleuti* factors whenever the Department of Homeland Security seeks to charge that a returning lawful permanent resident is inadmissible based on a pre-IIRIRA conviction. Whether a returning resident is charged with inadmissibility will, in turn, impact what forms of relief are available to the resident. Thus, applying the *Fleuti* doctrine correctly will continue to be of critical importance for adjudicators facing these cases.

Sabrina Gillespie is an Attorney Advisor at the Los Angeles Immigration Court.

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1. Throughout the article, the author will refer to these three criteria as the "*Fleuti* factors."
2. The Court specifically noted that only the retroactive application of section 101(a)(13)(C)(v) of the Act to returning lawful permanent residents was relevant in *Vartelas*. *See* 132 S. Ct. at 485. The question remains whether the Court's retroactivity analysis would bar the application of other provisions in section 101(a)(13)(C) to a returning resident's pre-IIRIRA conduct. For example, the *Vartelas* decision does not address whether section 101(a)(13)(C)(iii), which classifies a returning lawful permanent resident who has engaged in illegal activity after departing the United States as an alien seeking admission, can be applied to a resident with a pre-IIRIRA conviction for a crime that is not described in section 212(a)(2) of the Act.
3. Former section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1) (1994), permitted the Attorney General to suspend the deportation of an alien who could demonstrate that he had been continuously physically present in the United States for 7 years; that he had been a person of good moral character throughout that time; and that his deportation would result in extreme hardship to himself, or to his spouse, child, or parent, who was a United States citizen or lawful permanent resident. Although the Supreme Court determined that the *Fleuti* doctrine did not apply to aliens applying for suspension of deportation, its holding was abrogated by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. *See* former section 244(b)(2) of the Act; *United States v. Phinpathya*, 464 U.S. 183, 194 (1984).
4. An example of such a differing approach can be found in the Ninth Circuit's decisions addressing the application of the *Fleuti* factors to requests for suspension of deportation. *See, e.g.*, *Kamheangpatiyooth v. INS*, 597 F.2d 1253, 1258 (9th Cir. 1979) (requiring a court to consider the traditional *Fleuti* factors alongside the hardship that deportation would cause an alien when determining if the alien has established the requisite physical presence).

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